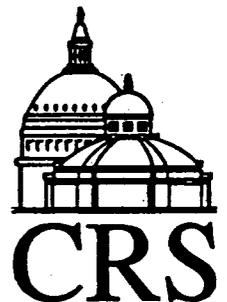


CRS Report for Congress

The Electoral College Method of Electing the President and Vice President and Proposals for Reform

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THE ELECTORAL COLLEGE METHOD OF ELECTING THE PRESIDENT AND VICE PRESIDENT AND PROPOSALS FOR REFORM

SUMMARY

The people do not elect the President and Vice President at the November general election every 4 years, but the archaic institution called the Electoral College does when a presidential and vice presidential ticket wins the majority of electoral college votes. Reform of the Electoral College method of electing the President and Vice President has been the subject of much controversy since the Constitutional Convention 1787 due to a number of problems caused by the Electoral College system. Some of these problems are stated as follows.

First, the Electoral College system can result in the election of a "minority" President and a Vice President receiving fewer popular votes than their opponents, but more electoral votes since the system is not based on the one-person, one-vote standard and the principle of equal representation for equal numbers of people. Second, the winner-take-all method of allocating electoral votes generally fails to recognize any proportional strengths of minority parties and independent groups. Third, under the present system, if no presidential and vice presidential ticket receives a majority of the Electoral College votes, then the election of the President and Vice President is further removed from the people by having the Congress decide the offices in accordance with the Twelfth Amendment.

Four proposals have been advanced in many Congresses to reform the Electoral College: (1) the direct election plan, (2) the district plan, (3) the proportional plan, and (4) the automatic plan. The direct election plan would abolish the Electoral College and provide for the direct popular election of the President and the Vice President. The district plan would essentially preserve the Electoral College votes but would award the electoral votes to the presidential and vice presidential ticket winning the congressional districts within a state with the exception of the at-large (senatorial-based) electoral votes going to the statewide winning ticket. The proportional plan would abolish the Electoral College but would retain the electoral vote concept by awarding the electoral votes to the presidential and vice presidential candidates in proportion to the number of popular votes received by them. The automatic plan would abolish the office of presidential elector while still preserving some aspects of the Electoral College by awarding a state's electoral votes on an automatic, winner-take-all basis to the presidential and vice presidential candidates winning the most votes.

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The Electoral College Method Of Electing The President And Vice President And Proposals For Reform

INTRODUCTION

The President and the Vice President of the United States are not elected directly by the voters in the November general election, but indirectly by the institution called the Electoral College. The United States Constitution under Article II, Section 1, Clause 2 and the Twelfth Amendment provides only for the election of presidential and vice presidential electors at the November general election. The constitutional provisions do not provide for any type of nominating procedures for presidential elections such as primary elections or national nominating conventions which are based on state statutory provisions and major political party rules. The number of electors to which each state is entitled is based on the state's congressional representation in the House of Representatives¹ and the United States Senate. After each decennial census as the states gain or lose population and consequently Representatives in the House, the number of electoral collegians of the Electoral College assigned to each state likewise changes. There are presently 538 electors apportioned to the states and the District of Columbia based on: (1) 100 Senators, (2) 435 Representatives, and (3) 3 electors constitutionally assigned to the District of Columbia in accordance with the Twenty-third Amendment. After the 1990 decennial census, the fifty states and the District of Columbia were entitled to the following numbers of electors:

¹ Cf., *Apportionment Population And State Representation*, 102d Congress, 1st Session, Jan. 7, 1991, House Document 102-18.

Alabama	9	Kentucky	8	North Dakota	3
Alaska	3	Louisiana	9	Ohio	21
Arizona	8	Maine	4	Oklahoma	8
Arkansas	6	Maryland	10	Oregon	7
California	54	Massachusetts	12	Pennsylvania	23
Colorado	8	Michigan	18	Rhode Island	4
Connecticut	8	Minnesota	10	South Carolina	8
Delaware	3	Mississippi	7	South Dakota	3
D.C.	3	Missouri	11	Tennessee	11
Georgia	13	Montana	3	Texas	32
Florida	25	Nebraska	5	Utah	5
Hawaii	4	Nevada	4	Vermont	3
Idaho	4	New Hampshire	4	Virginia	13
Illinois	22	New Jersey	15	Washington	11
Indiana	12	New Mexico	5	West Virginia	5
Iowa	7	New York	33	Wisconsin	11
Kansas	6	North Carolina	14	Wyoming	3

TOTAL: 538 Electoral College Votes; 270 votes needed to win.

The method of electing the President and the Vice President of the United States was the subject of much controversy at the Constitutional Convention of 1787. There was considerable opposition by the framers of the Constitution to the direct popular election of the President and the Vice President since they feared that the popular electorate lacked sufficient knowledge of the character and qualifications of the presidential and vice presidential candidates to make intelligent electoral decisions.²

There was also the large state versus the small state controversy as to the proper method of electing the President and Vice President.

The Constitutional Convention of 1787 settled on a compromise plan which was the Electoral College Method as we know it today. It provided for the election of the President and the Vice President by which each state would appoint electors in a manner determined by its legislature³ who would then meet in their respective states and cast their votes for President and Vice President. Accordingly, under Article II, Section 1, Clause 2 of the Constitution as amended by the Twelfth Amendment in 1804, each state is required to appoint in a manner determined by the state legislature a number of electors equal in number to its congressional representation. Also, the Twenty-third Amendment adopted in 1961 provided for three electors from the District of Columbia. However, it should be noted that the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Canal Zone, and other territories of the United

² *Presidential Elections Since 1789*, 2d ed. (Washington, D.C.: Congressional Quarterly, Inc., 1980), p. 1.

³ *Ibid.*

States are not constitutionally entitled to electors in the Electoral College since they do not have either Senators or Representatives in the Congress.

Congress has the responsibility under Article II, Section 1, Clause 4 of the Constitution of setting the dates on which the electors are chosen and on which they are to meet and cast their votes for President and Vice President. Congress accordingly has set the Tuesday after the first Monday in November in every fourth year as the general election date for the election of electors.⁴ It has also set the first Monday after the second Wednesday in December following the general election as the date on which the electors are to meet in their respective states and cast their votes.⁵ As provided by the Twelfth Amendment adopted in 1804, the electors meet in their own states, and each elector casts two ballots, one for President and one for Vice President. All of the states and the District of Columbia provide for the "appointment" of electors by direct popular election at the general election in November.

