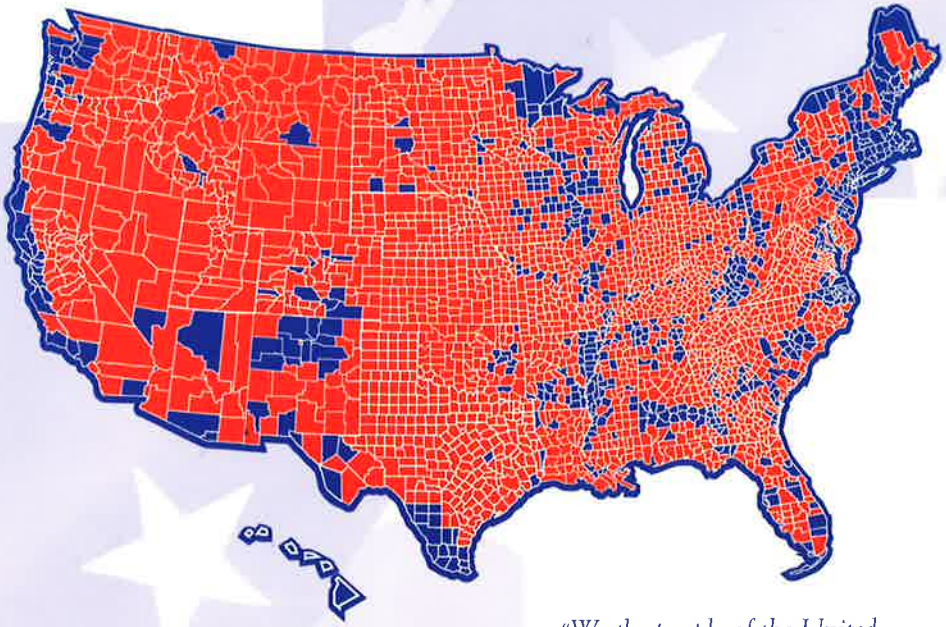
The Electoral College:
Proven Constitutional Pillar of Freedom



"We the people of the United States, in order to form a more perfect union, establish justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Prosperity, do ordain and establish this Constitution for the United States of America."

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Preface

The Electoral College may be the least understood, and yet most reviled, institution in American politics. The purpose of this book, therefore, is to explain the Electoral College, so that from better understanding may come greater appreciation for its merits.

The Claremont Institute would be involved in this debate if for no other reason than abolishing the Electoral College would involve amending the Constitution–something we always approach cautiously. But we have other connections with this constitutional device as well. In 1970, a young graduate student studying under Professor Harry V. Jaffa (the intellectual founder of the Claremont Institute) was also working as the minority counsel to the Republican members of the Senate Judiciary Committee. A proposed constitutional amendment to abolish the Electoral College had recently passed the House of Representatives and was bidding fair to pass in the Senate as well. The Judiciary Committee issued a report recommending passage of the amendment. Included in that report was the dissenting view of the Republican members. The minority view was largely prepared by that young staffer. Through the depth, insight and range of its arguments, it may have been the single most effective force leading to the amendment's ultimate defeat in the Senate.

That dissent (beginning on page 41) is the centerpiece of this publication. Thirty years later, the young staffer, Michael M. Uhlmann, is now a professor of government at Claremont McKenna College and one of the Institute's contributing scholars. To revise and extend his remarks, so to speak, in the wake of the 2000 election controversy in Florida he has written an article on the same subject for a recent edition of the *Claremont Review of Books*. We include that article here as well.

In addition, we have another connection to the recent imbroglio. While deliberating over their actual and potential role in selecting Florida's electors, the state legislature formed a Select Joint Committee on the 2000 Presidential Election and heard expert testimony on the complicated federal law governing such controversies. One of the key witnesses

called was Dr. John C. Eastman, a professor of law at Chapman University and director of the Claremont Institute's Center for Constitutional Jurisprudence. We include here a transcript of Dr. Eastman's testimony, as well as an appendix with the relevant portions of the statute, U.S. Code Title 3, Sections 5, 6 and 15.

This booklet is one of many such reports the Claremont Institute publishes on American politics and constitutionalism. For more information, please visit our web site at www.claremont.org.

Glenn Ellmers, *Director of Research*
Claremont, CA, March 2001

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As the Electoral Goes, So Goes the Constitution

By Michael M. Uhlmann

The 2000 presidential election was certainly one for the books. Most of them, alas, will likely be written by professors who believe that the will of the people was thwarted, if not by the Supreme Court, then by an outmoded and undemocratic method of presidential election. President Clinton aided their cause a few weeks ago by questioning both the legitimacy of his successor and the integrity of the High Court. As if on cue, People for the American Way rounded up 585 law professors from 112 law schools and took a full-page ad in the New York Times that, in so many words, accused five Republican justices of betraying their oath of office.

More along this line will be forthcoming in the months ahead, as Democratic propagandists crank their mills in anticipation of the 2002 and 2004 elections. It will be said (a) that Mr. Gore was the true choice of the people because he garnered a majority of the national popular vote, which is, after all, the only thing that really matters; and (b) that but for the partisan intervention of the Supreme Court, he would have been the victor in Florida and thereby the national electoral-vote winner as well. As this mythology of the "stolen" election unfolds, the mechanism for electing presidents will be targeted as an obstacle to the effectuation of popular will. Senator Hillary Rodham Clinton, the late would-be reformer of the nation's health-care system, has already announced plans to abolish the Electoral College. She will be supported in her efforts by the usual academic and television network suspects, who will puzzle gravely over why such a "dangerous" and "undemocratic" system continues to be tolerated. Constitutional amendments will be introduced, hearings will be held, polls will be taken, and the national salivations will come forth on schedule. So-called "direct" election of the president will become a national cause.

I say "so-called," because we already have de facto direct election of the president. Strictly speaking, voters choose a slate of electors pledged to one of the nominees, and it is these electors who actually cast the constitutionally binding ballots for president. As a practical matter, however, the office of elector might as well not exist. Ever since the 1830's electors, with but a handful of exceptions, have faithfully cast their ballots for the popular vote winner in their states. The "faithless elector"

problem (which is easily enough cured in any event) is a diversion that distracts attention from the larger agenda, which is to remove the states from the presidential election process and to replace our current system with a national plebiscite. The consequences of such a step would alter our political customs and derange our constitutional order as nothing before. As Professor Charles Black of the Law School pointed out 30 years ago, election of the president by national plebiscite without reference to the states would be "the most deeply radical amendment that has ever entered the Constitution of the United States."

Why this is so requires a bit of reflection of the sort not typically encountered in popular discussions today. The first point to be recognized is that presidential elections are not a thing apart from the rest of our constitutional and political system. The president is at once the chief executive officer of the Constitution and the most potent political actor in the nation. Our major political parties came into being for the primary purpose of capturing the presidency, and that remains their central goal today. But the structure of our major parties follows the structure of the Constitution: They are federal in nature because the Constitution requires a majority of electoral votes to win. Electoral votes, in turn, are apportioned to the several states in the same manner as seats in Congress: Each state is granted at least three electoral votes, with the larger states having more in proportion to the number of seats to which they are entitled in the House of Representatives.

The Electoral College is thus animated by precisely the same organizing principle as the Congress of the United States. By incorporating the federal principle into the mode of presidential election, the Constitution at once connects the presidency to the rest of the constitutional structure and reminds presidential candidates of the unique character of the nation they seek to lead. And because the states, whether small or large, are the principal battleground in presidential contests, candidates are forced to accommodate interests that might otherwise be ignored if population alone were the sole criterion for election. Proponents of a "de-federalized" national plebiscite often argue that, as the president represents "all the people," it follows that he ought to be elected by the people considered as a single unit. But the conclusion does not follow at all. Yes, we are all citizens of a single nation, but that nation is a uniquely federated republic. While the

supremacy of the federal Constitution is acknowledged by all, we take pride as well in the distinct political societies of our home states. The extraordinarily rich diversity of state political cultures is a bulwark against the homogenizing tendencies of the age, and its strength derives in no small part from the role played by states in presidential campaigns. Campaigning in New Hampshire is very different from campaigning in California, and representing "all the people" means representing them no less as Texans or New Yorkers than as citizens of an undifferentiated whole.

Once the states are removed from the presidential election system, these unique and celebrated features of political locale will lose much of their significance. Voters in the less populous states, indeed in any state that cannot be readily subsumed in a mass media market, will be of decidedly secondary interest to presidential candidates. Politicians naturally gravitate toward the largest pool of voters they can find at the lowest cost per voter. That necessarily means the larger television markets, where many millions of voters can be reached at a single thrust, regardless of state borders. Pitching voters in such fashion is expensive, but on a per-capita basis it is the cheapest route to electoral success when what counts is the sheer number of voters rather than their state of residence. To be sure, mass marketing in this manner takes place under the current system, but it would be wholly unrestrained under a national plebiscite. With direct election, you can say good-bye forever to state caucuses and primaries, even to national conventions to which delegates now come as members of state delegations. What would be their point? And you can say permanent hello to admend, number-crunchers, and spin-meisters who will care little about what animates voters at the state and local level, except insofar as they can be melded into a one-size-fits-all national pool of voter sentiment. Under direct election, the media mavens will not have to leave their offices in New York, Washington, or Los Angeles to run a presidential campaign. Why should they?

The Electoral College has also left its mark on the structure of our major political parties, which are but loose coalitions of state and local party units that come together every four years in an effort to capture the presidency. With a national plebiscite, this federated structure will disappear, and the ties that bind state and local party units to the national ticket will be severely weakened. One cannot predict with certainty what will replace these long-standing arrangements, but it's

a good guess that the current national party committees will be displaced by political operatives paid by and loyal to powerful candidates or sitting presidents. And it's also likely that the new power-brokers will be drawn chiefly from the big cities and their near-suburbs, which will become the mean theater of political operations under direct election. It cannot be repeated often enough that once the states are severed from presidential campaigns, almost everything you thought you knew about our political parties will undergo radical change. As John F. Kennedy said in defending the Electoral College in the 1950's, changing the mode of presidential elections affects not only presidential candidates, but the whole solar system of our constitutional and political arrangements–and in ways that are difficult to predict but unlikely to be beneficial.

All this in the name of guarding against...well, what? The fate of the nation would be imperiled, it has been said, were a president to be elected with a majority of electoral votes but lacking a popular plurality. That appears to have happened in 2000 (assuming, that is, all votes were honestly cast and counted), but the Capitol still stands and President Bush took the oath of office with the applause and good wishes of his fellow citizens echoing in his ears. In short, with the exception of a few discontented demagogues, the public seems satisfied that the result conformed to constitutional proprieties, and that is enough for them. The last time this sort of thing happened was1888, with much the same result. (In passing, it should be noted that no one really knows what the actual popular vote count was in any of the historical examples cited by the opponents of the electoral-vote.) But an event that occurs once every hundred years or so without imminent peril to the political order not exactly the stuff of which crises are made.

The truth of the matter is that in 2000, the electorate was so evenly divided that the result was essentially a dead-heat. When a hundred-million ballots are cast and you have to go to the third decimal place to discern the winner, the public is unlikely to be alarmed no matter who is declared the victor. What matters to most people in that situation is obedience to the rules and a sense of finality. The verdict on Mr. Bush's "legitimacy," to the extent it was not conferred by the Constitution itself, will be rendered in November, 2004. To claim that Mr. Gore's 300,000 popular-vote margin confers some sort of legitimacy that Mr. Bush's electoral-vote victory does not ignores the genius of our current constitutional arrangements. The electoral-vote

system not only produces a popular-vote majority or plurality for the winner in most cases, but it tends to ensure that the winner's electoral vote will be geographically distributed.

The principal reason why the public recognizes Mr. Bush's victory as legitimate can be inferred from a quick glance at the electoral map: His electoral- vote majority was razor-thin, but he carried 30 states and five-sixths of the nation's counties. Conversely, the pattern of Mr. Gore's state victories was far less dispersed. Although he appears to have won the national popular vote by slim margin, it is clear from the map that his base of support is far less representative of the nation than is Mr. Bush's. His heaviest support came precisely from those areas dominated by big-city machines and mass television markets. Under direct election, that geographically skewed pattern, dominated by areas of heavy population density, may be sufficient to carry the country every time, but will it be truly representative of national interests? Direct election seeks to guarantee popular-vote winners, only at a price. It cannot guarantee that the popular vote will truly reflect the nation, and for that reason it cannot guarantee that a popular-vote victor will be able to govern fairly or effectively.

The Framers, in their wisdom, understood the limits of simple-minded majoritarianism of the sort embraced by direct election. If elections were simply a matter of counting heads and stopping when you got to 50% plus one, we could dispense with all the checks and balances of the Constitution, including federalism, bicameralism, the separation of powers, and, yes, the Electoral College. The point of these time-honored devices is not to circumvent popular sentiment, but to shape and channel it in such fashion that it supports the ends for which popular government is constituted. Majority rule can become majority tyranny, as the wisest thinkers on politics have always known. The trick in establishing popular government is to empower the majority without endangering the rights of minorities, and that is precisely what our Constitution's checks and balances seek to do. Thomas Jefferson said it well in his First Inaugural Address, following one of the most bitterly contested elections in American history:

> All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will to be rightful must be reasonable; that the minority possess their equal rights, which equal law must protect, and to violate which would be oppression.

Not just any majority will do in a government dedicated to protecting the equal rights of all. One must pay heed not only to the numerical size of a winning coalition, but to the manner of its composition. The Electoral College is not perfect–no election system can be–but it has been notably successful in producing Jefferson's reasonable majorities. That is no small accomplishment in a nation of this size and diversity. Political passions run deep. When our party or candidate loses, we are of course disappointed, sometimes heatedly so, that our policy preferences will not be so easily enacted into law. But we do not have to worry that the winning party will endanger our basic rights. Part of the reason is that the electoral-vote system, reinforced by the winner-take-all custom that prevails in 48 states, requires serious national candidates to solicit support from most of the same voters. That requirement drives major candidates toward the center, which is why winners also take care once in office to govern from the center. Winner-take-all also induces interest groups, in turn, to moderate their demands and to accommodate them as best they can to both major parties.

Under direct election, these incentives toward moderation on the part of candidates and interest groups would be seriously weakened. A national plebiscite conducted without reference to winner-take-all in the states (indeed, without reference to the states at all) has no mechanism to ensure that both major party candidates will appeal to all or most of the same voters; it has no mechanism to ensure that they will carry their campaigns across the breadth of the land and none to encourage interest groups to moderate their demands; it has no mechanism, in short, to ensure that the majority coalition will be reasonable, in Jefferson's sense, either during the campaign or once in office. The United States has never known plebiscitary politics of the sort envisioned by direct election. While it is hard to say for sure, the likely result will be much sharper ideological and geographical divisions. And because direct election will almost certainly produce a runoff election every time, there will be little incentive for candidates to moderate their stands until after the first vote. Political moderation does not occur by accident or because politicians are inherently nicer people than the rest of us. Election systems are not the only means of inducing compromise, but they exert powerful influence over the conduct and rhetoric of campaigns. They can channel political ambition in socially constructive or destructive ways.

We cannot say for sure what forms presidential ambition will take under direct election. But we know this much: That it would be most unwise, even dangerous, to disconnect our chief executive from the Electoral College without compensating for the loss of its moderating influences. Take another look at the electoral map of 2000 and ask yourself what incentives to compromise would exist the next time around under direct election. Take another look and ask how much voters in the less populous states would matter in a mass media market campaign. Take another look at the Florida imbroglio and ask yourself whether we would be better off if such squabbles took place in a dozen places at once throughout the country, as they almost certainly would under a national plebiscite. And ask yourself which system is more likely to discourage and contain fraud. (There are approximately 200,000 polling places in the United States. Under direct election, as Everett Dirksen might say, a few votes here, a few votes there, and pretty soon it all adds up.)

Ever since the presidency became a popularly elective office, campaigns have been conducted on a state-by-state basis. Most of our political habits, customs, expectations, and opinions about presidential politics are informed and mediated by the principles of federalism. The same holds true for the candidates themselves, who learn much about this nation's incredible diversity by being forced to campaign throughout the country. They also learn a great deal on a practical level about our unique constitutional system and the political culture it inspires. Once election to the presidency is severed from the rest of our constitutional structure, new incentives will be created, and new lessons taught, none of which will have very much to do with the way elections have been conducted in the past. If "the will of the people" is seen as an independent force, separate and apart from our constitutional structure, how shall we constrain a president who invokes the "moral mandate" of popular will as his reason for ignoring that structure once in office?

(A version of this article appeared in the Winter, 2001 *Claremont Review of Books*.)

91st Congress Senate Report
2d Session No. 91-1123

Direct Popular Election of the President

August 14, 1970 — Ordered to be printed
Mr. Bayh, from the Committee on the Judiciary,
submitted the following

Report

together with

Individual, Separate and Minority Views

The Committee on the Judiciary, to which was referred the resolution (S.J. Res. 1) proposing an amendment to the Constitution of the United States relating to the election of the President and the Vice President, having considered the same, reports favorably thereon, that the resolution, as amended, do pass.

