

PROPOSED CONSTITUTIONAL AMENDMENT PROVIDING FOR DIRECT  
ELECTION OF THE PRESIDENT AND THE VICE PRESIDENT OF THE  
UNITED STATES

By THE COMMITTEE ON FEDERAL LEGISLATION

INTRODUCTION

"I am not an advocate for frequent changes in laws and constitutions, but laws and constitutions must go hand in hand with the progress of the human mind as that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change. With the change of circumstances institutions must advance also to keep pace with the times." Thomas Jefferson

It has been twenty-three years since the Association of the Bar of the City of New York last issued a report in support of direct election of the President and Vice President of the United States.<sup>1</sup> It has been 176 years since direct elections were proposed in Congress by Senator Abner Lacock of Pennsylvania.<sup>2</sup> The events of the past two centuries and, especially, of the last twenty years, continue to demonstrate the advisability of abandoning the Electoral College system in favor of direct democratic election of the President based on the principle of one person, one vote.

The ever recurring possibility of an election elevating the popular vote loser to the Presidency, or of electors striking a deal amongst themselves to choose a President, or of an election being thrown into Congress to be decided under a formula that distorts the most elementary principles of self-government, are

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<sup>1</sup> 24 Record of A.B.C.N.Y. 285 (1969).

<sup>2</sup> 29 Annals of Cong. 220 (1816).

the most glaring examples of the inadequacies of the present system.

The 1992 election and the independent candidacy of Ross Perot serve as an additional reminder of the dangers inherent in the Electoral College system. Governor Clinton received approximately 43% of the popular vote, and 69% of the electoral vote. Mr. Perot received approximately 19% of the popular vote, and none of the electoral vote. Obviously, a system of election that deviates from the popular vote by over 20% per candidate could easily result in the negation of the will of the voters. With a growing popular realization that our present system is archaic, undemocratic and needlessly complex, the time has never been more ripe to rid ourselves of this method of electing the President of the United States, an individual who should personify democracy worldwide.

#### THE PRESENT SYSTEM

Our odd electoral system works as follows. Instead of voting directly for their President, citizens vote by state for presidential electors equal in number to their state's total number of congressional representatives.<sup>3</sup> The electors themselves are chosen by the political parties, and are often public officeholders. Once the popular election has been held, and the populace has cast votes for particular electors, voters have no further say as to who actually assumes the office of President. The winning slate of electors -- Republican, Democrat

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<sup>3</sup> The District of Columbia is allocated two additional electors, for a total of three electoral votes, despite its lack of representation in the Senate.

or Independent -- from each state convenes on the Monday after the second Wednesday in December to cast its votes. The electors are not bound to cast their votes for the candidate who won their state, nor are they bound to vote for the candidate whom they pledged to support. Rather, they as individuals may vote as they see fit.<sup>4</sup>

The results of the Electoral College vote are sent to Washington where they are opened in a joint session of Congress held on January 6. The candidate who has garnered a majority of the electoral votes is then declared President.

The twelfth amendment to the Constitution provides that if no candidate has obtained a majority of the Electoral votes,

then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice.

It is then left to the Senate to choose the Vice-President from the top two vice presidential contenders. The Senate is not

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<sup>4</sup> The problems which could be caused by a faithless elector are demonstrated by the following telegram sent by an Oklahoma Republican elector to his fellow electors following the Kennedy-Nixon popular election: "The Republican electors cannot deny election to Kennedy. Sufficient conservative Democratic electors available to deny labor Socialist nominee. Would you consider Byrd President Goldwater Vice President, or wire any acceptable substitute. All replies strict confidence." Quoted in Cong. Rec., July 10, 1979 at S17738.

required to select as Vice President the running mate of the President chosen by the House of Representatives.

#### PROPOSED AMENDMENTS

In 1969, the Association of the Bar of the City of New York (the "Association") published a report which fully supported S.J.Res. 1, 91st Cong., 1st Sess. (1969), which proposed amending the Constitution to provide for direct presidential elections and thus abolish the Electoral College. This proposal, as amended, was easily passed in the House of Representatives by a vote of 339-70, providing the requisite two-thirds for passage of a constitutional amendment. Unfortunately, the bill died on the floor of the Senate in 1969.

