

CRS Report for Congress

Received through the CRS Web

The Electoral College: An Overview and Analysis of Reform Proposals

Updated November 5, 2004

L. Paige Whitaker
Legislative Attorney
American Law Division

Thomas H. Neale
Government and Finance Division

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 a majority of 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 repair 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 each state's two at-large electoral votes to the statewide popular vote winners, and one electoral vote to the winning candidates in each congressional district; (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 all of each state's electoral votes directly on a winner-take-all basis to the statewide vote winners. Major reforms of the system can be effected only by constitutional amendment, a process that requires 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 be updated as events warrant. For further information, please consult CRS Report RL32611, *The Electoral College: How It Works in Contemporary Presidential Elections*, by Thomas H. Neale, and CRS Report RL32612, *The Electoral College: Reform Proposals in the 108th Congress*, by Thomas H. Neale.

Contents

Introduction: The Electoral College System in Brief	1
Origins of the Electoral College	1
The 12 th Amendment	2
Electoral Vote Allocation	3
State and District of Columbia Appointment of Electors	3
Appointment Date and Meeting Date of Electors	4
Counting and Certification of Electoral Votes	4
Contingent Election	5
Electoral College Criticisms and Controversies	5
Electoral College Deadlock: Contingent Election	5
The Minority President: An Electoral College Misfire	7
A “Small State” Advantage in the Electoral College?	8
An Ethnic Voter Advantage in the Electoral College?	9
Current Methods of Allocating Electoral Votes	9
The General Ticket or Winner-Take-All System	9
The District System	10
The Decennial Census Problem	10
The Faithless Elector	10
Presidential Succession: Between Nomination and Inauguration	13
Independent and Third-Party versus Major Party Candidates	15
Electoral College Reform: The Fox and the Hedgehog	17
History	17
The Direct Election Plan: Elimination of the Electoral College	18
Pro and Con Arguments	19
Electoral College Reform	20
The District Plan	20
The Proportional Plan	22
The Automatic Plan	24
Reform Proposals Following the 2000 Presidential Election	24
Concluding Observations: Prospects for Reform	25

The Electoral College: An Overview and Analysis of Reform Proposals

Introduction: The Electoral College System in Brief

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,¹ provides the broad framework through which electors are appointed and by which they cast votes for the President and Vice President.

Origins 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 would lack sufficient knowledge of the character and qualifications of presidential and vice presidential candidates to make intelligent electoral decisions. Indirect election of the chief executive, by Congress, the legislatures of the states, or even by electors drawn by lot, enjoyed equally wide or greater support. Moreover, the delegates were reluctant to set uniform national voting standards 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.²

The Convention settled on a compromise plan: the electoral college system.³ 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. Among its more attractive elements, it removed election from Congress, thus reinforcing separation of powers, acknowledged the federal principle by requiring electoral votes to be cast by state, and made it at least possible that some of the people would be able to vote, albeit indirectly, for the nation's chief executive. For instance, while the Constitution did not mandate popular participation in the selection of electors, neither did it prohibit it, leaving the question to state discretion. In fact, the states moved to provide for direct popular choice of electors by the voters beginning in the late 18th Century. By 1836, only

¹ The implementing statutes are codified at 3 U.S.C. §§ 1-17.

² CONGRESSIONAL QUARTERLY, INC., *PRESIDENTIAL ELECTIONS SINCE 1789* 1 (2d ed. 1980).

³ 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).

South Carolina's legislature continued to select the state's presidential electors, and since the Civil War, electors have been popularly chosen in all states.

The 12th Amendment.

The Constitution originally provided that each elector would cast two votes, for different persons, for President. The person winning the most electoral votes, provided the total was a majority of the total number of electors, would become President; the person winning the next largest number would become Vice President. There was to be no separate vote for Vice President. This system understandably failed to envision the growth of political parties in the new republic, which would nominate unified tickets of nominees for President and Vice President.⁴ The system worked as intended only for the two elections won by George Washington. By 1796, a nascent party system proposed competing candidacies of John Adams and Thomas Pinckney for the federalists, and Thomas Jefferson and Aaron Burr for the anti-federalists or republicans.⁵ In each case, the second named candidate was clearly intended to be nominated for Vice President, but because electoral votes were undifferentiated, it was necessary for at least one elector on the winning team to cast a vote for a candidate other than the designated vice presidential nominee, in order to avoid a tie for the presidency.

When Adams and Jefferson again contested the election of 1800, with Burr again as Jefferson's designated vice presidential running mate, the republicans won a solid majority of electors, but failed to have one elector cast his vote for someone other than Jefferson. Jefferson and Burr were thus tied for the presidency, and the election went to the House of Representatives. The electoral college "misfire" threw the nation into its first, and one of its worst, constitutional crises, as federalists and dissident republicans plotted and caballed to deny Jefferson the presidency. The House required 35 deadlocked ballots before the impasse was broken and Jefferson was elected.

