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## The Electoral College: An Overview and Analysis of Reform Proposals

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# The Electoral College: An Overview and Analysis of Reform Proposals

## Summary

American voters elect the President and Vice President of the United States indirectly, through an arrangement known as the electoral college system. The electoral college system comprises a complex mosaic of constitutional provisions, state and federal laws, and political party rules and practices.

Although the electoral college system has delivered uncontested results in 46 out of 50 presidential elections since it assumed its present constitutional form in 1804, it has been the subject of persistent criticism and frequent proposals for reform. Reform advocates cite several problems with the current system, including: a close or multi-candidate election can result in no electoral college majority, leading to a contingent election in Congress; the current system can result in the election of a President and Vice President who received more electoral votes, but fewer popular votes, than their opponents; the formula for assignment of electoral votes is claimed to provide an unfair advantage for less populous states and does not account for population changes between censuses; and the winner-take-all system used by most states does not recognize the proportional strength of the losing major party, minor party, and independent candidates. On the other hand, defenders assert that the electoral college system is an integral and vital component of federalism, that it has a 92% record of non-controversial results, and that it promotes an ideologically and geographically broad two-party system. They maintain that reform of the electoral college system, rather than abolition, would eliminate any perceived defects while retaining its overall strengths.

Proponents of presidential election reform generally advocate either completely eliminating the electoral college system, replacing it with direct popular election, or repairing perceived defects in the existing system. The direct election alternative would replace the electoral college with a single, nationwide count of popular votes. That is, the candidates winning a plurality of votes would be elected; most proposals provide for a runoff election if no candidates received a minimum of 40% of the popular vote. Electoral college reform proposals include: (1) the district plan, awarding one electoral vote to the winning candidates in each congressional district, with an additional two electoral votes assigned to each state regardless of population, to the statewide vote winners; (2) the proportional plan, awarding electoral votes in states in direct proportion to the popular vote gained in the state by each candidate; and (3) the automatic plan, awarding each state's electoral votes directly on a winner-take-all basis to the statewide vote winners.

Following the closely contested presidential election of 2000, it is anticipated that Congress may revisit the issue of electoral college reform. Although some reforms could be effected through federal or state statutes, most would require overcoming the considerable hurdles encountered by proposed constitutional amendments: two-thirds approval by both houses of Congress, followed by ratification by three-fourths (38) of the states, usually within a period of seven years. This report will not track specific proposals in the 107<sup>th</sup> Congress, but it will be updated as events warrant.

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# The Electoral College: An Overview and Analysis of Reform Proposals<sup>1</sup>

## Introduction: The Electoral College System In Brief<sup>2</sup>

The President and the Vice President of the United States are elected indirectly by an institution known as the electoral college. The U.S. Constitution, in Article II, Section 1, Clause 2, as amended by the 12th Amendment, together with a series of implementing federal statutes,<sup>3</sup> provides the broad framework through which electors are appointed and by which they cast votes for the President and Vice President.

### Origin of the Electoral College

The method of electing the President and Vice President was the subject of considerable discussion at the Constitutional Convention of 1787. While some delegates favored direct election of the President, others opposed it on the grounds that the people lacked sufficient knowledge of the character and qualifications of the presidential and vice presidential candidates to make intelligent electoral decisions. Moreover, the delegates were reluctant to set uniform national suffrage requirements for federal elections, believing this to be a prerogative of the states. Finally, delegates from less populous states feared that presidential elections might be dominated by a few large states.<sup>4</sup>

The Convention settled on a compromise plan: the electoral college system.<sup>5</sup> It provides for the election of the President and Vice President by electors appointed by each state in a manner determined by its legislature. The electors then meet in their respective states to vote. While these provisions did not mandate popular participation in the selection of electors, neither did they prohibit it. In fact, most

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<sup>1</sup> This Report updates and supersedes *The Electoral College Method of Electing the President and Vice President and Proposals for Reform*, (CRS Rpt. 96-125), by Thomas M. Durbin.

<sup>2</sup> For further discussion of the operation of the electoral college, see *The Electoral College: How it Works in Contemporary Presidential Elections*, (CRS Rpt. RS20273), by Thomas H. Neale.

<sup>3</sup> The implementing statutes are codified at 3 U.S.C. §§ 1-17.

<sup>4</sup> CONGRESSIONAL QUARTERLY, INC., PRESIDENTIAL ELECTIONS SINCE 1789 1 (2d ed. 1980).

<sup>5</sup> R. Gordon Hoxie, *Alexander Hamilton and the Electoral System Revisited*, 18 Presidential Studies Q. 717-20 (1987) (arguing that the electoral college represented a compromise between those advocating direct election of the President and those advocating that state or federal representatives should elect the President).

states moved to provide for direct popular choice of electors by the voters beginning in the late 18<sup>th</sup> Century. Since 1836, all states except South Carolina, whose legislature continued to select its electors until after the Civil War, had provided for statewide popular election of electors.<sup>6</sup>

### **Electoral Vote Allocation**

The total number of electors comprising the electoral college equals the total combined congressional representation of each state (House plus Senate seats), plus three electors representing the District of Columbia.<sup>7</sup> After each decennial census, as the states gain or lose population and, consequently, gain or lose Representatives in the House, the number of electors assigned to each state may change to reflect the new apportionment. Presently, 538 electors are apportioned to the states and the District of Columbia based on: (1) 100 Senators; (2) 435 Representatives; and (3) 3 electors representing the District of Columbia. After the 2000 decennial census, the 50 states and the District of Columbia were entitled to the following numbers of electors:

Alabama	9	Kentucky	8	North Dakota	3
Alaska	3	Louisiana	9	Ohio	20
Arizona	10	Maine	4	Oklahoma	7
Arkansas	6	Maryland	10	Oregon	7
California	55	Massachusetts	12	Pennsylvania	21
Colorado	9	Michigan	17	Rhode Island	4
Connecticut	7	Minnesota	10	South Carolina	8
Delaware	3	Mississippi	6	South Dakota	3
D.C.	3	Missouri	11	Tennessee	11
Florida	27	Montana	3	Texas	34
Georgia	15	Nebraska	5	Utah	5
Hawaii	4	Nevada	5	Vermont	3
Idaho	4	New Hampshire	4	Virginia	13
Illinois	21	New Jersey	15	Washington	11
Indiana	11	New Mexico	5	West Virginia	5
Iowa	7	New York	31	Wisconsin	10
Kansas	6	North Carolina	15	Wyoming	3

Total: 538 electoral college votes; 270 constituting a majority. These totals will be in effect for the 2004 and 2008 presidential elections.)

### **State and D.C. Appointment of Electors**

Under Article II, Section 1, Clause 2 of the Constitution, as amended by the 12th Amendment in 1804, each state is required to appoint electors in the manner directed by its state legislature. In 1961, the 23rd Amendment provided for three electors from the District of Columbia. The Commonwealth of Puerto Rico, Guam, the U.S.

<sup>6</sup> CONGRESSIONAL QUARTERLY, INC., GUIDE TO U.S. ELECTIONS 206 (1976).

<sup>7</sup> U.S. CONST. amend. XXIII.