The text of the Senate Joint Resolution 1, as amended, is as follows:

An Amendment in the Nature of a Substitute

That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislature of three-fourths of the several States within 7 years from the date of its submission by the Congress:

Article

Section 1. The people of the several States and the District constituting the seat of government of the United States shall elect the President and Vice President. Each elector shall cast a single vote for two persons who shall have consented to the joining of their names as candidates for the offices of President and Vice President. No candidate shall consent to the joinder of his name with that of more than one other person.

Section 2. The electors of President and Vice President in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature, except that for electors of President and Vice President, the legislature of any State

may prescribe less restrictive residence qualifications and for electors of President and Vice President the Congress may establish uniform residence qualifications.

Section 3. The pair of persons having the greatest number of votes for President and Vice President shall be elected, if such number be at least 40 per centum of the whole number of votes cast for such offices. If no pair of persons has such number, a runoff election shall be held in which choice of President and Vice President shall be made from the two pairs of persons who received the highest number of votes.

Section 4. The times, places, and manner of holding such elections and entitlement to inclusion on the ballot shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations. The days for such elections shall be determined by Congress and shall be uniform throughout the United States. The Congress shall prescribe by law the time, place, and manner in which the results of such elections shall be ascertained and declared.

Section 5. The Congress may by law provide for the case of the death, inability, or withdrawal of any candidate for President or Vice President before a President and Vice President have been elected, and for the case of the death of both the President-elect and the Vice-President-elect.

Section 6. The Congress shall have power to enforce this article by appropriate legislation.

Section 7. This article shall take effect 1 year after the 15th day of April following ratification.

Purpose of the Proposed Constitution Amendment

Senate Joint Resolution 1 proposes an amendment to the Constitution of the United States to abolish the antiquated Electoral College and undemocratic "unit vote" system and substitute direct popular election of the President and Vice President. The proposed amendment provides, further, that in the unlikely event no candidate receives at least 40 percent of the total popular vote, a runoff election shall be held between the top two candidates.

History of Senate Joint Resolution 1

The Subcommittee on Constitutional Amendments began the first of two sets of hearings on the election of the President on February 28, 1966. The subcommittee held 18 days of hearings and heard testimony on all the various plans for reform of the electoral system. More than 50 witnesses appeared before the subcommittee and the hearing record totaled nearly 1,000 pages. (Election of the President, hearings before the Subcommittee on Constitutional Amendments, 89th Cong., second session. and 90th Cong., first session).

Following the near electoral mishap in 1968, the subcommittee undertook a further study of electoral reform. In 11 days of hearings, the subcommittee heard 49 witnesses and compiled a second hearing record of more than 1,000 pages. Once again, the subcommittee heard testimony on all the various plans for reform. (Electing the President, Subcommittee on Constitutional Amendments, 91st Cong., first session.).

In September 1969, electoral reform became the pending order of business before the full Judiciary Committee. On February 3, 1970, the committee voted 13-4 to consider electoral reform by April 14 and to vote on the pending resolutions no later than April 24. Three additional days of hearings were held by the full Judiciary Committee on April 15, 16, and 17.

The full Judiciary Committee met in executive session on April 23. In the course of its deliberations, the committee rejected a number of substitute amendments, including the district plan (S.J. Res. 12), the proportional plan (S.J. Res. 2), the modified present system plan (S.J. Res. 191), and a number of other substantive amendments that would have altered the runoff provisions of Senate Joint Resolution 1. The committee then voted 11-6 to report the direct popular election plan embodied in the substitute version of Senate Joint Resolution 1.

Analysis of the Resolution

The resolution contains the customary provisions that the proposed new article to the Constitution shall be valid as part of the Constitution only if ratified by the legislature of three-fourths of the States within 7 years after it has been submitted to them by the Congress.

Section 1 of the proposed article would abolish the Electoral College system of electing the President and Vice President of the United States

and provide for their election by direct popular vote. The people of every State and District of Columbia would vote directly for President and Vice President. This section prevents a candidate for either office from being paired with more than one other person. Candidates must consent to run jointly.

Section 2 provides that voters for President and Vice President in each State must meet the qualifications for voting for the most numerous branch of the State legislature in that State. The term "electors" is retained, but instead of referring to the Electoral College, the term henceforth means qualified voters, as it does in existing provisions dealing with popular election of members of Congress. This clause also permits the legislature of any State to prescribe less restrictive residence requirements and is necessary in order to prevent invalidation of relaxed residence requirements already or hereafter adopted by the States for voting in presidential elections.

The Congress is also empowered to establish uniform residence qualifications. This authority would in no way affect the provisions dealing with residency requirements in presidential elections adopted as part of the proposed Voting Rights Act of 1970. The Voting Rights Act would abolish residency requirements for voting in presidential elections and establishes nationwide, uniform standards relating to absentee registration and absentee voting in presidential elections. This provision, moreover, does not modify or limit in anyway existing constitutional powers of the Congress to legislate on the subject of voting qualifications. The District of Columbia is not referred to in section 2 because Congress now possesses the legislative power to establish voting qualifications for the District under article I, section 8, clauses 17 and 18.

Section 2 is modeled after the provisions of article I, section 2, and the 17th amendment to the Constitution regarding the qualifications of those voting for Members of Congress. As a result, general uniformity within each State regarding the qualifications for voting for all elected Federal officials is retained. Use of the expression "electors of the most numerous branch of the State legislature" does not nullify by implication or intent the provisions of the 24th amendment that bar payment of a poll tax or any other tax as a requisite for voting in Federal election. The Supreme Court, moreover, has held that a poll tax may not be enacted as a requisite for voting in State elections as well, *Harper v. Board of Supervisors*, 383 U.S. 663 (1966).

Section 3 requires that candidates obtain at least 40 percent of the whole number of votes cast to be elected President and Vice President. The expression "whole number of votes cast" refers to all valid votes counted in the final tally. The term "whole number" is consistent with prior expressions in the Constitution, as in the 12th amendment. Section 3 further provides that if no pair of persons receives at least 40 percent of the whole number of votes cast for President and Vice President, a popular runoff will be held among the two pairs of persons who receive the highest number of votes.

Section 4 embodies provisions imposing duties upon the Congress and the States in regard to the conduct of elections. The first part of this section requires the State legislatures to prescribe the times, places, and manner of holding presidential elections and entitlement to inclusion on the ballot—subject to a reserve power in Congress to make or alter such regulations. This provision is modeled after similar provisions in article I and the 17th amendment dealing with elections of members of Congress. States will continue to have the primary responsibility for regulating the ballot. However, if a State sought to exclude a major party candidate from appearing on the ballot—as happened in 1948 and 1964—the Congress would be empowered to deal with such a situation.

Section 4 also requires Congress to establish by statute the days for the regular election and any runoff election, which must be uniform throughout the United States. This conforms to the present constitutional requirement for electoral voting (article II, section 1), to which Congress has responded by establishing a uniform day for the election of electors (3 U.S.C. 1).

Section 4 further requires Congress to prescribe the time, place, and manner in which the results of such election shall be ascertained and declared. The mandatory language is comparable to the mandatory duties imposed upon the States to provide popular election machinery for Members of Congress. In implementing this section, Congress may choose to accept State certifications of the popular vote as it now accepts electoral vote certifications under the provisions of 3 U.S.C. 15. Federal enabling legislation will be required to provide the specific legislative details contemplated in the broad constitutional language of the amendment.

Section 5 empowers Congress to provide by legislation for the death, inability, or withdrawal of any candidate for President and Vice President either before or after a regular runoff election, but before a President or Vice President has been elected. Once a President and Vice President have been elected, existing constitutional provisions would apply. Thus, the death of the President-elect would be governed by the 20th amendment and the death of the Vice President-elect would be governed by the procedure for filling a Vice Presidential vacancy contained in the 25th amendment. Section 5 also empowers the Congress to provide by legislation for the case of the death of both the President-elect and the Vice-President-elect.

Section 6 confers on Congress the power to enforce this article by appropriate legislation. The power conferred upon Congress by this section parallels the reserve power granted to the Congress by numerous amendments to the Constitution. Any exercise of power under this section must not only be "appropriate" to the effectuation of the article but must also be consistent with the Constitution.

Section 7 provides that the article shall take effect 1 year after the 15th day of April following ratification. The committee was of the opinion that since State and Federal legislation will be necessary to fully implement and effectuate the purposes of the proposed amendment, a reasonable period of time should be provided between the date of ratification and the date on which the amendment is to take effect. The committee believes that this provision affords both the Congress and the States an adequate opportunity to legislate, but does not foreclose the possibility of securing ratification in time for the proposed article to be in effect before the 1972 Presidential election.

The Electoral College System

The Constitution provides, in article II, section 1, that each State is entitled "to appoint" as many electors as it has Senators and Representatives. The District of Columbia, according to the terms of the 23rd amendment, is entitled to appoint the same number of electors it would have if it were a State, but in no event more than the least populous State.

In the first few presidential elections, State legislatures appointed electors. Today, however, all of the States and the District choose their electors by direct popular vote. In nearly all of the States, according to State laws, the party electoral slate that wins a statewide popular vote

plurality is awarded all of the State's electoral votes. Four States—Alaska, Florida, Oklahoma, and Oregon—require electors to pledge themselves, or swear an oath, to vote for their party nominees. In approximately one-third of the States there are statutory provisions requiring electors to vote for the candidates of their party. The constitutionality of these pledges and statutory requirements, however, is very doubtful. See *Ray v. Blair*, 343 U.S. 214 (1952).

In the event no candidate receives an electoral majority, the Constitution empowers the House of Representatives to choose the President from the three candidates receiving the largest number of electoral votes. The balloting in the House of Representatives is by States, with each State having one vote. According to the rules of the House, the vote of a State is awarded to the candidate who receives a majority of the votes cast by the State delegation. If a State delegation is evenly divided, that State forfeits its vote. A majority of all of the States is required for election. If the House of Representatives fails to elect a President by the time fixed for the beginning of the presidential term—set at January 20 by the 20th amendment—or if the President-elect fails to qualify, the Vice President-elect acts as President until the House chooses a President.

In the absence of an electoral majority for Vice President, the choice rests with the Senate from the two candidates with the greatest number of electoral votes. A majority of all the Senators is required for election.

Historical Design of the Framers of The Constitution

In 1787 James Wilson of Pennsylvania spoke of the difficulty the Constitutional Convention had experienced in agreeing on a plan for choosing the President:

> This Convention, Sir, was perplexed with no part of this plan so much as with the mode of choosing the President of the United Sates. * * * This subject has greatly divided the House, and will also divide people out of doors. It is in truth the most difficult of all on which we had to decide.

There was no shortage of ideas at the Convention on how to elect the President. Among the many plans proposed were direct popular election, election by the Congress, and election by the State legislatures. Direct popular election was opposed mainly because it was felt that the

people, lacking knowledge of the candidates, could not make an intelligent choice. An election by Congress was rejected because it was believed that this would undermine the independence of the Executive. Similarly, the idea of election by State legislatures was defeated because of the fear that the President would be so indebted to the States that the exercise of Federal authority would be jeopardized.

Unable to agree upon a plan, the Convention appointed a "Committee of Eleven" to propose a compromise solution. The hybrid Electoral College system was that compromise solution. The people would choose electors in the first instance, either by direct popular election or through appointment by popularly elected state legislatures, but the electors they chose would actually vote for President and Vice President. The electors, according to the original design would vote individually for the candidates they believed best qualified for President and Vice President. As Alexander Hamilton wrote in *Federalist No.* 68, "a small number of person selected by their fellow citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations...."

Defects and Deficiencies in the Present System

The appearance of political party candidates as early as 1800 meant, in effect, that Hamilton's concept of a "select assembly" of independent electors already had lost its purpose only a decade after its embodiment in the Constitution. A Senate report published in 1826 caustically noted that the free and independent electors had "degenerated into mere agents in a case which requires no agency and where the agent must be useless if he is faithful and dangerous if he is not." More than 125 years later, however, the elector still retains his constitutionally guaranteed independence. In January, 1969, Congress confirmed this 18th century prerogative by accepting the vote of a popularly chosen Republican elector from North Carolina who had cast his vote in the Electoral College for George Wallace, the American Independent Party candidate.

How dangerous is the anachronistic elector? Historically, as the late Justice Jackson pointed out, "they always voted at their party's beck and call and never thought of thinking for themselves at all." The prospect of unknown electors auctioning off the Presidency to the highest bidder, nevertheless, is all too real. That is the lesson of 1968,

when the present electoral system brought us to the brink of constitutional crisis. A shift from Nixon to Humphrey of only 42,000 popular votes in three states would have denied Nixon and electoral majority and given Wallace, with his 46 electoral votes, the balance of power. As the former Alabama Governor explained to an exclusive interview with U.S. News and World Report (September 30, 1968):

> **Question.** *If none of the three candidates get a majority, is the election going to be decided in the Electoral College or in the House of Representatives?*
>
> **Wallace.** I think it would be settled in the Electoral College.
>
> **Question.** *Two of the candidates get together or their electors get together and determine who is to be President?*
>
> **Wallace.** That is right.

The elector is to the body politic what the appendix is to the human body. As Henry Cabot Lodge said, "while it does no good and ordinarily causes no trouble, it continually exposes the body to the danger of political peritonitis." We can avoid this dangerous disease simply by eliminating the elector. But that is not a cure-all for what ails our present electoral machinery. The elector, in fact, is merely a symptom of what the American Bar Association's Special Commission on Electoral Reform aptly described as our "archaic, undemocratic, complex, ambiguous, indirect, and dangerous" method of electing a President. After a 10 month study, the committee concluded that the entire electoral system should be replaced and popular choice substituted for political chance.

Among other things, the present system can elect a President who has fewer votes than his opponent and thus is not the first choice of the voters; awards all of a State's electoral votes to the winner of the State popular vote, whether his margin is 1 vote or 1 million votes; cancels out all of the popular votes cast for the losing candidate in a state and casts these votes for the winner; assigns to each State a minimum of three electoral votes regardless of population and voter turnout; and provides for a patently undemocratic method for choosing a President in the event no candidate receives an electoral majority.

The major defect of the present electoral system—the unit rule—is not even a constitutional provision. The unit rule or "winner-take-all"

formula is the State practice of awarding all of its electoral votes to the statewide popular vote winner. In effect, millions of voters are disfranchised if they vote for the losing candidate in their State because the full voting power of the State—its electoral vote—is awarded to the candidate they opposed. The obvious injustice of this was pointed out by Thomas Hart Benton over a century ago. "To lose

	Percent of Popular Vote		Percent of Electoral Vote	
	Democrats	Republicans	Democrats	Republicans
1952	44.4	55.1	16.7	83.2
1956	42.0	57.4	13.7	83.4
1960	49.5	49.3	56.1	40.7
1964	61.1	38.5	90.4	9.6
1968	42.7	43.3	35.5	56.9

their votes is the fate of all minorities," he said, "and it is their duty to submit; but this is not a case of votes lost, but of votes taken away, added to those of the majority and given to a person to whom the minority is opposed."

A practical consequence of this disfranchisement is that it discourages the minority party in traditionally one-party States. Simply stated, where there is no hope of carrying the statewide popular vote the size of the voter turnout for the likely loser is meaningless. This necessarily leads to the atrophying of the party structure in many States. By the same token, the prospective winner has little incentive to turn out his vote because the margin of victory likewise is meaningless. In sum, the unit rule has the unhealthy political effect of both maintaining weak second parties and discouraging voting. This is reflected most clearly in the poor voter turnout in U.S. presidential elections in comparison to most other democratic nations.

A by-product of the unit rule is the distortions it produces in the value of individual popular votes. The unit rule tends to inflate the voting power of a small number of well-organized voters in the handful of large, closely contested States where blocs of electoral votes can be won on the basis of narrow popular vote margins. A candidate, for example, could win an electoral majority by capturing statewide pluralities in the 11 largest States and the District of Columbia—even if he did not

receive a single popular vote in all of the other States! This means, in effect, that under the present system in 1968, 25 percent of the popular vote could have elected a President.

Some opponents of electoral reform have argued that this inequity is a political necessity and a fair counter-weight to the small State advantage built into the electoral system (each State is entitled to a minimum of three electoral votes). The committee concluded, however, that this "uneasy tension between opposing distortions of the popular will" is not the proper foundation on which to build a sound and democratic electoral process—a process that should ensure every American voter, white and black, North and South, the same opportunity to vote directly and equally for the presidential candidate of his choice and guarantees a popular choice every time.

Largely as a result of the unit rule, the present electoral vote system cannot guarantee that the candidate with the most popular votes will be elected. This dangerous prospect, more than anything else,

Percentage of Districts and States Carried by Candidates and Their Popular Vote Margins					
	54.9 or less	55 to 59	60 to 64.9	65 to 69.9	70% or more
Districts in 1960	39	29	18	7	7
States in 1960	68	22	10	0	0
Districts in 196	17	23	21	17	22
States in1964	16	29	23	22	10
Districts in 1968	66	18	6	4	6
States in 1968	78	14	6	2	0

condemns the present system as an imperfect device for recording the sentiment of American voters. In 1824, 1876 and again in 1888 this system produced Presidents who were not the popular choices of the voters. On numerous other occasions in this century, a shift of less than 1 percent of the popular vote would have produced an electoral majority for the candidate who received fewer popular votes. 1948, for example, a shift of less than 30,000 popular votes in three States would have given Governor Dewey an electoral vote majority—despite President Truman's 2 million-plus popular vote margin.