The shock of the 1800 election led directly to proposal of the 12th Amendment in 1803 and its speedy ratification in 1804. The system was revised so that electors would cast one vote each for President and Vice President, thus compartmentalizing the two contests. As before, the candidates who gained a majority of electoral votes would be elected President and Vice President; if there were no majority, the House

⁴ The founders feared and deprecated the whole idea of competing political factions, or parties, which they associated with what they viewed as the worst excesses of the British system. In the electoral college, they sought, perhaps ingenuously, to craft a system where electors chosen by, or simply in touch with, the people would cast non-politically motivated votes for the best candidates for President.

⁵ Adams was elected President, but too many federalist electors cast their second votes for candidates other than Pinckney, so Jefferson came in second in the total number of electoral votes, and was thus elected Vice President. This revealed another unintended consequence of the original constitutional provisions, since Adams and Jefferson, now President and Vice President, were bitter political enemies.

of Representatives would elect the President and the Senate, the Vice President.⁶ The 12th Amendment is the most recent constitutional change to the electoral college system.

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.⁷ 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. The current allocation of electoral votes by state, which remains in effect for the 2004 and 2008 presidential elections, follows.

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
District of Columbia	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 votes constitute a majority.

State and District of Columbia 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.

⁶ For additional information on this process, known as contingent election, please consult CRS Report RS20300, *Election of the President and Vice President by Congress: Contingent Election*, by Thomas H. Neale.

⁷ U.S. CONST. amend. XXIII.

Virgin Islands, and American Samoa are not constitutionally entitled to electors, because 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 United States.⁸ 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 choice of electors.⁹ Voters also choose U.S. Senators and Representatives and a wide range of state and local officials at this time, which is generally known as national election day. Election day falls on November 2 in 2004. Article II further authorizes Congress to determine the date for the electors to meet and cast their ballots¹⁰ 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.¹¹ The electors will meet on December 13 in 2004.

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 and applicable federal law, the certified results are transmitted to Congress and to other designated authorities.¹² On January 6, following the election, the Senate and the House of Representatives, with the President of the Senate (the Vice President of the United States) serving as the presiding officer, meet in joint session to count the electoral votes.¹³ 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.¹⁴

Objections to either individual electoral votes or state electoral vote totals may be made by Members of Congress at the joint electoral vote count session. Such objections must be presented in writing and signed by one Senator and one Representative to be in order. If a valid objection is raised, the session recesses; the Senate returns to its own chamber, and the two houses deliberate separately on the question. Debate is limited to two hours, and each Member is limited to five minutes

⁸ U.S. CONST. art. II, § 1, cl. 3.

⁹ 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.

¹⁰ U.S. CONST. art. II, § 1, cl. 3.

¹¹ 2 U.S.C. § 7.

¹² 3 U.S.C. §§ 9, 10, 11.

¹³ 3 U.S.C. § 15.

¹⁴ *Id.*

speaking time on the floor. At the end of the two hours, the House and Senate vote separately on the objection, and the joint session reassembles. If both houses vote to sustain the objection, the electoral vote or votes in question are not counted.¹⁵

Contingent Election¹⁶

If no candidates for president and/or vice president obtain 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.¹⁷ 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 12th 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.¹⁸

Electoral College Criticisms and Controversies

Proponents of presidential election reform cite several shortcomings in the electoral college as justifications for reform or abolition of the current system.

Electoral College Deadlock: Contingent Election

As noted previously in this report, if 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 by contingent election.¹⁹ 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

¹⁵ For further discussion regarding the electoral vote count session and the objection process, please consult CRS Congressional Distribution Memorandum, *Overview of Electoral College Procedure and the Role of Congress*, by Jack Maskell, available from the author to Members of Congress and congressional staff.

¹⁶ For further discussion regarding the contingent election process, please consult CRS Report RS20300, *Election of the President and Vice President: Contingent Election*, by Thomas H. Neale.

¹⁷ U.S. CONST. amend. XII.

¹⁸ *Id.*

¹⁹ U.S. CONST. amend. XII.

additional 4 states voting for William H. Crawford.²⁰ Likewise, election of the Vice President by the Senate has 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.

Some commentators have criticized the 1825 presidential contingent election, claiming it created a “constitutional crisis” because the House, according to Jackson supporters, appeared to select a 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).²¹ 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 districts, states, 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.²²

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 election, then democratic criteria would require implementing reforms that “bring ... the people into the contingency process.”²³ 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, increases the likelihood of contingent election. The most recent 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

²⁰ 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.

²¹ Jackson supporters asserted that Adams agreed to nominate Clay for Secretary of State, in return for Clay’s support in the contingent election process. William Josephson and Beverly J. Ross, *Repairing the Electoral College*, 22 J. Legis. 145, 149 (1996).

²² *Id.*

²³ 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.

southern states.²⁴ 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.²⁵

It is also important to note, when considering the contingent election procedure, that the 12th Amendment does not provide for District of Columbia participation in a 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.²⁶

The Minority President: An Electoral College Misfire

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 a majority of electoral votes, 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.²⁷

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. The popular vote results for that election were: Gore and Lieberman: 50,992,335; for Bush and Cheney: 50,455,156.²⁸

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

²⁵ 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 CRS Congressional Distribution Memorandum, *Overview of Electoral College Procedure and the Role of Congress*, by Jack Maskell and Paul S. Rundquist, available to Members of Congress and staff from the authors.