Under Article II, Section 1, Clause 2 as amended by the Twelfth Amendment, the electors are required to meet in their respective states as an "Electoral College" in December and actually choose the President-elect and the Vice President-elect while the people only choose the electors for the Electoral College at the general election in November. After the Electoral College meets and the votes are cast for President and Vice President, the certified results, in accordance with the Twelfth Amendment and federal statutory provisions,⁶ are transmitted to the Archivist of the United States who then transmits such results to the House of Representatives and the Senate. On January 6th following the election, the new incoming Senate and the House of Representatives, with the President of the Senate as the presiding officer, meet at 1 p.m. in the chamber of the House of Representatives to count the Electoral College votes. The presidential and vice presidential candidates having the simple majority (270) of the total number of electoral votes (538) shall be President-elect and Vice President-elect. But, if no presidential and vice presidential ticket obtains such a simple majority of the electoral votes, the House of Representatives under the Twelfth Amendment would immediately begin the process of choosing by ballot from among the three presidential candidates having the highest number of electoral college votes. The Senate would then adjourn to its respective chamber and begin the process of choosing the Vice President from the two vice presidential candidates receiving the highest number of electoral votes.⁷

⁴ 3 U.S.C. § 1 (time of appointing electors) which reads as follows: "The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President. (June 25, 1948, ch. 644, 62 Stat. 672.)

⁵ 2 U.S.C. § 7 (meeting and vote of electors).

⁶ 3 U.S.C. §§ 6, 15.

⁷ U.S. CONST. Amend. XII; 3 U.S.C. § 15.

HISTORICAL PROBLEMS OF THE ELECTORAL COLLEGE

Presidential and Vice Presidential Election by the Congress Rather Than by the People

If the presidential and vice presidential candidates do not receive a simple majority of the Electoral College votes, the House of Representatives must choose the President and the Senate the Vice President. According to the Twelfth Amendment, the procedure for choosing the President by the House of Representatives shall be by the states in alphabetical order with each state having only one vote. Each state's vote would be determined by a simple majority vote within the state's delegation, and a tie vote within a state's delegation may result in the state's abstaining from casting a vote. The constitutional quorum required would be members from two-thirds of the states (34 of the 50 states) in order for votes for the President to be cast; and the President would be chosen by a simple majority of the states' votes; thus, twenty-six (26) states would be required to win the presidency. The new incoming House of Representatives of the new Congress would be the House that would choose the President since under Section 1 of the Twentieth Amendment and by federal statute,⁸ the new Congress convenes on the 3rd day of January after the general election and counts the electoral votes on the 6th day of January after the December meeting of the Electoral College.⁹

Likewise, under the Twelfth Amendment of the Constitution, if no vice presidential candidate has a simple majority of electoral votes (270), the new incoming Senate then chooses the Vice President from the two vice presidential candidates with the highest number of electoral votes. The quorum for the Senate for making such selection must consist of two-thirds of the total number of Senators (67). The vice presidential candidate receiving the greater number of senatorial votes shall be elected Vice President with a simple majority of fifty-one votes (51) required to win. Thus, there is a possibility that the President could be of one political party and the Vice President of another political party.

The election of the President by the House of Representatives has only happened two times before, in 1801 when Thomas Jefferson was chosen over Aaron Burr and in 1825 when the House chose John Quincy Adams over Andrew Jackson. The presidential election of 1800 was resolved by the House of Representatives when, on February 17, 1801, Thomas Jefferson was chosen by the votes of 10 states with 4 for Aaron Burr, and 2 blank ballots. In the presidential election of 1824, the House on February 9, 1825 elected John Quincy Adams as President over Andrew Jackson by a vote of 13 states to 7. Four state votes went for William H. Crawford.

The threat of a presidential election being thrown into the House of Representatives increases when there is a viable and well-funded third-party or

⁸ 2 U.S.C. §§ 1, 7.

⁹ 3 U.S.C. § 15 (counting of electoral votes in Congress).

independent presidential candidate who is able to spin off electoral college votes by carrying a plurality of votes in statewide elections. The last example of a third-party candidate winning electoral votes occurred in 1968 with the minor party candidacy of George C. Wallace who won 46 Electoral College votes by carrying six southern states.

While the Twenty-third Amendment ratified in 1961 grants the District of Columbia three electoral votes in the Electoral College, the District of Columbia would be effectively disenfranchised if the election of the President is to be decided by the House of Representatives since the District of Columbia does not have any Representatives in the House. The District of Columbia has only a non-voting Delegate in the House of Representatives who would not play any voting role in the election of the President by the House. Since each state is entitled to only one vote in the House of Representatives in choosing a President, it has been argued that the House election of the President is one step further removed from the democratic ideal of a popular election. Likewise, the District of Columbia would not play any role in the selection of the Vice President for a similar reason in that the District does not have any U. S. Senators.

"Minority President" Problem

The Electoral College system can result in the election of a "minority" president winning the electoral vote, but losing the popular vote. The Electoral College system has in the past led to the election of three "minority" presidents, namely, National Republican John Quincy Adams in 1824, Republican Rutherford B. Hayes in 1876, and Republican Benjamin Harrison in 1888. In the 1824 presidential election, National Republican John Quincy Adams received fewer popular votes than his major opponent Democrat Andrew Jackson (108,740 for Adams and 153,544 for Jackson), but was elected President when the election fell to the House of Representatives which gave a majority of its votes to National Republican John Quincy Adams. In the 1876 presidential election, Republican Rutherford B. Hayes received fewer popular votes than his opponent Democrat Samuel J. Tilden (4,036,298 for Hayes and 4,300,590 for Tilden) and won the election by one electoral vote. And in the presidential election of 1888, Republican Benjamin Harrison received fewer popular votes than his major opponent, Democrat Grover Cleveland (5,439,853 for Harrison and 5,540,309 for Cleveland), but won the election with more Electoral College votes (233 for Harrison and 168 for Cleveland).¹⁰

¹⁰ *Nomination And Election Of The President And The Vice President, 1992, S. Doc. 102-14 (Washington, D.C.: U.S. Govt Printing Office, 1992), p. 394 (hereinafter cited as *Nomination and Election*).*

Small-State Advantage in the Electoral College

Because the Electoral College system is based on a state's representation in the Congress, it may be viewed as contrary to one-person, one-vote principle¹¹ since each state is entitled to two Senators in Congress no matter how small the population of the state is. The Framers of the Constitution at the Constitutional Convention of 1787, in debating how a President and Vice President should be elected, agreed on a compromise plan whereby less populous states were assured of a minimum of three electoral votes based on two Senators and one Representative irregardless of how small the populations of the states might be.¹²

The composition of the Electoral College appears to be weighted in favor of the small states and consequently may result in a disproportion of votes to smaller states since not all of the Electoral College votes are apportioned to the states based on an equal population standard. The two U.S. senatorial electoral votes and the one U.S. representative electoral vote that each state is entitled to--no matter how small--may advantage smaller states over the larger states since voters in the smaller states can in fact influence more electoral votes than those in larger states. Also the fact that each state is entitled to one House seat in the Congress irregardless of population size may likewise result in a disproportion of electoral votes to smaller states contrary to the equal population principle.¹³

For example, after the 1990 census, when you compare the States of Alaska and California in terms of Electoral College votes, Alaska with a population of 551,947, is entitled to three (3) electoral votes, while California with a population of 29,839,250, is entitled to fifty-four (54) electoral votes. Thus, in the 1990 decade, such disproportion has been manifested in that Alaska has one Electoral College vote for every 183,982 inhabitants, while California has one Electoral College vote for every 552,579 inhabitants.¹⁴ Because of such an inequitable distribution of electoral votes among the states away from the one-person one-vote standard, there is a small state advantage over large states as to the allocation of the electoral votes relative to the states' populations.

