

## ARTICLES

# REPAIRING THE ELECTORAL COLLEGE

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### I. INTRODUCTION

During the past few years, a growing number of voters have registered or described themselves as "independent."<sup>1</sup> They have expressed serious interest in voting or working for independent or third-party presidential candidates.

Throughout 1995, a number of nationally-known political figures tested the waters or were urged to run as independent candidates. At the National Conference of United We Stand, America, conducted in August, H. Ross Perot told his supporters that he would consider another independent run for President if neither the Democratic nor Republican parties shaped up to his satisfaction.<sup>2</sup> He also announced that he and his supporters had begun the process of forming a national party that could serve as a potential vehicle for an appropriate independent candidate.<sup>3</sup> The same month, New Jersey Senator Bill Bradley announced that he would not seek re-election as Senator in 1996 but was considering a possible independent run for the presidency.<sup>4</sup> Retired Gen-

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1. DAVID B. HILL & NORMAN R. LUTTBURG, *TRENDS IN AMERICAN ELECTORAL BEHAVIOR* 32 (2d ed. 1983); NORMAN H. NIE ET AL., *THE CHANGING AMERICAN VOTER* 47 (enlarged ed. 1979); KEVIN P. PHILLIPS, *POST-CONSERVATIVE AMERICA* 227 (1982); HEDRICK SMITH, *THE POWER GAME: HOW WASHINGTON WORKS* 671 (1988). *But see generally* BRUCE E. KEITH ET AL., *THE MYTH OF THE INDEPENDENT VOTER* (1992).

2. B. Drummond Ayres, Jr., *Perot Leaves Door Open For '96 Presidential Run*, N.Y. TIMES, Aug. 14, 1995, at A8. *See also* Timothy Egan, *Perot Hints at a Possible Run Again*, N.Y. TIMES, Feb. 23, 1996, at A23; Adam Nagourney, *Third Parties: When Perot Talks Its Like a Campaign*, N.Y. TIMES, Mar. 25, 1996, at A13 (nat'l ed.); Sam H. Verhovek, *Perot as Political Presence: 1992 All Over Again?*, N.Y. TIMES, Jan. 23, 1996, at A10.

3. *Perot Party Gains in Maine*, N.Y. TIMES, Dec. 1, 1995, at A24; Gerald Posner, *The Stealth Candidate*, N.Y. TIMES, Mar. 3, 1996, § 6 (Magazine), at 46-47.

4. Clifford J. Levy, *Bradley Says He Won't Seek 4th Term*, N.Y. TIMES, Aug. 17, 1995, at A1; Clifford J. Levy, *Bradley Weighing Independent Race for White House*, N.Y. TIMES, Aug. 18, 1995, at A1.

eral Colin L. Powell, who gained national attention during the Persian Gulf War,<sup>5</sup> was the subject of continuing speculation and entreaty until he announced, on November 8th, that he would not run for political office in 1996.<sup>6</sup> Despite this announcement, in his 1995 autobiography, *My American Journey*, Powell stated that "the time may be at hand for a third major party to emerge"<sup>7</sup> in the United States. As of March 1996, it became clear that Republican candidate Patrick J. Buchanan would not win his party's nomination, and he has also begun to toy with the idea of an independent campaign.<sup>8</sup> These individuals, of course, are not the first in American history to contemplate independent presidential campaigns.

In the early part of this century, with the exception of Theodore Roosevelt's 1912 Bull Moose campaign,<sup>9</sup> independent presidential candidacies were largely the province of small parties at one end or the other of the political spectrum. These parties were never expected to affect the outcome of any presidential election, and none did.<sup>10</sup> Beginning with the 1948 independent campaigns of Henry A. Wallace and Senator Strom Thurmond,<sup>11</sup> a series of third-party or independent presidential candidates—Governor George C. Wallace in 1968, Senator Eugene McCarthy in 1976, Senator John Anderson in 1980, and H. Ross Perot in 1992—raised concerns that the electoral vote might fail to produce an immediate and decisive winner.<sup>12</sup>

In 1912, Theodore Roosevelt's candidacy split the Republican Party, denied reelection to the incumbent Republican President, William Howard Taft, and ultimately led to the election of Woodrow Wilson, the first Democratic President since Grover Cleveland. However, the effects of independent candidacies have not always been this clear. For example, polling organizations and analysts are still arguing whether Ross Perot's independent candidacy in 1992 took more votes from the incumbent Republican President, George Bush, or whether it affected both major parties equally.<sup>13</sup> This

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5. See Bob Woodward, *The Powell Predicament*, WASH. POST, Sept. 24, 1995, at W8.

6. *The Powell Decision: Excerpts From Powell's News Conference on Political Plans*, N.Y. TIMES, Nov. 9, 1995, at B13. Many factors suggested that Powell would run as an independent rather than a Republican. First, he had long refused to commit to the Republican Party. Second, in his youth he was a member of the Liberal Party. Third, the field of Republican candidates was already crowded. See, e.g., Hendrick Hertzberg, *The Independent Route: Would a Powell-Bradley Insurgency Be Good For America?*, THE NEW YORKER, Sept. 4, 1995, at 5 (urging Powell to pursue and independent run for the presidency with Sen. Bradley, a Democrat, as his running mate).

7. R. W. Apple, Jr., *In Book, Powell Says a 3d Party May Be Needed*, N.Y. TIMES, Sept. 10, 1995, § 1, at 1.

8. James Bennett, *Patrick Buchanan: An R.S.V.P. for the Dole Victory Celebration Isn't Being Sent Back Yet*, N.Y. TIMES, Mar. 25, 1996, at B8.

9. See generally JOHN A. GABLE, *THE BULL MOOSE YEARS: THEODORE ROOSEVELT AND THE PROGRESSIVE PARTY* (1978).

10. Theodore Roosevelt came closest in 1912, when he received 27.4% of the popular vote and 88 electoral votes from six states. *Id.* at 132-33. As the Supreme Court noted in *Buckley v. Valeo*, 424 U.S. 1, 98 n.132 (1976), Roosevelt's Progressive Party threat to the major parties ended four years later when it rejoined the Republican Party to support candidate Charles Evans Hughes. Also, except for 1912, the major parties have outpolled all "third parties" since 1856. GABLE, *supra* note 9, at 132-33.

11. Like Roosevelt, former Vice President Henry A. Wallace ran under the banner of the Progressive Party. Then Governor Strom Thurmond formed the States Rights Democratic Party as the vehicle for his 1948 presidential bid.

12. See NEAL R. PEIRCE & LAWRENCE D. LONGLEY, *THE PEOPLE'S PRESIDENT: THE ELECTORAL COLLEGE IN AMERICAN HISTORY AND THE DIRECT VOTE ALTERNATIVE* at ix-x (rev. ed. 1981) (referring to the 1968 election).

13. Compare *Ross Perot's Party: Caught Short*, ECONOMIST, Oct. 21-27, 1995, at 31 ("In the 1992 election, . . . Mr Perot . . . split the Republican vote, letting Bill Clinton win California and

is not an idle question. Democratic President Bill Clinton was elected with a 43 percent plurality of the popular vote but 69 percent of the electoral votes.

Observers of the American political scene attribute the recent increase in third-party candidacies to trends that might be expected to continue, potentially with greater impact than at any time since 1912. One factor that has contributed to the increase in third-party candidacies is the growing disillusionment with American government. This disillusionment is manifested in numerous ways, including a weakening of internal party discipline within the two-party system.<sup>14</sup> Another factor is the communications revolution. Beginning with the first televised presidential debate in 1960 between Senator John F. Kennedy and Vice President Richard M. Nixon, the number and diversity of information sources has increased, along with the propensity of voters to make up their own minds about the candidates. This has further contributed to the major political parties' reduced influence.<sup>15</sup> If these trends continue, more competitive third-party candidacies are likely to emerge. Yet most observers also agree that the two-party system, combined with fixed terms for national officers, is what has given the United States political stability compared to other polities such as Italy.<sup>16</sup>

Each time a serious independent or third-party candidate runs for President, attention turns to the electoral college. Under Article II and the Twelfth and Twenty-third Amendments to the Constitution, each of the states and the District of Columbia has a number of presidential electors equal to its total number of Senators and Representatives.<sup>17</sup> These electors cast the ballots that, when counted, elect the President and Vice President. Although most electors vote for the presidential and vice presidential candidates who received a majority or plurality of their states' popular vote, electors occasionally vote for other candidates or even non-candidates. In fact, electors have failed to vote for their party's presidential candidate in seven of the last twelve elections, and in six of the eight elections between 1948 and 1976.<sup>18</sup> While none of these

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thus clinch the presidency for the Democrats.") with Letter from Gary Langer, Senior Polling Analyst, ABC News, to the Editor, *ECONOMIST*, Nov. 11-17, 1995, at 10 ("Mr Perot took more votes from Mr Clinton than from George Bush in California (and nationally).") and Posner, *supra* note 3 ("[E]xit polling showed that Perot hurt both parties almost equally, taking roughly the same number of votes from Clinton as he did from Bush.").