Virgin Islands, and American Samoa are not constitutionally entitled to electors, as they are not states.

## **Appointment Date and Meeting Date of Electors**

Article II provides that Congress may determine the date for selecting electors and mandates that the date chosen be uniform throughout the U.S.<sup>8</sup> Accordingly, Congress, in 1845, enacted federal law establishing the Tuesday after the first Monday in November in every presidential election year as the general election date for the election of electors.<sup>9</sup> Article II further authorizes Congress to determine the date for the electors to meet and cast their ballots<sup>10</sup> and, hence, federal law provides that on the Monday after the second Wednesday in December following each presidential election, the electors meet at a place designated by each state to vote for the President and Vice President.<sup>11</sup>

## **Counting and Certification of Electoral Votes**

After the electoral college delegations meet in their states and cast votes for President and Vice President, according to the 12th Amendment<sup>12</sup> and applicable federal law, the certified results are transmitted to the Congress and to other designated authorities.<sup>13</sup> On January 6, following the election, the Senate and the House of Representatives, with the President of the Senate serving as the presiding officer, meet in joint session to count the electoral votes.<sup>14</sup> The presidential and vice presidential candidates receiving a majority of the total number of electoral votes are then declared to be elected President and Vice President.<sup>15</sup>

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<sup>8</sup> U.S. CONST. art. II, § 1, cl. 3.

<sup>9</sup> 3 U.S.C. § 1. (“The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.”) June 25, 1948, ch. 644, 62 Stat. 672.

<sup>10</sup> U.S. CONST. art. II, § 1, cl. 3.

<sup>11</sup> 2 U.S.C. § 7.

<sup>12</sup> Prior to the 12th Amendment, each elector cast two undifferentiated votes for President. The candidate winning the most votes, provided such total was at least a majority of the number of electors (not electoral votes), was elected President, and the runner-up was elected Vice President. This system, which failed to anticipate the emergence of political parties and unified party tickets of President and Vice President, led to a tie vote between Thomas Jefferson and his vice presidential running mate, Aaron Burr in the 1800 election. A constitutional crisis and contingent election in the House of Representatives followed. The anomalies of the original system were remedied by the 12th Amendment, which specified separate votes for President and Vice President.

<sup>13</sup> 3 U.S.C. §§ 9, 10, 11.

<sup>14</sup> 3 U.S.C. § 15.

<sup>15</sup> *Id.*

## Contingent Election<sup>16</sup>

If no presidential and vice presidential ticket obtains a simple majority of the electoral votes, according to the 12th Amendment, the newly elected Congress conducts what is referred to as “contingent election”: the House of Representatives chooses the President and the Senate chooses the Vice President.<sup>17</sup> In the House, the President is elected from among the three candidates who received the most electoral votes, with each state (not including the District of Columbia) casting a single vote for President. In 1825, the only occasion on which contingent election was conducted under the 25<sup>th</sup> Amendment, a majority of votes within multi-member state House delegations was required to cast each state vote. In the Senate, the Vice President is elected from among the two candidates who received the most electoral votes, with each Senator casting a single vote. In the House, a majority of 26 or more state votes is required to elect; in the Senate, a majority of 51 or more votes is required to elect.<sup>18</sup>

## Electoral College Criticisms and Controversies

Proponents of presidential election reform cite several shortcomings in the electoral college to justify reform or abolition of the current system.

### Electoral College Deadlock: Contingent Election

If, in any election, the presidential and vice presidential candidates fail to receive a simple majority of the electoral college votes, the 12th Amendment provides that the House of Representatives chooses the President and the Senate chooses the Vice President in a process known as contingent election.<sup>19</sup> The election of the President by the House of Representatives has happened only once since ratification of the 12th Amendment. On February 9, 1825, the House elected John Quincy Adams as President over Andrew Jackson by a vote of 13 states to 7, with an additional 4 states voting for William H. Crawford.<sup>20</sup> Likewise, election of the Vice President by the Senate has also occurred only once. On February 8, 1837, the Senate elected Richard Mentor Johnson as Vice President over Francis Granger by a vote of 33 to 16.

Many commentators have criticized the 1825 presidential contingent election, claiming it created a “constitutional crisis” because the House appeared to select a

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<sup>16</sup> For further discussion regarding the contingent election process, *see Election of the President and Vice President: Contingent Election*, (CRS Rpt. RS20300), by Thomas H. Neale.

<sup>17</sup> U.S. CONST. amend. XII.

<sup>18</sup> *Id.*

<sup>19</sup> U.S. CONST. amend. XII.

<sup>20</sup> The 1824 presidential election was contested by four candidates: Jackson, who won a plurality of popular and electoral votes, Adams, Crawford, and Henry Clay, all of whom were Democratic Republicans. In contrast, there was only one vice presidential candidate in the election, John C. Calhoun.

President as part of a political “corrupt bargain” between Adams and Henry Clay, who had been disqualified from the contingent election process because he came in fourth, after Jackson, Adams, and Crawford in electoral vote totals (recall that the 12th Amendment limits contingent election candidates to the top three electoral vote winners).<sup>21</sup> Indeed, critics of the contingent election system generally argue that it further removes the choice of President and Vice President from the voters. That is, members of the House and Senate are free to exercise their choice without regard to the winners of the popular vote in their district, state, or in the nation at large. Moreover, by effectively granting each state an equal vote, the contingent election system fails to account for great differences in population – and the number of votes cast – in the various states. On the other hand, others point out that the 1825 House contingent election resulted in a political backlash that ultimately facilitated Andrew Jackson’s successful election four years later. As a result, supporters maintain, the contingent election system has demonstrated that it does function by channeling voter dissatisfaction into subsequent political action.<sup>22</sup>

In evaluating the contingent election process, some commentators have suggested that any threshold inquiry requires assessing how often contingent election occurs. That is, if the results of a general election are frequently inconclusive, thereby increasing the likelihood of contingent elections, then democratic criteria would require implementing reforms that “bring ... the people into the contingency process.”<sup>23</sup> Indeed, critics of the electoral college system caution that the presence of viable and well funded third-party or independent presidential candidates, who may be able to garner electoral votes by carrying a plurality of the votes in statewide elections, increase the likelihood of contingent election. The last example of a third-party candidate winning electoral votes occurred in 1968 with the minor party candidacy of George C. Wallace who won 46 electoral college votes in six southern states.<sup>24</sup> Furthermore, critics argue, an extremely close and/or contested presidential election, such as that of 2000, could likewise increase the probability of a contingent election determining the presidency.<sup>25</sup>

It is also important to note, when considering the contingent election procedure, that the 12th Amendment would not authorize the District of Columbia to vote in a

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<sup>21</sup> William Josephson and Beverly J. Ross, *Repairing the Electoral College*, 22 J. Legis. 145, 149 (1996).

<sup>22</sup> *Id.*

<sup>23</sup> JUDITH VAIRO BEST, THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT, A DEFENSE OF THE ELECTORAL COLLEGE 88-89 (1971). The commentator notes, however, that since ratification of the 12th Amendment, only one contingent election has been necessary and, further, since gradual adoption by the states of the winner-take-all or general ticket system of awarding electoral votes, discussed *infra*, there have been no contingent elections.