¹¹ The one-person one-vote principle was adopted by the United States Supreme Court for congressional and state legislative reapportionment and redistricting cases in order that there would be equal representation for equal numbers of people. See *e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) and *Wesberry v. Sanders*, 376 U.S. 1, 7-18 (1964).

¹² See "Presidential Elections and the Electoral College," *Presidential Elections Since 1789*, *supra*, pp. 1-2.

¹³ William R. Keech, *Winner Take all* (New York: Holmes & Meier Publishers, Inc., 1979), p. 28.

¹⁴ *Apportionment Population And State Representation*, H.R. DOC. 102-18, 102d Cong., 1st Sess. 3 (1991).

In a sense, while it is generally recognized that there is a small-state advantage in the Electoral College, there is also a large-state advantage in such system in that the most populated states control the largest blocs of electoral votes. For example, voters in larger populated states in 1990 have been able to influence a larger bloc of Electoral College votes than voters in smaller populated states because of the winner-take-all method of allocating a state's Electoral College votes. Thus, a voter in Alaska could only influence three (3) electoral votes, whereas, a voter in California could influence fifty-four (54) electoral votes in a presidential election.

Winner-Take-All Method of Allocating Electoral Votes

Under Article II, Section 1, Clause 2 of the Constitution, electors are appointed by the states in the manner that is determined by state legislatures. Presently all of the states and the District of Columbia, with the exception of the States of Maine and Nebraska, have adopted the winner-take-all method of allocation of electors so that the corresponding slate of electors representing the presidential and vice presidential ticket which wins a majority or the largest plurality of votes in a state or the District of Columbia is elected at the general election day in November and later meets in mid December as part of the Electoral College to cast all of the ballots for the winning presidential and vice presidential candidates from that state.¹⁵

The States of Maine and Nebraska have adopted the congressional district method of allocating some of the electors. The problem with the winner-take-all method is that it fails to recognize the strengths of slates of opposing presidential and vice presidential candidates losing statewide votes by narrow margins and thus failing to pick up any electoral votes.

The Decennial Census Problem

Under the present Electoral College method, the assignment of electors to the various states on the basis of congressional representation depends to a large degree on the population of a state since the number of electors a state may have depends on the number of Representatives and Senators that it has in Congress. After each decennial census, the 435 U.S. Representatives are re-apportioned to the states based on their respective populations with some states gaining Representatives and other states losing them. The gain or loss of a state's representation in the House of Representatives corresponds to the state's gain or loss in the number of electors in the Electoral College.

For example, after the 1990 decennial census, there was a shift of 19 seats in the House of Representatives from the northeast and midwest regions of the United States to the southern and the western regions. Consequently, certain states primarily in the northeast, northwest and midwest lost House seats: Illinois -2, Iowa -1, Louisiana -1, Kansas -1, Kentucky -1, Massachusetts -1,

¹⁵ See generally, "State Laws Relating to the Nomination and Election of Presidential Electors," *Nomination and Election, 1992, supra* at pp. 287-376.

Michigan -2, Montana -1, New Jersey -1, and New York -3, Ohio -2, Pennsylvania -2, and West Virginia -1. At the same time certain states primarily in the south, southwest, and the west gained House seats: Arizona +1, California +7, Florida +4, Georgia +1, North Carolina +1, Texas +3, Virginia +1, and Washington +1.¹⁶ Such gain or loss by a state in its representation in the House denotes a gain or loss in the number of electors a state has in the Electoral College. This would thus either increase or decrease a state's influence in the presidential and vice presidential electoral process.

A problem with the decennial census as it relates to the number of electors to which each state is entitled is that significant population shifts often occurring within the decade are usually unaccounted for at quadrennial presidential elections later in the decade. Moreover, the number of Representatives to which each state is entitled, and likewise its number of electors in the Electoral College, are often not effective until 2 years after the decennial census. This situation results in some states being over-represented while others are under-represented in the Electoral College for a period of time. Consequently, a state theoretically can have more influence or less influence on the presidential electoral process than it should have because of a decennial census that occurred years before. For example, when a presidential election occurs during the first year of a new decade in a decennial census year, the presidential election is actually based on the apportionment of electors to the Electoral College based on a census that was taken 10 years earlier.¹⁷

The Faithless Elector

Generally, although restrictive state legislation exists in the absence of any federal statutory or constitutional provisions, the electors in the various states and the District of Columbia who collectively comprise the Electoral College essentially remain constitutionally free to cast their ballots for any presidential and vice presidential candidates for whomever they wish. There is no uniformity among the state statutory provisions binding or not binding the electoral collegians. Some states have no statutory provisions binding or directing the electors as to their votes. The state statutory provisions that do attempt to bind them can be categorized as: (1) those requiring an oath or pledge to support under penalty of law,¹⁸ (2) those requiring a mere pledge or affirmation of support without penalty of law, and (3) those merely directing electors to support the winning ticket.¹⁹ Some state political parties in their

¹⁶ See H.R. DOC. NO. 102-18 *supra* at pp. 3-4.

¹⁷ Keech, *supra*, p. 27.

¹⁸ See, e.g., Oklahoma Statutes Annotated, title 26, §§ 10-102, 10-109 whereby electors committed to a presidential and vice presidential ticket must take an oath to support that ticket when the Electoral College meets. A failure to do so could result in a misdemeanor punishable by a fine of not more than one thousand dollars.

¹⁹ See generally, *Nomination and Election*, as to the state statutory provisions relating to the electors at pp. 290-376.

rules require that candidates for the offices of presidential and vice presidential elector make an affirmation or take a pledge to support the nominees for president and vice president of the parties' national nominating conventions if the party's presidential and vice presidential ticket wins a majority or a plurality of the statewide vote at the general election.

