

June 19, 1979

## **ELECTORAL COLLEGE REFORM**

### **(S.J. RES. 28)**

#### STATUS

S.J. Res. 28 is scheduled for floor consideration on Thursday, June 21. The measure is a proposed constitutional amendment abolishing the electoral college, substituting direct popular election of the president, and providing for a runoff between the top two candidates if no candidate receives 40 percent of the popular vote. The amendment has already received floor consideration on March 14 and 15 when Senator Birch Bayh (D-Ind.) bypassed his own Subcommittee on the Constitution and placed the amendment directly on the Senate calendar. However, a unanimous consent agreement was reached whereby the amendment was referred to the subcommittee for hearings, which were held in April, and referred back to the floor on June 1. House proponents of direct election have been waiting for final Senate action before beginning their own consideration.

#### BACKGROUND

Article II, Section I of the Constitution prescribes the manner of electing the President:

Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the Congress: but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

The Twelfth Amendment, ratified in 1804, has been the only substantial change in the original method of presidential election. The amendment was prompted by the election of 1800 in which the Republican electors inadvertently caused a tie in the electoral

college by casting equal numbers of votes for the presidential candidate, Thomas Jefferson, and the vice-presidential candidate, Aaron Burr. The election was thrown into the House of Representatives and thirty-six ballots were required before Jefferson was finally elected president. The Twelfth Amendment provided the electors should vote separately for president and vice-president.

At the beginning of the Republic, the method of choosing electors varied from state to state -- "in such manner as the legislature thereof may direct." Some state legislatures chose the electors themselves; others allowed direct election of electors by the voters. But by 1804, the majority of state legislatures had adopted election by popular vote. And by 1832, only one state still retained the appointment of electors by the state legislature.

The Constitution provides that an elector is completely independent and can vote for any candidate he chooses. However, from the very first election, almost all electors have voted for the candidate who won the popular vote of their state. Of the nearly 18,000 electors who have voted for president in the history of the Republic, no more than a dozen have ever cast their vote in contravention of their pledged loyalties. None of these "faithless" electors has ever altered the outcome of an election.

The present practice whereby all the electors in any state vote for the candidate who wins the state's popular vote is not a constitutional requirement, but is a longstanding and firm tradition. Nothing in the Constitution forbids states from awarding their electoral votes on a proportionate basis. State legislatures retain their power to specify any method of choosing presidential electors and also to specify the method the electors themselves use to vote for presidential candidates.

#### UNUSUAL PRESIDENTIAL ELECTIONS

Of the forty-eight presidential elections held under the electoral college system, fifteen have resulted in the election of a president who received less than 50 percent of the popular vote because of a third party candidate. Of these fifteen elections, the elections of 1824, 1876, and 1880 resulted in the elections of a president who trailed his opponent in the popular vote.

The 1824 Election. In 1824, four candidates, all members of the same party, the Democratic Republicans, were running for president. When the popular vote was tabulated, the result revealed that Andrew Jackson had outpolled his nearest contender, John Quincy Adams, by 38,194 popular votes. However, Jackson's ninety-nine electoral votes were thirty-two short of a majority and therefore the election was decided by the House of Representatives. In the House, the third place candidate, Henry Clay, threw his support behind Adams and he emerged victorious.

Circumstances surrounding the 1824 election were significantly different from our current political customs. There was no national nominating convention and there was only one party in the election. In addition, six states were operating on a district system of electoral vote allocation, and six states were still choosing their electors through the state legislature. Therefore, although Adams carried the overwhelming electoral vote in New York and Vermont, he had no popular votes to show for it.

The 1876 Election. The election of 1876 was attended by widespread fraud and disruptions on election day as Rutherford B. Hayes won the electoral vote 185-184, but lost the popular vote by 250,000 votes. After the election, both sides claimed victory. Four states, South Carolina, Louisiana, Florida, and Oregon filed double returns. An electoral commission was established by Congress to certify the returns of these states. The commission, composed of eight Republicans and seven Democrats, certified Hayes the winner in the electoral college. The tabulation of the popular vote, in particular, was mixed with fraud on both sides. There were riots, assassinations, murder, and midnight raids on the South to keep the Republicans and blacks from the polls.