<sup>24</sup> See discussion of independent and third-party candidacies *infra* pp. 11-13.

<sup>25</sup> For discussion of electoral college procedure if, for example, as the result of a closely contested election, two lists of electors from the same state are presented to the Congress, see U.S. LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, OVERVIEW OF ELECTORAL COLLEGE PROCEDURE AND THE ROLE OF CONGRESS 6-7, CD00785 (Nov. 17, 2000).



contingent election in the House and Senate. While the ratification of the 23rd Amendment in 1961 granted the District of Columbia three votes in the electoral college, the District of Columbia would be effectively disenfranchised in a contingent election, as it is not a state and sends neither Senators nor Representatives to Congress.<sup>26</sup>

### **The “Minority President”**

Reform proponents also cite the fact that the current electoral college system can result in the election of a so-called “minority” president, *i.e.* one who wins the electoral vote, but loses the popular vote. Indeed, in the 1800s, the electoral college system led to the election of three such “minority” presidents, namely, John Quincy Adams in 1824, Rutherford B. Hayes in 1876, and Benjamin Harrison in 1888. In 1824, John Quincy Adams received fewer popular and electoral votes than Andrew Jackson, his major opponent, but was chosen President by contingent election (as noted previously, both ran as Democratic Republicans). In 1876, Republican Rutherford B. Hayes received fewer popular votes than his opponent Democrat Samuel J. Tilden, but won the election by one electoral vote. In the presidential election of 1888, Republican Benjamin Harrison received fewer popular votes than his major opponent, Democrat Grover Cleveland, but won the election with more electoral college votes.<sup>27</sup>

Most recently, for the first time in 112 years, the very closely contested presidential election of 2000 resulted in a President and Vice President who received a majority of electoral votes, but fewer popular votes than the electoral vote runners-up. This event has led to renewed congressional and public interest in reforming the electoral college system.

### **Small State Advantage in the Electoral College**

As the composition of the electoral college is based on state representation in Congress, some maintain it is inconsistent with the “one person, one vote” principle.<sup>28</sup> The Constitutional Convention of 1787 agreed on a compromise election plan whereby less populous states were assured of a minimum of three electoral votes, based on two Senators and one Representative, regardless of state population. Since state electoral college delegations are equal to the combined total of each state’s Senate and House delegation, the composition of the electoral college thus appears

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<sup>26</sup> “But in choosing the President, the votes shall be taken by *states*” and “the Senate shall choose the Vice-President.” U.S. CONST. amend. XII (emphasis added).

<sup>27</sup> NOMINATION AND ELECTION OF THE PRESIDENT AND VICE PRESIDENT, S. Doc. 106-16 at 409 (2000). Some historians suggest that, due to the prevalence of election fraud by both parties, it is difficult to determine which candidate actually won more votes in the 1876 and 1888 contests.

<sup>28</sup> The one person, one vote principle was established by the U.S. Supreme Court in congressional and state legislative reapportionment and redistricting cases in order to insure equal representation for equal numbers of people. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 568 (1964) and *Wesberry v. Sanders*, 376 U.S. 1, 7-18 (1964).

to be weighted in favor of the small states. The two “senatorial” electors and the one “representative” elector to which each state is entitled may advantage smaller states over more populous ones because voters in the smaller states, in effect, cast more electoral votes per voter. For instance, in 1996, voters in Wyoming, the least populous state, cast 209,250 votes for President or one electoral vote (Wyoming is allocated 3) for every 69,750 voters. By comparison, Californians cast 9,663,105 votes, or one electoral vote (California is allocated 54) for every 178,946 voters.<sup>29</sup> As a result of this distribution of electoral votes among the states, it is arguable that there is a small state advantage over large states with regard to electoral vote allocation relative to the states’ populations.

While it is generally recognized that there is a small state arithmetical advantage in the electoral college, there is, conversely, a large state advantage in that the most populated states control the largest blocs of electoral votes. For example, voters in more populous states are able to influence a larger bloc of electoral votes than those in less populous ones, because of the winner-take-all method of allocating electoral votes. Thus, to use the previously cited examples, a voter in Wyoming in 1996 could influence only three electoral votes, whereas a voter in California could influence 54 electoral votes in the same presidential election. According to this argument, known as the “voting power” theory, the electoral college system actually provides an *advantage* to the six most populous states (California, Florida, Illinois, New York, Pennsylvania, and Texas) and disadvantages all other states and the District of Columbia.<sup>30</sup>

## Methods of Allocating Electoral Votes

Under Article II, Section 1, Clause 2 of the Constitution, electors are appointed in “such Manner as the Legislature thereof may direct.” In interpreting this constitutional provision, the Supreme Court, in the 1892 decision *McPherson v. Blacker*,<sup>31</sup> held that state legislatures have the exclusive power to direct the manner in which presidential and vice presidential electors are appointed. Moreover, aside from Congress having the authority, under this provision, to determine the time of choosing electors and the day on which they vote, the power of the several states is exclusive. Accordingly, a state legislature has the authority to determine, for example, whether its electors will be allocated according to the general ticket system or the district system.<sup>32</sup>

### The General Ticket or Winner-Take-All System.

Presently, 48 states and the District of Columbia (Maine and Nebraska are the exceptions, having adopted the district system) have adopted the winner-take-all

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<sup>29</sup> CONGRESSIONAL QUARTERLY, INC., *AMERICA VOTES 22: A HANDBOOK OF CONTEMPORARY AMERICAN ELECTION STATISTICS* (1988).

<sup>30</sup> Lawrence D. Longley and James D. Dana, Jr., *The Biases of the Electoral College in the 1990s*, 25 *Polity* 123-45 (1992).

<sup>31</sup> 146 U.S. 1 (1892).

<sup>32</sup> *Id.* at 35-36.

method of allocating electors. Under this method of allocation, the slate of electors, representing the presidential and vice presidential ticket that wins a plurality of votes in a state is elected on election day in November, and later meets in mid-December in the electoral college to cast all of the state's electoral ballots for the winning presidential and vice presidential candidates.<sup>33</sup>

### **The District System.**

The states of Maine<sup>34</sup> and Nebraska<sup>35</sup> have adopted the congressional district method of allocating some of their electors. Under the district system, two electors are chosen on a statewide, at-large basis, and one is elected in each congressional district. Each voter casts a single vote for President and Vice President, but the votes are counted twice. That is, they are first tallied on a statewide basis and the two at-large elector candidates winning the most votes (a plurality) are elected. They are also tallied for each district, where the district elector candidate winning the most votes is elected. Proponents of the district system claim that it more accurately reflects differences in support in various parts of a state and does not necessarily "disenfranchise" voters who picked the losing ticket.

### **The Decennial Census Problem**

As the number of electors apportioned to each state is equal to the combined total of its Representatives and Senators in Congress,<sup>36</sup> that number is ultimately dependent upon each state's population. After each decennial census, the 435 Representatives are reapportioned to the states based on their respective populations: some states gain Representatives while other states lose them, in accordance with shifts in population.<sup>37</sup> Therefore, the gain or loss of a state's representation in the House of Representatives affects the size of its electoral college delegation.