14. See generally DAVID S. BRODER, *THE PARTY'S OVER: THE FAILURE OF POLITICS IN AMERICA* (1972); Michael Kelly, *Uninvited Guests*, *THE NEW YORKER*, March 11, 1996, at 58. Cf. ALEXANDER M. BICKEL, *REFORM AND CONTINUITY: THE ELECTORAL COLLEGE, THE CONVENTION, AND THE PARTY SYSTEM* 42-43 (1971).

15. See generally LAWRENCE K. GROSSMAN, *THE ELECTRONIC REPUBLIC: RESHAPING DEMOCRACY IN THE INFORMATION AGE* (1995).

16. See KAARE STROM, *MINORITY GOVERNMENT AND MAJORITY RULE* 153-54, 160-63 (1990).

17. U.S. CONST. art. II, § 1, cl. 2; U.S. CONST. amend. XII; U.S. CONST. amend. XXIII. Currently the number of state electors ranges from three (corresponding to two senators and one representative) for the six least populous states and the District of Columbia to fifty-four for California.

18. In 1820, the New Hampshire Democratic-Republican elector voted for John Quincy Adams instead of the party nominee. In 1948, Preston Parks, a Truman elector in Tennessee, voted for Governor Strom Thurmond of South Carolina, presidential nominee of the States Rights Democratic Party. In 1956, W.F. Turner, a Stevenson elector in Alabama, voted for a local judge, Walter E. Jones. In 1960, Henry D. Irwin, a Nixon elector in Oklahoma, voted for Sen. Harry F. Byrd, a Virginia Democrat. Six out of eleven Alabama Democratic electors, who had declared themselves as uncommitted prior to the election, also cast their votes for Sen. Byrd rather than Kennedy. In 1968, Lloyd Bailey, a Nixon elector in North Carolina, voted for the American Independent Party candidate, Governor George C. Wallace. In 1972, Roger L. McBride, a Nixon elector in Virginia, voted for the Libertarian Party candidate, John Hospers. In 1976, a Washington State elector voted for Ronald Reagan rather than for Gerald Ford, the Republican Party's presidential nominee. In 1988, Margaret Leach, a Democratic

votes have affected any election's outcome, the presence of respected independent or third-party candidates who offer attractive personal or policy alternatives could result in an increasing number of "faithless electors"<sup>19</sup> who disregard their party commitments when presented with an opportunity to play "king or queen maker."<sup>20</sup>

Of more substantial concern is that the electors' votes might be indecisive and throw the President's election to the House of Representatives (and/or the Vice President's election to the Senate).<sup>21</sup> The Constitution and Twelfth Amendment pro-

elector in West Virginia, transposed the choices of her party by voting for her party's vice presidential nominee, Sen. Lloyd Bentsen, for President and Gov. Michael Dukakis for Vice President.

19. The tradition of following the popular vote is so strong that electors who fail to do so are traditionally called faithless electors or sometimes unfaithful, errant, rogue or defector electors. See Denny Piliant, *No—The Electoral College Should Not Be Abolished*, in *CONTROVERSIAL ISSUES IN PRESIDENTIAL SELECTION* 216, 223 (Gary L. Rose ed., 1991). A neutral term would be preferable given the legal controversy over elector discretion. However, given the lack of such an accepted neutral term, we will use the traditional term "faithless elector" in this article. See Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 13 J.L. & POL. (forthcoming Sept. 1996).

20. Other concerns, not directly relevant to the issues addressed in this article are: (1) the possibility that elector voting will result in a "runner-up presidency," as when Benjamin Harrison defeated Grover Cleveland in the electoral college in 1888; (2) the inequalities in voting power among voters across the nation produced by the electoral system, especially in conjunction with use of the "unit rule" (allocating all of a state's electoral votes to the winner of a plurality of its popular vote) method of voting; and (3) the way that use of the unit rule can magnify the effects of fraud or simple mistakes in tabulation. All of these possibilities have been claimed to threaten the legitimacy of the presidency. See *generally* *CONTROVERSIAL ISSUES IN PRESIDENTIAL SELECTION* (Gary L. Rose ed., 1991).

21. Beyond the scope of this article is the thicket of issues that arise in the House and the Senate if the electoral count is inconclusive. The following is a brief summary.

Under the Twelfth Amendment a constitutional quorum of the House is a member or members from two thirds of the states. The House votes by state, not by members. A majority of the states is necessary to a choice.

The House has no applicable standing rules. What is a quorum for each state's House delegation? What is a majority? What if a state's House delegation is tied? Each state's representatives vote by ballot (we discuss later the constitutional meaning of "ballot."). See *infra* notes 201-09 and accompanying text.

The House should, in a non-partisan and detached manner, adopt rules beforehand. The prospect of the House doing so in the context of choosing a President, even if "immediately", could be construed to permit it to do so, is horrible to contemplate. See U.S. CONST. amend. XII ("if no person [has a] majority [of the electoral votes], then . . . the House of Representatives shall choose *immediately*, by ballot, the President." (emphasis added)). Former House Speaker Thomas S. Foley (D-WA), discussing some of these issues in a recent interview, expressed opposition to the House addressing these issues beforehand. Gary Lee, *Foley Opposes Formula For Presidential Voting; If House Should Decide, Members Should Look at Circumstances at the Time, Speaker Says*, WASH. POST, June 15, 1992, at A7. Yet, acting beforehand would seem far preferable to waiting for a specific, politically charged context.

At the plain meaning level of the Twelfth Amendment, by contrast with the House provision, the Senate apparently does not vote for the Vice President immediately or by ballot. This raises the questions whether and how long the Senate may wait to vote and how it will vote.

In 1980, Martin Frost addressed a memorandum to then Chair Richard Bolling (D-MO) of the House Rules Committee on the subject: "Election of the President in the House of Representatives." Frost discusses the foregoing and other issues. He points out that specific rules were adopted by the House in 1801 and 1825. In both cases the galleries were closed to the public. He specifically opines that "ballot" means secret ballot. Attached to his memorandum are outlines of proposed standing rules as well as the 1801 and 1825 rules. Apparently no action was taken by the Committee or the House. See Memorandum from Martin Frost to Richard Bolling, Chair, Comm. on Rules (July 1, 1980) (on file with authors); see also, *If the House Picks the President*, N.Y. TIMES, June 11, 1992, at A22.

The authors hope to discuss these issues in detail in a later article. They are well summarized in MICHAEL J. GLENNON, *WHEN NO MAJORITY RULES: THE ELECTORAL COLLEGE AND PRESIDENTIAL SUCCESSION* 45-55 (1992).

The House should appoint a bipartisan Select Committee to draw rules for contingency elections of the President and should adopt such rules.

vide that when no presidential candidate receives a majority of the electoral vote, the House of Representatives elects the President. Such contingency elections occurred in 1801, 1825 and 1877. If no vice presidential candidate has a majority, the Senate elects the Vice President. This has happened only once, in 1837. The only truly multi-candidate presidential race which resulted in election by the House was the election of 1824.<sup>22</sup> Many commentators claim that this election resulted in a constitutional crisis because the House appeared to select a President in a "back room" deal. Others, however, point out that the House election led to a backlash that paved the way for Andrew Jackson's election four years later, thus demonstrating that the two-tiered electoral system does function by channeling voter dissatisfaction into political action.

A problem more likely to arise than contingency elections is the exploitation of federal and state statutory procedures governing the electoral college for the purpose of influencing the outcome of a close race. This problem may be especially acute when there is a strong independent or third-party candidate. These procedures have substantial potential for manipulation by someone with the determination and resources to affect the outcome of the electoral voting. A thorough understanding of these procedures is necessary to correct or minimize these risks.

Many experts have examined the electoral college and proposed drastic reforms.<sup>23</sup> The most frequent proposal in recent decades is abolition of the electoral college in favor of direct popular election of the President and Vice President.<sup>24</sup> Aboli-

22. In 1824, four presidential candidates, all members of the Democratic Party (known under Thomas Jefferson as the Democratic-Republican or Republican party), split the electoral vote, with percentages of the electoral vote ranging between 14% and 38%.

We do not count the 1800-01 presidential election crisis. All presidential elections prior to adoption of the Twelfth Amendment were technically multi-candidate because the electors did not vote separately for President and Vice President. However, there were never more than two sponsoring political parties in any of these elections, and each party intended only one of its candidates to be elected President. See *infra* text accompanying notes 52-62.