²⁶ “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).

²⁷ 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.

²⁸ *Congressional Quarterly’s Guide to U.S. Elections*, 4th ed. (Washington: CQ Press, 2001), (continued...)

A “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.²⁹ 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 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 2000, voters in Wyoming, the least populous state, cast 218,351 popular votes and three electoral votes for President, or one electoral vote for every 72,784 voters. By comparison, Californians cast 10,965,856 popular votes and 54 electoral votes, or one electoral vote for every 203,071.³⁰ As a result of this distribution of electoral votes among the states, it is argued that “small” states have an advantage over large states with regard to electoral vote allocation relative to their populations.

While it is generally recognized that small states possess an arithmetical advantage in the electoral college, some observers hold that, conversely, the most populous (large) states enjoy a “voting power” advantage, because they control the largest blocs of electoral votes. For example, voters in more populous states are better 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 2000 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, 55 electoral votes; Texas, 34 electoral votes; New York, 31 electoral votes; Florida, 27 electoral votes; and Pennsylvania and Illinois, 21 electoral votes each) and disadvantages all other states and the District of Columbia.³¹

²⁸ (...continued)
vol. 1, p. 688.

²⁹ 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).

³⁰ *Congressional Quarterly’s Guide to U.S. Elections*, 4th ed., vol. 1, p. 688.

³¹ Lawrence D. Longley and James D. Dana, Jr., *The Biases of the Electoral College in the 1990s*, 25 *Polity* 123-45 (1992).

An Ethnic Voter Advantage in the Electoral College?

Another theory advanced during debate on electoral college reform centers on the asserted advantage enjoyed by ethnic minority voters. According to this argument, minority voters, e.g., Blacks, Hispanics, and Jews, tend to be concentrated in populous states with large electoral college delegations. By virtue of this concentration, they are presumably able to exert greater influence over the outcomes in such states because they tend to vote overwhelmingly for candidates whose policies they perceive to be favorable to their interests, and thus helping to gain these states and their electoral votes for the favored candidates. These arguments were advanced by the Presidents of the American Jewish Congress and the National Urban League as reasons for their support of the electoral college system during hearings before the Senate Judiciary Committee's Subcommittee on the Constitution as it considered a direct election amendment in 1979.³²

Current 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*,³³ 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.³⁴

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 method of allocating electors. Under this method, 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 as the electoral college to cast all of the state's electoral ballots for the winning presidential and vice presidential candidates.³⁵

³² U.S. Congress, Senate, Committee on the Judiciary, Subcommittee on the Constitution, *Direct Election of the President and Vice President of the United States*, hearings on S.J.Res. 28, 96th Cong., 1st sess, Mar. 27, 30 Apr. 3, 9, 1979 (Washington: GPO, 1979), pp. 163-219.

³³ 146 U.S. 1 (1892).

³⁴ *Id.* at 35-36.

³⁵ NOMINATION AND ELECTION OF THE PRESIDENT AND VICE PRESIDENT, S. Doc. 106-16 at 313-94 (2000).

The District System.

The states of Maine³⁶ and Nebraska³⁷ have adopted the congressional district method of allocating 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. The popular votes are also tallied in 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,³⁸ 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.³⁹ 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 occur 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 came into effect only with the presidential election of 2004, when it was four years out of date. It will be even more less reflective of state population trends for the 2008 election.

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 electors⁴⁰ by one of several means: (1) requiring an

³⁶ ME. REV. STAT. ANN. tit. 21, § 805.

³⁷ NEB. REV. STAT. § 32-548.

³⁸ U.S. CONST. art. II, § 1, cl. 2.

³⁹ U.S. CONST. art. I, § 2, cl. 3.

⁴⁰ 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

oath or pledge or requiring the elector to cast a vote for the candidates of the political party he or she represents, all under penalty of law;⁴¹ (2) requiring a pledge or affirmation of support, without any penalty of law;⁴² (3) directing electors to support the winning ticket;⁴³ and (4) directing electors to vote for the candidates of the party they represent.⁴⁴ 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 its 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.⁴⁵ 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.⁴⁶ In addition, the Court determined, state imposition of such pledge requirements does not violate the 12th Amendment,⁴⁷ nor does it deny equal protection and due process under the Fourteenth Amendment.⁴⁸

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 remain free agents who may vote for any candidate they choose.⁴⁹ Presidential election reform advocates argue that the free agency status of

⁴⁰ (...continued)

BINDING ELECTORS' VOTES IN THE ELECTORAL COLLEGE (2000), Memorandum by L. Paige Whitaker.

⁴¹ New Mexico, North Carolina, Oklahoma, South Carolina, and Washington.

⁴² District of Columbia, Florida, Massachusetts, Mississippi, and Oregon.