The decennial reapportionment of electors fails, however, to account for significant population shifts that often during the course of a decade. Thus, the allocation of electoral votes in the 2000 election actually reflected 1990 population distribution among the states. For a period of time, therefore, this situation results in over-representation in the electoral college for some states and under-representation for others. Moreover, the 2000 reallocation of electoral votes will not be in effect until the presidential election of 2004, when it will be four years out of date.

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<sup>33</sup> NOMINATION AND ELECTION OF THE PRESIDENT AND VICE PRESIDENT, S. Doc. 106-16 at 313-94 (2000).

<sup>34</sup> ME. REV. STAT. ANN. tit. 21, § 805.

<sup>35</sup> NEB. REV. STAT. § 32-548.

<sup>36</sup> U.S. CONST. art. II, § 1, cl. 2.

<sup>37</sup> U.S. CONST. art. I, § 2, cl. 3.

## The Faithless Elector

Although presidential electors are generally expected to support the candidates in whose name they are chosen, 26 states plus the District of Columbia go one step further and attempt to bind their electors<sup>38</sup> by one of several means: (1) requiring an oath or pledge or requiring electors to cast a vote for the candidates of the political party they represent, all under penalty of law;<sup>39</sup> (2) requiring a pledge or affirmation of support, without any penalty of law;<sup>40</sup> (3) directing electors to support the winning ticket;<sup>41</sup> and (4) directing electors to vote for the candidates of the party they represent.<sup>42</sup> In addition, some state political parties require in their rules that candidates for elector make an affirmation or pledge to support the party nominees.

In the 1952 decision, *Ray v. Blair*, the Supreme Court held that it does not violate the Constitution for a political party, exercising state-delegated authority, to require candidates for the office of elector to pledge to support the presidential and vice presidential nominees of the party's national convention.<sup>43</sup> Specifically, the Court found that excluding a candidate for elector because he or she refuses to pledge support for the party's nominees is a legitimate method of securing party candidates who are pledged to that party's philosophy and leadership. According to the Court, such exclusion is a valid exercise of a state's right under Article II, Section 1 of the Constitution, which provides for appointment of electors in such manner as the state legislature chooses.<sup>44</sup> In addition, the Court determined, state imposition of such pledge requirements does not violate the 12th Amendment<sup>45</sup> nor does it deny equal protection and due process under the Fourteenth Amendment.<sup>46</sup>

In *Ray v. Blair*, however, the Court did not rule on the constitutionality of state laws that bind electors and left unsettled the question of whether elector pledges and penalties for failure to vote as pledged may be constitutionally enforceable. Indeed, in the view of many commentators, based on the text of the Constitution, its structure, and history, statutes binding electors and the pledges that electors make are likely to be constitutionally *unenforceable*. That is, according to some commentators, electors

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<sup>38</sup> For a summary of the state and District of Columbia statutes binding electors votes, *see*, U.S. LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, STATE STATUTES BINDING ELECTORS' VOTES IN THE ELECTORAL COLLEGE (2000), Memorandum by L. Paige Whitaker.

<sup>39</sup> New Mexico, North Carolina, Oklahoma, South Carolina, and Washington.

<sup>40</sup> District of Columbia, Florida, Massachusetts, Mississippi, and Oregon.

<sup>41</sup> Alabama, Alaska, Colorado, Maine, Maryland, Montana, Nebraska, Nevada, Vermont, and Wyoming.

<sup>42</sup> California, Connecticut, Hawaii, Michigan, Ohio, Virginia, and Wisconsin.

<sup>43</sup> 343 U.S. 214, 228-231 (1952).

<sup>44</sup> *Id.* at 225-27.

<sup>45</sup> *Id.* at 228-31.

<sup>46</sup> *Id.* at 226, n.14 (distinguishing *Nixon v. Herndon*, 273 U.S. 536 (1927)).

remain free agents who may vote for any candidate they choose.<sup>47</sup> Presidential election reform advocates argue that the free agency status of electors further diminishes democratic involvement in the presidential election process.

Historically, most electors have actually been faithful to the presidential and vice presidential tickets winning the most votes in their respective states. There have been, however, a number of occasions when “faithless electors” voted for presidential and vice presidential candidates other than those to whom they were pledged, and, in the election of 2000, an elector cast a blank ballot. Contemporary incidents of the “faithless elector,” and the one elector who cast a blank ballot, have occurred in the following presidential election years:

- 1948 – Preston Parks, a Tennessee elector for Harry S. Truman (D) voted for Governor Strom Thurmond (States’ Rights) of South Carolina;
- 1956 – W.F. Turner, an Alabama elector for Adlai E. Stevenson (D) voted for Walter E. Jones, a local judge;
- 1960 – Henry D. Irwin, an Oklahoma elector for Richard M. Nixon (R) voted for Senator Harry F. Byrd (D) of Virginia;
- 1968 – Dr. Lloyd W. Bailey, a North Carolina elector for Richard M. Nixon (R) voted for George C. Wallace of the American Independent Party;
- 1972 – Roger MacBride, a Virginia elector for Richard M. Nixon (R) voted for John Hospers of the Libertarian Party;
- 1976 – Mike Padden, a Washington elector for Gerald R. Ford (R) voted for Governor Ronald Reagan (R) of California; and
- 1988 – Margaret Leach, a West Virginia elector for Michael Dukakis (D) voted for Senator Lloyd Bentsen (D) of Texas;<sup>48</sup> and
- 2000 – Barbara Lett-Simmons, a District of Columbia elector for Albert Gore, Jr. (D) cast a blank ballot.

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<sup>47</sup> See, e.g., LAWRENCE D. LONGLEY AND NEAL R. PEIRCE, THE ELECTORAL COLLEGE PRIMER 109 (1996)(remarking that “statutes binding electors, or pledges that they may give, are unenforceable”); Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution’s Succession Gap*, 48 Ark. L. Rev. 215, 230 (1995)(“Notwithstanding some language in *Ray v. Blair*,” Professor Amar acknowledges “real doubts about state laws that attempt to force electors to take legally binding pledges” and further notes that “even if a legal pledge can be required, it is far from clear that any legal sanction could be imposed in the event of a subsequent violation of that pledge”); *But see* Beverly J. Ross and William Josephson, *The Electoral College and the Popular Vote*, 12 J.L. & Politics 665, 745 (1996)(concluding that “state statute-based direct or party pledge binding legislation is valid and should be enforceable.”)

<sup>48</sup> Ms. Leach effectively reversed the order of her vote, choosing Senator Bentsen, the vice presidential nominee in 1988, for President, and Governor Dukakis, the presidential nominee, for Vice President.

## Presidential Succession: Between Nomination and Inauguration<sup>49</sup>

During the multistage presidential election process, as set forth in the Constitution and applicable federal statutes, a number of contingencies could occur as a result of the death, disability, or resignation of a prospective president or vice president during the period between nomination and inauguration. As the rules of succession may be unclear during certain stages of the process, some commentators have argued that statutory or constitutional reforms are needed in order to provide clarification and avoid dispute.