23. For a sampling of scholarly attention to the electoral college, see JUDITH BEST, *THE CASE AGAINST DIRECT ELECTION OF THE PRESIDENT* (1975); ROBERT H. HARDAWAY, *THE ELECTORAL COLLEGE AND THE CONSTITUTION* (1994); PEIRCE & LONGLEY, *supra* note 12; Rose, *supra* note 20; Albert J. Rosenthal, *The Constitution, Congress, and Presidential Elections*, 67 MICH. L. REV. 1 (1968); Victor Williams & Alison M. MacDonald, *Rethinking Article II, Section 1 and Its Twelfth Amendment Restatement: Challenging Our Nation's Malapportioned, Undemocratic Presidential Election Systems*, 77 MARQ. L. REV. 210 (1994).

24. Other reforms suggested for the electoral college are: (1) to split each state's electors proportionately in accordance with the popular vote, see, e.g., S.J. Res. 138, 89th Cong., 2d Sess. (1966); (2) to allocate all but two of each state's electors by congressional district and the other two to the winner of a majority of a state's popular vote, as now occurs in Maine and Nebraska, see, e.g., S.J. Res. 12, 91st Cong., 1st Sess. (1969); (3) to allocate all electors by specially drawn districts, see Rosenthal, *supra* note 23, at 8; and (4) to eliminate the electors as persons and allocate the state's "electoral vote" automatically to the state's popular vote winner, see, e.g., S.J. Res. 58, 89th Cong., 1st Sess. (1965). See also *Election of the President, Hearings before the Subcomm. on Constitutional Amendments of the Senate Judiciary Comm.*, 89th Cong., 2d Sess. 151, 160-62 (1966) (testimony of Attorney General Nicholas Katzenbach); Rosenthal, *supra* note 23, at 31-38 (1968); NELSON W. POLSBY & AARON B. WILDAVSKY, *PRESIDENTIAL ELECTIONS: STRATEGIES OF AMERICAN ELECTORAL POLITICS* 259 (9th ed. 1996).

Obviously, the possibility that the electors' votes could elect a President who did not receive the largest popular vote would be reduced if all states adopted, as Maine and Nebraska have, some system that splits each state's electoral votes between the candidates. See *infra* text accompanying note 98. This would also increase the importance of each electoral vote and thus of the smaller states' votes compared to the larger states'.

However, a proportional, district, or modified district system of allocating electors' votes would also decrease the probability that the electoral college vote will result in persuasive majorities and would

tion can be effected only by constitutional amendment, which requires a two-thirds majority of each house of Congress and approval by the legislatures of three quarters of the states.<sup>25</sup> Most constitutional amendments subsequent to the Bill of Rights have been adopted either to extend the franchise<sup>26</sup> or in response to specific crises. Amendments generally are not adopted to prevent hypothetical problems.<sup>27</sup> Notwithstanding the controversies about the electoral college, which have continued since passage of the Twelfth Amendment in 1801, no subsequent proposal for its reform has succeeded.<sup>28</sup>

The last serious effort to change the electoral college began in 1966 and sought to institute direct popular presidential elections.<sup>29</sup> In 1979, the Senate held extensive hearings on a direct election proposal. After extended floor debate, the proposal was defeated by a vote of 51 to 48, well short of the required two-thirds majority.<sup>30</sup> Since then, similar proposals have been introduced in every Congress, but none has received serious consideration.

increase the incentive for third-party and/or independent candidates. Such changes would, therefore, increase the possibility of an election by the House of Representatives. That possibility, in the authors' view, is an overwhelming reason for not dividing a state's electoral vote according to the popular vote.

If the House and Senate contingency elections were eliminated, then one would have to consider run-offs in cases where no candidate won a majority of the popular vote cast. *See, e.g.*, H.R.J. Res. 65, 103d Cong., 1st Sess. (1993); H.R.J. Res. 60, 103d Cong., 1st Sess. (1993); H.R.J. Res. 42, 103d Cong., 1st Sess. (1993); H.R.J. Res. 28, 103d Cong., 1st Sess. (1993); S.J. Res. 297, 102d Cong., 2d Sess. (1992); S.J. Res. 312, 102d Cong., 2d Sess. (1992).

The history of early 19th century reform efforts is described in *McPherson v. Blacker*, 146 U.S. 1, 33-34 (1892).

25. There is an alternate procedure. If legislatures of two-thirds of the states apply to Congress to call a national convention for proposing amendments to the Constitution, Congress probably must do so. *See* RUSSELL L. CAPLAN, *CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION* 115-17 (1988); *cf.* U.S. CONST. art. V. Article V also permits states to ratify amendments proposed in either fashion by state conventions called for that purpose.

After passage by Congress, successful amendments generally get ratified fairly quickly. The first ten amendments took from September 25, 1789, when they passed the Senate, to December 15, 1791, when Virginia ratified. The Eleventh, Twelfth, Thirteenth, Fifteenth, Seventeenth, Twenty-first and Twenty-sixth took less than a year; the Fourteenth, Eighteenth, Nineteenth, Twentieth, Twenty-third and Twenty-fifth took less than two years; and the Sixteenth, Twenty-second and Twenty-fourth took less than four years. Only the Twenty-seventh, which was ratified in 1992, more than 202 years after adoption by Congress, took a long time to be ratified.

26. The Fifteenth, Nineteenth, Twenty-third and Twenty-sixth Amendments, respectively, extended the vote to male African-American former slaves, women, citizens of the District of Columbia and all persons over the age of eighteen. The Seventeenth Amendment instituted direct popular election of Senators and the Twenty-fourth banned the poll tax.

27. The Eleventh Amendment overruled *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). The Twelfth Amendment was a reaction to the presidential election crisis of 1801. The Thirteenth, Fourteenth and Fifteenth Amendments were direct results of the Civil War. The Twenty-fifth Amendment concerning presidential succession responded to the assassination of President John F. Kennedy. Four of the seventeen constitutional amendments adopted since the Bill of Rights have concerned the presidency: the Twelfth, the Twentieth (reduction of lame-duck presidential and congressional terms), the Twenty-second (limiting a President to two terms, which might be attributed to the "crisis" created by President Franklin D. Roosevelt's four terms), and the Twenty-fifth (providing for presidential disabilities and vice presidential vacancies).

28. Electoral systems tend to be quite stable everywhere. *See generally* AREND LJPHART, *ELECTORAL SYSTEMS AND PARTY SYSTEMS: A STUDY OF TWENTY-SEVEN DEMOCRACIES, 1945-1990* (1994).

29. S.J. Res. 28, 96th Cong., 1st Sess. (1979).

30. 125 CONG. REC. 17,766 (1979). For a more complete history of this proposal, see the report of the Senate Judiciary Committee on Senate Joint Resolution 28, S. REP. NO. 111, 96th Cong., 1st Sess. 3-4 (1979).

Since constitutional elimination or reform of the electoral college seems unlikely to occur in the near future, in this article we choose to be analysts and improvers of the electoral college, not defenders or attackers. While we accept the electoral college as established by the Constitution, we make a number of proposals, most for adoption by the states, which would strengthen the existing system. Our proposals would eliminate procedural anomalies among states and gaps in the federal framework for the electors' voting. We also recommend that Congress amend the federal election campaign financing laws to cover lobbying by candidates and parties after the popular vote. It should cover lobbying of electors, and also of Congress when counting the electoral vote becomes material or if the presidential or vice presidential election is thrown into the House or Senate. In addition, we make some suggestions for states that wish to bind their electors.

In the first section of this article we review the history of the electoral college, with a special emphasis on the assumptions made by the architects of this compromise institution, the issues it has raised in past elections, and changes made to date. In the second part, we set forth the electoral process from the date the popular vote is cast until Congress counts the electoral vote. Next, we conduct a detailed analysis of federal and state laws, look at each stage of the electoral process, and discuss some of the defects. Finally, we analyze the congressional process of counting the electors' ballots and dealing with objections to elector votes.

We conclude that a concentrated effort by the states could significantly improve the present electoral college. Congress could also enact some important reforms. Only one of our recommendations would require a constitutional amendment, but it should be much less controversial than amendments abolishing or radically changing the electoral college system.

## II. ORIGIN AND FUNCTION OF THE ELECTORAL COLLEGE

### A. Constitutional Convention

The mechanism for electing the President and Vice President was one of the last issues decided by the 1787 Constitutional Convention. It followed the famous Connecticut Compromise, in which the large states were permitted to control the House of Representatives and the small states were given influence in the Senate disproportionate to their population.<sup>31</sup>

To some extent, the proposals for electing the President and Vice President and their accompanying debates reflected the same large state/small state concerns that drove the structuring of Congress. The larger states favored direct popular election of the chief executive or some other system that accurately reflected population distribution among the states.<sup>32</sup> The smaller states feared they would have no significant voice in a direct election. Charles Pinckney of South Carolina warned, "[t]he most

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31. PEIRCE & LONGLEY, *supra* note 12, at 16.