⁴³ Alabama, Alaska, Colorado, Maine, Maryland, Montana, Nebraska, Nevada, Vermont, and Wyoming.

⁴⁴ California, Connecticut, Hawaii, Michigan, Ohio, Virginia, and Wisconsin.

⁴⁵ 343 U.S. 214, 228-231 (1952).

⁴⁶ *Id.* at 225-27.

⁴⁷ *Id.* at 228-31.

⁴⁸ *Id.* at 226, n.14 (distinguishing *Nixon v. Herndon*, 273 U.S. 536 (1927)).

⁴⁹ 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 (continued...)”).

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. On a number of occasions, however, “faithless electors” have 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 — 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;
- 1988 — Margaret Leach, a West Virginia elector for Michael Dukakis (D), voted for Senator Lloyd Bentsen (D) of Texas;⁵⁰ and
- 2000 — Barbara Lett-Simmons, a District of Columbia elector for Albert Gore, Jr. (D), cast a blank ballot.

⁴⁹ (...continued)

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.”)

⁵⁰ 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 Inauguration⁵¹

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. Given that 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.⁵² As a result, the political parties have adopted rules to fill presidential and vice presidential nominee vacancies.⁵³ For example, in 1972, the Democratic Party filled a vacancy when vice presidential nominee Senator 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 were to die 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.⁵⁴ Other commentators, however, caution that a faithful elector, perhaps complying with a state statutorily mandated pledge, would feel compelled to vote for the decedent, even though precedent suggests that such votes might not be counted by Congress.⁵⁵ Due to the arguable indecisiveness of the

⁵¹ For additional information, see CRS Archived Report 96-855, *Major Party Candidates for President and Vice President: How Vacancies Are Filled*, 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.

⁵² 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).

⁵³ 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).

⁵⁴ *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).

⁵⁵ Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's* (continued...)

process, many commentators have urged Congress to enact clarifying federal statutes to address this contingency.⁵⁶

Similarly, a third contingency, if a presidential or vice presidential nominee were to die 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.” Some 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 20th Amendment provides clear rules of succession.⁵⁷ 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 20.⁵⁸ This point of view receives strong support from the language of the 1932 House committee report accompanying the 20th Amendment. Addressing the question of when there is a President elect, the report states:

It will be noted that the committee uses the term “President elect” in its generally accepted sense, as meaning the person who has received the majority of electoral votes, or the person who has been chosen by the House of Representatives in the event that the election is thrown into the House. It is immaterial whether or not the votes have been counted, for the person becomes the President elect as soon as the votes are cast.⁵⁹

Others, however, 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.⁶⁰

The 20th and 25th 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

⁵⁵ (...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”).

⁵⁶ *See, e.g., Id.*

⁵⁷ *Hearing, supra* note 47, at 11 (prepared statement of Walter Dellinger).

⁵⁸ U.S. CONST. amend. XX, § 3, cl. 1.

⁵⁹ U.S. Congress, House *Proposing an Amendment to the Constitution of the United States*, report to accompany S.J.Res. 14, 72nd Cong., 1st sess., Rept. 345 (Washington? GPO?: 1932), p. 6.

⁶⁰ *Hearing, supra* note 47, at 39 (prepared statement of Walter Berns, John M. Olin University Professor, Georgetown University; Adjunct Scholar, American Enterprise Institute).

were to die after certification, but before being inaugurated, the Vice President-elect would become President-elect, under the 20th Amendment.⁶¹ 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 25th Amendment.⁶² Likewise, according to the 25th Amendment, if the Vice President-elect were to die after certification, but before inauguration, the vacancy would be filled by the new President after the inauguration, subject to confirmation by a majority of both houses of Congress.⁶³

Independent and Third-Party versus Major Party Candidates

As it evolved politically and historically 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.⁶⁴ 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 reasonable level of support.⁶⁵

⁶¹ U.S. CONST. amend. XX, § 3, cl. 1.

⁶² U.S. CONST. amend. XXV, § 2.

⁶³ *Id.*

⁶⁴ *See* NOMINATION AND ELECTION OF THE PRESIDENT AND VICE PRESIDENT, S. Doc. 106-16, at 310-94 (2000).

⁶⁵ *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.

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 (States' Rights Party); 1960 — 15 electoral votes for Harry F. Byrd ("unpledged" Democrat); and 1968 — 46 electoral votes for George C. Wallace (American Independent Party).⁶⁶

Over the last 35 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 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 14th Amendment equal protection clause.⁶⁷ Furthermore, during the 1976 presidential election, independent candidate Eugene J. McCarthy challenged the constitutionality of a number of 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.⁶⁸ 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: Florida,⁶⁹ Kentucky,⁷⁰ Maine,⁷¹ Maryland,⁷² New Mexico,⁷³ Ohio,⁷⁴ and North Carolina.⁷⁵ Generally, as a result of such challenges, it is now somewhat easier

⁶⁶ See U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE U.S. 72 (115 ed. 1995).

⁶⁷ 393 U.S. 23, 28-34 (1968).