The first contingency could occur if a candidate nominated by a political party were to die or resign prior to the November election. At that point in the process, since no one has been elected, there is not yet a question of succession under the Constitution or federal law.<sup>50</sup> As a result, the political parties have adopted rules to fill presidential and vice presidential nominee vacancies.<sup>51</sup> For example, in 1972, a political party filled a vice presidential nominee vacancy when vice presidential candidate Thomas Eagleton resigned at the end of July and the Democratic National Committee met on August 8 to nominate R. Sargent Shriver as the new vice presidential candidate.

The second could occur if a presidential or vice presidential candidate dies after election day in November, but before the electors meet to cast their votes in December. This contingency has been the subject of concerned speculation and unsettled debate. Some commentators suggest that, the political parties, employing their rules providing for the filling of presidential and vice presidential vacancies, would designate a substitute nominee. Accordingly, the electors, who are predominantly party loyalists, would cast their votes for the substitute nominee, thereby producing the satisfactory result of the election of a candidate from the party that prevailed in November.<sup>52</sup> Other commentators, however, caution that a faithful elector, perhaps complying with a state statutorily mandated pledge, would vote for the decedent even though precedent suggests that such votes might not be counted by the Congress.<sup>53</sup> Due to the arguable indecisiveness of the process, many

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<sup>49</sup> For additional information, see *Major Party Candidates for President and Vice President: How Vacancies Are Filled*, (CRS Archived Rpt. 96-855(GOV)) by Thomas H. Neale; U.S. LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, PRESIDENTIAL AND VICE PRESIDENTIAL SUCCESSION: FROM NOMINATION THROUGH INAUGURATION (2000), Memorandum by L. Paige Whitaker.

<sup>50</sup> See WALTER BERNS, *AFTER THE PEOPLE VOTE: A GUIDE TO THE ELECTORAL COLLEGE* 92-93 (Walter Berns ed., American Enterprise Institute Press, 2d ed. 1992).

<sup>51</sup> See The Republican National Committee Rules, 2000, Rule No. 9; The Charter and ByLaws of the Democratic Party of the U.S., Sept. 25, 1999, Art. III, § 1(c).

<sup>52</sup> *Presidential Succession Between the Popular Election and the Inauguration: Hearing Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 103d Cong., 2d Sess. 12-13 (1994) [hereinafter *Hearing*] (prepared statement of Walter Dellinger on behalf of the Office of Senate Legal Counsel U.S. Dept. of Justice).

<sup>53</sup> Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's* (continued...)

commentators have urged Congress to enact clarifying federal statutes to address this contingency.<sup>54</sup>

Similarly, the third contingency, where a presidential or vice presidential nominee dies after the electors cast their votes in December, but before Congress counts the electoral votes in January, has also been discussed with uncertainty. Legal scholars suggest that ascertaining the applicable succession process for this contingency turns on when a presidential or vice presidential designate, who has received a majority of the electoral votes, becomes certified “President-elect” or “Vice President-elect.” Commentators, who maintain that presidential and vice presidential designates are considered president and vice president-elect at this stage in the process, conclude that the 20<sup>th</sup> Amendment provides clear rules of succession.<sup>55</sup> That is, if at the time the presidential term is set to begin (namely, January 20), the “President elect shall have died,” the Vice President-elect shall become President on January 20.<sup>56</sup> On the other hand, some commentators are doubtful as to whether an official President and Vice President-elect exist prior to the electoral votes being counted and announced by Congress on January 6, and therefore contend that this is also a problematic contingency lacking clear constitutional or statutory direction.<sup>57</sup>

The 20<sup>th</sup> and 25<sup>th</sup> Amendments clearly address the fourth contingency whereby a president or vice president-elect dies after Congress counts and certifies the electoral votes, but prior to being inaugurated on January 20. If the President-elect dies after certification, but before being inaugurated, the Vice President-elect becomes president-elect, under the 20<sup>th</sup> Amendment.<sup>58</sup> The resulting vacancy in the Vice Presidency would then be filled after inauguration by the new President, subject to confirmation by a majority of both Houses of Congress, under the 25<sup>th</sup> Amendment.<sup>59</sup> Likewise, according to the 25<sup>th</sup> Amendment, if the Vice President-elect dies after certification, but before inauguration, the vacancy would be filled by the new President after he or she is inaugurated, subject to confirmation by a majority of both Houses of Congress.<sup>60</sup>

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<sup>53</sup> (...continued)

*Succession Gap*, 48 Ark. L. Rev. 215 (1995), reprinted in *Hearing*, at 217-19 (prepared statement of Akhil Reed Amar, Southmayd Professor, Yale Law School)(advocating that Congress enact federal law clearly providing a succession process in order to address this “time bomb ticking away in our Constitution”).

<sup>54</sup> *See, e.g., Id.*

<sup>55</sup> *Hearing, supra* note 47, at 11 (prepared statement of Walter Dellinger).

<sup>56</sup> U.S. CONST. amend. XX, § 3, cl. 1.

<sup>57</sup> *Hearing, supra* note 47, at 39 (prepared statement of Walter Berns, John M. Olin University Professor, Georgetown University; Adjunct Scholar, American Enterprise Institute).

<sup>58</sup> U.S. CONST. amend. XX, § 3, cl. 1.

<sup>59</sup> U.S. CONST. amend. XXV, § 2.

<sup>60</sup> *Id.*

## Independent and Third-Party vs. Major Party Candidates

As it politically and historically evolved under state election laws and major political party rules, the electoral college system has generally favored the major political parties over independent and third-party candidacies. While major party presidential candidates are automatically placed on the ballot, independent and third-party presidential and vice presidential candidates must demonstrate certain levels of popular support to gain access to the November general election ballots in the states and the District of Columbia.<sup>61</sup> Often the independent candidates directly, and the minor parties generally by party committee, appoint or nominate their electors to state election officers to be voted on in the November general election. Moreover, the non-major party candidates must comply with diverse and often complicated nominating petition requirements for ballot positions in these 51 jurisdictions, which generally require a certain number of voter signatures in order to demonstrate that the candidate or party has a level of support.<sup>62</sup>

Historically, no independent, minor party, or third-party presidential candidate has ever won the presidency, although three presidential candidates in past elections did win statewide elections and thus electoral college votes: 1948–39 electoral votes for Strom Thurmond; 1960–15 electoral votes for Harry F. Byrd; and 1968–46 electoral votes for George C. Wallace.<sup>63</sup>

Over the last thirty years, however, various federal court decisions have made it easier for minor party and independent candidates for President and Vice President to gain ballot access. For example, in 1968, the Supreme Court in *Williams v. Rhodes*, struck down on equal protection grounds an Ohio election law requiring a new political party to obtain petitions signed by qualified electors totaling 15% of the number of ballots cast at the last gubernatorial election and to file them in early

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<sup>61</sup> See NOMINATION AND ELECTION OF THE PRESIDENT AND VICE PRESIDENT, S. Doc. 106-16, at 310-94 (2000).