32. *Id.* at 21.

populous states by combining in favor of the same individual will be able to carry their points."<sup>33</sup>

The Convention's Committee of Detail proposed election of the President by the national legislature. The Committee reasoned that "the members of the national legislature—who themselves had been selected by the people and state legislatures"<sup>34</sup>—would certainly be in the best position to judge the qualifications of the various candidates."<sup>35</sup> However, Roger Sherman of Connecticut declared that such an election would deprive "the states represented in the Senate of the negative intended them in that house."<sup>36</sup>

A proposal for election by a joint ballot of members of both houses of Congress was also opposed by the small states. They were not mollified by Madison's argument that this way "of voting would 'give to the largest state, compared with the smallest, an influence as four to one only, although the population is ten to one.'"<sup>37</sup> Even the proposal made by Jonathan Dayton of New Jersey, to give each state one vote for President in a joint session of Congress, was defeated by a vote of six states to five.<sup>38</sup>

The division among the convention delegates over these proposals also reflected the underlying philosophical differences of the Framers—differences that would become clearer in the subsequent debate over adoption of the Constitution. The arguments for direct election were in part arguments for popular control of the government and in part arguments for additional checks and balances among the various branches. James Wilson wanted the President, the Senate, and the House of Representatives to be "chosen by direct popular mandate 'to make them as independent as possible of each other, as well as of the states.'"<sup>39</sup> Likewise, Gouverneur Morris warned that election of the President by Congress would create a chief executive who was "'the mere creature' of that body."<sup>40</sup> He feared that such an election would "be the work of intrigue, or cabal, and of faction: it will be like the election of a pope by a conclave of cardinals; real merit will rarely be the title of the appointment."<sup>41</sup>

There were many practical arguments against direct election of the President.<sup>42</sup> In addition, opponents stressed the need for a republican structure, a layer of representatives between the people and government decision-making. Elbridge Gerry stated that "the people are uninformed and would be misled by a few designing men."<sup>43</sup> George

33. *Id.* at 16.

34. The Constitution provided for the election of Senators by the state legislatures. U.S. CONST. art. I, § 3, cl. 1. This was changed by the Seventeenth Amendment.

35. PEIRCE & LONGLEY, *supra* note 12, at 20.

36. *Id.* at 16.

37. *Id.* at 16-17. TADAHISA KURODA, *THE ORIGINS OF THE TWELFTH AMENDMENT: THE ELECTORAL COLLEGE IN THE EARLY REPUBLIC, 1787-1804*, at 13-14 (1994). The total congressional delegation of the largest state numbered twelve (ten Representatives and two Senators) and that of the smallest three (one Representative and two Senators).

38. PEIRCE & LONGLEY, *supra* note 12, at 17.

39. *Id.* at 21.

40. *Id.* at 20.

41. *Id.*

42. It would be impossible to take a census before the first election. The states had different suffrage requirements. Registration and supervision of a national election would be expensive and time-consuming. Involving the people in a national election was feared as a potential source of disturbances, even riots, that would exacerbate regional tensions and "destabilize the republican experiment." KURODA, *supra* note 37, at 9 (citing RECORDS OF THE FEDERAL CONVENTION 32, 56-57 (Max Farrand ed., 1911)).

43. PEIRCE & LONGLEY, *supra* note 12, at 21.



Mason stated that "it would be as unnatural to refer the choice of a proper magistrate to the people, as it would, to refer a trial of colors to a blind man . . . [because the] extent of the country renders it impossible that the people can have the requisite capacity to judge . . . the candidates."<sup>44</sup>

The compromise that became part of the Constitution provided that each state would have electors equal to the number of representatives plus the number of senators it had in Congress. No mention was made in the Convention records of the advantage given to the small states by giving all states two senatorial counterpart electors.<sup>45</sup> However, James Madison did write later that the presidential election provisions were the "result of compromise between the larger and smaller states, giving to the latter the advantage of selecting a President from the candidates, in consideration of the former in selecting the candidates from the people."<sup>46</sup>

The Convention delegates appear to have believed their essential concession to the small states was the provision that, if one candidate did not receive a majority of the electoral votes, the House of Representatives, with each state having one vote, would select the President from among the five candidates with the highest votes.<sup>47</sup> This would have seemed crucial because the delegates believed many of the presidential electors would vote for candidates from their own state or region, throwing most elections into the House.<sup>48</sup>

The method of appointing electors was delegated entirely to the states. The electors were to cast their ballots for two persons—the votes to be of equal weight—in the hope that at least one of them would be a man of "continental reputation" rather than a fellow citizen of the elector's home state.<sup>49</sup> In fact, the drafters required that "one at least" of the two persons the electors voted for "shall not be an inhabitant of the same State with themselves."<sup>50</sup> The drafters' failure to require separate votes for President and Vice President would raise difficulties in the third and fourth elections, leading to amendment of this provision in 1804.<sup>51</sup>

## B. Elections of 1788-1800

In the first presidential election, in 1788, five state legislatures (Connecticut, New Jersey, Delaware, South Carolina and Georgia) appointed electors without reference to the people. New York's legislature tried to do the same, but the two houses

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44. *Id.*

45. *Id.* at 17.

46. *Id.*

47. This number was reduced to three by the Twelfth Amendment, which also reduced to two from three the number of candidates from which the Senate would choose the Vice President.

48. PEIRCE & LONGLEY, *supra* note 12, at 17. Thus, the final compromise struck a balance between those who favored popular election of the President and those who favored election by the legislative branch. See *supra* text accompanying notes 37-38.

49. PEIRCE & LONGLEY, *supra* note 12, at 25.

50. U.S. CONST. art. II, § 1, cl. 3, *amended by* U.S. CONST. amend. XII. The Constitution does not, as it could have, prohibit the President and Vice President from being from the same state. By this provision it only hopes that individual electors will not exercise their discretion parochially. But the premise of the provision is that the electors have discretion which must in this respect, and in this respect only, be limited.

51. See U.S. CONST. amend. XII.

argued so much that the day for voting passed, and New York lost its vote completely. In Massachusetts the legislature let the people choose electors by district but appointed two "at-large" electors itself. Maryland and Virginia let all their electors be elected by the people on a district basis, while in Pennsylvania and New Hampshire the people voted statewide for the electors using a general ticket. Rhode Island and North Carolina had not yet ratified the Constitution, so they did not participate.<sup>52</sup>

The undifferentiated votes for President and Vice President under Article II were immediately recognized as a potential problem.<sup>53</sup> John Adams was a popular choice for Vice President but was not considered presidential in 1788. The unanimous sentiment was to make George Washington the republic's first President. However, if all the electors had named Adams and Washington as their choices, the election would have been thrown into the House of Representatives. In fact, many electors cast their second votes for candidates other than Adams, some apparently out of conviction, others apparently out of concern that Adams' total vote not rival Washington's.<sup>54</sup> Obviously, they thought they had the discretion to do so, and their votes were counted.

In the second election, in 1792, nine of the then fifteen states' legislatures selected their presidential electors.<sup>55</sup> In four states, the people chose the electors, while two states divided the task between the people and the legislature.<sup>56</sup>

By 1796, partisan politics had become more pronounced. The two undifferentiated votes afforded each elector led directly to the election of a President and Vice President of different parties. The Federalists had a three vote majority of electors, and Democratic-Republican Thomas Jefferson fell three votes short of Adams' seventy-one. However, so many Federalist electors did not cast their second votes for the Federalists' Thomas Pinckney that Jefferson was elected Vice President.<sup>57</sup> Again, the electors obviously thought they had the discretion to do so. The methods for selecting the electors again differed widely from state to state.<sup>58</sup>

In anticipation of the election of 1800, there was scrambling in state after state to revise the mode for choosing electors as one party or both tried to gain an edge. For example, to ensure that Thomas Jefferson would get all the Virginia electors, Virginia changed its election procedure to provide for a winner-take-all statewide election, instead of the district voting which had been used.<sup>59</sup> The issue of how presidential electors would be selected in the future itself became an issue, debated by the candidates and their parties. The Federalists in the Senate introduced a bill, eventually defeated, to allow Congress to review the returns from electors and to accept or reject their votes, interposing themselves between the election and the people.<sup>60</sup>

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52. PEIRCE & LONGLEY, *supra* note 12, at 33.

53. See KURODA, *supra* note 37, at 33.

54. PEIRCE & LONGLEY, *supra* note 12, at 33; Washington received one vote from each of the 69 electors and Adams received votes from 34. U.S. SENATE, SENATE MANUAL, S. DOC. NO. 1, 103d Cong., 2d Sess. 961 (1993) [hereinafter SENATE MANUAL].

55. PEIRCE & LONGLEY, *supra* note 12, at 34.

56. *Id.* Washington received votes from all 132 electors, a unanimous vote of the electors appointed, while Adams received votes from 77. George Clinton, Thomas Jefferson and Aaron Burr received 50, 4 and 1 elector votes, respectively. SENATE MANUAL, *supra* note 54, at 961.