⁶⁸ See generally, COMMITTEE FOR A CONSTITUTIONAL PRESIDENCY, *Progress Report On McCarthy Legal Challenges* (1976).

⁶⁹ *Anderson v. Firestone*, 499 F. Supp. 1027 (N.D. Fla. 1980).

⁷⁰ *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 (6th Cir. 1981).

⁷¹ *Anderson v. Quinn*, 495 F. Supp. 730 (D. Me. 1980), *aff'd* 634 F.2d 616 (1st Cir. 1980).

⁷² *Anderson v. Morris*, 500 F. Supp. 1095 (D. Md. 1980), *aff'd* 636 F.2d 55 (4th Cir. 1980), judgment vacated 658 F. 2d 246 (4th Cir. 1980).

⁷³ *Anderson v. Hooper*, 498 F. Supp. 898 (D.N.M. 1980).

⁷⁴ *Anderson v. Celebrezze*, 499 F. Supp. 121 (S.D. Oh. 1980), *rev'd* 664 F. 2d 554 (6th 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.

⁷⁵ *Anderson v. Babb*, No. 80-561-CIV-5 (E.D. N.C. 1980), *aff'd per curiam* 632 F.2d 300 (continued...)

for independent and third party presidential candidates to gain ballot access in the states and the District of Columbia, and, therefore, to wage more competitive campaigns against major party presidential candidates.

Electoral College Reform: The Fox and the Hedgehog

The arguments raised in defense of the electoral college, and those arrayed in support of direct popular election, are arguably profoundly different. These basic differences are perhaps summed up in Isaiah Berlin's famous quotation of the Greek poet Archilochus: "the fox knows many things, but the hedgehog knows one big thing." The electoral college's defenders may be likened to Archilochus's fox in that they deploy a wide range of arguments and assertions in support of their position: original intent, tradition, federalism, minority voting power, state voting power (for both populous and less populated states), avoidance of post-election controversies, support of the two-party system, political moderation, and others. Proponents of the direct election alternative more closely resemble the hedgehog in that they focus largely, on the democratic principle of majority rule. "Many things" versus "one big thing": which is more likely to prevail?

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 prescribes the current electoral voting procedures, has been the only major reform of the electoral college. Since then, in almost every session of Congress, resolutions have 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 2004, approximately 595 such amendments were proposed.⁷⁶ Generally, most of these resolutions had minimal legislative activity. For some, however, hearings were held and 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.⁷⁷

⁷⁵ (...continued)
(4th Cir. 1980).

⁷⁶ CONG. REC. index; Legislative Information Service.

⁷⁷ 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
(continued...)

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 91st Congress (1969-1970), H.J.Res. 681, introduced by Representative Emanuel 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 if 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.⁷⁸

Likewise, congressional interest increased after the close presidential election in 1976, in which Democratic candidate Jimmy Carter defeated Republican President Gerald R. Ford by a 50.1% popular vote margin and by 297 electoral votes to Ford's 48.0% of the popular vote and 240 electoral votes, with 270 needed to win.⁷⁹ S.J.Res. 28, introduced by Senator Birch Bayh in the 96th Congress (1979-1980), proposed direct popular election but failed of passage by a Senate vote of 51-48 in 1979.⁸⁰ Given the results of the vote, the leadership of the House of Representatives decided not to bring the House version of the proposal to the floor in the 96th Congress. No proposal concerning electoral college reform has come to the floor of either house since that time.

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 widely offered 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

⁷⁷ (...continued)

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.*

⁷⁸ CONGRESSIONAL QUARTERLY, INC., POWERS OF CONGRESS 279-80 (1976).

⁷⁹ 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. Note that one Ford elector cast his vote for Ronald Reagan. See above under "The Faithless Elector" for further information.

⁸⁰ Recall that Article V of the Constitution requires a two-thirds majority vote in both houses to propose constitutional amendments.

provide for a runoff election between the two presidential and vice presidential tickets receiving the greatest number of popular votes if no candidates receive the requisite percentage.⁸¹ Some direct election plans, however, would not require candidates to win a specific percentage of the vote in order to be elected: more votes, or a plurality, would suffice. Others have proposed that in the event the 40% threshold is not attained, then Congress, meeting in joint session and voting per capita (rather than by states as under current contingent election procedures), would elect the President and Vice President.

Pro and Con Arguments.

Proponents of direct election, as noted earlier, may be likened to Archilochus's foxes. They make the argument that their proposal is simple and democratic: the candidates winning the most popular votes would always 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 what they characterize as 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 give 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, since the winning candidates would become President and Vice President-elect as soon as the results were certified.