<sup>62</sup> See *id.* Further adding to the major party advantage in presidential elections, the federal public financing provisions facilitate the acquisition of public campaign funds for major party presidential candidates, while independent, minor party, and third-party candidates must demonstrate at least a 5% voter support in order to receive any public funds, which are then provided four years later. See generally, 26 U.S.C. §§ 9001-9012 (general election presidential public financing provisions); 26 U.S.C. § 9004(a)(2)(A)(B),(3)(eligibility of minor party candidates to receive public funds). While it was argued in the 1976 Supreme Court decision, *Buckley v. Valeo*, 424 U.S.1, 97 (1976), that the presidential public financing provisions were invidiously discriminatory against non-major party candidates in violation of the due process clause of the Fifth Amendment, the *Buckley* Court disagreed since “the Constitution does not require Congress to treat all declared candidates the same for public financing purposes.” *Id.* at 97. “The Constitution does not require the Government to ‘finance the efforts of every nascent political group’ [quoting *American Party of Texas v. White*, 415 U.S. at 794] merely because Congress chose to finance the efforts of the major parties.” The Court noted, however, that it was not ruling out a future conclusion that public financing systems invidiously discriminate against non-major parties if such parties could present an appropriate factual demonstration. *Id.* at 97, n.13.

<sup>63</sup> See U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 72 (115 ed. 1995).



February of the presidential election year. The Court found that Ohio's election laws relating to the nomination and election of presidential and vice presidential electors, which effectively limited general election ballot access to the two major political parties, taken as a whole, were invidiously discriminatory against minor party candidates in violation of the 14<sup>th</sup> Amendment equal protection clause.<sup>64</sup> Furthermore, during the 1976 presidential election, independent candidate Eugene J. McCarthy challenged the constitutionality of many state statutes providing ballot access procedures for independent presidential candidates, many of which the federal courts invalidated on equal protection grounds as being discriminatory to independent presidential candidates.<sup>65</sup> During the 1980 election, independent presidential candidate John B. Anderson still encountered similar obstacles to ballot access and, accordingly, he was able to successfully challenge state election laws in seven states: (1) Florida,<sup>66</sup> (2) Kentucky,<sup>67</sup> (3) Maine,<sup>68</sup> (4) Maryland,<sup>69</sup> (5) New Mexico,<sup>70</sup> (6) Ohio,<sup>71</sup> and (7) North Carolina.<sup>72</sup> Generally, as a result of such challenges, it is now somewhat easier for independent and third party presidential candidates to gain ballot access in the states and the District of Columbia and therefore to wage a more competitive campaign against major party presidential candidates.

## Electoral College Reform Proposals

### History

Since the adoption of the Constitution, the electoral college has been the subject of discussion and controversy. The 12th Amendment, (proposed by Congress on December 9, 1803 and ratified by three-fourths of the several states on July 27, 1804) which sets forth electoral voting procedures, has been the only major reform of the electoral college. Since then, in almost every session of Congress, resolutions have

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<sup>64</sup> 393 U.S. 23, 28-34 (1968).

<sup>65</sup> See generally, COMMITTEE FOR A CONSTITUTIONAL PRESIDENCY, *Progress Report On McCarthy Legal Challenges* (1976).

<sup>66</sup> *Anderson v. Firestone*, 499 F. Supp. 1027 (N.D. Fla. 1980).

<sup>67</sup> *Greaves v. Mills*, 497 F. Supp. 283 (E.D. Ky. 1980), *aff'd* in part and *rev'd* in part, *sub nom.*, *Anderson v. Mills*, 664 F.2d 602 (6<sup>th</sup> Cir. 1981).

<sup>68</sup> *Anderson v. Quinn*, 495 F. Supp. 730 (D. Me. 1980), *aff'd* 634 F.2d 616 (1<sup>st</sup> Cir. 1980).

<sup>69</sup> *Anderson v. Morris*, 500 F. Supp. 1095 (D. Md. 1980), *aff'd* 636 F.2d 55 (4<sup>th</sup> Cir. 1980), judgment vacated 658 F. 2d 246 (4<sup>th</sup> Cir. 1980).

<sup>70</sup> *Anderson v. Hooper*, 498 F. Supp. 898 (D.N.M. 1980).

<sup>71</sup> *Anderson v. Celebrezze*, 499 F. Supp. 121 (S.D. Oh. 1980), *rev'd* 664 F. 2d 554 (6<sup>th</sup> Cir. 1981), *rev'd* 460 U.S. 780 (1983). The Supreme Court held that the restrictive provisions of the Ohio election statutes, requiring early filing deadlines for independent candidates, placed an unconstitutional burden on the voting and associational rights of the independent candidate's supporters. *Id.* at 790-95.

<sup>72</sup> *Anderson v. Babb*, No. 80-561-CIV-5 (E.D. N.C. 1980), *aff'd per curiam* 632 F.2d 300 (4<sup>th</sup> Cir. 1980).

been introduced proposing electoral college reform. Indeed, more proposed constitutional amendments have been introduced in Congress regarding electoral college reform than on any other subject. Between 1889 and 2000, approximately 587 such amendments were proposed.<sup>73</sup> Generally, most of these bills had minimal legislative activity. However, for some of these proposals, hearings were held and some legislative activity occurred, but there was insufficient legislative support to obtain the two-thirds votes of both Houses of Congress necessary for approval of a constitutional amendment under Article V.<sup>74</sup>

The attempt in Congress that came closest to success occurred after the 1968 presidential election when American Independent party candidate George Wallace won 46 electoral votes, generating concern about the prospect of contingent election or the trading of electoral votes in return for policy concessions. In the 91<sup>st</sup> Congress (1969-70), H.J. Res. 681 (Celler), proposed to abolish the electoral college and provide for the direct popular election of the President and the Vice President, with a runoff requirement between the two presidential candidates with the highest votes when a 40% margin of the vote was not obtained. This resolution passed the House on September 18, 1969 by a vote of 338-70, but failed to pass the Senate in 1970 due to a filibuster.<sup>75</sup>

Likewise, congressional interest increased after the close presidential election in 1976, in which the Democratic candidate (Jimmy Carter) beat the Republican President (Gerald R. Ford) by a 50.1 percent popular vote margin and by an electoral vote of 297-240 (270 votes needed to win).<sup>76</sup> S.J. Res. 26 of the 96<sup>th</sup> Congress proposed direct popular election and was approved in the Senate by a margin of 51 to 48 in 1979. This margin was far short of the two-thirds required for a constitutional amendment. Given the results of the vote, the House leadership decided not to bring the proposal to the floor in the 96<sup>th</sup> Congress. To date, this 1979 Senate vote was the most recent floor action regarding presidential election reform.

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<sup>73</sup> CONG. REC. index; Legislative Information Service.

<sup>74</sup> LEAGUE OF WOMEN VOTERS OF THE U. S., WHO SHOULD ELECT THE PRESIDENT? 43, 92-95 (1969). The House Judiciary Committee held hearings on proposals to reform the electoral college in 1947, 1949, 1951, and 1969. Likewise, the Senate Subcommittee on Constitutional Amendments held hearings in 1948, 1953, 1955, 1961, 1963, 1966, 1967, and 1969. In the House, between 1947 and 1968, there were four occasions when House Joint Resolutions were reported favorably: 1948 (H.J. Res. 9, Gossett); 1949 (H.J. Res. 2, Gossett); 1950 (S.J. Res. 2, Lodge); and 1951 (H.J. Res. 19, Gossett). Between 1947 and 1968, Senate Joint Resolutions were also reported favorably four times: 1948 (S.J. Res. 200, Lodge); 1949 (S.J. Res. 2, Lodge); 1951 (S.J. Res. 52, Lodge); and 1955 (S.J. 31, Daniel). S. J. Res. 2 (Lodge) passed the Senate by the required two-thirds votes, but the House failed to vote on the Senate Resolution. *Id.*

<sup>75</sup> CONGRESSIONAL QUARTERLY, INC., POWERS OF CONGRESS 279-80 (1976).