After the 1976 elections, when a relatively minor vote shift in two states would have changed the results of the election,<sup>5</sup> interest in reform and in the bill were revived. In 1979, a majority of the Senate voted to abolish the Electoral College in favor of conducting direct elections. The vote of 51-48, however, was only a simple majority, insufficient to pass a constitutional amendment.

On May 5, 1992, Senator David Pryor of Arkansas introduced S.J.Res. 297, 102nd Cong., 2nd Sess, to amend the Constitution

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<sup>5</sup> In no less than twenty-two elections a relatively minor vote shift in certain states would have either changed the outcome of an election or sent it to the House, despite a popular vote that favored a specific candidate. For example, in the 1976 elections, a 12,000 vote shift in Delaware and Ohio would have deadlocked the Electoral College. A 10,000 vote shift in Hawaii and Ohio would have kept President Ford in the White House, despite President Carter's popular vote margin of nearly two million. Neal R. Pierce and Lawrence D. Longley, The People's President: The Electoral College in American History and the Direct Vote Alternative, 258 (1981)(hereinafter "Pierce").

of the United States and abolish the Electoral College in favor of direct elections of the President and Vice President. This new proposal is virtually identical to the 1969 proposal,<sup>6</sup> requiring candidates to win a popular plurality of at least forty percent to be elected President and Vice President. If no candidate receives forty percent of the vote, the amendment provides for a popular vote run-off between the top two contenders. Such a system would ensure that the people's choice, in every case, is elected President. The Association of the Bar of the City of New York, therefore, fully supports S.J.Res. 297, just as it fully supported S.J.Res. 1 in 1969.

#### THE NEED TO REFORM THE ELECTORAL COLLEGE SYSTEM

"The difficulty of finding an unexceptional process for appointing the Executive Organ of a Government such as that of the United States, was deeply felt by the Convention; and as the final arrangement took place in the latter stages of the session, influence produced by fatigue and impatience in all such bodies; tho the degree was much less than usually prevails in them."

Letter from James Madison to George Hay, August 23, 1823<sup>7</sup>

"What do I chuse Samual Miles to determine for me whether John Adams or Thomas Jefferson shall be President? No! I chuse him to act, not to think."

Irate Voter, United States Gazette, 1796<sup>8</sup>

These two statements made during the infancy of our democracy vividly illustrate two realities of the Electoral

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<sup>6</sup> The 1969 proposal, however, was to take effect one year after ratification, while the new proposal calls for a two-year period before it becomes effective.

<sup>7</sup> 3 M. Farrand, The Records of the Federal Constitutional Convention of 1787 458 (1937).

<sup>8</sup> Quoted in Bayh, The Electoral College: An Enigma in a Democratic Society, 11 Valp. U. L. Rev. 315, 317 (1977).

College system: its insufficient theoretical foundation and its potential to cause unfairness to the American people.

History shows that unlike the bi-cameral legislature, the Electoral College was not the result of a negotiated compromise between large and small states seeking equitable federal representation for their citizens.<sup>9</sup> Instead, the Electoral College was the weary result of efforts to appease a faction of intellectuals who demanded congressional election of the President as a safeguard against what they perceived as an ignorant, uneducated populace with minimal access to reliable information. That theory, which is repugnant to a modern free and independent people, is the historical foundation of the Electoral College system.