Opponents, Archilochus's foxes, offer many arguments by comparison. They assert 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. Today's two major parties are relatively broadly based both ideologically and geographically, and conduct nationwide presidential campaigns in order to assemble the requisite majority of 270 electoral votes. Similarly, the need to forge national coalitions having a wide appeal has been a contributing factor to the comparative moderation of the two major parties and the governmental stability enjoyed by the nation under the present system. Moreover, it is argued, the growth or emergence of more narrowly focused 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 also contend that a direct election plan would weaken the influence both the smallest and most populous populated states are said to enjoy under the present system, since direct popular election would eliminate the role of states as election units in favor of the single nationwide count under direct presidential election. Thus, 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.⁸² Finally, they question the 40% runoff requirement included in most direct election proposals:

⁸¹ A less frequently offered variant would provide for election by a joint session of Congress instead of a runoff election in the event no candidates received a 40% majority.

⁸² LEAGUE OF WOMEN VOTERS OF THE U. S., *supra* note 74, at 71-79.

how can the concept of a “plurality” President, who may have gained well under half the votes, be justifiable if the chief aim of direct popular election is to elect a President who enjoys a majority of votes?

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 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.

Finally, they note that, as was demonstrated in the presidential election of 2000, close results in a single state in a close election are likely to be bitterly contested. Under direct election, they claim, every close contest in the future could resemble the post-election struggles in 2000, but on a nationwide basis, as both parties would seek to gain every vote. Such rancorous disputes, they argue, could have profound negative effects on political comity in the nation, and possibly even affect the political stability of the federal government.

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 and vice 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 its power to appoint electors in Article II, Section 1, clause 2 of the Constitution, is currently used by Maine⁸³ and Nebraska, as noted earlier in this report.⁸⁴ Under the district plan, the presidential and vice presidential candidates winning a simple majority of the electoral votes would be elected.

⁸³ ME. REV. STAT. ANN. tit. 21, § 805.

⁸⁴ NEB. REV. STAT. § 32-548.

Most district plan proposals provide that, in case of an electoral college tie, the candidates having the plurality of the district electoral votes nationwide — 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.

On the national level, the district system would have produced somewhat different national electoral college results if it had been in effect in the presidential election of 2000. The blank electoral vote cast in 2000 is not retained, since the district plan would eliminate the office of elector, thus eliminating the possibility of casting a blank vote. Totals for the general ticket and district methods are provided below⁸⁵:

<u>Candidate</u>	<u>General Ticket System</u>	<u>District System</u>
Bush (R)	271	288
Gore (D)	266	250
Blank/Other	1	0
Total	538	538

An example of how the district system would operate in one state of average population, Missouri, with 11 electoral votes, as compared with the winner-take-all or general ticket system, follows.⁸⁶ In 2000, under the existing general ticket system, Republican candidates Bush and Cheney won a majority of popular votes in Missouri, and were awarded all 11 of its electoral votes, while Democratic candidates Gore and Lieberman received none. Under the district system, Bush and Cheney would have received a total of eight electoral votes in Missouri in the 2000 election: one for each of the six congressional districts where they received a plurality of popular votes, and two for having won the statewide popular vote. Gore and Lieberman would have won three electoral votes, one for the three congressional districts where they received a popular vote majority.⁸⁷

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

⁸⁵ Computed by CRS. See CRS congressional distribution memorandum, *Alternative Methods to Allocate the Electoral Vote: The Winner-Takes-All, Proportional, and District Systems Compared Using 1992, 1996 and 2000 Data*, by David C. Huckabee. Available to Members of Congress and their staff from the author.

⁸⁶ Dividing 50 states and the District of Columbia into the total of 538 electoral votes yields an average of 10.55 electoral votes per jurisdiction.

⁸⁷ Huckabee, *Alternative Methods to Allocate the Electoral Vote*, pp. 10-11.

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. The also maintain that in 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.⁸⁸ 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" Presidents and Vice Presidents, who won the electoral vote while losing the popular vote. Some opponents of the district plan further argue that it has the potential to fragment the electoral vote among marginal candidates who may manage to capture a few districts. This, they claim, might actually weaken the present two-party system by encouraging parties that cater to narrow geographical interests or ideological interests that may be concentrated in certain areas.

The Proportional Plan.

The proportional plan retains electoral votes, but awards the votes in each state based on the percentage of votes received in each state (regardless of the districts from which the voters come) by the competing candidates. In the interests of fairness and accuracy, most proportional plans divide whole electoral votes into thousandths of votes, that is, to the third decimal point. This variation is known as the strict proportional plan. Another version, the rounded proportional plan, would provide some form of rounding to retain whole electoral votes.⁸⁹ Under most proposals advocating the proportional plan, the presidential and vice presidential candidates receiving a simple majority of the electoral 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.

⁸⁸ 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.

⁸⁹ For information on a 2004 initiative proposal in Colorado that would have established a rounded proportional plan in that state, please consult CRS Report RL32611, *The Electoral College: How It Works in Contemporary Presidential Elections*, by Thomas H. Neale.