57. KURODA, *supra* note 37, at 108. Adams received 71 electoral votes, Jefferson received 68, and Pinckney received 59. SENATE MANUAL, *supra* note 54, at 962.

58. KURODA, *supra* note 37, at 66-72.

59. *Id.* at 74.

60. *Id.* at 73-74.

Because the Federalists had lost the vice presidency in 1796, the Republican electors in 1800 were afraid or unwilling to chance a similar result. The two top recipients of electoral votes that year were the Republicans' presidential and vice presidential candidates, Jefferson and Aaron Burr; both had seventy-three electoral votes. To embarrass the Republicans, the Federalist dominated state delegations in the lame-duck House consistently voted for Burr through thirty-five ballots over six days.<sup>61</sup> On the thirty-sixth ballot, crucial Federalist representatives abstained, and Jefferson was elected President.<sup>62</sup>

### C. Adoption of the Twelfth Amendment

That first House election of a President provided the impetus for the adoption of the Twelfth Amendment, but many actual and potential problems with the presidential election procedures had already been noted. There was widespread unhappiness with direct selection of electors by the state legislatures. Because of the rapid development of political parties in the states as well as nationally, the results of elector selection by a legislature were predictable as soon as the legislature was elected, sometimes years before the presidential election. A mechanism which the Framers had created to produce electors free from political pressure and partisan control was leading to the opposite result.<sup>63</sup>

Other unforeseen effects of organization of voting by political parties led many to question the wisdom of the existing electoral college procedures.<sup>64</sup> The Federalists' 1796 loss of the vice presidency convinced many of the need for a constitutional amendment requiring separate ballots for President and Vice President. The new Democratic-Republican party was also in favor of an amendment requiring separate ballots because of the principle of majority rule. Requiring one vote for President and one for Vice President would keep most contests from reaching the House of Representatives, where the votes of nine small states, with only one-fifth of the national population, could determine the chief executive. The new party was also concerned that another House election like that in 1800 could result in the choice of a vice presidential candidate or a fourth or even fifth place electoral vote recipient as the President.<sup>65</sup>

When the Democratic-Republicans, who as a result of the election of 1800 controlled both the Senate and the House, drafted the Twelfth Amendment, they not only required electors to ballot separately for President and Vice President, they also reduced the number of presidential candidates considered in a House contingency election from five to three, and the number of vice presidential candidates in a Senate contingency election from three to two. The amendment also provided for the Vice President to act as President if the House had not chosen a President by March 4 following the election.<sup>66</sup>

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61. 10 ANNALS OF CONG. 1022-32 (1801).

62. KURODA, *supra* note 37, at 105.

63. *Id.* at 110.

64. *Id.* at 108.

65. *Id.* at 133-50.

66. U.S. CONST. amend. XII. Section 3 of the Twentieth Amendment provides, among other things, that if a President shall not have been chosen before the time fixed for the beginning of his term, then the Vice President shall act as President until a President shall have qualified.

The amendment had been approved by three quarters of the states by July 7, 1804 and governed the voting of the electors in the election that fall. Because the Democratic-Republican Party dominated a large majority of the states, Jefferson was easily reelected along with another Republican, George Clinton, as Vice President.<sup>67</sup>

No one at the Constitutional Convention or the ratification debate of the 1787 Constitution had considered the electors constitutionally or legally bound to vote in accordance with any popular vote. Elector voting patterns immediately following adoption of the Constitution substantiate this.<sup>68</sup> For example, as we have seen, in 1796 the Federalists and Democratic-Republicans in many of the states favored second candidates other than their parties' vice presidential candidates. As a consequence, only four states' electors cast all their votes for the Federalists' two candidates, Adams and Pinckney, and in only two states were all votes cast for the Democratic-Republican candidates, Jefferson and Burr. This represented a total of six states out of seventeen. On the other hand, in the elections of 1792 and 1800, whether or not the electors thought they were constitutionally or legally bound to vote as they were chosen, almost all of them did so. Only one elector voted otherwise in Pennsylvania and South Carolina in 1792 and in Rhode Island in 1800.

Did the enactors of the Twelfth Amendment intend to bind electors to the results of a popular vote? On its face, the Amendment effected only three relevant changes: (1) to provide for separate elector votes for President and Vice President; (2) to reduce the number of candidates who could be elected President or Vice President by the House and Senate, respectively; and (3) to provide against the possibility of any House deadlock that continued through the scheduled inauguration date. But at least some people's assumptions about the process had begun to shift:

Under the Constitution electors are to vote for two persons, one of whom does not reside in the State of the electors; but it does not require a designation of the persons voted for. Wise and virtuous as were the members of the Convention, experience has shown that the mode therein adopted cannot be carried into operation; for the people do not elect a person for an elector who, they know, does not intend to vote for a particular person as President. Therefore, practically, the very thing is adopted, intended by this amendment.<sup>69</sup>

#### D. Elections of 1876 and 1824

In the presidential election of 1876, Democrat Samuel J. Tilden received a quarter of a million more popular votes than Republican Rutherford B. Hayes. The Tilden ticket obtained 184 uncontested elector votes, just one short of the number required to be elected. Hayes trailed with only 166 uncontested elector votes. The votes of two groups of electors, one Democratic, the other Republican, were submitted from Louisi-

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67. SENATE MANUAL, *supra* note 54, at 963.

68. See *id.* at 961-63.

69. 11 ANNALS OF CONG. 1289-90 (1802). The Supreme Court's opinion in *Ray v. Blair*, 343 U.S. 214, 228 n.15 (1952), which sustained Alabama's statutorily based elector party pledge, quotes this 1802 statement as if it were controlling legislative history of the Twelfth Amendment, but that Amendment was not adopted until December 1803, after much debate and change. KURODA, *supra* note 37, at 118-52.

ana, South Carolina and Florida. Oregon's Governor had certified a slate of seven Republican and one Democratic electors.<sup>70</sup>

Without the disputed votes, neither candidate had a majority. Democrats controlled the House and Republicans controlled the Senate. No statute provided a resolution for any deadlock. The Twelfth Amendment provides that "if no person have such majority," then the House shall choose the President. The lame-duck Democratic House would presumably have elected Tilden. If the House had deadlocked and the deadlock had continued past March 3, the lame-duck Republican Senate would have elected a Vice President who, under the Twelfth Amendment, would have "act[ed] as President."

Prior to counting the votes, Congress created an Electoral Commission, consisting of representatives, senators and Supreme Court justices, to decide the contested electors.<sup>71</sup> Following the disqualification and replacement of the sole "independent" on the Commission, the Republicans secured an eight to seven majority. The Commission, by an eight to seven decision, recognized all contested electoral votes for Republican Hayes. The deadlock in the House and Senate upheld the Commission's decisions, and Hayes was inaugurated.<sup>72</sup>

The Commission's solution to the Hayes-Tilden dispute was an unconstitutional delegation of authority by Congress. Nothing in the Constitution as amended authorized the House and Senate to provide that if they could not agree on the counting of the electoral votes, the decision of another body would bind them.<sup>73</sup>

This delegation also fails the two-part test for ascertaining unconstitutional delegations of power subsequently established by the Supreme Court in *Bowsher v. Synar*.<sup>74</sup> The Electoral Count Commission included members of the judicial and legislative branches. It is the province of the judiciary to determine cases and controversies,<sup>75</sup> and the separation of powers principle precludes the judiciary from intervening in issues that are political questions.<sup>76</sup> The counting of electoral votes is a political question, so long as constitutional requirements are satisfied. Therefore, the Hayes-Tilden dispute resolution mechanism should not be viewed as an authoritative precedent for an electoral system failure.<sup>77</sup>

70. Initially, eight Republicans were appointed in accordance with the popular vote. One elector died before the date of the electors' balloting. Oregon law made no provision for alternate electors. PEIRCE & LONGLEY, *supra* note 12, at 54.

71. Act of Jan. 29, 1877, ch. 37, 19 Stat. 227.

72. PEIRCE & LONGLEY, *supra* note 12, at 56.

73. See Samuel T. Spear, *Counting the Electoral Votes*, 15 ALBANY L.J. 156, 157-60 (1877). But see John W. Burgess, *The Law of the Electoral Count*, 3 POL. SCI. Q. 633, 647-48 (1888).

74. *Bowsher v. Synar*, 478 U.S. 714, 727-34 (1980) (where the Court asked, first, to which branch of government does the delegate belong and, second, is the nature of the functions delegated consistent).

75. U.S. CONST. art. III, § 2, cl. 1.

76. *Baker v. Carr*, 369 U.S. 186 (1962).