Good fortune, not design, has produced Presidents who were the popular choices of the people. A glance at past elections reveals that there have been very few elections where the candidates' percentage

of the electoral vote reasonably resembled their percentage of the popular vote.

In runaway elections, of course, any system will produce an electoral victory for the popular victory for the popular vote winner. It is the accuracy of the results produced in closely contested elections, however, that determines the true soundness of an electoral system. Based on this criterion, the committee concluded that the present system is clearly defective. A recent computer study of presidential elections over the last 50 years revealed, for example, that in elections as close as 1960 the present system offered only a 50-50 chance that the electoral result would agree with the popular vote. For an election as close as 1968, where some 500,000 popular votes separated the candidates, there was one chance in three that the electoral vote winner would not be the popular vote winner as well. According to the evidence, the danger of an electoral backfire is clear and present.

The tests of a modern electoral system, the committee determined, are threefold. First, it must guarantee that the candidate with the most votes is elected President. Second, it must count every vote equally. Third, it must provide the people themselves with the right to directly make the choice. Only direct popular election meets all three tests. The committee voted 11-6, therefore, to report favorably Senate Joint Resolution 1.

Reform Plans Defeated in Committee

The District Plan (S.J. Res. 2). The district plan would retain the electoral vote, with electors chosen from single-member districts within each State and two electors running at large statewide.

The district plan, like the present electoral system, is based on the "winner-take-all" principle—merely shifting its application from the State level to the district level. As a result, the district plan would continue to produce significant disparities between the popular vote and the electoral vote. To cite just one example of the consequences of the district plan, the committee compared the returns for the 1st and 15th Illinois Congressional Districts in 1964. President Johnson carried the 1st District by only 167,458 votes Senator Goldwater, in contrast, won the 15th District by only 71 votes. Under the district plan, each candidate would have received one electoral vote. The unit rule operating at the district level, therefore, would have wasted a net popular vote margin of 167,387 votes for President Johnson.

By "wasting" large numbers of popular votes, the district system can easily elect a President who is not the popular choice of the voters.

As in the case of the present system, the district plan, in fact, would operate even more effectively to discourage voters because a larger number of congressional districts are safely controlled by one party than are States.

Furthermore, despite the specific requirement of Senate Joint Resolution 12 that electoral districts be "compact, contiguous, and nearly equal in population" it still would be possible for partisan state legislatures to gerrymander electoral units. The impracticality of enforcing this vague constitution standard was another major obstacle to the district plan.

The Proportional Plan (S.J. Res. 12). The proportional plan would retain the electoral vote, but replace the unit rule with a proportional division of a State's electoral vote on the basis of the popular vote in that State.

Had the proportional system been in effect in 1968, it would have produced the following distortions in two States having the identical number of electoral votes:

> President Nixon captured 43 percent of the popular vote in Virginia and under the proportional plan this would have produced 5.2 electoral votes. Vice President Humphrey's 43 percent of the popular vote in Missouri, likewise, would have produced 5.2 electoral votes. Nixon, however, only required 590,315 popular votes, whereas Humphrey had to poll 791,444 votes in order to produce 5.2 electoral votes—a startling difference of 201,129 popular votes.
>
> Both Idaho and Utah have 4 electoral votes. In both States, Nixon captured 56 percent of the statewide popular vote and this would have entitled him to 2.2 electoral votes. The interesting point is that it required 238,728 popular votes in Utah to produce the same number of electoral votes as 165,369 popular votes in Idaho.

The practical political consequences of the proportional plan is that it enhances the political influence of the "safe" States, which traditionally have had poor voter turnouts. Simply, a popular vote in a State where the voter turnout is poor is worth more than a vote in a State of equal size with a heavy voter turnout.

Year	President elected and percent popular vote	Opponent's percent popular vote	Others (percent popular vote)	
1824	Adams 30.54	Jackson 43.13	Clay 13.24	Crawford 13.09
1844	Polk 49.56	Clay 48.14	Birney 2.30	
1848	Taylor 47.35	Cass 42.52	Van Buren 10.13	
1856	Buchanan 45.32	Fremont 33.13	Fillmore 21.55	
1860	Lincoln 39.78	Douglas 29.49	Breckenridge 18.09	Belt 12.64
1878	Hayes 48.04	Tilden 50.99	Cooper 0.97	
1880	Garfield 48.32	Hancock 48.21	Weaver 3.35	
1884	Cleveland 48.53	Blaine 48.24	Butler 1.74	St. John 1.49
1888	Harrison 47.86	Cleveland 48.66	Fisk 2.19	Streeter 1.29
1892	Cleveland 46.04	Harrison 43.01	Weaver 8.53	Others 2.42
1912	Wilson 41.85	Roosevelt 27.42	Taft 23.15	Others 7.58
1916	Wilson 49.26	Hughes 46.12	Benson 3.16	Others 1.46
1948	Truman 49.51	Dewey 45.13	Thurmond 2.40	Others 2.96
1960[1]	Kennedy 49.48	Nixon 49.32	Unpledged 0.88	Others 0.32
1968	Nixon 43.40	Humphrey 42.72	Wallace 13.53	

States sharing marked sectional interests, moreover, would have a great incentive to maximize their electoral influence by encouraging one-partyism. As a result, regional third party challenges are likely to be encouraged. In 1948, for example, the States Rights Party polled only 2.4 percent of the total popular vote, but under a proportional plan it would have received more than three times that percentage of the electoral vote.

Under certain political conditions, the proportional plan would produce a President who was not the popular choice of the voters. If one candidate won handily in most of the States where the turnout was poor and the results in the remaining States were almost evenly divided, it is likely the electoral winner would have been the popular vote loser. A perfect example of this division occurred in the election of 1986. Bryan captured 46.7 percent of the popular vote and McKinley won 51.1 percent. McKinley's majority of the popular vote under the present system produced 61 percent of the electoral vote. Under a proportional plan, however, Bryan would have won a 6 vote electoral victory—despite being a popular vote loser.

A recent computer study presented to the committee examined the electoral results produced under a proportional system in close popular elections. The random survey, based on several thousand two candidates races with the popular vote distribution varying from a wide 60-40 split to a 50-50 division, revealed that with a plurality of less than 1 million votes there was a 14 percent chance of an electoral mishap. In an election as close as 1968, moreover, there was a 25 percent chance of electing the popular vote loser.

The Modified Present System (S.J. Res. 191) The modified present plan would write into the Constitution for the first time the major defect of the present system—the unit rule. Rather than leave the election of the President to the strange arithmetic of the unit rule and perpetuate the other inequities in the present system—including the distortions in voting power, the built-in advantage for lower voter turnout, and above all the great risk of electing a candidate who is not the first choice of the voters—the committee defeated an amendment that would have modified the system only to the extent of eliminating the elector. The adoption of the "Katzenbach Plan" would not only write into the Constitution the evils of the "winner-take all" rule, but is likely to preclude meaningful reform indefinitely.

The committee determined that the popular choice of the people should also be the sole criterion for electing a President—as it is in all other elections in the United States—and that every voter should have his vote count equally. The committee reported favorably, therefore, Senate Joint Resolution 1, providing for direct popularelection.

Major Features of Senate Joint Resolution

1. The 40 percent plurality requirement. The proposed amendment requires the winning candidate to obtain at least 40 percent of the total popular vote. During the committee's deliberations, a question was raised as to what percentage of the popular vote—if any—should be required for election. The committee believes it is necessary to establish a reasonable plurality requirement indicating a legitimate mandate to govern. On the other hand, the committee felt that such a requirement should not be set so high that it would disrupt the stability of our political system.

An amendment to require a majority of the popular vote for election was defeated. The committee believes that a majority vote require-

ment might too easily proliferate the party system and needlessly trigger the runoff. Historically, the committee noted, 15 Presidents have been elected with less than 50 percent of the popular vote:

Popular-vote totals for the 1960 election are in dispute because of the Alabama returns, where a state of 11 electors—6 unpledged and 5 pledged to President Kennedy—was chosen. While percentages would vary according to the method used in calculating the vote, Kenney's total would be less than 50 percent. The difficulty of determining the popular-vote count arises, of course, from the peculiarities of the electoral system and the fact that voters do not ballot directly for candidates. Furthermore, under the present system there is no need for a final nationwide popular-vote total.

On the other hand, as the chart indicates, only one President since 1860 has received less than 40 percent of the popular vote. In 1860, Lincoln received 39.79 percent of the vote but his name did not appear on the ballot in ten States.

The committee also believes that a 40 percent plurality requirement would assure a reasonable mandate to govern, while not unnecessarily triggering the runoff election. The committee concluded that it was very unlikely that neither major party candidate would receive a 40 percent plurality—even with a third party candidate in the race. Under the terms of Senate Joint Resolution 1, a splinter party would have to poll at least 20 percent of the total popular vote—and in most instances more—before triggering the runoff. That was considered unlikely in view of the strong two-party system in the United States. In 1968, for example, the most significant third party bid since 1924 could only produce 13.5 percent of the popular vote for George Wallace.

Even more to the point, the committee reviewed the four-way race in 1912, noting that in the face of challenges by an incumbent President and a popular former President, Woodrow Wilson still received more than 40 percent of the popular vote. The four way race in 1948, involving Truman, Dewey, Thurmond, and Wallace, likewise produced a candidate with well over 40 percent of the popular vote. The likelihood of a major party candidate receiving the required plurality, therefore, is not confined merely to third party races but to multiparty contests as well.

The 40 percent requirement, in short, is a prudent cutoff point because it avoids the likelihood of frequent runoffs, places reasonable limits on

the growth of third parties, and provides a sufficient mandate to govern.

2. The runoff election. Since a 40 percent plurality requirement was established, a contingent election procedure was necessary in the unlikely event that no candidate received the requisite 40 percent. The committee believes that a popular vote runoff is the most appropriate contingency in a situation where the country is so divided that no candidate receives 40 percent of the popular vote. The committee reasoned that no other contingency procedure would ensure as much legitimacy and would be less susceptible to intrigue and closed-door deals.

A question was raised in the committee as to whether the runoff might unnecessarily encourage third parties to enter presidential elections. The committee found the following statement by Professor Paul Freund of the Harvard School very persuasive on this point:

> This provision for a run-off is important not only as a democratic solution to the problem of a deadlock, but as a deterrent to the rise of splinter parties. Some critics of a direct popular vote have feared that by giving effect to every voter in the final tally, the plan would foster the growth of minor parties and would jeopardize the two-party system. If, however, the only achievement that such splinter parties could hope for would be to force a runoff between the two leading candidates, their gain would probably not seem to be worth the candle in the first place, and there would be an incentive to come to terms with a major party, as at present.
>
> The two-party system, in addition, is buttressed by more than the unit count of the present electoral system; it rests on the foundations of the party system in Congress and the States, and there is no solid reason to expect that these foundations would be shaken by the direct election of the President.

For these reasons, the committee rejected an amendment that would have permitted the election of the popular vote winner if he had either (1) 40 percent of the popular vote or (2) an electoral majority as determined by the present unit vote rule. In the event no candidate met either of these tests, the amendment provided, further, that a joint session of the Congress would elect the President from among the two popular vote leaders.

The committee concluded that in the long run the political health of our democratic system would be strengthened if the final choice rests with the people. A choice by any body other than the people, it was felt, was either useless or mischievous—useless if it reflects the will of the people and mischievous if it does not.

3. Election regulations and voter qualifications. The proposed amendment strikes a necessary balance between traditional State authority and compelling Federal interest in the conduct of presidential elections. The committee believes such a balance is workable and that until proven otherwise, there is no need to completely nationalize voting procedures and standards. For this reason, the committee rejected an amendment that would have prescribed mandatory Federal regulations and qualifications.

The proposed amendment empowers the States to establish voter qualifications and election machinery similar to the responsibilities the States now exercise for the election of Senators, Representatives, and for electors of the President and Vice President. Senate Joint Resolution 1 provides that the qualifications for voting in presidential elections are to be prescribed by State law and shall be the same as those voting for members of the most numerous branch of the State legislature. These provisions are identical to the present constitutional requirements spelled out in article I, section 2, relating to the qualifications for voting for Members of the Congress.

The States are further authorized to prescribe less restrictive residence requirements for voting in presidential elections. This provision was deemed necessary in order to prevent the invalidation of existing laws in many States where less restrictive residence requirements for voting in presidential elections are already in effect. Congress, moreover, is expressly empowered with a reserve authority to establish uniform residence requirements. In this age of great mobility, Sate residence requirements for voting in presidential elections often work an undue hardship on millions of Americans. It is estimated, for example, that in 1968 approximately 5 million voters were arbitrarily disfranchised because of restrictive State residency requirements.

The committee deemed it advisable to include this reserve authority in Congress despite the recent action of the Senate liberalizing and standardizing residency requirements in presidential elections. The committee's action in this regard should not be viewed as reflecting,

in any way, doubt as to the constitutionality of the relevant provisions of the Voting Rights Act of 1970 that is now awaiting final congressional approval.

The mechanical details of providing for a direct popular election, including provision for the runoff, prescribing a uniform election date, and the manner in which the vote is to be ascertained and declared, are left to Congress to legislate.

Prescribing the times, places and manner of holding such elections and provision for inclusion on the ballot remain the primary responsibility of the States. The Congress, however, is given a reserve power to make or alter such regulations. In the event a State attempts to exclude the name of a major party candidate from the ballot, for example, the Congress would have the authority to prevent such arbitrary action. Furthermore, the committee noted that such action appears unlikely in view of the Supreme Court's recent decision in *Williams* v. *Rhodes*, 393 U.S. 23 (1968). There the Court held that the equal protection clause of the 14th amendment and the right of assembly guaranteed by the first amendment impose limitations upon a State's freedom to restrict parties in their access to the ballot.

The committee concluded that direct popular election is the only system that guarantees the election of the people's choice, counts every vote equally, and works in the manner in which most Americans expect the electoral process to work—directly and democratically.

In evaluating the prospects for electoral reform, the committee was impressed by the overwhelming vote of the House of Representatives 339-70 for direct popular election (H.J. Res. 681). The committee is also aware of the widespread popular support for the proposed amendment. Recent public opinion polls, for example, indicate that over 80 percent of the American people favor direct elections. A formidable array of national organizations have publicly endorsed Senate Joint Resolution 1, including the American Bar Association, the U.S. Chamber of Commerce, the AFL-CIO, the U.A.W., League of Women Voters, the National Federation of Independent Business, and the National Small Business Association.

Separate Views of Mr. Griffin and Mr. Tydings

Although we wholeheartedly endorse the direct elections concept contained in Senate Joint Resolution 1, we are concerned that the contingency for a runoff election in the event that the popular vote winner has less than 40 percent of the votes cast may encourage a proliferation of minor parties and consequently a breakdown of the two-party structure as we know it.

In order to preserve the framework of accommodation and compromise which has been the crucial unifying element in American politics, we offered an amendment in committee retaining the basic popular voter concept while, at the same time, restricting the opportunity of minor party candidates to weaken significantly the two-party system. Essentially, our amendment substitutes an election by a joint session of Congress for the runoff contingency in Senate Joint Resolution 1. However, the congressional runoff we propose will occur only if the popular vote winner does not receive 40 percent of the popular vote or a majority of the electoral vote. The text of this proposal follows our statement.

Problems with the Runoff

In probing the justifications advanced for the popular runoff contingency in Senate Joint Resolution 1, a number of disturbing, unanswered questions remain. How, for instance, do we account for the general consensus among political scientists that election of Governors and legislators by plurality vote, without a runoff, has definitely encouraged the two-party system? What relevance to the committee proposal is there in the history of divisive, bitterly fought primary runoffs, particularly in the South, where the first election provides a testing ground for the strength of various ideologies? Even in statewide contests where only a plurality is required, four relatively strong parties have emerged in New York, thereby demonstrating the clout of minor parties.

While a runoff in the House of Representatives is possible under the present electoral system, the inhibiting effect of the unit rule has discouraged the proliferation of minor parties except for those having some type of regional base. Under the winner-take-all feature minor parties have thrown the election into the House only in the case of the 1824 election. Of the 46 Presidential elections since 1789, major third-party challenges have occurred in only eight contests.

Despite this record, popular vote totals in past elections are relied upon for formulating the 40-percent plurality requirement designed to minimize the possibility of runoffs. However, is the history of results under the present system, where a powerful deterrent exists to the entrance of minor parties on the political scene, good precedent for evaluating the success of an entirely new concept lacking the safeguards against ideological candidates?

These questions, in our opinion, can be satisfactorily answered only by altering the runoff contingency in order to strike a better balance between the need for direct public participation and the need for institutional stability.

Although it is possible for the present system to produce some peculiar and undesirable results as the committee report emphasizes, it is important not to lose sight of its strong points.

Since 1836 when the unit rule became the general standard in the States for allocating electoral votes, not one election has been sent to the House of Representatives due to the inability of any candidate to receive a majority of the electoral votes. The 1876 election went to the House only to determine which major party candidate should have received the 22 electoral vote in four States where the election returns were in dispute.

As emphasized during the Senate hearings by Prof. Alexander Bickel of Yale Law School and former Presidential assistant Richard Goodwin, the present electoral system restricts third-party challenges to those candidates who have a strong regional base. The lack of such a base is illustrated by the demise of the Progressive Party. In 1924 Robert La Follette garnered 16.6 percent of the popular vote but carried only Wisconsin with its 13 electoral votes. Henry Wallace, running on the Progressive ticket in 1948, got 2.4 percent of the popular vote but won no electoral votes. That same year, Senator Thurmond, representing the regionally based States Rights Party, received the same percentage of the popular vote as Henry Wallace but collected 39 electoral votes. Of course, the impact of the States Rights Party can be seen today in George Wallace's American Independent Party.