In 1952, Supreme Court in *Ray v. Blair* upheld the right of political parties to require pledges from candidates for the office of presidential and vice presidential elector to support the party's nominees for president and vice president should they win the state's general election.²⁰ The Supreme Court held that the Twelfth Amendment does not bar a political party from requiring pledges of candidates for the office of presidential and vice presidential elector.²¹ The exclusion of a candidate in a primary election by a state or a political party for failing to pledge support for the party's presidential and vice presidential nominees was found to be a constitutionally accepted method of securing party candidates for the office of elector who are pledged to the political party's philosophy and leadership. In the Court's view, such a requirement does not violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment.²²

Generally, when the presidential and vice presidential electors meet in December as an "Electoral College" in the 51 jurisdictions, the electors are faithful to the presidential and vice presidential tickets winning the most votes in their respective states and the District of Columbia at the general election. Despite certain state statutory provisions and party rules requiring support for the winning presidential and vice presidential slate, there have been a number of occasions when certain "faithless electors" voted for presidential and vice presidential candidates different from the political party's candidates who won the most votes in a state. Recent incidences of the "faithless elector" have occurred in the following presidential election years:

- in 1948, Preston Parks, a Tennessee elector for Harry S. Truman voted for Gov. Strom Thurmond of South Carolina;
- in 1956, W.F. Turner, an Alabama elector for Adlai E. Stevenson voted for Walter E. Jones, a local judge;
- in 1960, Henry D. Irwin, an Oklahoma elector for Richard M. Nixon voted for Senator Harry F. Byrd of Virginia;
- in 1968, Dr. Lloyd W. Bailey, a North Carolina elector for Richard M. Nixon voted for George C. Wallace of the American Independent Party;

²⁰ 343 U.S. 214, 225-227 (1952).

²¹ *Id.*, 228-231.

²² *Id.*, 225-227.

- in 1972, Roger L. MacBride, a Virginia elector for Richard M. Nixon voted for John Hospers of the Libertarian Party; and
- in 1976, Mike Padden, a Washington elector for Gerald R. Ford voted for Gov. Ronald Reagan of California.²³
- in 1988, a West Virginia elector for Michael Dukakis voted for Sen. Lloyd Bentsen for president.²⁴

Death of a President-elect

Neither the United States Constitution nor federal statutes provide for the contingency involving a death of the President-elect or even a Vice President-elect between the time of the November general election and the December meeting of the Electoral College.²⁵ The two major political parties realizing this problem have granted the responsibilities for filling any presidential and vice presidential vacancies to their national committees to make any appointment of a new President-elect or a Vice President-elect when necessary.²⁶ Such a contingency in effect would mean that the major political party winning the most Electoral College votes at the November general election would then select the next President, and possibly even the next Vice President, thus removing the election one step further from the voters.²⁷

For independent presidential candidacies, there are no provisions, regulatory, statutory, or constitutional providing for filling such a vacancy created by an independent President-elect's death. The electoral collegians of an independent presidential candidate winning certain statewide pluralities

²³ *Presidential Elections Since 1789*, *supra* note 1, p. 7.

²⁴ The last time a "faithless elector" vote was cast in the Electoral College was in the 1988 presidential election year. See, Table No. 436 *Electoral Vote Cast for President, by Major Political Party--States: 1952 to 1992*, STATISTICAL ABSTRACT OF THE UNITED STATES 1995, 115 ed., U.S. Department of Commerce, p. 272.

²⁵ Under 3 U.S.C. § 7, the electors meet and vote on the first Monday after the second Wednesday in December.

²⁶ See generally, Article 3, Section 1, (c) of the Charter of the Democratic Party and Article 2, Section 1 (c) of the Bylaws of the Democratic Party, as amended in 1995, providing that the Democratic National Committee shall have the responsibility in "(c) filling vacancies in the nominations for the office of President and Vice President" at pp. 3, 11. And see Rule 27 of The Rules of The Republican Party as adopted by the 1992 Republican National Convention providing for the filling of vacancies in nominations; Rule 27 (a) states: "The Republican National Committee is hereby authorized and empowered to fill any and all vacancies which may incur by reason of death, declination, or otherwise in the office of Republican candidate for President of the United States or Republican candidate for Vice President of the United States, as nominated by the national convention, or the Republican National Committee may reconvene the national convention for the purpose of filling any such vacancies."

²⁷ See generally, Akhil R. Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 Ark. L. Rev. 215 (1995).

would appear then to be free to vote for any presidential candidate when the Electoral College meets absent such regulatory, statutory, or constitutional guidance.

STATE LAWS PROVIDING FOR THE NOMINATION AND ELECTION OF PRESIDENTIAL AND VICE PRESIDENTIAL ELECTORS

Major Political Party Nominations of Electors

Under Article II, Section 1, Clause 2 of the Constitution, "[E]ach 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...." The appointment and the manner of the appointment of electors to the Electoral College from the various states is left up to the states and their legislatures. The election laws of the various states and District of Columbia differ as to the method of nominating the presidential and vice presidential electors. In some states the method of nominating presidential and vice presidential electors is delegated by the legislatures to the major political parties, which enact rules providing for the nomination of the electors. There are generally three methods of nomination of the electors by the major political parties in the various states and the District of Columbia: (1) state party conventions, (2) state party committees, and (3) state party primaries. Most of the state statutory provisions direct the major political parties as to the manner of nominating presidential and vice presidential electors while other states leave such electoral nominating processes completely up to the option of the major political parties to determine such processes by state party rules. The two major political parties nominate presidential electors by the state party convention or by state party committee in the states and forward them to the secretaries of states or state election officers of the various states and the District of Columbia by a date certain to be placed on the November general election ballot as the electors for President and Vice President.²⁸ While in Pennsylvania, independently of the political party, the presidential nominees of each major political party must nominate within 30 days after his or her nomination by the party National Convention the number of party candidates for the office of presidential elector equal to the number of electors that such nominee is entitled to in Pennsylvania.²⁹

²⁸ See generally, *Nomination and Election*, supra, "Part IV. State Laws Relating to the Nomination and Election of presidential Electors." at pp. 287-376.

²⁹ 12 Pennsylvania Statutes Annotated, title 25, § 2878.

Independent and Minor Party Presidential and Vice Presidential Candidates

The Electoral College system would seem to favor the major political parties over minor parties, third parties, and independent candidates since the presidential electoral system, as it has politically and historically evolved under state election laws and major political party rules, provides for an almost automatic mechanism by which the major parties can place their candidates for President and Vice President and also their electors on the general election ballot in November.³⁰ Also the federal presidential, public financing provisions facilitate the acquisition of public campaign funds for major political party candidates for President and Vice President while independent, minor party, and third-party candidates must demonstrate at least a 5% voter support in order to receive any public funds which are then provided 4 years later well after the election is over.³¹

The names of the independent and minor party presidential and vice presidential candidates are not automatically placed on the November general election ballots in the states and the District of Columbia as they are for the major party presidential and vice presidential candidates. Often the independent candidates directly and the minor parties most likely by party committee would then appoint or nominate their electors to the secretaries of state or the state election officers to be voted on in the November general election.³² The non-major party candidates must comply with the diverse and complicated nominating petition requirements for ballot positions in these 51 jurisdictions which generally demand a requisite number of signatures of voters in order to show a certain modicum of support. The statutory requirements for such filing petitions for independent and minor party presidential and vice presidential candidates differ from state to state as to: (1) the form of the petition and the information required on it; (2) the requisite number of signatures of voters throughout the state; (3) information concerning the signers' occupations, residences, and intentions to support and vote for such candidates; (4) qualifications of signatories as registered voters; and (5) time requirements for

³⁰ See, *Nomination and Election, supra*, Part IV, at pp. 287-376.