The three possible results that can be produced by our system of presidential elections reveal the Electoral College to be unnecessary and undemocratic. First, if use of the Electoral College mimics the popular vote, it only adds a redundant procedure into the election. Second, in at least two elections, the operation of the Electoral College has defeated the express wishes of the nation by elevating the loser of the popular vote

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<sup>9</sup> In fact, the small states refused to be mollified by the recommendation of bi-cameral elections of the Executive in Congress, with the small states retaining the advantage allocated to them by their automatic two votes represented by their Senate seats. In the ultimate of ironies for those who oppose direct elections as undermining the role of small states in the election process, small states were in fact appeased by the one state one vote system instituted for contingency elections. So, while the large populous states would have the advantage in choosing the candidates, the small states would have the advantage in choosing from among the candidates in the contingency elections in the House, an opportunity everyone assumed would arise in 95 percent of the elections. Pierce, at 16-17.

to the presidency.<sup>10</sup> Third, the Electoral College system has prompted contingency elections in the House of Representatives,<sup>11</sup> where personal and partisan politics play a role in determining the President.<sup>12</sup>

The Electoral College has never served, as is sometimes supposed, to protect the smaller states. Indeed, a system that essentially allows the citizens of the twelve largest states to elect the President against the wishes of the majority appears undemocratic.

Although much of this inequity is the result of the winner-takes-all rule prevailing in forty-eight of the fifty states, any system that must translate the votes of one hundred million people into the votes of a mere 537, with state borders dictating which candidate receives those votes, runs the risk of ignoring the people's choice. The Electoral College potentially

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<sup>10</sup> In 1876, Rutherford B. Hayes was elected as President with an Electoral College majority of one, despite Samuel Tilden's popular vote majority of 50.9%.

In 1888, Benjamin Harrison defeated Grover Cleveland by an electoral margin of 65 votes despite Cleveland's popular vote plurality of 48.6% (95,000 vote margin over Harrison).

Many analysts believe that in the 1960 election, Nixon actually had a 58,000 popular vote margin over Kennedy, despite Kennedy's victory in the Electoral College by a margin of 84 electoral votes.

<sup>11</sup> In 1800 and 1824, the House of Representatives was called upon to elect the President. The infamous House politics involved in the 1824 elections resulted in John Quincy Adams being elected by capturing thirteen of the twenty-four voting states. Andrew Jackson, however, had a clear plurality, with 42.2% of the popular vote to Adams' 31.9%.

<sup>12</sup> See If the House Picks the President, N.Y. Times, June 11, 1992 at A22; Barrett, Electoral Roulette, Time, May 25, 1992 at 35; Starr, An Electoral Fantasy, The Washington Post, May 20, 1992.

disenfranchises minority voters, creates unequal voting power among the citizens of different states, and discourages voter turnout wherever a regional result is predictable.

#### DIRECT ELECTIONS

The nation's progress toward equality in government and in the electoral process necessitates the introduction of direct popular election of the President and Vice President of the United States. A direct election is the only method that would eliminate the inequitable structural flaws inherent in the Electoral College.

In the United States, every elected officeholder, except the President and Vice President, is chosen by direct election. No other system assures that each voter carries equal weight in deciding who should govern. By continuing to use an electoral system that appears to give greater importance to the votes cast by those who reside in certain states, we ignore the fundamental democratic principle of one person, one vote.

Only direct elections can ensure that the President is in fact the people's choice and that all voters have the opportunity to be heard. As former President Richard Nixon, a possible victim of the workings of the Electoral College, has noted, it is quite reasonable to assume that "if the man who wins the popular vote is denied the Presidency, the man who gets the Presidency would have very great difficulty in governing."<sup>13</sup>

Implementing direct elections would eliminate all voting inequities, both those favoring the large states and those

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<sup>13</sup> Quoted in Cong. Q. No. 43, pt.2, 2955 (Oct. 25, 1968).



theoretically favoring smaller states. It would eliminate the useless and dangerous office of elector, as well as the confusing and possibly undemocratic<sup>14</sup> contingency election option. In a direct election, the vote of each individual member of our diverse society carries equal weight in determining the leadership of our country.

#### OBJECTIONS TO DIRECT, POPULAR ELECTIONS

Although the Association is firmly of the view that the Electoral College should be abandoned, it also recognizes that adherents of the current system raise serious questions which must be considered.