The limitations of even solid regional support on a third party's efforts are strikingly demonstrated by going back to the 1860 election. Although the southern Democratic candidate, John Breckinridge,

polled 72 electoral votes and John Bell of the constitutional Union Party polled 39, Abraham Lincoln won a majority of the electoral vote with only 39.9 percent of the popular vote.

On the other hand, under the 40-percent plurality required for direct election, a minor party or combination of minor parties need only approach 20 percent of the popular vote in order to reach a strong bargaining position. The prospect of two minor party candidates, one regional and one ideological, amassing 20 percent of the vote is quite realistic in the near future of American politics.

In view of this attractive political framework, the direct election plan, as embodied in Senate Joint Resolution 1, opens the door to public political bargaining with the most far-reaching consequences. Concessions wrung from major party candidates either before or after the first election would be made in a heated atmosphere conducive to the creation of public distrust. Given the fact that bargaining before the runoff election would take place under conditions of division and disappointment, cynical political moves might in themselves lead to a crisis of respect and legitimacy in the selection of the President. Undoubtedly, the aura of legitimacy would be all the more in doubt where the runner-up in the initial contest wins the runoff by wooing third-party support. In such a case, the question of legitimacy is sharpened even further if the turnout in the second election is substantially lower than in the first election.

The Amendment

While we believe that the 40-percent requirement in Senate Joint Resolution 1 has validity and provides a legitimate base of support, we are convinced that further protection is needed to insure that the 40-percent standard becomes the floor and not the ceiling for popular vote winners. At the same time, any move away from the runoff approach should be exercised with extreme care in order that the essential principle of direct election is not destroyed.

The amendment we propose is designed to accomplish these objectives. We are confident that, if adopted, it will not only strengthen the direct vote proposal but also will enhance its chances of being ratified by three-fourths of the State legislatures.

Importantly, our proposal does not differ from Senate Joint Resolution 1 where at least one candidate receives 40 percent or more of the

popular vote. However, instead of going immediately to a runoff election if no candidate polls the required 40 percent, the popular vote winner will still be elected provided he obtains a majority of the electoral vote. The contingency or runoff election before a joint session of Congress occurs only if the above conditions are not met.

Significantly, if this proposal had been incorporated in the Constitution from the outset, with all other things remaining equal, no presidential election in our Nation's history would have been decided by Congress. In fact, the popular vote winner would have become President in every election. Even under Senate Joint Resolution 1, a popular vote runoff would have been required in the 1860 election where Abraham Lincoln received only 39.9 percent of the popular vote. Under our plan, Lincoln automatically would have become President since he received a majority of the electoral vote.

Two important functions are served by this amendment. First, it raises a substantial barrier to minor party candidates by requiring them to get at least 20 percent of the popular vote as well as requiring them to poll or divert enough electoral votes from the popular vote winner in order to prevent him from getting a majority of such vote. It does not offer the incentives of the present system where, under the 12th amendment, a third-party candidate participates in the contingent runoff election in the House of Representatives. *Under our proposal only the two highest vote getters will be considered in the election by a joint session of Congress.*

Second, the geographical base provided by a majority of the electoral vote will add a significant factor of legitimacy to the popular vote winner who receives less than 40 percent of the popular vote.

In considering this plan, it should be kept in mind that the electoral vote cannot put the popular vote loser or runner-up in the White House. In other words, a repeat of the 1888 election, where Benjamin Harrison became President with fewer popular votes, is not possible under our system. Of course, it will still be true that Congress may elect the candidate with fewer popular votes than his opponent. But in such a case, it seems to us that the will of the people is more accurately reflected through the vote of their representatives than through the arbitrary allocation of electoral votes under the unit rule. In addition, where no candidate has a clear-cut preference among the voters, it would seem desirable that whoever is elected should start his term with at least a working majority in Congress.

Selection by the Congress in joint session with each Member having one vote lessens the chance, we believe, of any maneuvering casting suspicion on the legitimacy of the outcome. In contrast to the present situation where each State has one vote in the House of Representative, an independent obligation is placed on every Member to exercise his vote in a responsible manner.

In the event that Congress must elect the President, our amendment provides that the newly elected Congress shall meet in a special session on the first Monday in December. To do so will cut in half the time lag between the second election and the present November election date which would otherwise prevail if the joint session is held immediately after Congress assembles on January 3. A 2-week period is provided from the November election before the results must be declared. This should be adequate time for completion of recounts and ballot challenges. If Congress determines that more time is needed, the initial election may be moved back from its traditional November date. By narrowing the time between the first and second elections, we are confident that the climate and opportunity for backroom bargaining will be substantially reduced. By moving the second runoff election to the first week in December the President-elect will be given more opportunity to organize his administration.

Threat of Party Fragmentation

For many, substantial weakening of the two-party system would be a serious, if not crippling blow to the functioning of the American political process. A stable dual-party structure serves many vital tasks of our democracy. Two stable parties provide the continuity of program needed to accomplish major changes in a relatively slow-moving political process. Most important, with only two parties, there is a need to create a real majority or large plurality for electoral victory. This fact requires that each party provide a political program that attracts a broad spectrum of voters.

Of course, ours is a society that is in need of change and innovation in its policies and institutions. Many believe that the two-party system and barriers to third parties have impeded these needed reforms. However, historical precedent seems convincing that reform, if it is to be successful, is best directed within a major party. Only the major parties offer the strength of broad support and the structure of continuity that is a prerequisite for meaningful change. This is not to say,

however, that the parties do not require major internal reform in order to allow change and challenge from within.

It is difficult to gather the support of large and differing groups in any party for significant change; but this is the cost of governing by consent rather than decree. The only other alternative in such a diverse society as ours is political fragmentation. And fragmentation without coercion will be stagnation.

In short, our political system desperately needs all its institutions that moderate conflict and provide for the means to change. The enactment of Senate Joint Resolution 1 would alter the Presidential elections to encourage third parties and undermine one of the key institutions of conflict resolution and change in our system. We believe our modification of Senate Joint Resolution 1 combines the best features of the electoral and popular vote systems. It encourages accommodation while insuring that the President-elect directly reflects the vote of the people. While no Presidential election system can adequately encompass every interest in our complex society, we respectfully suggest that Senate Joint Resolution 1 as amended by our proposal offers the best alternative.

Summary Analysis

The amendment retains the basic requirement in Senate Joint Resolution 1 that a presidential candidate must receive 40 percent of the popular vote in order to be elected. However, instead of having a popular runoff if no candidate gets the necessary 40 percent of the popular vote or a majority of the electoral vote then the newly elected Congress sitting in a special joint session shall elect the President from among the two highest popular vote recipients. The special session will be held on the first Monday in December in the manner provided for by Congress. The election shall take place immediately after the assembling of Congress in joint session and after a quorum, consisting of three-fourths of the Members of Congress, has been attained. By a record vote the candidate receiving the most votes shall be elected President.

The special session shall be convened only for the purpose of electing the President and will no cut short any pending regular session or affect the powers or term of office of Members of Congress assembled for such a regular session.

An additional provision is included which allows Congress to set a presidential election earlier, but not later, than the present date for such elections. In addition, the results of the popular election must be declared by the third Tuesday after the first Monday in November. Since provision is made that a runoff election in Congress shall be held on the first Monday of December, at least a week will elapse between the formal declaration of the results and the second election. In the event that Congress determines there is not adequate time for recounts between the present November election date and the deadline for declaring the results an earlier date may be set for the initial election.

Robert P. Griffin.
Joseph D. Tydings.

91st Congress
S.J. Res. 1 2nd Session

In the Senate of the United States

Amendments

Intended to be proposed by Mr. Griffin (for himself and Mr. Tydings) to S. J. Res. 1, a joint resolution proposing an amendment to the Constitution to provide for the direct popular election of the President and Vice President of the United States, viz:

Beginning with line 20, page 2, strike out all to and including line 4, page 3, and insert in lieu thereof the following:

"Sec. 3. The persons joined as candidates for President and Vice President having the greatest number of votes shall be declared elected President and Vice President, if such number be at least 40 per centum of the total number of votes certified. If none of the persons joined as candidates for President and Vice President shall have at least 40 per centum of the total number of votes certified, but the persons joined as candidates for President and Vice President having the greatest number of votes cast in the election received the greatest number of votes cast in each of several States which in combination are entitled to a number of Senators and Representatives in the Congress constituting a majority of the whole number of Members of both Houses of Congress, such persons shall be declared elected President and Vice President. For the purposes of the preceding sentence, the District of Columbia shall be considered to be a State, and to be entitled

to a number of Senators and Representatives in the Congress equal to the number to which it would be entitled if it were a State, but in no event more than the number to which the least populous State is entitled.

"If, after any such election, none of the persons joined as candidates for President and Vice President can be declared to be elected pursuant to the preceding paragraph, the Congress shall assemble in special session, in such manner as the Congress shall prescribe by law, on the first Monday of December of the year in which the election occurred. The Congress so assembled in special session shall be composed of those persons who are qualified to serve as Members of the Senate and the House of Representatives for the regular session beginning in the year next following the year in which the election occurred. In that special session the Senate and the House of Representatives so constituted sitting in joint session shall choose immediately, from the two pairs of persons joined as candidates for President and Vice President who received the highest numbers of votes cast in the election, one such pair by ballot. For that purpose a quorum shall consist of three-fourths of the whole number of Senators and Representatives. The vote of each Member of each House shall be publicly announced and recorded. The pair of persons joined as candidates for President and Vice President receiving the greatest number of votes shall be declared elected President and Vice President. Immediately after such declaration, the special session shall be adjourned sine die.

"No business other than the choosing of a President and a Vice President shall be transacted in any special session in which the Congress is assembled under this section. A regular session of the Congress shall be adjourned during the period of any such special session, but may be continued after the adjournment of such special session until the beginning of the next regular session of the Congress. The assembly of the Congress in special session under this section shall not affect the term of office for which a Member of the Congress theretofore has been elected or appointed, and this section shall not impair the powers of any Member of the Congress with respect to any matter other than proceedings conducted in special session under this section.

On page 3, line 16, immediately after the period, insert the following new sentence: "No such election shall be held later than the first Tuesday after the first Monday in November, and the results thereof shall be declared no later than the third Tuesday after the first Monday in November of the year in which the election occurs."

Individual Views of Mr. Griffin

In addition to my reservations outlined in "Separate Views" concerning the runoff election, I am concerned because Senate Joint Resolution 1 does not require that uniform election procedures and voter qualifications be established as part of the plan to elect the President by direct popular vote.

To make each vote cast for President anywhere in the United States equal to every other vote is a commendable goal. But it would make no sense under such a system to count the votes of 18-year-olds in some States, 19-year-olds in others, and 21-year-olds in yet others. Of course, the current attempt to lower the voting age to 18 by statute may provide a partial answer—if the statute is held to be constitutional by the Supreme Court.

Furthermore, it would be inconsistent and self-defeating to leave each State with jurisdiction, as Senate Joint Resolution 1 does, to determine which candidates for President will appear on the ballot and the circumstances under which ballots for President will be counted.

During the committee's deliberations, I offered amendments to make sections 2 and 4 of Senate Joint Resolution 1 read as follows:

> **Section 2.** The Congress shall prescribe the qualifications for electors of President and Vice President in each State and the District of Columbia, which qualifications shall be uniform throughout the United States.
>
> **Section 4.** The Congress shall prescribe, by provisions of law uniform throughout the United States, the days for such elections, the requirements for entitlement to inclusion on the ballot therein; the times, places, and manner of holding such elections within each of the several States and the District of Columbia; the times, places, and manner in which the results of such elections shall be ascertained, certified and declared; and the manner in which and the period for which ballots cast in such elections shall be preserved.

Even under the present election system, much attention has been centered in recent years on providing additional guarantees for insuring the right to vote in the presidential contest as well as other elections. Adoption of the anti-poll tax constitutional amendment, the Voting Rights Act of 1965—with its provisions for suspending the use of literacy tests and for sending Federal examiners to local districts—and the 1970 amendments to the Voting Rights Acts extending the ban on literacy tests, lowering the voting age to 18 and providing uniform residency requirements are significant examples of the trend toward establishing uniform national standards.

In the course of the current debate on the various electoral reform proposals, support for extending Federal jurisdiction over the procedures and voting qualifications for presidential elections was evidenced by opponents as well as supporters of the direct popular vote.

For example, in the Senate hearings, testimony from the American Jewish Congress, which opposes direct election of the President, emphasized that if the popular vote proposal were adopted, Congress should have the "power to set all of the requirements for the election of the President."

Clarence Mitchell, Washington director of the NAACP, pointed out to the House Judiciary Committee that the NAACP favored the direct election approach "only if there are adequate safeguards against all forms of discrimination that deny the ballot to our citizens because of race." Later, in response to questioning from Congressman Biester, Mr. Mitchell indicated that if the popular vote amendment were to include a provision giving Congress authority to set voter qualifications a "substantial part" of the NAACP's reservations about this plan would be satisfied.

Some may argue that a serious burden would be placed on State and local officials if different standards are established for Federal, as distinguished from State and local elections. However, after examining the election laws in the 50 States, Congress should be able to pattern Federal standards along the lines of the most effective and common State legislation, thus minimizing disruption of State and local elections. In fact with respect to vote counting procedures, the American Bar Association stated in its testimony before the House Judiciary Committee that "[t]here are now procedures in the various States for certifying the results of popular elections for other offices which could be adapted to a system of direct election of the President."

In light of the premise on which the direct popular vote is founded—that is, making every vote count—it is essential to guard against any device which would tend to dilute the vote of any individual or class of individuals. To leave each State with jurisdiction to determine voter qualifications and inclusion on the ballot would invite discredit on the claim that every citizen has an equal opportunity to participate in the election of the President.

Consequently, I believe sections 2 and 4 of Senate Joint Resolution 1 should be amended in accordance with the amendments which I proposed in committee. The result of adopting such amendments will be to confirm the public expectation of equal participation in the selection of a President.

Robert P. Griffin.

Executive Summary of the Minority View

- A radical change in the way we elect our President would have far reaching consequences for our entire system of government. As John F. Kennedy said in defending the Electoral College: "It is not only the unit vote for the Presidency we are talking about but a whole solar system of government power. If it is proposed to change the balance of power of one of the elements of the system, it is necessary to consider the other."
- All of the unique features of our Constitution–not just the Electoral College–are explicit departures from simple majoritarianism. Federalism prevents the smaller states from being dominated by the larger states. Bicameralism bases the House of Representatives on population but the Senate on equal representation of the states. Separation of powers allows great authority to be invested in a non-elected judiciary. Therefore, if the Electoral College is to be abolished because it is in consistent with simple majoritarianism, what reason is there for retaining these other institutions? Conversely, if a departure from simple majoritarianism is to be tolerated in the rest of the federal government, why should it not be tolerated in the Presidency?
- In fact, the Constitution intended to replace the idea of simple majoritarianism with the principle of majority rule protecting minority rights. It insists that any majority, to be legitimate, must be reasonable. The Electoral College helps to do that. In other words, it promotes constitutional majorities, rather than mere numerical majorities.
- To risk tampering with our entire political system, which has for centuries been the most successful frame of government in history, places a tremendous burden of proof on those who advocate scrapping the Electoral College.
- That burden of proof has not been met, because direct election of the president would have serious consequences. It would:
    - destroy the two party system and encourage the formation of splinter parties-extremist parties, regional parties, single-issue parties (p. 49)

    - undermine the federal system by removing the states as states from the electoral process (p. 54)
    - remove a key institution that supports separation of powers (p. 58)
    - radicalize public opinion and endanger the rights of minorities by removing incentives to compromise (p. 59)
    - create a temptation to electoral fraud (p. 64)
    - lead to interminable recounts and challenges (p. 66)
    - necessitate national control of every aspect of the electoral process (p. 68)
- The weakening of our two party system is the most critical defect of direct election of the president. The Electoral College promotes two parties that are broadly based and take into account a spectrum of interests and points of view. The reason is that in order to win the presidency a party must win a majority of the Electoral College. This means that it must reach out beyond its partisan or geographical base to many states, and within those states it must appeal to a variety of minority interests. To the greatest extent possible, the two parties try to include all, exclude none. Electoral majorities are geographically dispersed and ideologically moderate. The victorious party therefore is capable of governing. This is an important reason why the American system of government has been so stable and successful in comparison to countries in which tenuous majorities have to be negotiated among several factious splinter parties.
- Under a system of direct election, with a run-off provision in case one of the candidates received less than 40% of the vote, there would be a proliferation of single issue, regional, or extremist parties, not to mention demagogues and wealthy media candidates. There would be no incentive for voters not to "waste" their votes on these parties, as there is now, because there would usually be a second round of voting.
- This presents a real danger. Under our current system, there is a process of mediation, bargaining and compromise that takes place during the party primaries and conventions in a fairly open way. In a multi-party system, this task of coalition building would be

relegated to a handful of candidates and their managers in the period between the election and the run-off. This would be less democratic, less open, and would shift more power to extremists.