<sup>76</sup> U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 271 (1995). In 1976, the Democratic presidential and vice presidential candidates received 40,831,000 votes over the Republican presidential and vice presidential candidates, who received 39,148,000 votes.

Proposals to reform the electoral college in recent Congresses generally fall into two categories: those that would eliminate the electoral college system entirely, replacing it with direct popular election, and those that seek to repair perceived defects in the existing arrangement. These proposals are examined below.

### **The Direct Election Plan: Elimination of the Electoral College**

In recent decades, the most popular proposal to reform the present method of electing the President and Vice President has been the direct election plan. Under this plan, the electoral college would be abolished and the President and Vice President would be elected directly by popular vote. Most direct election proposals would require that the winning candidates receive at least 40% of the votes cast, and provide for a runoff election between the two presidential and vice presidential tickets receiving the greatest number of popular votes if no candidate receives the requisite percentage.

Proponents of the direct election plan argue that their proposal is simple and democratic: the candidates winning the most popular votes would be elected. Direct election would thus eliminate the possibility of a “minority” President and Vice President because the candidate winning the most popular votes would always prevail. Further, it would eliminate an even greater potential for distortion of the public will by abolishing the contingent election process. In addition, proponents note that the direct election plan would provide every vote equal weight, regardless of the state in which it was cast. It is further noted that the direct election plan would reduce the complications that currently could arise, in the event of a presidential candidate’s death, between Election Day and the date that the electoral college meets.

Opponents argue that the direct election plan would weaken the present two-party system and result in the growth of minor parties, third parties, and new parties. The parties are forced to conduct broad-based campaigns throughout the nation, in hopes of assembling the requisite majority of 270 votes, thus discouraging minor or splinter parties. Similarly, the need to forge national coalitions having a wide appeal has been a contributing factor to the relative moderation and governmental stability enjoyed by the nation under the two-party system. Moreover, it is argued, the growth of such parties could have a divisive effect on national politics and result in governance by less stable coalitions similar to those in some parliamentary democracies. Opponents further contend that a direct election plan would weaken the powers of the smallest and largest populated states under the present system since this new system would make each state’s borders irrelevant in terms of voting because each vote would be counted equally under the one person, one vote principle, regardless of the population size of the state in which it was cast.<sup>77</sup> Finally, other critics of direct election contend that the allocation of electoral votes is a vital component of our federal system. The federal nature of the electoral college system is a positive good, according to its defenders. They assert that the founders of the Constitution intended the states to play an important role in the presidential elections and that the electoral college system provides for a federal election of the President that is no less legitimate than the

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<sup>77</sup> LEAGUE OF WOMEN VOTERS OF THE U. S., *supra* note 74, at 71-79.

system of allocating equal state representation in the Senate. Direct popular election, they claim, would be a serious blow to federalism in the United States.

## **Electoral College Reform**

In contrast to direct popular election, the three proposals described in this section would retain the electoral college, but would repair perceived defects in the existing system. One characteristic shared by all three is the elimination of electors as individual actors in the process. Electoral votes would remain, but they would be awarded directly to candidates. The asserted advantage of this element in these reform plans is that it would eliminate the potential for faithless electors.

### **The District Plan.**

The district plan preserves the electoral college method of electing the President and Vice President, with each state choosing a number of electors equal to the combined total of its Senate and House of Representatives delegations. It would, however, eliminate the present general ticket or winner-take-all procedure of allotting a state's entire electoral vote to the presidential candidates winning the statewide vote. Instead, one elector would be chosen by the voters for each congressional district, while an additional two, representing the two "senatorial" electors allocated to each state regardless of population, would be chosen by the voters at large. This plan, which could be adopted by any state, under their power to appoint electors in Article II, Section 1, Clause 2 of the Constitution, is currently used by Maine<sup>78</sup> and Nebraska.<sup>79</sup> Under the district plan, the presidential and vice presidential candidates winning a simple majority of the electoral votes would be elected.

Most district plan proposals provide that, in case of an electoral college tie, the candidates having the plurality of the district electoral votes – excluding the at-large electoral votes assigned to each state for Senators – would be declared the winners. If the electoral vote count still failed to produce a winner, most proposals advocating the district plan would require the Senate and House of Representatives to meet in joint session to elect the President and Vice President by majority vote, with each Member having one vote, from the three candidate tickets winning the most electoral votes.

An example of how the district system would operate in one state, as compared with the winner-take-all or general ticket system, follows. In 1996, President Bill Clinton received 5,119,815 popular votes in California to 3,882,368 for Republican nominee Bob Dole, and thus won all 54 of that state's electoral votes under the winner-take-all general ticket. (Independent candidate Ross Perot and assorted minor party nominees received an additional 1,070,398 votes). By contrast, under the district system, Clinton, who carried 37 congressional districts and the statewide vote, would have won 39 electoral votes (37 plus the additional two allocated to the

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<sup>78</sup> ME. REV. STAT. ANN. tit. 21, § 805.

<sup>79</sup> NEB. REV. STAT. § 32-548.

statewide winner under the district system), while Dole would have won the 15 electoral votes representing the districts he carried.

On the national level, the district system would have produced somewhat different national electoral college results if it had been in effect in 1996. Totals for the general ticket and district methods are provided below:

<u>Candidate</u>	<u>General Ticket System</u>	<u>District System</u>
Clinton (D)	379	345
Dole (R)	159	193
Others	0	0
Total	538	538

(Comparative electoral vote totals for the 1996 presidential elections: the general ticket and district systems compared.)<sup>80</sup>

Proponents of the district plan assert that it would more accurately reflect the popular vote results for presidential and vice presidential candidates than the present electoral college method. Moreover, proponents note, by preserving the electoral college, the district plan would not deprive small or sparsely populated states of certain advantages under the present system. That is, each state would still be allocated at least three electoral votes, correlating to its two Senators and its one Representative, regardless of the size of the state's population. In those states dominated by one political party, the district plan might also provide an incentive for greater voter participation and an invigoration of the two-party system in presidential elections because it might be possible for the less dominant political party's candidates to carry certain congressional districts.<sup>81</sup> Finally, proponents argue that the district plan reflects political diversity within different regions of states, while still providing a two-vote bonus for statewide vote winners.

On the other hand, opponents of the district plan contend that it does not go far enough in reforming the present electoral college method, because the weight of each vote in a small state would still be greater than the weight of a vote in a more populous state. In addition, they note, the district plan would continue to allow the possibility of electing "minority" candidates who win the electoral votes while losing the popular vote. Some opponents of the district plan further argue that by facilitating the garnering of electoral votes (since winning congressional districts is easier than winning statewide) implementation of the district plan would actually weaken the

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<sup>80</sup> U.S. LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, PRESIDENTIAL ELECTION RETURNS BY CONGRESSIONAL DISTRICT 6, 23 (2000), Memorandum by David C. Huckabee.