1. Is change from the current system necessary or advisable?

Although the Electoral College system is not as democratic as direct elections, it is not inherently inconsistent with a republican form of government. Neither is it necessarily unrepresentative to entrust the election of the President to the members of the House of Representatives, as currently happens in the event that no candidate wins a majority of the Electoral College. Although such a system can result, and in the past has resulted, in the popular vote loser being made President, the people at least have the chance to vote for the Representatives who pick the chief executive. This method of selection is similar to that used in parliamentary democracies, such as the United Kingdom. Five months before the 1992 election,

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<sup>14</sup> The twenty-six least populous states could in effect dictate the winner of the presidential race by voting as a block in a House election.

Representative Don Edwards (D. Cal.) argued that the founders "believed that presidential elections would produce many regional candidates, none of whom would win a majority of the popular or electoral college vote. They expected that in most elections, the President would be chosen by the House. And they did not fear this result."<sup>15</sup>

Furthermore, it should be recognized that the Electoral College system generally does result in the winner of the popular vote becoming President, and in fact has not circumvented the will of the people for at least thirty-two years. Reform of the Electoral College system, on the other hand, could result in some unforeseen and unintended result. As the nation has survived more than two centuries with the current system, the argument goes, and since that system is not inherently contrary to a republican form of government, we should not risk changing it.

While these arguments in favor of the Electoral College are not without merit, the Association believes that on balance the risks inherent in the current system are greater than the risk that some unintended negative consequence might result from change. The abandonment of the Electoral College is not a new idea which requires further study. Direct elections were proposed in Congress in 1816,<sup>16</sup> and by this Association in

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<sup>15</sup> A Solemn Responsibility; I'm Going to Vote my Conscience if the Election Goes to the House of Representatives, Washington Post, June 14, 1992 at C7. See also note 9 supra.

<sup>16</sup> 29 Annals of Cong. 220 (1816).

1969.<sup>17</sup> The risk of an unforeseen negative result seems relatively small.

On the other hand, there is a significant risk of a clearly foreseeable and avoidable disaster in the event that we do not abandon the Electoral College. While we have been fortunate in recent years, it is only a matter of time before a popular vote winner is denied the Presidency. Besides the fact that such a result would defeat the will of the people, if it were to occur during a politically unstable period it could also precipitate a constitutional crisis.

2. Does the current system add political stability?

Defenders of the Electoral College also point out that it, at least in some ways, adds stability to the political system. Because most states vote all their electoral college ballots to the state's popular vote winner, the electoral vote tally magnifies the popular vote winner's margin of victory. According to Thomas Mann of the Brookings Institute, "[i]n almost every case, [the Electoral College] has taken popular vote pluralities or bare majorities and turned them into decisive electoral vote majorities thereby lending legitimacy to the victor."<sup>18</sup> An exaggerated dimension of victory puts the winner in a "better position to govern."<sup>19</sup>

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<sup>17</sup> 24 Record of A.B.C.N.Y. 285 (1969).

<sup>18</sup> Susan Mandel, *Investor's Daily*, in Washington, *Investor's Business Daily*, July 28, 1992 at 1 (hereinafter "Mandel").

<sup>19</sup> *Id.* It should, however, be noted that it is also possible for the popular vote winner to receive a smaller margin of victory in the Electoral College.

The Electoral College may also promote governmental stability by discouraging challenges to the current dominance of the Democratic and Republican parties. The winner-take-all feature of most states' Electoral College vote allotment makes it likely that a candidate from one of the two major parties will obtain a majority of Electoral College votes. Unless a third-party or independent candidate stands a good chance of carrying a state, voters may be persuaded that they should not bother to vote for that candidate, regardless of whether that individual would be a good President.

It is at least debatable whether as a factual matter the Electoral College does promote stability either by entrenching the two party system or by fooling the populace into believing that the victor has a popular mandate that does not exist in reality. The Association continues to believe, however, that any such stabilizing effect is outweighed by the risk that the Electoral College election of an unpopular candidate could precipitate a political crisis. As Senator James Exon (D. Neb.) warned, "if the electoral college chooses a president without a mandate from the American people, it would be the political equivalent of the Rodney King verdict, shaking American confidence to the very core."<sup>20</sup>

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<sup>20</sup> Mandel at 1.