77. See generally C. VANN WOODWARD, *ORIGINS OF THE NEW SOUTH* 23-74 (1951); James E. Shaw, *The Electoral College and Unstable Congressional Apportionment* (1979), reprinted in *Hearings on S.J. Res. 28 Before Subcomm. on Constitution of the Senate Comm. on Judiciary*, 96th Cong., 1st Sess. (1979) [hereinafter 1979 *Hearings*], at 463-76. But see John W. Burgess, *supra* note 73, at 647-48. Later, we will discuss how the 1876 election would have likely been resolved if the statute enacted 10 years later, which is still in effect, had been enacted in 1877. See *infra* notes 290-300 and accompanying text.

Nor is Rutherford Hayes' election in 1876 a clear example of a "runner-up" or "minority-majority" presidency. Although most histories give Tilden a popular vote percentage of 50.93 in that election, there was widespread fraud in casting and counting votes in several states, much of it in the form of

The only election which is arguably relevant to the problems of the electoral college as they persist today is the election of 1824. This was a true multi-candidate race, triggered by the rapid disintegration of the Democratic-Republican party. Briefly, John Quincy Adams, William H. Crawford and Andrew Jackson had the three highest numbers of electoral votes, with Jackson having received a clear plurality of the electoral votes<sup>78</sup> and probable plurality of the popular vote.<sup>79</sup> Henry Clay, the Speaker of the House and the candidate with the fourth highest number of votes, was instrumental in getting the Maryland, Ohio, Kentucky, Illinois, Missouri and Louisiana delegations to back Adams. Daniel Webster and Clay entreated the swing representative from New York to cast his vote for Adams, thus bringing the New York delegation into the Adams column. Adams won on the first ballot of the states in the lame-duck House. Clay became Adams' Secretary of State. At least partly in reaction to Jackson's loss in 1824 despite his receipt of a plurality of the popular vote, Jackson won the 1828 election overwhelmingly.

The 1824 scenario could be repeated if an independent or third-party candidate captured just enough electoral votes to prevent either major party candidate from attaining a majority. Whether the third-party candidate is a regional candidate, such as Alabama Governor George Wallace in 1968, or someone with a broad national following such as Ross Perot in 1992, the balance of power held by the third candidate could lead to deal-making of the kind suspected and resented by the public in 1825.

### III. ELECTORAL COLLEGE PROCEDURES

The Constitution, together with a series of implementing statutes,<sup>80</sup> sets out the broad framework and timing for the appointment and voting of the electoral college. The statutes are now codified in Title 3 of the United States Code, Sections 1-17.<sup>81</sup>

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intimidation by white Southern Democrats against Republican freedmen. Despite such tactics, in Florida, Louisiana and South Carolina the counts were so close that it is still uncertain who formally won the popular vote. Without such intimidation, Hayes' popular vote would surely have exceeded Tilden's. BEST, *supra* note 23, at 52-53 (citing PAUL L. HAWORTH, THE HAYES-TILDEN DISPUTED PRESIDENTIAL ELECTION OF 1876 (1906)).

78. Hardaway suggests that if the general ticket or unit rule system had been generally in effect in 1824 as it is today, one of the candidates, probably Jackson, would have received an electoral vote majority. HARDAWAY, *supra* note 23, at 124.

79. In fact, not all states tabulated and reported their popular vote results, so we cannot be sure that the reported returns are an accurate measure of the popular vote in the entire country. *Id.*

80. Act of Mar. 1, 1792, ch. 8, 1 Stat. 239 (meetings of electors and transmission of their votes to Congress); Act of Mar. 26, 1804, ch. 50, 2 Stat. 295 (voting by electors following changes of the Twelfth Amendment); Act of Jan. 23, 1845, ch. 1, 5 Stat. 721 (filling of vacancies among the electors); Act of Jan. 29, 1877, ch. 37, 19 Stat. 227 (electoral commission); Act of Feb. 3, 1887, ch. 90, 24 Stat. 373 (elector meetings, transmission of votes and counting of electoral votes by Congress); Act of May 29, 1928, ch. 85, 45 Stat. 945 (elector meetings and transmission of votes); Act of June 5, 1934, ch. 390, 48 Stat. 879 (conforming statutory codification to changes of Twentieth Amendment); Act of June 25, 1948, ch. 644, 62 Stat. 672 (1948) (codified and enacted into positive law and may be cited as 3 U.S.C.); Act of Oct. 31, 1951, ch. 655, 65 Stat. 742 (1951) (substituted Administrator of General Services for Secretary of State as repository of extra copies of certificates of electors' votes); Act of Oct. 4, 1961, Pub. L. No. 87-389, § 2(a), 75 Stat. 820 (1961) (added definitions to include the District of Columbia following adoption of the Twenty-Third Amendment); Act of Oct. 15, 1984, Pub. L. No. 98-497, § 107, 98 Stat. 2291 (1984) (substituted Archivist of the United States for Administrator of General Services as repository of extra copies of certificates of electors' votes).

81. See Act of June 25, 1948, ch. 644, 62 Stat. 672.

The number of electors equals the total combined congressional representation of each state<sup>82</sup> plus three electors for the District of Columbia.<sup>83</sup>

These 538 electors are appointed in each state "in such manner as the Legislature thereof may direct."<sup>84</sup> Congress may determine only the "Time" of choosing the electors.<sup>85</sup> Popular elections for appointing the electors are held the Tuesday after the first Monday in November, on what is commonly known as Election Day.<sup>86</sup>

In addition, "[t]he Congress may determine . . . the Day on which [the electors] shall give their Votes; which Day shall be the same throughout the United States."<sup>87</sup> Congress has determined that the electors cast their votes separately for President and Vice President on the first Monday after the second Wednesday in December, in meetings that are convened in each state and the District of Columbia.<sup>88</sup>

Signed, sealed and certified lists of the votes are then transmitted to Congress.<sup>89</sup> On the 6th of January, the President of the Senate, in the presence of both houses, opens the certificates and the votes are counted.<sup>90</sup> The candidate who obtains a majority of electoral votes is declared to be President. The Vice President is determined in the same fashion. If no candidate for President receives a majority of the electoral votes, the House of Representatives elects the President from the top three vote-getters.<sup>91</sup> If no candidate for Vice President receives a majority of the electoral votes, the Senate elects the Vice President from the top two vote-getters.<sup>92</sup> Within this broad framework lurk numerous unresolved issues.

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82. U.S. CONST. art. II, § 1, cl. 2.

83. U.S. CONST. amend. XXIII.

84. U.S. CONST. art. II, § 1, cl. 2. Congress determines the manner of appointment of electors for the District of Columbia. U.S. CONST. amend. XXIII. See *McPherson v. Blacker*, 146 U.S. 1 (1892).

85. U.S. CONST. art. II, § 1, cl. 4.

86. 3 U.S.C. § 1 (1994).

87. U.S. CONST. art. II, § 1, cl. 4.

88. 3 U.S.C. § 7 (1994). State laws set out the rules regarding nominating and qualifying candidates for election, appointing electors, meeting times and locations, filling vacancies, quorum, balloting, election contests and enforcement of any voting requirements. The electors cast their votes separately for President and Vice President. U.S. CONST. amend. XII.

89. 3 U.S.C. §§ 9-11 (1994).

90. U.S. CONST. amend. XII; 3 U.S.C. § 15 (1994). If January 6 falls on Saturday or Sunday, joint resolutions are enacted changing this date. *E.g.*, H.R.J. Res. 677, 100th Cong., 2d Sess. (1988).

91. U.S. CONST. amend. XII.

92. *Id.*

## A. From Election Day to Casting of the Electors' Votes

### 1. Designation of Election Day

As authorized by the Constitution,<sup>93</sup> Congress has defined statutorily the "Time" when the electors are appointed. "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."<sup>94</sup> The statute also provides that "[w]henever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct."<sup>95</sup>

Since the time of day for choosing electors is not set forth in the Constitution or the federal statutes, it is governed by state law. The resulting lack of uniformity has been criticized.<sup>96</sup> While this lack of uniformity does not inhibit the workings of the electoral college, exercise by Congress of its authority to set a uniform time for appointing electors is a reform which would complement our recommendation about the timing of casting of the electors' votes.<sup>97</sup>

### 2. Allocation of Popular Votes for Electors

Currently all states but Maine and Nebraska follow the "unit rule," under which the state appoints all its electors from the slate that receives a plurality of the state's popular vote.<sup>98</sup> Some state legislatures appointed their states' electors well into the

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93. U.S. CONST. art. II, § 1, cl. 4. It is not surprising that the Constitution provides discretionary rather than mandatory authority to Congress to set a uniform date and time for choosing the electors. In 1787, subsequent increases in population density, easy travel and instantaneous telecommunications could not have been imagined. Cf. S. REP. NO. 26, 72d Cong., 1st Sess. 2 (1932) [hereinafter S. REP. NO. 26] (cites changes in communications and travel times as reasons for Twentieth Amendment, which brought forward the beginning of the terms of the new Congress and President and Vice President from March to January).

94. 3 U.S.C. § 1 (1994).