³¹ See generally, 26 U.S.C. §§ 9001-9012 concerning presidential general election public financing, and see 26 U.S.C. § 9004(a)(2)(A)(B),(3) concerning the eligibility of minor party candidates to receive public funds. While it was argued in the 1976 decision in *Buckley v. Valeo*, 424 U.S.1, 97 (1976) that the federal public financing provisions of the federal law for presidential candidates were invidiously discriminatory against non-major party candidates in violation of the Due Process Clause of the Fifth Amendment, the *Buckley* Court disagreed since "...the Constitution does not require Congress to treat all declared candidates the same for public financing purposes." *Id.*, 97. "The Constitution does not require the Government to 'finance the efforts of every nascent political group,' [quoting *American Party of Texas v. White*, 415 U.S. at 794] merely because Congress chose to finance the efforts of the major parties." *Buckley* noted that the Court did not rule out in the future of concluding that such public financing system invidiously discriminates against non-major parties when they would present an appropriate factual demonstration. *Id.*, 97 at footnote 13.

³² See, *Nomination and Election, supra*, Part IV, at pp. 287-376.

gathering the required number of signatures and filing the petition with the requisite signatures in the offices of the states' chief election officers, usually the secretaries of state.³³

No independent, minor party, or third-party presidential candidate has ever won the presidency even though three presidential candidates in past elections did win statewide elections³⁴ and thus Electoral College votes: 1948--39 electoral votes for Strom Thurman; 1960--15 electoral votes for Harry F. Byrd; and 1968--46 electoral votes for George C. Wallace.³⁵ Such candidates could have faced many substantial difficulties in obtaining general election ballot access in the 50 states and the District of Columbia.

Various federal court decisions have made it easier for minor party and independent candidates for President and Vice President to get on the November general election ballot. For example, in 1968 the United States Supreme Court in *Williams v. Rhodes*, struck down on equal protection grounds the Ohio election law that required a new political party to obtain petitions signed by qualified electors totaling 15% of the number of ballots cast at the last gubernatorial election and to file them in early February of the presidential election year. The Court found that Ohio's election laws relating to the nomination and election of presidential and vice presidential electors, which effectively limited general election ballot access to the two major political parties, taken as a whole, were invidiously discriminatory against minor party candidates in violation of the Equal Protection Clause.³⁶

In the 1976 presidential election, independent candidate Eugene J. McCarthy successfully challenged the constitutionality of many state election law procedures concerning general election ballot access for independent presidential candidates. Consequently many of these procedures were struck down by the federal courts on equal protection grounds as being discriminatory to independent presidential candidates. Major challenges were made in a number of states against election laws which substantially impeded the efforts of independent presidential candidates in obtaining ballot access on the November general election ballots. In 15 states, these challenges were successful in having the courts strike down discriminatory aspects of state election laws as

³³ See generally, the provisions relating to "Minor and New Parties" and "Independent Candidates" in Part IV of *Nomination and Election*, *supra* at pp. 287-376.

³⁴ "Where Non-major Party Candidates Have Won," 1995 American Political Network, Inc.: The Hotline, Sec. White House '96, Sept. 28, 1995.

³⁵ See, Table No. 436 *Electoral Vote cast for President, by Major Political Party--States: 1952 to 1992*, STATISTICAL ABSTRACT OF THE UNITED STATES 1995, 115 ed., U.S. Department of Commerce, p. 72.

³⁶ 393 U.S. 23, 28-34 (1968).

they were applicable to independent candidates.³⁷ The 1980 independent presidential campaign of John B. Anderson still encountered similar obstacles. Major constitutional challenges to state election laws discriminating against independent presidential candidates were successfully made by the Anderson campaign in seven states: (1) Florida,³⁸ (2) Kentucky,³⁹ (3) Maine,⁴⁰ (4) Maryland,⁴¹ (5) New Mexico,⁴² (6) Ohio,⁴³ and (7) North Carolina.⁴⁴ Consequently, challenges to state ballot access procedural obstacles brought by George C. Wallace in 1968, Eugene J. McCarthy in 1976, John B. Anderson in 1980 and even by Ross Perot in 1992 and 1996⁴⁵ have generally made it easier for independent and third party presidential candidates to gain ballot access in the States and the District of Columbia and thus run against major party presidential candidates in the presidential general election in November.

Supreme Court Decisions concerning the Appointment of Electors by the States

In the 1892 decision of *McPherson v. Blacker*,⁴⁶ the Supreme Court held that, under Article II, Section 1, Clause 2 of the Constitution, the legislatures of the states have the exclusive power to direct the manner in which the presidential and vice presidential electors are to be appointed. Congress has the power under this provision to determine the time of choosing the electors and the day on which they are to vote, but otherwise the power of the several states is exclusive. Under this provision the states have the power, for example, to

³⁷ See generally, "Progress Report On McCarthy Legal Challenges," (Washington, D.C.: Committee For A Constitutional Presidency, 1976).

³⁸ *Anderson v. Firestone*, 499 F. Supp. 1027 (N.D. Fla. 1980).

³⁹ *Greaves v. Mills*, 497 F. Supp. 283 (E.D. Ky. 1980), *aff'd in part and rev'd in part, sub nom., Anderson v. Mills*, 664 F.2d 602 (6th Cir. 1981).

⁴⁰ *Anderson v. Quinn*, 495 F. Supp. 730 (D. Me. 1980), *aff'd* 634 F.2d 616 (1st Cir. 1980).

⁴¹ *Anderson v. Morris*, 500 F. Supp. 1095 (D. Md. 1980), *aff'd* 636 F.2d 55 (4th Cir. 1980), *judgment vacated* 658 F. 2d 246 (4th Cir. 1980).

⁴² *Anderson v. Hooper*, 498 F. Supp. 898 (D.N.M. 1980).

⁴³ *Anderson v. Celebrezze*, 449 F. Supp. 121 (S.D. Oh. 1980), *rev'd* 664 F. 2d 554 (6th Cir. 1981), *aff'd* 460 U.S. 780 (1981), *rev'd* 460 U.S. 780 (1983). The United States Supreme Court held that the restrictive provisions of the Ohio election statutes which required early filing deadlines for independent candidates placed an unconstitutional burden on the voting and associational rights of the independent candidate's supporters. *Id.*, 790-95.

⁴⁴ *Anderson v. Babb*, No. 80-561-CIV-5 (E.D. N.C. 1980), *aff'd per curiam* 632 F.2d 300 (4th Cir. 1980).