3. Does the current system support our federal system?

Finally, it should be noted that the Electoral College system champions the role of states in our federal system. Senator Mitch McConnell (R. Ky.), who supports some reform of the current system short of abolishing the Electoral College, argues "that minorities, small states, and a variety of other interest groups are very apprehensive about abolishing the Electoral College because they become magnificently irrelevant in a national sum total election."<sup>21</sup> Critics of Electoral College reform argue that candidates running only for popular votes would direct their campaigns at large states and big cities and, consequently, would ignore minorities, small states, rural communities and the regional issues that affect these groups. More specifically, critics of Electoral College reform suggest that the electoral candidate is basically forced to campaign in each of the fifty states and is forced to respond to divergent concerns.

It is unclear, however, that assigning the fewest number of electoral votes to the least populous states truly protects those states' interests. While district interests are protected in the House and state interests are looked after in the Senate, the office of the President in our federal system, as described by Senator Mike Mansfield in 1961, "has evolved, out of necessity, into the principal political office, as the courts have become the principal legal bulwark, beyond districts, beyond states, for safeguarding the interests of all the people in all the states.

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<sup>21</sup> Id.

And since such is the case, in [our] opinion, the Presidency should be subject to the direct and equal control of all the people."<sup>22</sup>

The Association recognizes that these arguments in opposition to Electoral College reform are not without merit. On balance, however, any benefits which may result from the Electoral College are outweighed by the continuing threat that the system will in the future work to defeat the people's choice for President.

#### OTHER PROPOSALS

A number of other proposals have been made relating to the election of the President and Vice President. These fall into three categories. One is the district vote system, which would require electors to be chosen by voters from single-member districts within each state, with two electors running at large. The second, the proportional vote system, would divide the electoral vote of each state in accordance with the popular vote cast in the state. The third, commonly referred to as the automatic or unit vote proposal, would retain the winner-take-all feature of the present system, eliminate the office of Presidential Elector, change the manner of handling contingent elections, and make other housekeeping improvements in the system.

The district, proportional and automatic proposals fall short of the type of change that is required. A modern electoral system should be responsive to the will of the people. That is,

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<sup>22</sup> 107 Cong. Rec. 350 (1961).

it should ensure that the candidate who amasses the most popular votes will be elected, and that every voter has the same chance to influence the outcome of the election.

The district, proportional and automatic vote proposals are deficient in both respects. They would leave open the possibility that the winner of the popular vote would lose the election, and they would retain the inequities that necessarily attach to a formula by which electoral votes are apportioned among the states. While the district and proportional vote proposals would likely split a state's electoral votes and thereby eliminate the inequity in a system that favors the larger states, they would retain the two bonus votes accorded each state and, consequently, continue an unjustified inequity favoring the smaller states. In addition, the district vote system would continue the winner-take-all rule at the district level, making it possible for the popular vote loser in a state to receive more electoral votes than the popular vote winner. It would also encourage partisan interests to gerrymander electoral districts for political advantage. The proportional vote system, on the other hand, would facilitate the disruption of the two-party system by enhancing the influence of splinter groups and third parties.

#### CONCLUSION

In his testimony to the Senate Judiciary committee in 1979, John Lewis, a civil rights leader dedicated to increasing citizen participation in the election process, concluded:

That every person's vote should count the same is one of the fundamental principles

which is bedrock in this country. Having won the long and difficult and dangerous struggle to win the right to vote, we cannot now accept the proposition that any one person's vote can count more than another . . . [t]he direct popular election of the President and Vice President is an idea whose time has not only come, but is long overdue.<sup>23</sup>

The Association of the Bar of the City of New York could not agree more.

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<sup>23</sup> Quoted in the Cong. Rec., July 10, 1979, at S17740.



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