95. 3 U.S.C. § 2 (1994). Congress is not expressly authorized to delegate to the states its constitutional function of setting the time when electors are appointed. However, this delegation of a portion of Congress' power to set the date for appointment of the electors appears to be constitutional. Because it involves a delegation to the state legislatures rather than to a co-equal branch of the federal government, no separation of powers issues are implicated. Moreover, the power to determine a contingent time and manner of appointment for those situations where the initial manner of appointment has failed on the date specified by Congress could be viewed as confirming the state's exclusive constitutional power to appoint.

96. 1979 *Hearings*, *supra* note 77, at 11; cf. 138 CONG. REC. 37,994 (daily ed. June 11, 1992) (statement of Sen. Slade Gorton (R-WA) against proposal for direct popular election of the President because of different voting times for eastern and western states).

97. Of course, a uniform time would take account of differences in time zones. Considering the small number of electors chosen in Alaska and Hawaii, exceptions might be made for those states.

98. SENATE COMM. ON RULES AND ADMIN., NOMINATION AND ELECTION OF THE PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES, 1992, S. DOC. NO. 14, 102d Cong., 2d Sess. 289 (1992). See ME. REV. STAT. ANN. tit. 21-A, § 805.2 (West 1994); NEB. REV. STAT. § 32-714 (1994). In Arizona, Connecticut, Florida, Georgia, Louisiana, New Jersey, New York, North Carolina and Virginia,



nineteenth century. Occasionally this resulted in electors who were loyal to different parties. This practice divided the electoral votes in New York in 1808 and 1824, and in Delaware and Louisiana in 1824.<sup>99</sup> Some states have permitted voters to select electors from districts.<sup>100</sup> This system caused the split in electoral votes in Maryland in 1804, 1808, 1812, 1824, 1828 and 1832; North Carolina in 1808; Illinois in 1824; Maine in 1828; and New York in 1828.

By 1836, all states except South Carolina whose legislature continued to select its electors until after the Civil War had established some system of statewide popular election of electors. While this development minimized electoral vote splits, states in which the names of all electors were listed on the ballot still occasionally divided their electoral votes. The listing of all elector names required voters to vote for each individual elector and also allowed voters to cross off names they did not like. In a close election, electors from different parties were sometimes chosen. For example, in 1912, eleven Progressive and two Democratic electors were chosen in California, and in 1916 seven Republican electors and one Democrat were chosen in West Virginia.<sup>101</sup>

The increasing use of voting machines and general ticket voting—where the pull of a lever or the marking of an “X” casts a vote for an entire slate of electors—led to a decline in split electoral votes.<sup>102</sup> From the mid-1880’s until recently, Maine was the only state that did not by custom or by law use the “unit rule” in appointing electors. In Maine, two electors are determined by the statewide popular vote. The other two are determined in accordance with the popular vote in each of Maine’s two congressional districts.<sup>103</sup> In 1994, Nebraska adopted a similar system.<sup>104</sup>

Even in states adopting the “unit rule” the potential still exists for split electoral votes through instances of “faithless elector” votes.<sup>105</sup> However, faithless elector votes have had no effect on any election’s outcome so far.

A tie in a state’s popular vote also raises issues about the allocation of popular votes to elector candidates. Only thirteen states plus the District of Columbia have provisions dictating how to select electors if presidential candidates tie in the popular

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legislation has been introduced to institute elections of presidential electors by congressional districts. Larry Rohter, *Florida is Rethinking the Way Presidents Are Elected*, N.Y. TIMES, June 7, 1992, at A25.

At least until 1968 Georgia required a majority vote. Rosenthal, *supra* note 23, at 5 n.19 (citing GA. CODE ANN. § 34-1514 (Supp. 1967)). Georgia now requires only a plurality vote. GA. CODE ANN. § 21-2-501 (Supp. 1995). The history of the unit rule, through 1892, is summarized in *McPherson v. Blacker*, 146 U.S. 1, 29-33 (1892), based on the argument of counsel for plaintiffs in error. *Id.* at 12-14. Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 YALE L.J. 935 (1996) argues that § 2 of the Voting Rights Act of 1965, as amended in 1982, raises issues about this winner-take-all rule in states where politically cohesive blocs of African-Americans or other minorities exist.

99. CONG. QUARTERLY INC., GUIDE TO U.S. ELECTIONS 206 (1976).

100. *Id.*

101. *Id.* at 207.

102. *See id.* at 206.

103. ME. REV. STAT. ANN. tit. 21-A, § 805.2 (West 1994).

104. NEB. REV. STAT. § 32-714 (1994). Legislation to do the same was introduced in New York in 1993 and 1995 but has not been enacted. *See* S. 30571/A.5173, 1993-94 Reg. Sess. (N.Y. Mar. 2, 1993); S. 215, 1995-96 Reg. Sess. (N.Y. Jan. 4, 1995). Arizona, Connecticut, Florida, Georgia, Louisiana, New Jersey, North Carolina and Virginia have considered similar legislation. Larry Rohter, *Florida is Rethinking the Way Presidents are Elected*, N.Y. TIMES, June 7, 1992, at A25. For the authors’ views on these proposals, *see supra*, text accompanying notes 47-51.

105. *See* Pilant, *supra* note 19; Bernard Weintraub, *Washington Talk*, N.Y. TIMES, Jan. 4, 1989, at B6.

vote. Most of these states provide for decision by lottery.<sup>106</sup> If a state holds separate lotteries for each elector, as does Nevada,<sup>107</sup> then the state may have an electoral vote split. Two states require the legislature to decide by joint vote.<sup>108</sup> One state, Alabama, allows the governor to decide.<sup>109</sup> This places the governor in an awkward position if the state's popular vote does not coincide with her own party affiliation.

In general, the electoral college and unit rule provide decisive majorities that lend stability to our presidential election system. Likewise, the use of a lottery to select a slate of electors in the event of a popular vote "tie" may provide greater electoral vote majorities. Even though popular vote ties are exceedingly rare, if the electoral votes of a state with a popular vote tie were to provide the margin of victory in a close presidential election, the political effect almost certainly would be destabilizing. Accordingly, we recommend that all states revise their laws to provide that in the event of a popular vote tie, their electoral votes should be divided equally among the tied candidates with the largest number of popular votes. If the number of tied candidates does not divide evenly into the number of electors, the number of elector votes remaining after an equal division should not be certified to Congress, and that number of electors should not cast their ballots.<sup>110</sup>

Recently, Victor Williams and Alison MacDonald<sup>111</sup> suggested that an equal protection challenge based on the Fourteenth Amendment should be made to the unit rule for elector voting. They also suggested a similar challenge, based on the Fifth Amendment, to House voting by state delegations in contingency elections.<sup>112</sup> Matthew Hoffman recently argued that the Voting Rights Act of 1965, as amended in 1982,<sup>113</sup> gives protected racial minorities in certain states a cause of action against the elector unit rule.<sup>114</sup>

As noted above, the elector unit rule has been adopted by the states by statute. States began to adopt this winner-take-all system for presidential elections prior to the 1800-01 election.<sup>115</sup> Its use rapidly became widespread, to give each elector's vote more weight and to prevent small states with similar and more homogeneous politics from capitalizing upon the divisions of political allegiance more typical in the larger

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106. ARK. CODE ANN. § 7-8-304 (Michie 1993); D.C. CODE ANN. § 1-1314(a)(2), (c) (1992 & Supp. 1995); FLA. STAT. ANN. § 103.062 (West 1995); IDAHO CODE § 34-1505 (1995); LA. REV. STAT. ANN. § 18:1261 (West 1979); MINN. STAT. ANN. § 208.06 (West 1992) (by coin flip); N.D. CENT. CODE § 16.1-14-01 (1991) (by coin flip); S.D. CODIFIED LAWS ANN. § 12-24-2 (1995); UTAH CODE ANN. § 20A-1-304 (1995); WIS. STAT. 5.01(4) (1986).

107. NEV. REV. STAT. ANN. § 293.400 (Michie 1995 & Supp. 1996).

108. ME. REV. STAT. ANN. tit. 21-A, § 732(2)(A) (West 1993); MO. REV. STAT. § 128.080 (1980).

109. ALA. CODE § 17-19-6 (1995).

110. The selection of electors who would vote could be based on the order in which the electors' names were originally submitted by the political parties or could be made alphabetically within each political party's state.

111. See generally Williams & MacDonald, *supra* note 23.

112. U.S. CONST. amend. XII.

113. 42 U.S.C. § 1973 (1994).

114. See generally Matthew M. Hoffman, *The Illegitimate President: Minority Vote Dilution and the Electoral College*, 105 YALE L.J. 935 (1996).