- Direct election based on simple majoritariansim would eliminate the rationale for state delegations to the national conventions, and indeed for national conventions themselves. It would likely lead to national primaries in place of conventions. This would be the final death knell for a federal system in which the states have an important role to play.

Direct Popular Election of the President

August 14, 1970—Ordered to be printed

Senate Judiciary Committee

Minority Views of Messrs. Eastland, McClellan, Ervin, Hruska, Fong, and Thurmond

I think a case can be made for the proposition that direct election, if it passes, will be the most deeply radical amendment which has ever entered the Constitution of the United States.—Charles Black, Henry Luce Professor of Jurisprudence, Yale Law School

I. Introduction

No more important business has come before the Senate in recent years than the consideration of our system of presidential election. Among the proposals for reform now being entertained are those which recommend moderate change, those which recommend extensive alteration, and those which demand complete abolition. We believe that the Judiciary Committee, in recommending the destruction of the electoral-vote system in favor of direct election, has embraced a scheme that will adversely affect the entire constitutional and political structure of the United States.

We realize that the present system has its defects. We believe, however, that remedies are available short of its wholesale destruction. In his statement in opposition to direct election, former Attorney General Nicholas De B. Katzenbach commented:

> I strongly feel that on a matter so basic to the confidence and structure of the country, we ought not to abandon the familiar and workable for the new and untried without the clearest demonstration of need. In my judgment, no such demonstration has been made. W should not substitute untried democratic dogma for proven democratic experience.

Direct election of the President, we believe, would—

> Destroy the two-party system and encourage the formation of a host of splinter parties;
>
> Undermine the Federal system by removing the States as States from the electoral process;

Remove an indispensable institutional support for the separation of powers;

Radicalize public opinion and endanger the rights of all minorities by removing incentives to compromise;

Create an irresistible temptation to electoral fraud;

Lead to interminable electoral recounts and challenges;

Necessitate national direction and control of every aspect of the electoral process.

How, it will be asked, could an idea which enjoys such widespread popular support be so dangerous? The answer, we believe, is to be found in an examination of certain influences which have attended the current debate over electoral reform.

It must be acknowledged, first, that direct election is a simple and easily communicable idea. That fact alone may account for its great popularity and for the widespread and uncritical support it has had from the communications media. Simplicity in the governance of human affairs, however, is not always a virtue; nor is it the distinguishing characteristic of this 200-year-old Republic which seeks to secure the blessings of liberty for 200 millions ofpeople. Human hopes and fears are complex; politics is complex; and the Constitution is complex. Still, simplicity has its charms, and not the least of them is the capacity to conceal danger.....

Burden of proof

....It is well known that the framers deliberately made the process of constitutional amendment a complicated and lengthy matter. They did so on the wise assumption that men can seldom be absolutely confident about the full range of consequences which may flow from even a seemingly minor alteration in the Constitution. Those who would amend the Constitution, therefore, are properly obliged to demonstrate that their proposal is salutary, not only for some apparent immediate purpose, but for the permanent and aggregate interests of the Nation.

The proponents of direct election, we believe, have not only failed to meet this obligation; they seem scarcely to be aware of it at all. Having fallen victim to the very forces which obscure the dangers of direct election from the public eye, they have grievously underestimated

what is at stake in the matter of electoral reform. They have undertaken the belief that the alteration is a mere housekeeping detail. With invincible innocence, they have reduced the manifold considerations which attend electoral reform to only one—the desire for a mathematical purity—without understanding what is implied by the application of "one-man, one-vote" to presidential elections. They would thus alter the most successful frame of government in history on behalf of a future the barest outlines of which can be only dimly perceived. Mr. Richard Goodwin, former advisor to President Kennedy and Johnson, was quite correct when he testified that it is here proposed "for the first time to amend the Constitution simply because we think something might go wrong at a future date." Mr. Goodwin further detailed his opposition to direct election as follows:

> We will exchange a mechanism which is clumsy but has worked well for an ideal construction of political theory whose consequences can't be foreseen. This, it seems to me, places a heavy burden of proof on the proponents of the measure, for it is difficult to predict the results of structural change in our democratic institutions. It is not enough to demonstrate that direct election will probably be an improvement. It must be shown beyond all reasonable doubt that the adverse consequences which are predicted by many, including myself, will not occur. I do not believe that this burden of proof can be sustained.

No other constitutional amendment to our knowledge, in our own time or in the entire history of the Republic, has been put forward with such an inadequate demonstration of what it might entail.

The good intentions of the proponents are not in issue here. What is in issue is the wisdom of direct election and the adequacy of the argument made on its behalf. It is not sufficient for the partisans of direct election to argue that the Electoral College is somehow defective. All modes of election are less than perfect, all provide certain benefits at the expense of certain other. What has bothered us in the current discussion is the unquestioned assumption that the alleged benefits of direct election can be had without paying a price, and the equally strong and equally unquestioned assumption that the alleged faults of the Electoral College are without redeeming merit. The partisans of direct election must prove that their proposal is meritorious both as to the removal of what they understand to be extant defects, and as to the avoidance of undesirable effects we

believe their scheme will produce in its own right. On both counts, they have come up short. They have failed to make a case for the profound alteration in the Constitution embraced by their proposal.

Accordingly, we recommend to the Senate that the proposal be decisively rejected.

Radical Nature of Direct Election

The radical nature of direct election, we have suggested, has been obscured by the narrow constitutional perspective of its proponents. The fact is nowhere better revealed than in the majority report, which is interesting more for what it does not say than for what it does. It makes no mention, for example, of the relation between the two-party system and presidential elections; it makes no mention of nominating procedures, or of any of the other processes which must necessarily precede any meaningful election contest; it makes no mention of the federal system and the importance of the States as States having a say in the selection and election of the Presidents; and it makes no mention of the way in which the Electoral College shores up the separation of powers. It makes no mention, in short, of those manifold institutions, laws, customs, and practices which have grown up in response to presidential elections over the past 150 years; nor does it reveal the slightest awareness that the Electoral College bears any relation to the rest of the Constitution. The report, taken as a whole, proceeds as if presidential elections took place in a vacuum and assumes, without supporting argument, that the mode of election can be changed while everything else remains constant.

This strange abstraction from political reality derives from the attempt to extend the logic of the "one-man, one-vote" decisions to presidential elections—a dangerous, if well-intentioned enterprise that will ultimately destroy the American constitutional system. Even if "one-man, one-vote" were unobjectionable as applied to local, State, and congressional offices, its application to presidential elections would not follow as a matter of course. For, there are constitutional and political questions which must be raised regarding the Presidency which need not be raised in the consideration of lesser offices. Such questions, however, will never be raised so long as the terms of debate are confined to the mathematical categories imposed by the "one-man, one-vote" criterion; and so long as such questions are not raised, the truly radical nature of direct election will remain forever obscured.

What is required is a comprehensive constitutional perspective, one which sees presidential elections as something more than a ritualistic ordeal by numbers. The selection of a singe man for a single office is not the only purpose which has been, or which ought to be, served by our electoral system. For the Presidency is not only a constitutional office; it is a highly political office which exercises a massive and pervasive influence throughout the entire political structure, right down to the local level. Thus, a debate about electoral reform, if properly conducted, will soon or late touch upon every institution with which the Presidency is connected by law or custom, by design or accident. As John F. Kennedy said in defending the Electoral College on the floor of the Senate in 1956:

> It is not only the unit vote for the Presidency we are talking about, but a whole solar system of governmental power. If it is proposed to change the balance of power of one of the elements of the system, it is necessary to consider the others.

This larger perspective, which understands the Presidency—and hence the mode of presidential election—as only part of a comprehensive and grand design, dominated all previous discussions of reform. It has, however, been lost sight of in the current debate, both in Congress and in the country at large. The proponents of direct election have circumscribed the question of electoral reform so as to obscure the relation between the Electoral College and the rest of the constitutional and political structure. Seizing upon one goal in particular—that of giving every man a mathematically equal vote—they have proposed a drastic reform which, in order to achieve that goal, must reach ever outward to encompass matters scarcely intended to be dealt with at the outset. It is not surprising, therefore, that some of the early proponents of direct election are now beginning to have second thoughts about the panaceas of a plebiscite. They are beginning to see that the Electoral College cannot be isolated from the constitutional and political system in its entirety, and that the repair of one part of the system may entail a tinkering with the rest. This growing awareness of the dangers of direct election was underscored last fall by *Congressional Quarterly*:

> House passage September 18 of the proposed constitutional amendment to abolish the Electoral College could mean the beginning of profound changes in American political institutions, traditions, and practices. *Just what those changes would be was largely a matter of opinion* during House debate. [Emphasis supplied.]

Clearly, there is more to direct election than its proponents would have us believe. Where the House was ambiguous, we must be forthright. Constitutional duty requires that we penetrate the screen of "one man, one vote."

III. Danger of Applying "One Man, One Vote" To the Presidency

It is not our purpose to criticize the recent reapportionment decisions except insofar as the attempt is made to apply them to presidential elections. It is their general rational rather than a particular result in a particular case which interests us here. Their general argument is that the Constitution requires that the weight of interests be precisely and mathematically proportional to their numbers. Whatever its effect in particular cases, we are persuaded that this doctrine emanates from an understanding of representative government that is wholly at odds with the spirit of American politics.

Nothing could be clearer in the Framers' thought than their rejection of a merely numerical concept of representative government. If the Constitution stands for nothing else, it stands for the idea that mere numbers have no capacity to make legitimate that which is otherwise illegitimate—whether those numbers be 51 or 90 percent of the whole. All the unique features of the Constitution are explicit departures from simple majoritarianism. This is true of the federal system, which, among other things, prevents the less populous States from being engulfed by the more populous States; this is true of bicameralism, which divides legislative responsibilities between House and Senate on grounds other than those of population; this is true of the separation of powers, whereby, among other things, great power is invested in a nonelective judiciary; and this is true of the Electoral College, which incorporates the Federal principle and grants to each State, however small, a minimum weight of three electoral votes.

Reasonable majorities

These departures from strict mathematical equality where designed, jointly and severally, to prevent any group of men, whether a minority or a majority, from seriously or permanently interfering with the rights of others. The understanding which produced these unique constitutional features was summarized with characteristic economy and eloquence by President Thomas Jefferson in his first inaugural address.

He said: "The will of the majority is in all cases to prevail, but that will, to be rightful, must be reasonable."

By *reasonable* majorities, Jefferson meant those which, by the very manner of their composition, would be disinclined or unable to interfere with the rights of others. Since the Constitution is dedicated to securing equal rights for *all*, it follows that only those majorities are entitled to rule which respect the rights of those who do not agree with them. We may say that the Constitution, in whole and in part, is devoted to the creation and maintenance of reasonable majorities. In more familiar terms, we say that the Constitution is equally devoted to majority rule and minority rights. The central character of American politics requires that we be concerned not just with the *size* of the majorities, but with their *character*.

Accordingly, the crucial question in considering electoral reform is whether one method if election is better than another at creating *reasonable* majorities. One method might be better at obtaining a strictly numerical majority, but only at the price of failing to protect minorities; another might protect minorities very well indeed, but only at the price of frustrating a truly *reasonable* majority.

In presidential elections, which are politically and symbolically the most important elections in the country, the Electoral College attempts to strike a golden mean: it attempts to create numerical majorities which are moderate in character. It does this in part by granting a certain weight to numbers—hence greater representation for the more populous States. But it denies, quite properly, that numbers alone should be the exclusive criterion—hence minimum representation for the least populous States. The Electoral College seeks to satisfy qualitative—as well as quantitative—goals, among them:

—the desirability of supporting the federal system by giving the States as States a say in the selection and election of Presidents;

—the desirability of encouraging compromise among potentially antagonistic interests by seeing to it that compromises are worked out well in advance of elections and within geographically limited political areas;

—the desirability of representing certain interests whose only draw back is the want of great numbers;

—the desirability of placing institutional restraints upon the abuse of powers in the Chief Executive Office.

As we point out below, the Electoral College brings together all the distinctive elements of the American Constitution. It provides indispensable institutional support for the Federal system and the separation of powers. Moreover, it has through the years become inextricably intertwined with the two party system, and the national conventions, which carry out the Constitution's dedication to reasonable majorities in the everyday political process. To understand the Electoral College at all, it is necessary to understand it as the most important working part of an integral whole. The whole, as we have suggested, is devoted to the creation of reasonable majorities—majorities which represent the great diversity of the Nation without unduly interfering with minority rights. Such is no easy task, but none is more important to the survival of the Nation. The majority report, unfortunately, in reducing democratic processes to a mere "numbers game" understands neither the difficulty of the task nor its importance.

What's Wrong With Direct Election

We stated in the Introduction that direct election would

—destroy the party system and encourage splinter parties;

—undermine the federal system;

—alter the delicate balance underlying separation of powers;

—radicalize public opinion and endanger minorities;

—encourage electoral fraud;

—lead to interminable recounts and challenges; and

—necessitate national control of ever aspect of the electoral process.

We propose now to document these charges in detail.

Direct election would destroy the party system

It is generally agreed that our two-party system has been an indispensable aid in carrying out the dual purpose of American politics: majority rule with minority rights. It is also generally agreed that in a multiparty system either or both of these goals would be frustrated. Given the extent and variety of interests which compose this land, the maintenance of a two-party system is a remarkable feat. Indeed, the striking fact about American party politics is not that we have had a number of third-party movements, but that we have not had more

them. All third-party movements in U.S. history, taken together, account for only 5 percent of the total vote cast in presidential elections.

The two-party system, however is not a product of chance. Public opinion in this great and diversified land has no inherent tendency to divide itself into two, and only two, major political groupings. The ultimate causes of two-party politics are to be found in the requirements of the presidential election system under which parties have operated for nearly a century and a half. In the words of Prof. Richard McCormick, perhaps our foremost authority on the formation of parties in the 1820's and 1830's, "In broad terms, it was the contest for the Presidency that shaped this party system and defined its essential purpose." From the very moment of their inception, the major parties as we now know them had as their central organizing purpose the capturing of the Presidency. In order to carry out that goal, the parties had to contend with three constitutional requirements:

(1) The Constitution established a single office to be held by a single man. That is, it established a winner-take-all on the national level.

(2) It required a majority of electoral votes for victory.

(3) It distributed a fixed number of electoral votes to each State.

(4) In addition to these, there was a fourth requirement, which was a product of State law: the custom within each state of awarding electoral votes according to the unit rule.

These four requirements—a unitary Presidency; the necessity of carrying a majority of electoral votes; the distribution of electoral votes according to States; and the awarding of electoral votes within the States on the basis of winner-take-all—are chiefly responsible for the most important distinctive features of the American party system:

(1) We have only two major parties. Third party movements have been sporadic and, on the whole, ineffectual.

(2) The major parties, often called "national" are in fact coalitions of 50 State parties; the State parties, in turn, are coalitions of county and local party organizations.

(3) Both major parties include a wide range of interests and a broad spectrum of opinion.

Let us now consider briefly how these features are related to the requirements of the present electoral system.

The need for broadly based parties

Because a majority of electoral votes is required for victory, a party seeking the Presidency must expand its base of support beyond a narrow geographical region. And because electoral votes are apportioned according to the Federal principle, a party must campaign in all or most of the States. The States, thus, are the decisive political battlegrounds. The States, of course, are free to award their electoral votes as they see fit. All States, except one, however, follow the practice of awarding electoral votes by the unit rule, winner-take-all; and they have followed the practice without notable exception for 150 years. Whatever else may be said about the custom, pro or con, it cannot be denied that winner-take-all has had a great impact on the character and structure of our political parties. Because of winner-take-all, a party is under a strong inducement to extend its platform as widely as possible within each State; it must expand its base of support to carry a popular plurality. Since both major parties face the same requirement, both must campaign in most of the same places before most of the same voters. Both must be hospitable to a wide range of minority interests which might otherwise be excluded from electoral competition. Every minority, in turn, is under an inducement to moderate its views to make them compatible to *both* major parties, at the risk of having to form a separate party.

Winner-take-all, in short, encourages both parties to include everyone and to exclude no one. Both, of course, have traditional bases of support which remain loyal over a considerable period of time; but with rare exceptions, these are seldom sufficient to provide the margin of victory. In most States most of the time, neither party can afford to alienate any sizable interest group; both are forced to seek the support of those who are not traditionally wedded to either party. Since both parties face the same requirement in all States, an electoral majority, when it does emerge, is both geographically dispersed and ideologically moderate. The victorious party is therefore capable of governing. The Electoral College, in sum, produces truly competitive, State-based, moderate political parties.

Why, it will be asked, are there only two such parties? The answer is that the same inducements which produce broadly based, competitive, moderate national parties also operate to confine third parties to a

narrow regional base. In order to compete with any hope of success outside a regional base, a third party must be able to outpoll the major parties in States where the major parties are strongest—a highly unlikely occurrence. The same difficulty is presented even within the regional base of the third party, for the major parties, or at least one of the, may be found competing there also.