The 1888 Election. In 1888, Grover Cleveland won the popular vote by 96,000 votes but lost the electoral college vote and the election to Benjamin Harrison, who garnered 233 electoral votes to Cleveland's 168. It has been maintained that Cleveland's loss occurred because he was a sectional candidate. He openly angered the industrial North by pushing tariff revision in 1887 without regard for the political consequences. Thus, while Cleveland was able to roll up huge popular vote pluralities in some states, he made little effort to appeal to voters nation-wide. In addition, Cleveland's popular vote plurality was partially the result of a campaign of intimidation of black Republican voters in the South who would have voted for Hayes.

#### ELECTORAL COLLEGE VS. DIRECT ELECTION

All the states enjoy a measure of equality under the electoral college because each state's electoral vote is the sum of its congressmen and senators -- every state having, of course, two senators, regardless of its population. And because of the "winner-take-all" unit rule whereby all of a state's electors vote for the candidate who received the highest popular vote state-wide, any state's percentage of the winning candidate's electoral vote total nation-wide is always greater than that state's percentage of the candidate's total national popular vote.

For example, in the 1976 presidential election, Jimmy Carter rolled up his highest popular vote plurality in Georgia; he defeated President Ford by 495,666 votes. This plurality was 2.4 percent of his national popular vote total of 40,828,598. Yet

Georgia's twelve electoral votes were 4.04 percent of Carter's total of 297 electoral votes.

Similarly, President Ford won his greatest plurality in Indiana where he defeated Carter by 169,244 votes, 3.02 percent of Ford's national popular vote total. Yet, Indiana's thirteen electoral votes were 5.39 percent of his national electoral total of 241.

A like analysis can be done for any state in any presidential election. Under the unit rule, any state has more election day clout under the electoral college than it would under direct election.

On the other hand, such an analysis as above ignores the total popular vote that each state's losing candidate received. Critics of the electoral college have argued that these votes are "wasted" and that since only a plurality of one vote is necessary to win any state, candidates make no effort to increase their margins of victory in winning states or decrease their margins of defeat in losing states.

A more appropriate analysis compares a state's total popular vote for all candidates with the state's electoral vote. The following table shows the differences between each state's electoral vote in the 1976 elections and its total popular vote turnout.

Effect of the Adoption of Direct Popular Election of the  
President and Vice President on the Relative Influence of the  
Several States in Electing the President and Vice President  
in 1976

State	Percent- age of 1976 electoral college	Percent- age of nation- wide popular vote	Percent- age gain/ loss un- der direct popular election
Minnesota .....	1.8587	2.3909	+28.63
Wisconsin .....	2.0446	2.5800	+26.19
Florida .....	3.1599	3.8632	+22.26
Massachusetts ..	2.6022	3.1237	+20.04
Illinois .....	4.8327	5.7861	+19.73
New Jersey .....	3.1599	3.6962	+16.97
California .....	8.3643	9.6462	+15.33
Michigan .....	3.9033	4.4801	+14.78
Washington .....	1.6729	1.9073	+14.01
Connecticut .....	1.4870	1.6940	+13.92
Oregon .....	1.1152	1.2628	+13.24
Pennsylvania ...	5.0186	5.6658	+12.90