⁴⁵ For example, see, L. Stahl, "Perot's Party's Ohio Fails; Group Still Has Time To Get Candidates On November Ballot," THE DALLAS MORNING NEWS, December 20, 1995, at 6A.

⁴⁶ 146 U.S. 1 (1892).

provide for a statewide winner-take-all method or a congressional district method for choosing electors.⁴⁷

The 1952 Supreme Court decision in *Ray v. Blair*⁴⁸ held that when a state authorizes a political party to choose its presidential electoral nominees in a party primary and to determine the qualifications of such candidates, it was not violative of the Constitution to require the candidates to pledge to support the party's presidential and vice presidential nominees.⁴⁹ According to the Court, the exclusion of candidates for the offices of presidential elector for refusing to support the party's nominees for President and Vice President was an exercise of a state's right under Article II, Section 1, Clause 2 to appoint electors in such manner as it may choose.⁵⁰

FOUR PROPOSALS TO REFORM THE PRESENT METHOD OF ELECTING THE PRESIDENT AND THE VICE PRESIDENT

Since the adoption of the Constitution in 1787, the Electoral College method of electing the President and Vice President has been the subject of much discussion and controversy. The Twelfth Amendment providing for voting procedures for the Electoral College has been the only major reform of the Electoral College; it was passed by Congress on December 9, 1803 and was ratified by three-fourths of the several states on July 27, 1804. Since then, in almost every session of Congress, one or more House and Senate joint resolutions have been introduced proposing Electoral College reform. In the 104th Congress (1995-96) there has only been a handful of constitutional amendments proposing reform.⁵¹

There have been more congressionally proposed constitutional amendments introduced in Congress on Electoral College reform than any other proposed constitutional amendment.⁵² For example, between 1889 and 1946, approximately 109 constitutional amendments to reform of the Electoral College were proposed. And between 1947 and 1968, approximately 265 constitutional

⁴⁷ *Id.*, 35-36; today two States have chosen to employ the congressional district method of choosing presidential and vice presidential electors: (1) Maine (Maine Revised Statutes Annotated, title 21-A, § 805. 2) and (2) Nebraska (Revised Statutes of Nebraska, § 32-548).

⁴⁸ 343 U.S. 214 (1952).

⁴⁹ *Id.*, 224-225.

⁵⁰ *Id.*, 225-228.

⁵¹ See, H.J. Res. 36 (Orton); H.J. Res. 86 (Jacobs); and H.J. Res. 117 (Wise), 104th Cong., 1st Sess. (1995), all of which propose providing for the direct popular election of the President and the Vice President; there has been no significant legislative activity on these bills.

⁵² *Who Should Elect The President?* (Washington, D.C.: League of Women Voters of the United States, 1969), p. 43.

amendments were introduced for such reform.⁵³ Most of these bills had minimal legislative activity. However, on some of these proposals, there were some hearings and some legislative activity in both the House and the Senate, but there was not enough legislative support to obtain the necessary two-thirds of the votes of both houses for passage of a constitutional amendment under Article V.⁵⁴

One of the more serious legislative attempts by Congress to reform the Electoral College system occurred after the 1968 presidential election when third-party candidate, George Wallace, was able to carry six southern states with 46 electoral votes and thus caused considerable concern about whether the Congress and not the people would choose the next President and Vice President. In the following 91st Congress (1969-70) there was a flurry of legislative activity to reform the Electoral College by the direct election method. In the first Session of that Congress, H.J. Res. 681 was introduced by Emanuel Celler proposing to abolish the Electoral College and providing for the direct popular election of the President and the Vice President with a runoff requirement between the two presidential candidates with the highest votes when a 40% margin of the vote is not obtained. This proposal passed the House on September 18, 1969 by a vote of 338-70, but failed to pass the Senate in 1970 because of filibuster activities by Senators from small states and southern states.⁵⁵ The resolution was laid aside on October 5, 1970 after two unsuccessful efforts to stop the filibuster by invoking cloture.⁵⁶

Likewise, congressional interest significantly increased after the close presidential election in 1976 in which the Democratic candidate (Jimmy Carter) beat the Republican candidate (Gerald R. Ford) by a 50.1 percent popular vote margin and by an Electoral College vote of 297-240 (270 votes needed to win).⁵⁷ This was the case in the 95th Congress (1977-1978) which convened in the following year. Conversely, when one political party wins the Electoral College

⁵³ *Id.*, 43.

⁵⁴ The House Judiciary Committee held hearings on proposals to reform the Electoral College in 1947, 1949, 1951, and 1969. The Senate Subcommittee on Constitutional Amendments held hearings in 1948, 1953, 1955, 1961, 1963, 1966, 1967, and 1969 on such reform proposals. In the House, between 1947 and 1968, there were four occasions when House Joint Resolutions were reported favorably: 1948 (H.J. Res. 9, Gossett); 1949 (H.J. Res. 2, Gossett); 1950 (S.J. Res. 2, Lodge); and 1951 (H.J. Res. 19, Gossett). Between 1947 and 1968, Senate Joint Resolutions were also reported favorably four times: 1948 (S.J. Res 200, Lodge); 1949 (S.J. Res. 2, Lodge); 1951 (S.J. Res. 52, Lodge); and 1955 (S.J. 31, Daniel). S.J. Res. 2 (Lodge) passed the Senate by the required two-thirds vote, but the House failed to vote on the Senate Resolution. *Id.*, 92-95.

⁵⁵ *Powers of Congress* (Washington, D.C.: Congressional Quarterly, Inc., 1976), pp. 279-80.

⁵⁶ "Electoral Reform" in *Powers of Congress, supra*, pp. 279-280.

⁵⁷ In 1976, the Democratic presidential and vice presidential candidates received 40,831,000 votes over the Republican presidential and vice presidential candidates who received 39,148,000 votes. See generally, Statistical Abstract of the United States, 1995, U.S. Department of Commerce, 115th Edition at p. 271.

vote by large margins such as in the 1980, 1984, and 1988 presidential elections,⁵⁸ congressional interest in such reform diminishes.

The proposals to reform the Electoral College in recent Congresses generally fall into four categories: (1) the direct election plan, (2) the district plan, (3) the proportional plan, and (4) the automatic electoral vote plan.⁵⁹

The Direct Election Plan

The most popular proposal to reform the present method of electing the President and the Vice President is the direct election plan. This plan has been the most popular proposal for reform in the 103d Congress (1993-1994)⁶⁰ and the 104th Congress (1995-96).⁶¹ Under such plan, the Electoral College would be abolished, and the President and Vice President would be elected directly by a majority of the total popular votes. Many direct election proposals provide for a runoff election between the two presidential and vice presidential tickets receiving the greatest number of popular votes when a certain required percentage of the popular vote, such as 35% or 40%, is not attained.