Direct election would encourage splinter parties

Under direct election, most of the incentives toward moderate, broadly based, two-party competition are removed. It is true that a sizable popular plurality—40 percent—would be required for victory. But that, without more, is insufficient to sustain two-party competition of the kind we have known. Under direct election, it is not the distribution of the vote which matters, but only the size. Votes would be sought without regard to the States which happened to contain them. Interest groups would face no necessity to moderate their views or to compromise with other groups within their resident States. Candidates, in turn, would face no necessity to present a broadly based platform within each State. Indeed, there would be little necessity for a candidate to campaign in most, or even many, States. He would be encouraged to build a numerically sizable following without regard to its character. Since the same strategy would be followed by many others at the same time, there would be a tendency toward a multiplicity of single-interest splinter parties, each uncompromisingly attached to a particular candidate. Only a few might realistically expect to win; but all would hope, at the very least, to maximize their bargaining by accumulating as many popular votes as they could, if for no other reason than to prevent someone else from winning.

As Mr. Richard Goodwin told the Judiciary Committee:

To see that this is more than a theoretical possibility let us look at the experience of New York. That State is as close to a miniature nation, in terms of diversity of population and interests, as any in the Union. It is as large as some countries. New York now has four parties. The two smaller parties—liberals and conservatives—cannot carry a single city or borough, but within a State that does not matter. Popular vote is everything in statewide contests. The result is that both minor parties are important, and can make a decisive difference in a close race. They behave on a State scale, exactly as we speculate that minor parties might act on the national scale: offering endorsements, making deals,

and running their own candidate. For their members a separate party has proved the surest route to real power. If we move to direct election, there is no reason whatsoever why the same will not be true at the national level. In fact, operating just in New York both the liberal and conservative parties receive more votes than the total margin of national victory in two of our last three presidential elections.

The proponents of direct election may reply that the 40 percent requirement would mitigate against the multiplication of parties. It must be noted, first, that proponents of direct election originally favored a 51 percent requirement. That was reduced to 40 percent precisely because they doubted whether anyone could get 51 percent under direct election. That concession, however, may prove fatal to the proponents of direct election, because it confirms one of our worst fears, namely, that direct election will undermine the two-party system.

Moreover, we cannot but think it somewhat disingenuous to condemn the Electoral College for being "undemocratic" while at the same time embracing a 40 percent requirement under direct election. For that figure, turned upside down, says that the man who is not the choice of 60 percent of the electorate shall be President. To this, proponents of direct election like to reply that under the present system, Presidents have been elected with less than a simple majority of the popular vote even while winning a majority of the electoral vote. What this argument fails to recognize is the essential difference between the size of a plurality and the manner of its composition. A 43 percent vote under direct election, for example (assuming it could be acquired), represents a very different kind of popular plurality from a 43 percent popular vote under the Electoral College. The popular vote is always widely dispersed geographically and ideologically and is distributed, moreover, throughout all the States. Thus, even when the winning percentage is less than a popular majority, it is still possible for the electoral vote majority winner to govern. Under the direct election scheme, which is indifferent to the way in which majorities are formed or where they are located, there is no guarantee that a winner will actually be able to govern.

The direct election proposal makes no provision whatsoever for any pre-election machinery capable of putting together a 40 percent coalition, or of insuring that the coalition will be truly representative of the Nation as a whole. The proponents of direct election assume that all else in the political process will go on pretty much as-is, that

the negotiation, compromise, and coalition now undertaken by the two major parties within the States will be performed in the same way. No argument is made, no facts are listed, to indicate how or why this would be the case. We are asked to take it on faith that everything will continue in the accustomed manner. Needless to say, we have strong reservations about that prospect.

Dangers of the Run-off

Our reservations about direct election in general are in every respect strengthened when we come to consider the runoff provision. The general tendency of direct election toward party splintering is reinforced by the runoff. With a runoff, it is not only possible, but probably, that many candidates will enter the presidential race. With a runoff, there is absolutely no incentive for any candidate to withdraw until after the first election. Many candidates would run, not necessarily with the hopes of winning, but with the hope of maximizing their party's bargaining position in between the first election and the runoff. The consequences are not pleasant to behold. In the words of Prof. Alexander Bickel of the Yale Law School:

> I think it altogether probable that under a system of popular election the situation would be as follows: the runoff would be, not an occasional occurrence, but the typical event. The major party nomination would count for much less than it does now—and might even eventually begin to count against a candidate. There would be little inducement to unity in each party at or following conventions. Coalitions would be formed not at conventions, but during the period between the general election and the runoff. All in all, the dominant positions of the two major parties would not be sustainable.
>
> This sort of unstructured, volatile multi-party politics may look more open. So it would be—infinitely more open to demagogues, to quick-cure medicine men, and to fascists of left and right. It would offer, no doubt, all kinds of opportunities for blowing off steam and for standing up uncompromisingly for this or that cause, or passionately for one or another prejudice. But people who think that our democracy would become more participatory fool themselves. Weaker, yes. More participatory in any real sense, no.

> While men continue to take varying positions on issues, compromise and coalition remain unavoidable. The only question is when and how coalitions are formed and compromises take place. Coalitions are now formed chiefly in the two-party convention, which are relatively open and accessible and can certainly be made more so. In a multi-party system, the task of building coalitions will be relegated to a handful of candidates and their managers in the period between the election and the run-off. The net result will simply be that the task will be performed less openly, and that there will be less access to the process. Governments will be weaker, less stable and less capable than our governments are now of taking clear and coherent actions. Where multi-party systems have been tried, they have been found costly in just these ways, and they have scarcely yielded the ultimate in participatory democracy or good government. Nor have they lasted.

We are persuaded that direct election would encourage a disastrous multiplication of political parties.

Direct election would destroy State political power

One of the distinctive features of the American party system is that our parties are essentially State-dominated: the so-called "national" parties are, in fact, coalitions of State parties; and the State parties, in turn, are coalitions of county and local party organizations. The major parties are thus organized from the grassroots up—a feature which enables them to accommodate a wide diversity of competing interests at the state and local level, and helps to keep elected officials responsive to State and local needs. What brings the hundreds, perhaps thousands of State and local party units together is the attempt, every 4 years, to capture the Presidency. It is the role of the States as States in that process which accounts for the fact that our "national" parties are State-based. And this structure of the parties reinforces the power of the States as members of the Union.

The most obvious symbol of the State orientation of the major parties is the national convention. Delegates come to the conventions as representatives of their States, and voting power is allocated in proportion to electoral vote strength. Direct election, of course, would destroy the utility of having delegates selected or votes distributed in this manner. There would be no reason whatsoever for the States as such to be represented; delegates would most likely represent interest

groups. But without the states to act as mediators of compromise, there would be no way to determine beforehand what groups should be represented, or in what proportion. It is doubtful, indeed, whether there would be conventions at all under direct election. The logic of direct election leads inexorably toward presidential primaries, perhaps regional, but most likely national in scope. One could imagine without much difficulty a series of regional primaries, and, thereafter, a series of national primaries preceding the first election—to which must be added the likelihood of a run-off election after that.

It is apparent that the role of the States in the Electoral College contributes greatly to national stability; it also contributes greatly to the cohesion of State party organizations. Cohesion—or the lack of it—will depend on may other factors as well, such as the strength and appeal of State and National party leaders, the volatility of issues at any given time, and the strength of the opposition party. But the importance of cohesion in State party organizations is obvious. In most states, most of the time, a single party organization is able to coordinate presidential, gubernatorial, senatorial, congressional, and other campaigns and can thus act as a mediator among the conflicting aims of politicians and interest groups. But once the States as States are removed from the presidential election process, a strong inducement toward State party cohesion will also be removed. We cannot with any confidence predict what new forms party organization might assume; we can confidently predict, however, that a significant restructuring of State and hence national party organizations would take place. That restructuring, in turn, would alter in unforeseen ways the power of the States to carry on political business, especially in relation to the National Government. We simply do not know with any precision how much of a Governor's or a Senator's or a Congressman's power derives from his State's role in the Electoral College. We may be certain, however, that it is often considerable, and that Presidents are influenced by it.

But for the Electoral College, we might have had very different, party organizations; and If we were at liberty to begin all over again, we might well wish to go about it differently. But we are now living in 1970 and we are carrying on political business according to laws, customs, and habits which have grown up around the attempt to carry a majority in the Electoral College. An alteration in the mode of presidential election will necessarily affect the character of every

institution related to the Presidency, just as it will affect the attitudes and expectations which accompany a 150-year-old tradition. To pretend that such things are not relevant, or to push them aside for "later" consideration, or to say that they must be abolished because they do not comport with the mathematical abstractions of "one-man, one-vote," is to indulge a naiveté that borders on the irresponsible.

The Electoral College asks, in effect, "Who is Maine's choice for President?", "Who is Kentucky's?", "Who is Texas's?", "Nebraska's?", "California's?", "Hawaii's?", and so on. In so doing, the Electoral College shores up the power of the States in the Union. The commonly voiced argument that the Presidency is a "national" office and therefore demands a "national" as applied to the United States must include the most distinctive feature of our Constitution, a Constitution which established, in Mr. Justice Chase's famous phrase from his opinion in *Texas vs. White*, 74 U.S. 700 "an indestructible union of indestructible states." Some have lamented that fact, but no one can deny its significance. Nor can any proposal to reform the presidential election system ignore that fact without damaging the entire constitutional balance. What should be represented in the presidential elections are not only everyday political, social, and economic interests, but that paramount interest which is the precondition for the effectuation of all others: the preservation of those institutions which are essential to the maintenance of political equality. Chief among there, surely, is the federal system.

The details of the Philadelphia Convention have long since receded into the textbooks, but the substance of the Framers' work endures 200 years later in the structure of our governmental institutions. The key compromise at that convention was the creation of the federal system itself. This was not simply a compromise between large and small States on the matter of representation. It was a compromise on the *nature* of the Union, on the relationship between the National Government as a whole and the States as a whole. The Senate, with equal representation, was to represent the people as citizens of *States*. The House, with representation proportioned to population, was to represent the people as citizens of the *Union*. The bicameral structure of Congress, however, was not the only result of this great compromise. The *federal principle was incorporated within the Presidency itself*, by the involvement of the States in the presidential election process. The result is a delicately counterbalanced structure which, in the words of Prof. Alexander Bickel,

> cures the inevitable under-representation of the large States in Congress, while at the same time requiring a sectional distribution of the vote that elects the President, thus making possible combinations that also give advantage to the smaller States. This is just a long way of saying that the genius of the present system is the genius of a popular democracy organized on the federal principle.

The proponents of direct election may reply that they bear no animus against the federal system; that, on the contrary, they support it by recommending retention of State equality in the Senate. State equality in the Senate is certainly a strong underpinning of federalism, but with the great powers at the disposal of the President, would it not be foolish to rely upon the Senate alone as the bulwark of the federal system? Certainly, the Framers did not think that equality of representation in the Senate would be sufficient—which is why they decided to give the States a role in the selection of Presidents, a role that has been reinforced by our federally structured political parties.

If one day, someone comes forward to say that it is surely an absurdity to give New York and Hawaii equal representation inn the Senate; that a recent computer study has conclusively demonstrated that a citizen of New York is disfranchised 33 times relative to a citizen of Hawaii, and that, in so important a matter as the passage of national legislation this is tantamount to a denial of equal protection of the laws—when that day comes, what argument can the proponents of direct election make to defend State equality in the Senate?

The proponents of direct election must be asked how they propose to defend the federal system in principle. It is one thing for them to say that they favor the retention of the federal system; it is quite another for them to make an argument for federalism on the basis of the logic which impelled them to propose direct election in the first place.

The federal system is an explicit departure from the doctrine of mere numerical majorities, from the doctrine of "one-man, one vote." If no departure from that doctrine is to be permitted in the Presidency, by what reasoning is it to be defended in the federal system? Conversely, if it is to be tolerated in the federal system, why should it not be tolerated in the Presidency?

Direct election would undermined the separation of power

One of the least discussed but most dangerous aspects of direct election is its tendency to undo the delicate balance among the three branches of the National Government. Proponents of direct election may argue that their proposal will have no effect upon the separation of powers, but we have nothing more than their unsubstantiated assertions that this will be the case.

Separation of powers is rightly and most commonly thought of as referring to the distribution of functions among the executive, legislative, and judicial branches; but the manner of that distribution exists in part by virtue of the balance which was struck between the States as a whole and the National Government as a whole. Among the considerations weighed by the Framers in designing the Presidency was the desirability of providing the President with a constituency essentially independent from that of Congress and that of the States. The purpose of an independent constituency was forthrightly stated: to give energy to the executive, to avoid that disunity and frustration which might arise if the President were overly indebted to Congress or to the States for his election or reelection. But there was an equally strong desire to prevent the President from abusing the great powers of his office. This latter desire was carried out, first, by involving the States in the election process; and second, by distributing governmental powers at the national level, chiefly as between the two dominant branches. In practice, the balance of power between the executive and legislative branches has sometimes rested with the White house, sometimes with Congress, and sometime—most frequently—somewhere in-between. The Constitution is content to remain flexible on this point; but its flexibility is not wholly subject to the contingencies of the moment. The balance can and does shift back and forth without adversely affecting he principle of separation.

Under direct election, there is a strong likelihood that the entire constitutional balance will come undone. For there is more to the relationship between President and Congress than the formal separation of powers on paper will reveal. Senators and Representatives are members of political parties, and on the national level parties derive what unity they have from the attempt to carry a majority in the Electoral College. Insofar as the future under direct election can be foreseen at all, it is clear that there will be a radical restructuring of State and national party organizations. Just as it is difficult to say with

precision how much of a State's power derives from its role in presidential elections, it is difficult to say how much congressional influence with the President rests on the fact that Senators and Congressmen occupy positions of influence within State and national party organization. Once the States as States are excluded from the presidential election process, the subsequent restructuring of State and national party organizations will necessarily affect Members of Congress both in their capacity as representatives of their States and in their individual and collective relations with the President. But who will be affected, and whether favorably or unfavorably, cannot be predicted beforehand.

It is true that, even under direct election, the legislative powers of Congress would still account for the lion's share of congressional influenced; but the contingencies affecting the use of those powers would be bar different from those with which we are now familiar. Congress has been accustomed to deal with a President who is in part dependent upon, and therefore restrained by, the States. A President who is not only not dependent upon the States, but whose political obligations will bear no predictable relation to extant arty organizations, may be an entirely different creature.

Direct election would radicalize American public opinion

The central political goal of the Constitution and the Electoral College in particular is the creation of *reasonable* majorities, that is, of majorities which will not prey upon the rights of others. The Constitution and the Electoral College seek to accomplish this task by providing salutary incentives to compromise—by rewarding moderation and penalizing extremism. This process requires for its effectuation a blurring rather than an accentuation of the differences among men. The genius of our present method of election may be said to consist precisely in its ability to reveal what men have in common and to conceal what they do not.

The significance of this accomplishment should not be underestimated. Given the paramount importance of the Presidency in political affairs generally and in party organization in particular, the compromises which are made before, during, and after a presidential campaign tend to filter down through the entire political system. Thus, in the normal course of events, presidential campaigns have a moderating influence on the character of American public opinion as a whole. Indeed, it is

sometimes said that our presidential campaigns are drab, uninteresting affairs. It seldom occurs to those who make that comment that the phenomenon is more a virtue than a vice. The relatively mild tone of presidential campaigns derives from the fact that both major parties have to make eventually the same compromises because the Electoral College forces both to campaign I all or most of the States. Most of the difficult compromises are worked out within the parties before election campaigns, rather than between the parties during or after election campaigns. And the major compromises are worked out at the State rather than the national level.

The fact that the major compromises are worked out early, within parties, and at the State level produces a number of salutary consequences; (1) it reduces the number of compromises which have to be made at the national conventions, and makes the job of party unification easier; (2) it leads to moderation in platforms and candidates; (3) contributes to the cohesion of State party organizations.

Under direct election, it is difficult to see how or when these salutary compromises would be worked out. It does not suffice to say that they will be worked out within extant party organizations, because there is no guarantee that extant party organizations will continue. Once the States as States are removed from the electoral process, an interest group would face little compulsion to compromise with competing groups in its resident State. In fact, it might be penalized for doing so. Far greater would be the incentive to align with similar interest groups elsewhere, who would be under no compulsion to compromise within their States. There would thus be a national trend away from the major parties, which are State-based, toward single interest splinter parties; and since no one would be forced to compromise until after the election, there would be a widespread tendency toward extremism. Compromises would ultimately have to be made, but they would be made only at the last minute: and—because each group participating in the final compromise would have been encouraged toward extremism beforehand—the ultimate resolution of differences would be more difficult to achieve. The compromises, in short, would be both hastily contrived and inherently unstable. The winning coalition, however numerous would have difficulty governing.

The "Media Masters"

Mr. Theodore H. White quite rightly testified that direct election would change the nature of our presidential campaigns. He said:

> Our presidential campaigns right now are balanced in each party to bring a compromise, to eliminate the extremes of both sides, and create a man who has at least the gift of unifying his party and thereafter the Nation.
>
> Once you go to the plebiscite form of vote you get the more romantic, the more eloquent and the more extreme politicians, plus their hacks and TV agents polarizing the Nation rather than bringing it together. It is that fundamental erosion of the U.S.A. that horrified me...

And as Mr. White has written:

> If States are abolished as voting units, TV becomes absolutely dominant. Campaign strategy changes from delicately assembling a winning coalition of States and becomes a media effort to capture the largest share of the national "vote market." Instead of courting regional party leaders by compromise, candidates will reply on media masters. Issues will be shaped in national TV studios, and the heaviest swat will go to the candidate who raises the most money to buy the best time and most "creative" TV talent.