State	Percent- age of 1976 electoral college	Percent- age of nation- wide popular vote	Percent- age gain/ loss un- der direct popular election
Indiana .....	2.4164	2.7225	+12.67
Ohio .....	4.6468	5.0418	+8.50
Missouri .....	2.2305	2.3954	+7.39
Iowa .....	1.4870	2.5686	+5.49
New York .....	7.6208	8.0119	+5.13
Texas .....	4.8327	4.9928	+3.31
Colorado .....	1.3011	1.3262	+1.93
Tennessee .....	1.8587	1.8102	-2.61
Maryland .....	1.8587	1.7655	-5.01
Virginia .....	2.2305	2.0890	-6.34
Kansas .....	1.3011	1.1745	-9.73
Oklahoma .....	1.4870	1.3393	-9.93
Utah .....	.7435	.6636	-10.75
Alabama .....	1.6729	1.4311	-14.45
Kentucky .....	1.6729	1.4311	-14.45
North Carolina .	2.4164	2.0586	-14.81
Arkansas .....	1.1152	.9411	-15.61
Louisiana .....	1.8587	1.5676	-15.66
West Virginia ..	1.1152	.9208	-17.43
Arizona .....	1.1152	.9107	-18.35
Georgia .....	2.2305	1.7993	-19.33
Nebraska .....	.9294	.7451	-19.83
Maine .....	.7435	.5925	-20.31
Mississippi ....	1.3011	.9434	-27.49
New Mexico .....	.7435	.5130	-31.00
Rhode Island ...	.7435	.5042	-32.19
South Carolina .	1.4870	.9841	-33.82
North Dakota ...	.5576	.3644	-34.65
Idaho .....	.7435	.4219	-43.25
New Hampshire ..	.7435	.4164	-43.99
Montana .....	.7435	.4031	-45.73
Delaware .....	.5576	.2892	-48.13
South Dakota ...	.7435	.3687	-50.41
Hawaii .....	.7435	.3572	-51.96
Nevada .....	.5576	.2475	-55.61
Vermont .....	.5576	.2302	-58.72
Distict of			
Columbia .....	.5576	.2070	-62.88
Wyoming .....	.5576	.1917	-65.62
Alaska .....	.5576	.1515	-72.83

### Highlights

Nineteen states would gain influence under direct popular election and thirty-one states and the District of Columbia would lose influence.

The nineteen states gaining influence under direct popular election include the fourteen most populous states of the United States.

#### ARGUMENTS PRO AND CON

Federalism. Much has been said about the uniquely American idea of democracy, the federal system. It came about as a result of an elaborate series of compromises at the Constitutional Convention of 1787 from which emerged at least one unanimous opinion: American-style democracy would be an elaborate system for the purpose of always maintaining a balance of power. Madison closes Federalist Paper No. 39 with this complex summation:

The Proposed Constitution, therefore, is, in strictness, neither national nor a federal Constitution, but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them, again, it is federal, not national; and, finally, in the authoritative mode of introducing amendments, it is neither wholly federal nor wholly national.

The constitutional system of "checks and balances" among the three branches of the national government seems to be in good repair after 200 years, although the ascendancy of the Supreme Court is a contemporary development never envisioned by Founders. But the other system of checks and balances, the balance of power between the state government and the national government, has been much attenuated.

The Civil War destroyed the notion that the states were almost entirely sovereign. The Fourteenth and Fifteenth Amendments were aimed squarely at limiting the independence of the states. The federal income tax, established by the Sixteenth Amendment, preceded state income taxes by several decades. The Seventeenth Amendment changed the selection of United States senators from appointment by the state legislatures to the direct election of the people. Appointment of senators by the states, through the state legislatures, was a continuing imposition of the reality of state sovereignty on the federal government. And the Supreme Court of the twentieth century has consistently imposed federal mandates on the states, especially through its interpretation of the Fourteenth Amendment.

Proponents of the amendment argue that the electoral college has little to with the federalist concept of the balance of power between the national government and state governments. They also argue that since the current electoral college based on the silent elector and winner-take-all system has changed so much from the ideas of the Founding Fathers, the original federalist notion has nothing to do with the proposed amendment.

Opponents argue that the electoral college by definition serves as a continuing imposition of the rights of the states on the national government since electoral votes are awarded on a state-by-state basis. In addition, each state's electoral vote, being the sum of its senators and congressmen, is a reflection of the Great Compromise of the Constitutional Convention of 1787 that resolved the competing claim of the large versus the small states by making the Senate the body of equal representation of the states and the House the body of proportional representation of the population. Opponents also argue that the present system has provided an intimate connection between presidential elections, and therefore presidential decision-making, and state and local elections and political parties, political needs, and political compromises. With the states eliminated from presidential campaigns, such state and local campaigns would no longer have any necessary connection with national affairs.

The Two-Party System. Proponents of the amendment contend that direct election would strengthen the American two-party system as it has evolved. They maintain that the winner-take-all unit rule encourages a merely regional candidate to win a handful of states in his region and throw the presidential election into the House of Representatives. In addition, they deny that the electoral college has been the reason why significant third parties have been rare in American history. Rather, they cite other reasons such as the fact that the presidency is a distinct office and not the highest office in a parliamentary government of the European model.