Proponents of the direct election plan argue that it would eliminate the possibility of a "minority" President and Vice President since it would prevent the election of candidates who did not win at least a certain required plurality percentage of the vote or a majority of the popular votes. Proponents note that the direct election plan, unlike the present system, would give every vote equal weight regardless of the state in which it was cast. It is also noted that the direct election plan would reduce the risk of complications that might arise between the November general election date and the December meeting date of

⁵⁸ For example, in the 1980 presidential election, Ronald Reagan defeated Jimmy Carter in the Electoral College by a vote of 489-49, and in the 1984 presidential election, Ronald Reagan defeated Walter Mondale by a Electoral College vote of 525-13.

⁵⁹ For example, two bills, S.J. Res 312 and H.J. Res 513, were introduced in the 102d Congress, Second Session (1992) providing for a runoff election between the two presidential and vice presidential tickets receiving the highest number of popular votes should no ticket receive a majority of Electoral College votes. These two novel proposals provide for a different method of reform which could be a fifth plan of reform called the "runoff plan." This proposal would essentially remove the election from the Congress and return it to the people by a runoff election if no presidential and vice presidential tickets receive a simple majority of electoral votes in order to win.

⁶⁰ See generally, H.J. Res. 28, (Wise); H.J. Res. 33 (Jacobs); H.J. Res. 60 (Kleczka); H.J. Res. 65 (Wheat); H.J. Res. 169 (Orton); and S.J. Res. 173 (Exon), 103d Cong. (1993-94).

⁶¹ See, H.J. Res. 36 (Orton), H.J. Res. 86 (Jacobs), and H.J. Res. (Wise), 104th Cong., 1st Sess. (1995).

the Electoral College should a vacancy occur such as by the death of a "President-elect."⁶²

Opponents to the direct election plan argue that the direct election of the President and the Vice President would eventually eliminate the present two-party system and result in the growth of minor parties, third parties, and new parties. It is also argued that the growth of such parties may have a divisive effect on national politics and result in governance by coalition similar to European and other foreign parliamentary systems. Opponents contend that a direct election plan would weaken the powers of the smallest and largest populated states under the present system since this new system would mean that each state's borders would be irrelevant in terms of votes because each vote would be counted equally under a one-person one-vote standard regardless of the population size of the state in which it was cast.⁶³

The District Plan

Generally under the district plan, the Electoral College method of electing the President and Vice President would be preserved with each state choosing the number of electors equal in number to its membership in Congress. The district plan would eliminate the present winner-take-all procedure of allotting a state's entire electoral vote to the presidential candidates winning the statewide vote. One elector would be chosen by the voters for each congressional district in a state, and two representing the U.S. senatorial delegation would be chosen by the voters at large. The states theoretically could adopt the district plan of appointing electors under their power to appoint electors in Article II, Section 1, Clause 2 of the Constitution. The States of Maine and Nebraska are the only states which have adopted the district plan of appointing presidential and vice presidential electors.⁶⁴ Under the district plan, the presidential and vice presidential candidates winning a simple majority of the electoral votes in their congressional districts would be elected.

Most of the congressional legislative district plan proposals provide that in case of a tie vote, the candidates having the plurality of the district electoral votes--excluding the at-large electoral votes assigned to each state for the U.S. Senators--would be declared the winners accordingly. If the electoral vote count still failed to produce a winner, most proposals advocating the district plan would require that the Senate and the House of Representatives meeting in joint

⁶² See Article Three, Section 1 (c) of the Charter of the Democratic Party and Article Two, Section 1 (c) of the Bylaws of the Democratic Party. And see Rule No. 27 on "Filling Vacancies in Nominations" of the Rules of the Republican Party 1992.

⁶³ See generally, "The Direct Popular Vote Plan" in *Who Should Elect The President?* *supra*, pp. 71-79; "The Direct-Vote Plan" in *Voting For President, supra*, chap. 4, pp. 69-89.

⁶⁴ See Maine Revised Statutes, title 21, § 805.2 and Revised Statutes of Nebraska, § 32-556.

session would elect the President and the Vice President by majority vote, with each Member having one vote, from the top three candidate-tickets.

Proponents of the district plan assert that the popular vote results for presidential and vice presidential candidates would be more accurately reflected by this plan than they are under the present Electoral College method. Proponents also note that by preserving the Electoral College system, the district plan would not deprive small or sparsely populated states of certain advantages that they now possess under the present system since each state would still have three electoral votes for its two U.S. Senators and its one U.S. Representative regardless of the size of its population. Also, the district plan might provide an incentive for greater voter participation and an invigoration of the two-party system in presidential elections in states dominated by one political party since it may be possible for the less dominant political party's candidates to carry certain congressional districts.⁶⁵

Opponents of the district plan contend that it does not go far enough in reforming the present Electoral College method since it still would weigh votes in favor of small states. Also the district plan would continue to allow the possibility of electing "minority" candidates winning the electoral vote while losing the popular vote. Some opponents of the district plan argue that it would weaken the present two-party system and encourage the development of minor parties, new parties, and third parties since it would be easier to win Electoral College votes by carrying congressional districts than it would be by carrying statewide votes under the present system.⁶⁶

Some of the proposals in past Congresses calling for reform of the Electoral College by the district plan are as follows: H.J. Res. 875, 94th Cong., 2d Sess. (1976); H.J. Res. 125, 95th Cong., 1st Sess. (1977); H.J. Res. 195, 95th Cong., 1st Sess. (1977); H.J. Res. 267, 95th Cong., 1st Sess. (1977); H.J. Res. 106, 96th Cong., 1st Sess. (1979); H.J. Res. 207, 96th Cong., 1st Sess. (1979); H.J. Res. 549, 96th Cong., 2d Sess. (1980); H.J. Res. 12, 97th Cong., 1st Sess. (1981); and H.J. Res. 29, 97th Cong., 1st Sess. (1981); H.J. Res. 18, 98th Cong., 1st Sess. (1983). None of these district plan proposals has been the subject of any significant legislative activity.

The Proportional Plan

The proportional plan would abolish the Electoral College, but the electoral vote in each state based on congressional representation in Congress and the three electoral votes assigned to the District of Columbia under the Twenty-third Amendment would be apportioned to the presidential and vice presidential candidates according to the number of popular votes received by them, thereby

⁶⁵ See generally, "The District Plan" in *Who Should Elect The President?*, *supra*, pp. 64-66; and see, Wallace S. Sayre and Judith H. Parros. "The District Plan" in *Voting For President*, (Washington, D.C.: The Brookings Institution, 1970), chap. 6, pp. 102-117.

⁶⁶ *Ibid.*

eliminating the present winner-take-all system. The office of presidential and vice presidential elector would be abolished, and there would be no need for the traditional meeting of the electors in the Electoral College in December of the presidential election year.