Direct election would undermine moderate influence

The creation of a reasonable majority in a country of this size and diversity is a task of enormous magnitude. The number and variety of interests are such that any majority must necessarily be a coalition of minorities, each of which, quite naturally, tends to prefer its own interest to those of others. The peculiar "magic" of our present system is precisely that it forces every group to see the satisfaction of its own interest as depending in large part on the satisfaction of other interests. But the majority retains the character of its parts, which is to say that a majority is only temporarily harmonious. A majority within either major party is constantly in tension, with the result that a party's capacity to command the allegiance of its followers—in power or out—is constantly being challenged. A coalition which wins at one election may not win a at the next-a fact which induces party leaders and Presidents to seek new bases of support and to be very wary of alienating any significant group presently loyal to their party.

The Electoral College says, in effect, that so long as Presidents are going to be indebted to certain interests for their election or—what may be more important—for their reelection, it is better to have those interests funneled through the mediating influence of the States (a) because the States as members of a Federal union ought properly to be represented as States in the Presidency; and (b) because the interests to which a President will be indebted will thereby be moderate in character. Under direct election, neither of these considerations are deemed important. The consequence is not only that the power of the States will be diminished, but that Presidents will be directly influenced by highly ideologized and uncompromising interest groups. Under direct election, a President would at once be driven toward demagogy and freed from the salutary restraints now imposed by the States and our State-based party organizations. We may obtain majorities under direct election, but will we be able to live with them?

Direct election would endanger minority rights

So successful has the Electoral College been that most Americans are inclined to forget that they are, in one or more senses, members of a minority-geographic, ethnic, religious, social, or economic. Under our present system, to be a member of the losing party carries no long-term liability: it neither invites invidious discrimination nor endangers the security of one's liberty. We are therefore inclined to think of "minorities" in terms of others, as those proverbial "other fellows". Nonetheless, the fact remains that each of us is a member of a potentially vulnerable minority. What is true of one minority will, soon or late, be true of every other. This fact, as we say, has been obscured by the very success of the Electoral College in putting together widely dispersed and virtually all-inclusive pluralities. But significance of being a member of one or more minorities, at present largely obscured for most, might be much greater under a different system of election, especially direct election. One's fundamental rights may very well be affected by whether or not he is a member of the winning coalition.

The power of all minorities, everywhere, of whatever kind, comes from the skill with which they are able to join themselves to other minorities. It is a string of such minorities which constitutes a majority of a winning plurality. A minority which fails to align itself with other minorities is a minority which finds its political power greatly diminished. One of the chief virtues of the Electoral College is that it

not only encourages such alliances, but virtually requires them. It builds moderate majorities while protecting the interest of all minorities that are willing to compromise.

Under direct election, with its emphasis on mere numbers, the strength of most so-called minorities—especially those which lack significant numbers—would likely be diminished. Congressman William Clay testified on this point:

> I firmly believe that the direct popular vote would inhibit the political influence of minority groups. The present system maximizes the importance of urban regions and especially of the high 3 registered—is more effectively applied within the two-party system which has evolved from the electoral system. And I am convinced—that the minority vote would likely follow a separationist trend without the cohesive influence of that electoral system.

The price extracted by the Electoral College for the political success of minorities is compromise. Anything which discourages compromise in fact, or delays it in time, diminishes the power of minorities and encourages extremism accordingly. Under our two-party system, which is held together by the Electoral College, those minorities which are not permanently wedded to one party have an opportunity to switch their support with maximum effect; for the loss of one is compounded by a gain for the other. The consequence is, in the words of Prof. Harry V. Jaffa,

> that each major party is under an inducement to be hospitable to minorities within the opposing party; and, on the other hand, that minorities are under an inducement so as to moderate their demands that they are negotiable within both major parties. ("The Nature and Origin of the American Party System," in *Equality and Liberty*, 1965, p. 7)

The multiplication of parties, the removal of the States from the electoral process, and the other inducements toward extremism that would result from direct election—all these factors would diminish the power of minorities by encouraging them, so to speak, to price themselves out of the political market.

Direct election would be an invitation to fraud

One of the most calamitous and probable consequences of direct popular election will be the increased incidence of election fraud. At present, whenever and wherever fraud occurs, its impact is limited to determining the winner of a State's electoral vote. The incentive to steal votes is now restricted to close contests in States which have a sufficiently large electoral vote to alter the final result. Thus, fraud can be profitable only in a few States, and is seldom capable of affecting the national outcome.

In his testimony during the Judiciary Committee hearings, Mr. Theodore White described this limitation on the impact of fraud. He said:

> Right now, what you have in the country is a system of self-sealing containers. Again, I speak the language of the press. If the crooks in Illinois, if the crooks in Cook County are going to steal votes, each State has built up some sort of antibody system, so that it seals the theft, the stealing, the rigging of elections. There are certain States like Minnesota, or Connecticut, California, Oregon, where I think the votes are counted with scrupulous honesty. But if the margin is going to be as thin as they were in 1960 and 1968, I can see the majority of honest States crumbling just like that.

Under direct election, a premium would be placed on stealing every vote in every precinct in every State. There would be no mechanism to prevent voting fraud from having a direct impact on the choice of the President. As votes are tabulated and reported in the Eastern States, for example, great pressure will develop in Western States to get every possible vote—even for a candidate who has no chance of winning—in order to offset early election returns from the East.

Mr. White cautioned:

There is an almost unprecedented chaos that comes in the system where the change of one or two votes per precinct can switch the national election of the United States.

Now we have 180,000 voting boxes in the precincts in the United States, and if by 10 or 11 o'clock it is going to be as close as 1960 or 1968, I hesitate to think of what is going to happen in the Western precinct boxes and some of the Southern precinct boxes.

In the case of a close popular election, such as in 1960 and in 1968, the determination of the presidential candidates and their ardent supporters to win will place great temptations before every election official in the country. Those who control the polling places, whether they are State or Federal officials, may succumb to the pressure to obtain the largest popular vote margin for their favorite candidate.

Recalling the partisan nature of the deliberations of the National Election Commission established to resolve the Hayes-Tilden controversy of 1876, Professor Bickel told the Judiciary committee:

> ... it seems to me inevitable if you go to the popular election system to set up, not only on an ad hoc basis, but on a permanent basis, national vote-counting, and I for one...am not at all that happy about central vote-counting. Honest men, when centrally in charge of a computer in Washington may be even more tempted than honest men in this or that county in the western part of the country or in the eastern part of the country.

Mr. White dramatically described what might occur on election night under direct elections:

I wonder whether you can imagine what the scenario of election night might be with the entire nation hanging awake for the returns if we had another election as close as 1960 or 1968 with no one knowing what was happening.

You all remember how in 1960 when the Connecticut vote was coming in strong for John F. Kennedy. Eisenhower took to the air to plead with the people of California to get out there and vote. Connecticut closes 3 hours earlier than California; I think about 8 hours earlier than Hawaii. Once those eastern votes start piling up from the big cities one way or another, the pressure, the urge to—and if it is a close election—you can't steal a real election, a real majority, but if it is a close election, that election night would be an invitation to have militia out guarding the ballot boxes the next morning.

The likelihood of an increase in minor party presidential candidacies and the probability, therefore, that a runoff will become a common occurrence under direct election, make even more likely the prospect of election fraud. The encouragement which direct popular election would give to fraud could very well turn American presidential elections into nightmares of charges and countercharges, of chaos

and crisis. During the days following a presidential election, the determination of a winner could become the regular and expected focus of political turmoil.

Direct election would encourage challenges and recounts

One of the most serious threats to our national stability under direct election would be the probability of contested elections. A contested election under any system is certainly dangerous. But as Ernest Brown, Langdell Professor of Law at Harvard, testified, under direct election "the mere fact of contest is a disaster."

Under the present system, the popular vote in most States most of the time is insulated against challenge and recount. Only extremely close and bitter contests in certain strategic States would even tempt one of the major parties to call for a recount. Under direct election, however, the popular vote in every State would be open to the perpetual threat of challenge. Whether a candidate wins or loses, a State by a large or small margin of votes, recounted votes in that State under direct election could still affect the national result. As Professor Brown explained:

> ...Close elections lead to contest. And with direct election, the contest would be nation wide. Every ballot box, every voting machine, would be subject to contest.

He went on to illustrate how nationally contested elections would develop under direct election:

> If one candidate contests a certain area, his opponent, to protect himself, warns of a contest where he thinks something might have been adverse to him. And in a little while, the whole electorate is involved.

The uncertainties surrounding a recount to determine the outcome of a close presidential election could paralyze our Nation. Even the mechanical aspects of a sizable recount would be dangerous enough, but if legal questions concerning voter qualifications and other matters were to be raised, as they surely would be, the period of the recount would be nothing short of chaotic.

To Theodore H. White, the spectre of the recount under direct election is a "nightmare." He put it this way:

> I do not think direct election would have worked. It would have failed us twice in the last election. In the 1960 election— I have never been able to get the full story— Mr. Nixon spent several hours wondering whether he should challenge or not, and they began to examine the laws of the various States. You could not have a recount in Missouri until some time in early spring. The laws as to recounts were different everywhere. It is a nightmare to me that we should live through 1960 and 1968 under the proposed amendment.

Prof. Charles Black explained to the committee how he felt the professional politicians would call for recounts under direct election in close contests:

> It would become the duty of the manager of anybody's campaign that might be advantaged by a recount to search very carefully in good faith for fraud, irregularity, and the sort of technical objections to voting that you refer to, so that even without those willful obstruction elements, I should think that in a close election, it would be almost inevitable that the vote everywhere would be scrutinized and contested, and every possible irregularity sought after, whereas, under the present system, it usually does not matter and people just do not bother with it.

Mr. Richard Goodwin outlined to the committee his thoughts on the recount problem under direct election:

> Eliminating the Electoral College can, as many have pointed out, transform the frequent and inevitable charges of election irregularity and fraud into demands for a nation wide recount. Since voting is now by State those charges are made with passion and they are allowed to lapse because even a charge in a particular state would rarely affect the national electorate result. However, if only the popular vote counted, then a recount in the few States could change the result. After all, two of our last three Presidents had popular vote margins smaller than 5 percent of the vote in the State of Illinois alone. In such a situation there would be incentive to pursue reasonable charges of irregularity and fraud. Counter charges would be inevitable. And of there was any substance to the allegations a nationwide recount would not be merely likely but inevitable. Such a protest could continue for months, in election commissions and in the courts, while the country waited to find out who had been elected.

There can be no doubt that the present system protects the Nation from the paralysis of recounts. Professor Brown characterized the protection this way:

> ...the present system insulates the States. When the vote is counted by the States, those lines insulate the area of contest and keep it local, and they insulate the significance of the contest.

Professor Black also testified at length on the protections which the present system offers against the possibility of recounts and contests. He said:

> We have now compartmentalization of the recount problem, like the compartmentalization of a ship. If it springs a leak in one part, that part is sealed off from the others. The recount problem is an infrequent incident, because very often the State in which fraud is charged or error is charged will be one which, on inspection of the electoral totals, does not matter anyway.

It is clear that recounts will be a disastrous problem for the United States should direct election of the President become law. Too many thoughtful experts have mentioned the recount problem for it to be only the idle speculation of those who would oppose direct election for political reasons. We believe the political stability of this Nation is the issue at stake; the Senate, before voting on the direct election proposal, should try to imagine this Nation, gripped by controversy, having to undergo a national recount every time there is a close election.

Direct election would necessitate Federal control of elections

There is no question that rigid uniformity must be an integral part of the direct election proposal if the one-man, one-vote rule is to be truly implemented. If the President is to be popularly elected in a nationwide election, State boundaries and jurisdictions will become inconveniences. All States would, of necessity, have to conform their election laws to a single Federal standard. Serious questions must be raised concerning the new election machinery and standards which must be created in order to have a smoothly-run national plebiscite.

Federal laws or guidelines would have to be enacted to regulate, among other things, the eligibility of parties and candidates; the counting of ballots and the declaration of the winner; the validating and counting of absentee ballots; the penalties and prohibitions applicable to elections; the registration deadlines and a host of related matters now

covered by State laws. Indeed, it is possible to envision a Federal Election Board charged with total responsibility for running the election down to and including the staffing of 180,000 polling places.

Specious Arguments Concerning the Electoral College

Direct election would create some dramatic problems and bring some fundamental changes to our electoral process. These have been discussed in detail in the preceding section of this report. Before concluding this analysis of S.J. Res. 1, it is necessary to look at a few of the specious arguments made by the majority concerning the Electoral College. Most of these take the form of "what might have happened if..."

The "faithless elector"

The "faithless elector" argument holds that electors may violate the implied pledges which bind them to toe vote for the most popular candidate in their State.

It is true that electors are frequently not bound by State law to vote for the winner of a popular plurality of their States, and it has been argued that Federal legislation would be powerless to compel them to do so. Nevertheless, custom, self-interest, and a sense of moral obligation have combined to do what the law has failed to require. The consequence is that electors, save for some symbolic purpose (as in 1968), hardly over violate their pledges. The record on this point is unmistakable in its implications: out of more than 16,000 electoral votes which have been cast, electors have violated their pledges only six of seven times. In no case did the electors' chicanery ever threaten to alter the outcome of an election. Still, the freedom of electors does not lend itself to mischief. That potential mischief, however, can be easily remedied without abolishing the electoral system altogether. Either the office of elector can be abolished, or the electors' pledge made binding by constitutional amendment. But to abolish the electoral vote system because of potentially faithless electors is a classic case of throwing out the baby with the bath water.

"A Shift of Only So Many Votes . . ."

Among the most frequently heard arguments against the electoral system is that which holds that a shift of only x thousand votes in y number of States would have caused the winner of the popular vote to lose the electoral vote. Of all the specious arguments, this is

perhaps the most specious. One is of course free to surmise, *after election statistics are tabulated*, that the shift of a few votes here or a few there *might have changed* the outcome. That, however, is true of election statistics generally and bears no special relation to the Electoral College. What gives this specious argument the favor it would not otherwise enjoy is the theoretical possibility under the Electoral College of having a popular vote winner who is an electoral vote loser. In order for such to happen—and it never has—a precise number of votes must shift in specified States; otherwise, the shift will have no effect on the outcome.

The clincher in the argument, of course, is that these shifts, so horrible to imagine in *retrospect*, never in the point of fact take place. The shifting that critics of the electoral system are always talking about exists nowhere but in their own retrospective imaginations. It is shifting which might have taken place—mathematically speaking—but which never occurs in fact. As to why such shifts do not take place, the critics have never provided an answer.

"If We Had Had Direct Election Back in . . ."

Critics of the Electoral College frequently attempt to apply electoral reform plans to prior election statistics in the effort to see whether a different result would have obtained. Although well-intentioned, this attempt is essentially futile, for it is simply impossible to say what the outcome of a prior election might have been under a different system. The size of the vote, its distribution, the candidates, are primarily the products of the particular election system in which they occur. Hence any effort to say that, in such-and-such a year, the outcome under direct election might have been different is only a playful speculative exercise; but it is not in any sense an argument against the existing system....

Summary and Conclusion

The current debate over Electoral College reform has been unduly restricted by a myopic constitutional perspective. In this report, we have discussed the ultimate causes of that unfortunate shortsightedness: on the one hand, a well-meant but dangerously naïve attempt to apply the logic of the "one-man, one-vote" decision to presidential elections, regardless of the consequences; and, on the other, an understandable but unfounded fear that something might go wrong at some future election.

Since in matters of constitutional reform perspective is everything, we have endeavored to show that "one-man, one-vote" can be bought only at the price of constitutional destruction and that the fears animating opponents of the Electoral College have been greatly exaggerated.

We have attempted to restore a proper perspective by discussing electoral reform and the Presidency in relation to the constitutional and political structure of the Nation as a whole. It is only in the light of that perspective that the proposal for direct election can be understood as an unnecessary and dangerous undertaking. It is unnecessary because the major objections to the present system can be accommodated without its wholesale destruction; it is dangerous if for no other reason than that we cannot predict with any confidence what the character and structure of American politics will be like under it. Indeed, the matters left untouched by the proponents of direct election convince us that they are themselves rather unsure of the future under their own proposal. Unless and until they come forward with firmer assurance about crucial aspects of their proposal, constitutional duty requires us to oppose their recommendations in the strongest possible terms.

We do not intend, however, to rest our case solely on the ground of unforeseeable consequences. It is true that much of the future under direct election is murky and unpredictable; but there is much, also, that is *not* murky and what we *can* see seems to us perilous in the extreme. The Electoral College is so intimately involved with the two-party system, federalism, and the separation of powers that we do not see how these institutional arrangements can possibly survive under direct election in the long-run. Nor do we see how it will be possible, once the logic of direct election is accepted, to defend them in principle. The burden of proof, it seems to us, is properly upon the proponents of direct election. We have made what we believe to be compelling arguments against direct election. Let the proponents now come forward and answer them. Let them now take up the burden they so long ago sought to thrust upon the opposition. But let them come forward with something more than passionate appeals and hopeful assurances. let them come forward with sound arguments and hard facts.