Nationwide electoral vote tallies for the presidential election of 2000 under the general ticket and proportional systems are provided below.⁹⁰

<u>Candidate</u>	<u>General Ticket System</u>	<u>Proportional System: Strict/Rounded</u>
Bush (R)	271	259.185/263
Gore (D)	267	258.227/269
Blank/Other	1	20.542/6
Total	538	538.004/538

Again using Missouri as an example, in 2000, a strict proportional plan would have awarded 5.547 Missouri electoral votes to Bush/Cheney, 5.179 to Gore/Lieberman, 0.180 to Nader/LaDuke, and 0.095 to other candidates. A rounded proportional plan of the type proposed for Colorado in the 2004 would have yielded six electoral votes for Bush/Cheney, and five for Gore/Lieberman. Nader/LaDuke and other minor party and independent candidates would not have gained sufficient popular votes to qualify for electoral votes under this plan.⁹¹

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 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.⁹² In close elections, it is asserted, the proportional plan would lead to more frequent instances of electoral vote deadlock, in which neither candidate would gain the necessary majority of electoral votes, if this threshold were retained. Relatedly, opponents question the

⁹⁰ Huckabee, *Alternative Methods to Allocate the Electoral Vote*, p. 11.

⁹¹ *Ibid.*, p. 10.

⁹² See generally LEAGUE OF WOMEN VOTERS OF THE U.S., *supra* note 74, at 68-71; SAYRE & PARRIS, *supra* note 81, at 118-34.

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 state 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.

The only change to electoral vote totals in 2000 under the automatic plan would have been elimination of the blank vote cast by a District of Columbia elector. Thus, the tally would have been 271 electoral votes for Bush/Cheney and 267 (as opposed to 266) for Gore/Lieberman.

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 automatic plan, it would still be possible to elect a "minority" President and Vice President — those receiving more electoral votes than popular votes under the present system.⁹³ Moreover, it 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.

Reform Proposals Following the 2000 Presidential Election

In the presidential election of 2000, the electoral college system resulted in a President and Vice President who received more electoral votes, but fewer popular votes, than the electoral vote runners-up for the first time in 112 years, a classic case

⁹³ See generally LEAGUE OF WOMEN VOTERS OF THE U.S., *supra* note 74, at 61-64; SAYRE & PARRIS, *supra* note 81, at 90-101.

of what some observers identify as an electoral college “misfire.” Following the bitterly contested aftermath of this election, and its extraordinarily close electoral vote margin, it was anticipated that Congress would revisit the question of electoral college reform. Reform proposals were duly introduced, but no action was taken during the 107th Congress, nor has any been taken to date on relevant proposals introduced in the 108th Congress.⁹⁴ Congressional attention focused instead on proposals for election administration reform, resulting in the passage of P.L. 107-252, the Help America Vote Act (HAVA), in 2002. This act expanded federal involvement in election administration, traditionally a state responsibility, by setting new requirements for improvements in voting systems, providing grants to states to improve voting administration, and establishing the federal Election Administration Commission to administer these programs and monitor state compliance with HAVA’s provisions.⁹⁵

Concluding Observations: Prospects for Reform

Despite various criticisms and controversies, the electoral college system has endured since the first presidential elections in 1789. Over the past two centuries, it has evolved through the ratification of one constitutional amendment, the 12th, the passage of various federal and state laws, and changing political party practices and traditions. It has delivered the presidency to the popular and electoral vote winners in 46 out of 51 elections since it became operational in 1804, and even in the case of “misfires,” that is, cases in which a candidate was elected with a majority of electoral votes but a minority of popular votes, the results it has delivered have been widely, if not universally, accepted as legitimate.⁹⁶

Interest in changing or abolishing the electoral college has arguably been dependent, at least in recent decades, on how accurately it has appeared to ratify the voters’ choice. During periods when the system seemed to be performing well, there was relatively little impetus for reform, although, as noted earlier, there was nearly always a steady stream of proposals for change. Following close elections in 1960, 1968, and 1976, however, proposed constitutional amendments providing for direct election were actively considered in the House of Representatives and the Senate in the 91st through 96th Congresses; during these periods of heightened interest, a direct

⁹⁴ For further information, please consult CRS Report RL30844, *The Electoral College: Reform Proposals in the 107th Congress*, by Thomas H. Neale, and CRS Report RL32612, *The Electoral College: Reform Proposals in the 108th Congress*, by Thomas H. Neale.

⁹⁵ For additional information on the Help America Vote Act and other election-related issues, consult CRS electronic briefing book, *Election Reform*, available to Members of Congress and staff at [<http://www.congress.gov/brbk/html/eberf1.shtml>] .

⁹⁶ 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).

popular election amendment was approved in the House in 1969,⁹⁷ and debated, but not approved, in the Senate in 1979.⁹⁸ In neither of these instances, however, did the proposals achieve the momentum necessary to hurdle the difficult challenge faced by all would-be constitutional amendments: approval by two-thirds of the Members of both chambers present and voting, followed by approval in three-fourths of the states.