<sup>81</sup> See WALLACE S. SAYRE AND JUDITH H. PARRIS, THE BROOKINGS INSTITUTION, VOTING FOR PRESIDENT 102-17 (1970); see generally LEAGUE OF WOMEN VOTERS OF THE U.S., *supra* note 74, at 64-66.

present two-party system and encourage the development of minor parties, new parties, and third parties.

### **The Proportional Plan.**

The proportional plan retains the electoral college, but awards electoral votes in each state based on the percentage of votes received in each state (irrespective of the districts from which the voters come) by the competing candidates. In the interests of fairness and accuracy, and to avoid problems with rounding, most proportional plans divide whole electoral votes into thousandths of votes, that is, to the third decimal point. Under most proposals advocating the proportional plan, the presidential and vice presidential candidates receiving a simple majority of the vote, or a plurality of at least 40% of the electoral votes, would be elected. Should presidential and vice presidential candidates fail to receive the percentage, most proportional plan proposals provide that the Senate and the House of Representatives would meet and vote in joint session to choose the President and the Vice President from the candidates having the two highest numbers of electoral votes.

An example of how the proportional plan would have operated in one state in the 1996 presidential election, as compared with the winner-take-all or general ticket system, follows. President Bill Clinton, who as noted previously, captured all 54 California electoral votes under the general ticket system, would have won 28.725 votes, to 21.299 for Bob Dole, and 3.976 for Ross Perot and other candidates in 1996 under the proportional plan.

Nationwide electoral vote tallies for 1996 under the general ticket and proportional systems are provided below:

<u>Candidate</u>	<u>General Ticket System</u>	<u>Proportional System</u>
Clinton(D)	379	268.358
Dole (R)	159	223.420
Others	0	46.221
Total	538	537.999

(Comparative electoral vote totals for the 1996 presidential elections: the general ticket and proportional systems compared.)<sup>82</sup>

Proponents of the proportional plan argue that this plan comes the closest of any of the other plans to electing the President and Vice President by popular vote while

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<sup>82</sup> U.S. LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, PRESIDENTIAL ELECTION RETURNS BY CONGRESSIONAL DISTRICT 9, 23 (2000), Memorandum by David C. Huckabee.

still preserving each state's electoral college strength. They also note that the proportional plan would make it more unlikely that "minority" presidents—those receiving more electoral votes than popular votes under the present system—would be elected. Proponents also argue that the proportional plan, by eliminating the present winner-take-all system, would give weight to the losing candidates by awarding them electoral votes in proportion to the number of votes they obtained. They also suggest that presidential campaigns would become more national in scope, with candidates gearing their efforts to nationwide popular and electoral vote totals, rather than concentrating on electoral vote-rich populous states.

Opponents of the proportional plan argue that it could undermine and eventually eliminate the present two-party system by making it easier for minor parties, new parties, and independent candidates to compete in the presidential elections by being able to win electoral votes without having to win statewide elections to do so. Further, opponents argue, the states would generally have less importance as units, since the winner-take-all aspect would be eliminated.<sup>83</sup> Finally, opponents question the 40% plurality threshold. If the point of the presidential election is to ascertain the people's choice, should not the winning candidate be required to gain at least a majority (50%) of electoral votes in order to avoid a runoff election or election in Congress?

### **The Automatic Plan.**

The automatic plan would amend the present system by abolishing the office of presidential elector and by allocating a state's electoral votes on an automatic winner-take-all basis to the candidates receiving the highest number of popular votes in a state. Most versions of the automatic plan provide some form of contingent election in Congress in the event no candidate receives a majority of electoral votes. Of the three principal proposals to reform the electoral college, this proposal would result in the least change from the present system of electing the President and the Vice President.

Proponents of the automatic plan argue that it would maintain the present electoral college system's balance between national and state powers and between large and small states. Proponents note that the automatic plan would eliminate the possibility of the "faithless elector." Furthermore, the automatic plan would preserve the present two-major party system under a state-by-state, winner-take-all method of allotting electoral votes.

Under the present system, minor parties, new parties, and independent candidates have not fared very well in presidential elections, probably due to, *inter alia*, problems such as ballot access procedures, public financing in the general election, and the lack of name recognition and grass-roots organization in comparison to those of the established major parties. Opponents of the automatic plan argue that it perpetuates many of the perceived inequities inherent in the present electoral college system of electing the President and the Vice President. Opponents also note that under the

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<sup>83</sup> See generally LEAGUE OF WOMEN VOTERS OF THE U.S., *supra* note 74, at 68-71; SAYRE & PARRIS, *supra* note 81, at 118-34.

automatic plan it would still be possible to elect a “minority” President and Vice President.<sup>84</sup> That is, it still presents the perceived problem that Congress and not the people could still decide the presidency and the vice presidency when a majority of the electoral votes is not obtained.

## Conclusion

Despite various criticisms and controversies, the current form of the electoral college has delivered the presidency to the popular and electoral vote winners in 46 out of 50 elections since it became operational in 1804.<sup>85</sup> In the very closely contested 2000 election, for the first time in 112 years, the system resulted in a President and Vice President who received more electoral votes, but fewer popular votes, than the electoral vote runners-up. This event has stimulated renewed congressional and public interest in the question of presidential election reform, particularly electoral college reform.

Generally, proponents of presidential election reform advocate either completely eliminating the electoral college system and replacing it with direct popular election, or repairing perceived defects in the existing system by implementing one of several electoral college reform proposals advanced over the years. Following several close elections in 1960, 1968, and 1976, proposed constitutional amendments providing for direct election were actively considered in the House of Representatives and the Senate in the 91<sup>st</sup> through 96<sup>th</sup> Congresses, but none received the approval of two-thirds of the Members of both chambers necessary for proposal to the states. In the two decades following the last floor action on electoral college reform, in 1979, the existing system delivered substantial majorities of electoral votes to the popular vote winner in every presidential election. Since the electoral college functioned as its defenders predicted, notwithstanding occasional concerns over close elections and the potential impact of independent or third party candidates, there was little impetus for change. Following the 2000 presidential election, should Congress choose to revisit the question of electoral college reform, it will need to weigh the merits of competing policies, while recognizing the difficult hurdles faced by any controversial proposal to amend the U.S. Constitution.<sup>86</sup>

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<sup>84</sup> See generally LEAGUE OF WOMEN VOTERS OF THE U.S., *supra* note 74, at 61-64; SAYRE & PARRIS, *supra* note 81, at 90-101.

<sup>85</sup> The anomaly contests included one in which the President was chosen by contingent election (1824), one in which the Vice President was chosen by contingent election (1836), and three occasions in which the electoral college winners received fewer popular votes than the electoral college runners-up (1876, 1888, and 2000).

<sup>86</sup> Proposed amendments must be approved by two-thirds majorities of both houses of Congress and ratified by three-fourths (38) of the states, usually within a prescribed time period of seven years.