The Electoral College may have its faults, but its true sins of commission and omission are not always apparent in the various and passionate bills of indictment which have traditionally been raised against it. For nearly a century-and-a-half the Electoral College has been condemned

as the "tool" of every imaginable interest. Conservatives have attacked it for producing liberal Presidents; liberals have attacked it for producing conservative Presidents. Republicans have said that it favors Democrats; Democrats have said that it favors Republicans. Northerners have accused it of aiding the South; Southerners have accused it of aiding the North. Easterners have deplored an alleged advantage that it gives to the West; Westerners have deplored and alleged advantage it gives to the East. City dwellers have lamented that it exaggerates the influence of rural folk; rural inhabitants have lamented that it exaggerates the influence of city dwellers. Citizens of small States have argued that it is controlled by large States; citizens of large States have argued that it gives undue weight to the small States.

This list might be expanded to encompass almost every political, sectional, economic, and social interest in the Nation. Indeed, the fact that the Electoral College has been criticized so variously is more significant than the fact that it has been criticized so persistently. The confusion among the critics suggests, at the very least, that there is more to the Electoral College than meets the eye of the discontented. For the contradictory character of the criticisms is the most potent proof one might adduce to demonstrate that the Electoral College is not now, and has never been, the "tool" of any narrow political, sectional, economic, or social interest. Yet, to take the more ardent critics at their word, one might well wonder how the Republic has managed to survive all these years.

Yet, survive it does, and with it, an allegedly antiquated electoral system. After everything has been said about the Electoral College, after the last indictment is in— and perhaps even after the computers have had their day— the fact remains that the Electoral College has provided us with an extraordinary number of distinguished Chief Executives who have entered office after a solid demonstration of public support and have governed the Nation honorably and well. It has given us men who, by and large, have been free from the corrupting influence of faction precisely because their method of election forces them to understand the public good as something more than the sum of the interests of their friends. It has given us Presidents who have been for the most part independent of Congress and the States, but well aware of the power and prerogatives of both. In short, the Electoral College, in conjunction with the party system which grew up in response to it, now

produces by more democratic means the very tasks that the Framers thought should be accomplished by a select body of enlightened men: an energetic and independent and yet responsible and limited Chief Executive. Thus, it will not do to say that the Electoral College is antiquated or outmoded; no more viable institution, no a more salutary one, will be found today. Let us, if need be, repair it; but let us not abandon it for the sake of a mathematical abstraction, or because we are angry that the world is not perfect.

James O. Eastland.
John L. McClelland.
Sam J. Erving, Jr.
Roman L. Hruska.
Himar L. Fong.
Strom Thurmond.

Appendix A

Has a Popular Vote Winner Ever Lost the Presidency?

It is frequently said that the electorate college makes it possible for a candidate to be elected who receives fewer popular votes than his chief opponent. It is alleged that this has happened three times: in 1824, in 1876, and in 1888. We propose to examine this charge to see whether it is worthy of the attention it has received.

While it is theoretically possible for an electoral vote winner to be an popular vote loser, it is highly unlikely that such an event will occur. It is theoretically possible for the simple reason that there is no a perfect mathematical proportion between the size of the popular vote and the size of the electoral vote. That disproportion is due to the fact that each State has at least three electoral votes regardless of size—a concession that the Framers saw as necessary to shore up the federal system. So long as we believe it wise or useful for the States as States to have a say in the selection of Presidents, and so long as we believe that the smaller States ought properly to have a minimum representation, it will remain theoretically possible for an electoral winner to be a popular loser. Whether we have "winner-take-all" or some other system of awarding electoral votes, so long as the concept of electoral votes is retained with a minimum representation for smaller states, that theoretical possibility remains.

The decisive policy question is whether the risk if this theoretical possibility is worth running. And the most important factor in determining the worthiness of the risk is the likelihood of its occurrence. On the basis of past election results, the risk would appear to be minimal. Indeed, it is our belief that the much-feared result has never occurred.

Let us now turn to consider the three elections, which it is alleged, did produce the unwanted result.

(a) The election of 1824.

In the election of 1824, Gen. Andrew Jackson obtained a plurality of both the popular vote and the electoral vote but, failing a majority in the electoral count, lost to John Quincy Adams in the House of Representatives.

The experience of 1824, however, is hardly relevant to present-day elections. None of the machinery we now possess to prevent such an outcome existed at the time; indeed the growth of the party system and the birth of national conventions can both be directly attributed to the experience of 1824.

While accurate figures are especially difficult to obtain for early 19th century elections, most authorities are agreed that something like 350,000 votes were cast in the election of 1824, out of a total population of roughly 11 million, of whom roughly 3 to 4 million were white adult males. Of the small number of votes which were cast, Jackson obtained a total of roughly 150,000— more than any other candidate, but it was not even a majority of those voting. Jackson's plurality can in no sense be termed a "victory," nor can it be said to have constituted a "mandate."

Further, there were four candidates in that election. Of the 24 States in the Union at the time, the four candidates appeared together on the ballots of only five States; in six States, only three were on the ballot, and in seven only two. Moreover, six States (including New York, at that time by far the most populous State) had no popular election at all, the electors being appointed by the State legislators.

The Presidency, in short, had yet to be conceived of as an elective office in the sense that we now understand it. Anyone who ventures to claim that Jackson's popular plurality represented the "will of the people" or that his defeat in the house was a "frustration of the popular will" understands neither the election of 1824 nor why its inconclusiveness cannot be repeated today. In the words of Prof. Eugene Roseboom, "The popular will

had been so dimly revealed in 1824 that the House could not have subverted it." (A History of Presidential Elections, 1957, p. 88)

(b) The election of 1876

It is claimed that in the election of 1876, Samuel Tilden carried the popular vote by 250,000 but had the election "stolen" from him by a "packed" special electoral commission which had been assembled to investigate vote-fraud allegation in a number of States. The only difficulty with this argument is that, in order to have any significance at all one must adjudge every decisive vote-fraud allegation in Tilden's favor— an act of naïve generosity that even Tilden's most vociferous supporters at the time dared not make. The very thing which brought the matter to the special commission in the first place— and the matter which occupied its members for days on end— was the clear and present incidence of fraud. The accuracy of the popular vote or the credentials of the electors were challenged in at least 10 states. No one but nó one has any idea of what the actual popular vote count was in 1876.

(c) The election of 1888

In the election of 1888, it is alleged, Grover Cleveland received a plurality of the popular vote but lost the electoral vote the Presidency to Benjamin Harrison. Of the three examples used by critics of the Electoral College, this is the strongest; but it remains a very week reed indeed. Even if the tabulated popular vote were taken as wholly accurate, less than 1 percentage point (actually 0.7) separated the two candidates in the popular vote. But the popular vote totals ought not to be taken as accurate. There is considerable evidence of fraud on both sides, involving both the size of the popular vote and the distribution of the electoral vote. The late Prof. Edward S. Corwin, perhaps the most distinguished constitutional authority of his generation, acknowledges that Cleveland's popular plurality (roughly 100,000) could be attributed entirely to this shenanigans of Tammany Hall alone. Neither man received a majority of the popular vote. As between two men, one receiving 48.6 percent of the vote, the other 47.9 percent, is it really possible to say that one is the clear choice of the people and the other not? What is decisively important in the presidential elections, as we have said before, is not so much the size of a majority as its distribution and character.

In any event, even if the election of 1888 is the strongest of the three examples used by Electoral College critics, it provides no basis for condemning the electoral system as a whole. The record otherwise is clear and unmistakable: the popular winner has always been the electoral winner.

(Source: Transcribed by The Claremont Institute
from *The Congressional Record*)

Testimony of Dr. John C. Eastman

Associate Professor of Law, Chapman University School of Law
Director, The Claremont Institute Center for
Constitutional Jurisprudence

Before the Select Joint Committee on
the 2000 Presidential Election
The Legislature of the State of Florida

November 29, 2000

Senator Lisa Carlton, Chairman:

Members, we have had several questions during the meeting yesterday, and even this morning, about the Electoral College and how the Electoral College works once the certificates get up to Congress. We went on a mission yesterday to find somebody who could be qualified as an expert, if you will, in the Electoral College and we have found someone and he has come all the way from California, actually overnight, and has arrived here. I am going to introduce him and allow him to give a presentation and we can ask some questions:

Professor John C. Eastman is on the faculty of the Chapman University School of Law; he earned his J.D. from the University of Chicago and his Ph.D. in Government from the Claremont Graduate School, with fields of concentration in Political Philosophy and American Government. He served clerkships in the U.S. Supreme Court, U.S. Court of Appeals for the 4th Circuit, and he is currently the Director of the The Claremont Institute's Center for Constitutional Jurisprudence, in Claremont, California.

Dr. Eastman maybe you can inform the committee how you have become so qualified and an expert on the Electoral College.

Dr. John C. Eastman:

Thank you Madam Chairman and Members of the Committee. I have spent the better part of my life studying the structural components of the Constitution. The litigation center than I run in addition to my teaching obligations, files amicus briefs and conducts litigation primarily on structural constitutional issues, the powers of the federal congress, the commerce clause and the spending clause, those types of

thing. **The Electoral College is part of that structural foundation that is part of the underlying principle and theory of our whole constitutional system.**

What we have today, as I think everybody has acknowledged, is that we are in unchartered territory. Nobody has interpreted these various statutory provisions as a matter of precedent. More to the point for you all, I think: What we are going through here is somewhat unsettling to you and to your colleagues in the legislature, because we have grown accustomed, at least in this century, to having the courts provide the last answer for us on all matters of law and constitutional interpretation. But that's not the way the Founders envisioned it in all cases. There are specific grants of power, not to courts, but to different bodies—to the Congress and to the Senate. We saw a couple years ago in the impeachment hearings that they serve as the court with no higher authority to reverse them, that's a plenary power. **Here the power delegated to you by Article 2, Section 1 is a plenary power. It knows no other appeal.** It's just like before we had a 17th Amendment, your power as a legislature to choose the Senators who would represent you in Congress. There was no other authority to counteract what you did. That power was given to you as a political body. It is a plenary power and the fact of that power is specified in Article 2, Section 1, and has also been affirmed by the Supreme Court in the McPherson case.

Now, I think it is important to keep that in mind as we go through these very technical statutory provisions—not ambiguous, but complicated statutory provisions, because in the backdrop of all those provisions—Section 2, Section 5, Section 15, which I'm going to talk about in some detail today—is that plenary power. And we cannot view those congressional statutes as altering your plenary power that you have directly by the Constitution of the United States, because Congress cannot enact by statute something that limits the plenary powers of another body when those powers are drawn from the Constitution itself. So all of this discussion, Professor Ackerman's discussion on Section 2 and Section 5, all of those have to be read in light of the plenary power to you in Article 2, Section 1.

Now let me go briefly through what happens after the slate of electors or slates of electors that are certified meet on the 18th and send their votes to Congress.

Title 3, Section 15 of the U.S. code gives us *four different options* that determine how Congress is going to vote or count the votes that it receives. The *first option* specified is when there is only one return designated by the State. That return must be counted by Congress—must be counted by Congress—unless both the House and the Senate, meeting separately, concurrently reject that return *either* because the votes were not regularly given by the electors, or because the electors were not lawfully certified. Now with all due respect to Professor Ackerman, I think that right there is a full answer to Representative Byrd's question of Professor Ackerman. It is that Congress—both Houses, operating separately—concurrently can reject a single slate of electors if they view that those electors were not lawfully certified. That gives the Congress the power to be the ultimate judge on whether the certification process comported with the law that you had set out that existed prior to election day. And if it does not, and both houses of the United States Congress agree that they were not certified in accordance with that law—"lawfully certified"—they can reject that slate of electors. That's the first option under Title 3, Section 15.

The remaining three options all deal with situations where we have more than one slate of electors certified, and there are two or more returns provided. In *the first instance*, Section 15 specifies that we shall count only those shown by the determination in Section 5—this is after a contest—if the determination shall have been made. There are two components there: It has to be timely made and it has to be made in accordance with existing law. Congress again has the power to judge whether those two components are qualified, and so that is one.

The second is if two or more slates of electors both claim under Section 5. Suppose there is some ambiguity in the manner in which you have designated that contest provision to go forward. The courts certify one slate; another executive official certifies another slate. Both claim to be part of the Section 5 controversy or contest determination. We will count only that slate that both Houses decide are supported by the state law. Again, it is Congress that has to make the determination on which of those slates is in accord with your state law.

And finally, if there are more than one slate, two or more slates of elector certifications up there, and none purport to be a Section 5 determination after a contest, but are in fact the initial determination or appointment of electors by two different mechanisms. Suppose the

Secretary of State issues one and your Attorney General issues another, neither purporting to be after a contested election but both initially. And again, the Congress is to determine which of those they will count: only those that both Houses decide were cast by lawful electors, appointed in accordance with your state law, unless *both* Houses decide—again both Houses decide—that such votes are not the lawful votes of legally appointed electors.

So in each of those multiple slate scenarios, Congress gets to judge whether they are in compliance with your state law. Now, very significantly, if the two Houses of Congress are not able to agree on which of those competing slates qualify—and this includes the conclusive determination under Section 5, when there is only one Section 5—if one of the Houses in Congress calls into question whether those are lawfully certified, the default provision in Section 15—**if the Houses disagree** with regard to whether such votes, all of those multiple vote scenarios that I've just described—**then the slate of electors certified by the executive shall be the one that is binding on Congress.**

Now how do we know? Because under your contest provision, we might have two slates certified by the executive. So how do we know which one they are talking about. I have not heard mentioned today, and I saw part of the hearings yesterday and I didn't hear mentioned yesterday, Section 6 of Title 3 tells us that answer. And again, with due respect to Professor Ackerman, a *contested* slate of electors does not replace the prior slate of electors, it adds to or supplements it; that's how we get two slates of electors up there in the first place. We don't repeal the slate of electors that have already been certified and is up there. Under Section 6, after the appointment of electors on the day designated by Congress, comes the final ascertainment, which according to your law was seven days after the election. The Secretary of State, under that law, had she certified on that date—that certification bearing the seal of the State, is then communicated to the archivist of the United States by the Governor, also under Seal. The certification, though, is by the Secretary of State; she is the executive officer who under your law does that. And if you go down further into Section 6, it says that if there shall be any final determination under Section 5, then that slate is also communicated by the Governor to the archivist. But note the Governor doesn't certify it, the Governor just communicates that slate to the Archivist,

and "the certificate of such determination in form and manner at the same shall have been made." So if the courts, in accordance with your contest provision, determine for themselves that after the contest there is another slate of electors, it is the court that certifies that.

Now we have two competing certifications: one in accord with Section 5, after the contest determination; and another *ab initio*, at the beginning, after the initial appointment and final ascertainment in accordance with your law before the contest occurred. **If either House of Congress disputes the legality of the final Section 5 determination, and they do not agree, then the slate certified by the Executive is the one that Congress shall count.** That's the first one, that's the one made after the appointment of electors on November 7th, after the final ascertainment under your law on the 14th of November. That's the Executive provision, that is Section 6, that is how we determine, which is the Executive certified slate, and which is some other slate that is certified in accordance with a Section 5 contest. We get there only if the two Houses in the Congress do not agree. That's the mechanism by which Congress has set out for itself how it will govern its counting obligations. But at each step of the way, it retains that judging ability and *it* is answerable to no one—not the Supreme Court of the United States, not the Supreme Court of Florida, in that judging, because that power is delegated to *it* by the Constitution.

That is the main structure, and that is the main piece I hadn't heard yet, and that is the main piece I wanted to get out on the table, and I think I will leave it there and take any questions you might have.

Senator Lisa Carlton:

Does anybody have any questions? No questions? Thank you very much, Dr. Eastman

Representative J. Dudley Goodlette:

Madame Chairman, may I ask one quick question? I'm just confused. What if the court were to order the governor to sign a subsequent slate or certificate?

Dr. Eastman:

I think that your statute doesn't make clear what the court's authority is on that. But the fact that the Governor would sign a subsequent slate does not mean that the executive certification as specified in Section 6 is different than it is as I just described. That would be a Section 5 determination certification; it would not be the executive determination that is specified in Section 6.

Representative J. Dudley Goodlette:

So the one specified in Section 6 would prevail?

Dr. Eastman:

That's right. Under the final default provision in sec 15, that is correct.

Representative J. Dudley Goodlette:

Thank you, professor.

Senator Lisa Carlton:

Thank you, Dr. Eastman, very much.

NOTE. Streaming video of this testimony, beginning at 4:48:10, is available at: http://video.cspan.org:8080/ramgen/odrive/c2k112900_flaleg.rm

3 USC Section 5,6, and15
Title 3 - The President

Chapter 1 - Presidential Elections and Vacancies

Section 5. Determination of controversy as to appointment of electors

Statute
If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made

pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

Section 6. Credentials of electors; transmission to Archivist of the United States and to Congress; public inspection

Statue
It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by section 7 of this title to meet, six duplicate-originals of the same certificate under the seal of the State; and if there shall have been any final determination in a State in the manner provided for by law of a controversy or contest concerning the appointment of all or any of the electors of such State, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate under the seal of the State to the Archivist of the United States a certificate of such determination in form and manner as the same shall have been made; and the certificate or certificates so received by the Archivist of the United States shall be preserved by him for one year and shall be a part of the public records of his office and shall be open to public inspection; and the Archivist of the United States at the first meeting of Congress thereafter shall transmit to the two Houses of Congress copies in full of each and every such certificate so received at the National Archives and Records Administration.

Section 15. Counting electoral votes in Congress

Statute

Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses. Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper

purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting s separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

(Source: U.S. House Internet Law Library)

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