Under most of the proposals advocating the proportional plan, the presidential and vice presidential candidates receiving a simple majority of the vote or a plurality of at least 40% of the electoral votes would be elected. Should presidential and vice presidential candidates fail to receive the required 40% of the electoral vote, most proportional plan proposals provide that the Senate and the House of Representatives are to meet and vote in joint session to choose the President and the Vice President from the candidates having the two highest numbers of electoral votes.

Proponents of the proportional plan argue that this plan comes the closest of any of the other plans to electing the President and Vice President by the popular vote while still preserving each state's electoral strength. Proponents note that the proportional plan would make it more unlikely that "minority" presidents--those receiving more electoral votes than popular votes under the present system--would be elected. Since the office of presidential elector is abolished, it is contended that the proportional plan gives the voter a more direct voice in the selection of the President and Vice President and eliminates the "faithless elector" problem. Proponents also argue that the proportional plan, by eliminating the present winner-take-all system, would give some weight to the losing candidates by awarding them with electoral votes in proportion to the number of votes they obtained.

Opponents of the proportional plan argue that it could undermine and eventually eliminate the present two-party system by making it easier for minor parties, third parties, and new parties to compete in the presidential elections by being able to win electoral votes without having to win statewide elections to do so. It is also contended by the opponents of the proportional plan that it could possibly result in the election of the President and the Vice President from different political parties. Opponents also argue that the states would generally have less importance as units since the winner-take-all aspect would be eliminated. Moreover, under a proportional plan, campaigning would be easier by candidates since they would no longer have to concentrate on large electoral vote states such as California (having the most electoral votes at 54); but rather campaigning would be more national in scope with more emphasis on issues and certain support groups within the states. The proportional plan, it is argued, would further diminish the role of the states in election of the President and Vice President.⁶⁷

Some of the proposals in past Congresses calling for a constitutional amendment to reform the Electoral College by the proportional plan are as follows: H.J. Res. 601, S.J. Res. 108, 94th Congress (1975-1976); H.J. Res. 226,

⁶⁷ See generally, "The Proportional Plan" in *Who Should Elect The President?*, *supra*, pp. 68-71; "The Proportional Plan" in *Voting For President*, *supra*, chap. 6, pp. 118-134.

H.J. Res. 328, H.J. Res. 455, H.J. Res. 523, S.J. Res. 8, S.J. Res. 18, 95th Congress (1977-1978); H.J. Res. 88, H.J. Res. 125, S.J. Res. 51, 96th Congress (1979-1980). None of these legislative proposals providing for reform of the Electoral College by the proportional plan was the subject of any significant legislative activity outside of hearings.⁶⁸

The Automatic Plan

The automatic plan would amend the present system by abolishing the office of presidential elector and thus the Electoral College and by allocating a state's electoral votes on an automatic winner-take-all basis to the candidates receiving the highest number of popular votes in a state. Of the four proposals to reform the Electoral College, this proposal would result in the least change from the present system of electing the President and the Vice President.

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

Under the present system, minor parties, new parties, third parties, and independent candidates have not fared very well probably due to such problems *inter alia* as ballot access procedures, public financing in the general election, the lack of name recognition and grass-roots organization in comparison to those of the established major parties. Opponents of the automatic plan argue that it does not go far enough in that it perpetuates many of the inequities inherent in the present Electoral College system of electing the President and the Vice President. Opponents note that under the automatic plan it would still be possible to elect a "minority" President and Vice President.⁶⁹ Another problem is that the Congress and not the people could still decide the presidency and the vice presidency when a majority of the electoral votes is not obtained.

Some of the legislative proposals in past Congresses proposing constitutional amendments for the automatic plan are as follows: H.J. Res. 1, 91st Congress (1969-1970); H.J. Res. 312, S.J. Res. 123, 95th Congress (1977-1978); H.J. Res. 223, S.J. Res. 48, 96th Congress (1979-1980).

⁶⁸ Hearings were held on S.J. Res. 8 and S.J. Res 18 in the 95th Congress, 1st Session on Jan. 27 and on Feb. 1, 2, 7, and 10, 1977 by the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee.

⁶⁹ See generally, "The Automatic Plan" in *Who Should Elect The President?*, *supra*, pp. 61-64; and see, "The Automatic Plan" in *Voting For President*, *supra*, chap. 5, pp. 90-101.

CONCLUSIONS

At issue is the need for reform of the Electoral College which was originally the product of 18th century political philosophy and compromise by the delegates to the Constitutional Convention of 1787. Is it time to reform the present method of electing the President and the Vice President? It is argued that today the Electoral College system encourages state-by-state campaigning in states with large numbers of electoral votes and in certain geographical regions of the country often to the detriment of many intrastate minority and special interest groups especially in urban areas.⁷⁰ In the 1967 American Bar Association's report on Electoral College reform, the system of electing the President and the Vice President was described as "archaic, undemocratic, complex, ambiguous, indirect, and dangerous."⁷¹

In almost every Congress, there have been proposals introduced to reform the Electoral College. Hundreds of resolutions have been introduced in past Congresses to change the present system of electing the Presidents and Vice Presidents with little significant legislative activity.⁷² The Twelfth Amendment providing for Electoral College procedures ratified by the states in 1804 was the only time that Congress significantly amended the Electoral College⁷³. The last serious legislative activity on any congressional proposal to reform the Electoral College was in 1969-1970 in the 91st Congress on the direct election plan after the close Nixon-Humphrey in 1968.⁷⁴

Since electoral votes are awarded to the winning candidate on a state-by-state, winner-take-all basis (with the exception of Maine's and Nebraska's congressional district electoral votes), the possibility still exists in a presidential race that a "minority" candidate could be elected President by winning the statewide electoral votes while losing the nationwide popular vote. If the popular-vote winner were to lose the election to the electoral vote winner, there would likely be public resentment, public outcry and a demand for reform. Such a scenario could more likely occur in a presidential election race when there is a popular independent or third-party candidate who could win statewide electoral votes in a three-way presidential race with the two major political party candidates. Thus, if none of the presidential and vice presidential tickets

⁷⁰ J. Clark Archer, et al., "The Geography of U.S. Presidential Elections," *Scientific American*, July 1988, pp. 44-51.

⁷¹ See American Bar Association, *Report of the Commission on Electoral College Reform, Electing The President*, pp. 3-4 (1967).

⁷² Feerick, "The Electoral College--Why It Ought To Be Abolished," 37 *Fordham L. Rev.* 26-27 (1968).

⁷³ However, note that the 23d Amendment to the U.S. Constitution, ratified by the required number of states in 1961, granted three electors to the District of Columbia in presidential and vice presidential elections.

⁷⁴ See H.J. Res. 681, 91st Cong., 1st Sess. (1969).

receives a simple majority of the electoral votes at the December meeting of the electoral collegians (presently 270 out of a total of 538 votes) in a three-way race, the House of Representatives would then select the President and the Senate the Vice President as provided by the Twelfth Amendment.