During the ensuing two decades, the electoral college delivered substantial majorities of electoral votes to the popular vote winners in every presidential election. Once again, the system functioned as its defenders predicted, notwithstanding occasional concerns over close elections and the potential impact of independent or third party candidates, and there was little impetus for change during this period. Curiously, perhaps, the bitterly contested presidential election of 2000, which many observers characterized as an electoral college “misfire,” failed to galvanize support for direct popular election or electoral college reform. Anger over the election’s outcome seemed more intensely directed against voting system inadequacies and failures in Florida, and by extension, nationwide, that had thrust the election results into uncertainty and contention for over a month. As noted earlier, the Help America Vote Act of 2002, which sought to remedy deficiencies in elections administration technology and procedures, owed its passage largely to these controversies.

The first, and perhaps largest single factor in the electoral college reform equation is Article V of the Constitution, which provides for its amendment, among other things. As noted previously in this report, the founders intentionally made it difficult to alter the nation’s fundamental charter, establishing what is the only double requirement of super majorities in the document: a proposed amendment must win proposed by two thirds majorities in both houses of Congress, and must then be approved by three fourths of the states. In practice, the hurdle has been raised even higher, since it is customary to attach a seven-year deadline for ratification of proposed amendments.

Second, most successful attempts to change the Constitution have depended on the stimulus of sudden great events, or have benefitted from the “ripeness” of an idea that had been before the public for many years. Sometimes both factors have contributed to the successful passage and ratification of an amendment. Another common element in successful amendments has generally been a widespread public awareness of a problem to be addressed and a broad national consensus that reform was necessary and desirable. Moreover, such an awareness has usually extended well beyond Congress into the nation at large.

For instance, the only previous constitutional revision of the electoral college, the 12th Amendment, was spurred by a profound constitutional crisis, the events

⁹⁷ H.J.Res. 681, 91st Cong., carried in the House on September 18, 1969, by a vote of 338 to 70.

⁹⁸ S.J.Res. 28, 96th Cong., was defeated in the Senate on July 10, 1979. The vote was 51 to 48, 15 votes short of the necessary two-thirds majority of Senators present and voting.

surrounding the presidential election of 1800.⁹⁹ Although “public opinion” in its modern sense can scarcely be said to have existed at the time, America’s political elites had been strongly influenced by the election and its aftermath. In this case, Congress acted with considerable dispatch for the era, proposing an amendment less than two years later, in December, 1803. The states moved even more quickly to approve the proposal: the 12th Amendment’s ratification process was completed in either June or July of 1804, depending on whether the legislature of New Hampshire or Tennessee is considered to have cast the decisive vote.¹⁰⁰

More recently, proposal and ratification of the 25th and 26th Amendments was facilitated by trends and developments representative of those cited above. The 25th Amendment, which revamped presidential succession procedures, emerged almost directly from the events surrounding the assassination of President John F. Kennedy in 1963, which incontestably stunned and galvanized both Congress and the nation. The vice presidency was vacant for 14 months, with the designated presidential successors during this period being the 71-year-old Speaker of the House of Representatives, John W. McCormack, and the 86-year-old President Pro Tempore of the Senate, Carl F. Hayden. The obvious need for constitutional procedures to replace a Vice President who had succeeded to the presidency, or left office for some other reason, coupled with the shock following President Kennedy’s death, led to a broad national consensus for change, both in Congress and among the public. An amendment was proposed to the states on July 6, 1965, and was declared to have been ratified less than 19 months later, on February 23, 1967.

The 26th Amendment, which effectively set 18 as voting age in the United States, had been under consideration in various proposals beginning in the 1940s, and throughout the post-war era, a public consensus favorable to lowering the voting age began to emerge. It is arguable, however, that the great upsurge in political involvement among young people that began with President Kennedy’s summons to public service in the early 1960s, and continued, albeit down many different roads, during the Vietnam War and the general cultural upheaval that characterized the latter part of the 1960s, also strongly contributed to the amendment’s success. The 26th Amendment was proposed by Congress on March 23, 1971, and was declared to have been ratified less than four months later, on July 10 of the same year.

Notwithstanding the results of the presidential election of 2000, proposals for direct popular election or reform of the electoral college in the subsequent 107th and 108th Congresses never benefitted from a comparable sense of urgency or high level of public awareness and consensus on the need for reform.

Finally, the success of amendments has often depended on the support of congressional leaders who helped guide such proposals to passage by Congress, and proposal to the states. For instance, both the 25th and 26th Amendments enjoyed the approval and very active support of House Judiciary Committee Chairman

⁹⁹ See discussion of the 12th Amendment earlier in this report.

¹⁰⁰ U.S. Congress, Senate, *The Constitution of the United States of America: Analysis and Interpretation*, Johnny H. Killian, ed., 99th Cong., 1st sess., S. Doc. 99-16 (Washington: GPO, 1987), p. 29.

Emmanuel Celler and Senator Birch Bayh, chairman of the Senate Judiciary Committee's Subcommittee on the Constitution. The cause of electoral college reform has not had such champions since Senator Bayh guided a direct election proposal to the Senate floor in 1979.

Given the high hurdles faced by proposed constitutional amendments, it is arguable that the electoral college system will likely remain in place unless or until its alleged failings become so compelling that large concurrent majorities in the public, the Congress, and the states, are prepared to undertake its reform or abolition.