Further, they contend that by counting every vote regardless of where it is cast, direct election would spread and foster two-party competition on a nation-wide scale. Simply carrying a state, the objective under the present system, would no longer be the ultimate objective. The critical point under direct election would be the margin of victory or the margin of defeat. As a consequence, the likely winner would seek to maximize each state's net plurality and the probable loser would work to minimize the state margin of defeat. The net result would be increased party activity -- particularly in what are now one-party states.

Opponents argue that direct election would stimulate a proliferation of parties of special interests. They maintain that third party ideas and special interest ideas may be seriously considered under the electoral college but such ideas themselves are unlikely to become dominant electoral forces. There is little possibility that they will gain electoral votes or provide much obstacle to the major parties unless they are capable of winning on a state-wide level. Thus, a fringe idea that has a minority of support in several states could never become a telling force under the electoral college because its supporters could never muster a majority in any one state or in a few states.



Opponents contend that rather than having to engage in the hopeless tasks of attracting large numbers of votes to defeat a major party candidate, small splinter parties will compete only to deny the major parties the threshold vote percentage of 40 percent. Splinter parties will not be competing against the larger parties but against the 40 percent threshold. It will not be necessary for a dominant or fourth party to be able by itself to deny the threshold level to the major parties, but simply that minor parties, taken in the aggregate, be able to keep both parties beneath this figure. Thus the general election would be transformed into a national primary. In a presidential runoff, minority parties would be in a much stronger position to bargain with the two candidates than under the electoral college system. Currently, any bargaining goes on at the beginning of a campaign and any special interest must accommodate itself to a number of other interests within the same party. But after a special interest third party has garnered 10 percent of the vote nationwide, its bargaining position cannot so easily be forced into compromise.

Minority Interests. One of the more difficult and more speculative arguments concerning the abolition of the electoral college is the effect it would have on minority voting power. For example, the Jewish vote in New York City and its environs is always a significant factor in determining which candidate carries the entire block of New York State's electoral votes. Similarly, blacks heavily concentrated in urban areas in some of the larger urban states can be the deciding margin for a candidate taking the entire state's block.

Proponents of the amendment contend that it will enhance the voting power of the minorities. They say that whatever alleged disproportionate influence exists under the present system as a result of the large numbers of electoral votes that clustered in states where minority groups are also located will certainly continue under direct election, since candidates tend to concentrate on areas which control the greatest numbers of potential votes. In addition, proponents argue that the winner-take-all unit rule wastes minority block voting power if the candidate favored by the minority is unable to win his state. Direct election would allow the pooling of these votes with other minority votes across the nation forming a national voting block that no candidate could ignore.

Opponents contend that it has been the genius of the American federalist system to avoid nationally decisive and special interest voting blocks. The electoral college scatters voting blocks by making them effective only in an individual state. Opponents further contend that direct election would also cause metropolitan areas to lose their point of leverage in the total political system. The ability of these areas heavily populated by minority groups to hold the balance of power in larger, competitive two-party states would be lost.



In addition, opponents maintain that the electoral college tends to inhibit the nomination of candidates likely to be objectionable to sizable minority groups and therefore assures attention to the needs and desires of groups whose interests might be given much less consideration under a system of direct popular election.

## CONCLUSION

The proposed amendment would bring about two major changes in the American system of the electing the chief officer of the land. The possible effects of these changes are completely unknown. First of all, the states as political entities would be eliminated from presidential election strategy. There would no longer be any necessary connection between either party's presidential campaign and the same party's campaigns for various offices in any state. Without the extra advantage each state enjoys under the electoral college and with national totals the only criterion for election, it would seem that candidates could concentrate on heavily populated areas. Latest Census Bureau statistics show that 73 percent of the American population is located in urban areas.

The other, and probably more profound change, is the introduction of the possibility (opponents say probability) of a national runoff for the presidency. If direct election stimulates a proliferation of multiple parties to the extent that no candidate is able to garner 40 percent of the vote, something that the electoral college militates against, the amendment would have not only changed the method of electing the president but also would have introduced a completely new area of presidential elections: the runoff campaign.

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