115. Virginia and Rhode Island both used a general ticket system in 1800. KURODA, *supra* note 37, at 74, 94.

states.<sup>116</sup> These same dynamics make state adoption of a district system for presidential elections equally unlikely today, absent a federal mandate.<sup>117</sup>

The unit rule has been declared unconstitutional for statewide officers<sup>118</sup> and state legislatures,<sup>119</sup> although not for congressional elections.<sup>120</sup> Presidential elections differ from state legislative and executive elections in that the Constitution is specific in assigning power to the state legislatures to choose the "Manner" of appointment of electors.<sup>121</sup> As *Williams v. Rhodes*,<sup>122</sup> evidences, this does not permit the states to eviscerate the people's right to meaningful participation in the election process. But in a case decided very soon thereafter, the Supreme Court affirmed a three-judge district court decision denying challenges to use of the unit rule for presidential electors.<sup>123</sup>

In *Williams v. Virginia State Board of Elections*,<sup>124</sup> plaintiffs challenged Virginia's use of the unit rule on three theories: (1) Article II, § 1 implicitly requires presidential electors to be chosen in the same manner as senators and representatives, i.e., two at-large and the rest in districts drawn by population; (2) the unit rule or general ticket method of electing presidential electors violates the Fourteenth Amendment's principle of one person, one vote; and (3) the general ticket system disadvantages the voters of states with a smaller number of electors, such as Virginia, in comparison with the voters of those states having a greater number of electors.<sup>125</sup> The three-judge court denied all claims and directed the plaintiffs to reimburse defendant's costs of the action.<sup>126</sup> The Supreme Court summarily affirmed per curiam without opinion.<sup>127</sup>

Plaintiffs contested only the unit rule. While conceding that the presidential electors were "to exercise their own judgment"<sup>128</sup> under the original plan of the Constitution, plaintiffs nevertheless claimed that the electors were to be "delegates" or "representatives" of the people, in the sense of being directly and immediately chosen by and responsible to the people. In their first claim, plaintiffs relied primarily upon "the parallelism drawn by the Constitution in the numerical correspondence of electors with the State's total of Senators and Representatives [and] the requirement of varying the number of electors as the number of Representatives change."<sup>129</sup>

116. *Id.* at 164. Virginia and Rhode Island retained, and Massachusetts, New Hampshire, New Jersey, Ohio and Pennsylvania adopted, general ticket systems for the election of 1804. *Id.* at 164-65, 167, 169. Before that, while preparing for the 1800 elections, Massachusetts and New York, *id.* at 74-75, as well as New Hampshire, *id.* at 95, had dropped popular election by district in favor of election by state legislatures.

117. See *Williams v. Virginia Bd. of Elections*, 288 F. Supp. 622, 626 (E.D. Va. 1968), *aff'd*, 393 U.S. 320 (per curiam), *reh'g denied*, 393 U.S. 1112 (1969).

118. *Gray v. Sanders*, 372 U.S. 368, 381 (1953).

119. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

120. But see *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (equal protection requires congressional districts to be drawn with populations as nearly equal as possible).

121. U.S. CONST. art. II, § 1, cl. 2.

122. 393 U.S. 23 (1968).

123. *Williams v. Virginia Bd. of Elections*, 288 F. Supp. 622 (E.D. Va. 1968), *aff'd*, 393 U.S. 320 (1969) (per curiam).

124. *Williams*, 288 F. Supp. at 622.

125. *Id.* at 624.

126. *Id.* at 629.

127. *Williams v. Virginia State Bd. of Elections*, 393 U.S. 320 (1969).

128. *Williams*, 288 F. Supp. at 625.

129. *Id.*

In making their Fourteenth Amendment claim, the plaintiffs relied upon *Gray v. Sanders*,<sup>130</sup> *Wesberry v. Sanders*<sup>131</sup> and *Reynolds v. Sims*<sup>132</sup> to allege that the general ticket system "debas[es], abridg[es] or misrepresent[s] the weight of the votes of citizens of the United States in presidential elections." The three-judge court stated:

Actually, the system is but another form of the unit rule . . . .

We see nothing in the unit rule offensive to the Constitution . . . .

. . . .

. . . In the selection of electors the rule does not in any way denigrate the power of one citizen's ballot and heighten the influence of another's vote. Admittedly, once the electoral slate is chosen, it speaks only for the element with the largest number of votes. This in a sense is discrimination against the minority voters, but in a democratic society the majority must rule, unless the discrimination is invidious. No such evil has been made manifest here. Every citizen is offered equal suffrage and no deprivation of the franchise is suffered by anyone.<sup>133</sup>

The court found significant the fact that the unit rule had never been rejected as unconstitutional or unfair in the election of members of the United States House of Representatives when two or more or all representatives must run on an at-large or statewide basis. "In the midst of the one-person, one-vote decisions, this practice was noticed without any question of its validity." The *Williams* court quoted *Wesberry v. Sanders*:<sup>134</sup>

We hold that, construed in its historical context, the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practical one man's vote in a congressional election is to be worth as much as another's. This rule is followed automatically, of course, when Representatives are chosen as a group on a statewide basis, as was a widespread practice in the first 50 years of our Nation's history.<sup>135</sup>

The *Williams* court also adverted to historical precedents by noting that Thomas Jefferson had recommended Virginia's adoption of the unit rule for presidential elections after Virginia had used the district method.<sup>136</sup> A recent precedent persuasive to the court was Congress' amendment of the federal statute relating to the election of repre-

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130. 372 U.S. 368, 381 (1953) (Georgia's county unit system for counting votes in statewide elections violates the Fourteenth Amendment).

131. 376 U.S. 1, 18 (1964) (equal protection requires congressional districts to be drawn with populations as nearly equal as possible).

132. 377 U.S. 533, 555 (1964) (dilution of vote through unequally apportioned state legislative districts violates equal protection).

133. *Williams*, 288 F. Supp. at 626-27.

134. 376 U.S. 1, 7-8 (1964).

135. *Williams*, 288 F. Supp. at 628.

136. *Id.* at 626.

sentatives by districts. At a time when the one person, one vote principle was already securely established, Congress had "expressly countenanced the election of [Representatives] from the 'State at large.'"<sup>137</sup>

Finally, the court observed that the unit rule "appears in Article II (Twelfth Amendment) making provision for the election of the President by the House of Representatives when no majority is obtained in the electoral college."<sup>138</sup>

The Supreme Court's affirmance, though per curiam and summary, is a decision on the merits.<sup>139</sup> It has since been cited approvingly by the Court and followed by other courts. It would appear to foreclose the Fourteenth Amendment claims advanced by Williams and MacDonald, who did not cite the decision. Its effect on the proposal by Hoffman (who also did not cite the decision) for unit rule challenges under the Voting Rights Act, as amended in 1982, is less clear because that Act was enacted pursuant to Congress' Fourteenth Amendment Section 5 enforcement powers.

For purposes of Hoffman's argument, *Williams v. Virginia Board of Elections* might be analogized to *Lassiter v. Northampton Election Board*<sup>140</sup> Whether a *Katzenbach v. Morgan*<sup>141</sup>-based exercise of Congress' Section 5 power to implement the Fourteenth Amendment would trump the states' explicit (and heretofore exclusive) authority to determine the manner of their elector appointments<sup>142</sup> is an open question.<sup>143</sup>

A statute eliminating the unit rule in contingency House presidential elections is even less likely to be constitutional than one proscribing use of the general ticket for presidential electors. The Constitution originally explicitly required this method of resolving elector-unresolved presidential elections<sup>144</sup> and the method was restated and readopted in the Twelfth Amendment. The only claim that could be made against the House state delegations voting as units must be based on Equal Protection concepts inherent in the Fifth Amendment.<sup>145</sup> That amendment was nearly contemporaneous with Article II of the 1787 Constitution. Unlike the Fourteenth Amendment, it was adopted prior to, not after, the Twelfth Amendment. Congress does not have explicit power to enforce the Fifth Amendment by "appropriate legislation" as it does the Fourteenth. Notwithstanding the Court's analogy in *Katzenbach* between Congress' power under Section 5 of the Fourteenth Amendment and its power under the Necessary and Proper Clause,<sup>146</sup> whether or not the Fifth Amendment would be interpreted to give Congress the power to eliminate an express provision of the 1787 Constitution is doubtful.<sup>147</sup>

137. *Id.* (quoting 2 U.S.C. §§ 2a, 2c (1995)).

138. *Id.* at 626.

139. See PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 726-34 (3d ed. 1988).

140. 360 U.S. 45 (1954) (North Carolina's English only literacy voting registration requirement is constitutional under the Fourteenth Amendment).

141. 384 U.S. 641 (1966) (Voting Rights Act of 1965 § 4(e), which provides that under certain circumstances no person is to be denied the right to vote because of inability to speak the English language, is a valid exercise of Congress' Fourteenth Amendment implementation powers).

142. U.S. CONST. art. II, § 1.

143. See *Williams v. Rhodes*, 393 U.S. at 28-29 (Powers explicitly granted to the states by the Constitution "are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution.").

144. U.S. CONST. art. II, § 1, cl. 3, *amended* by U.S. CONST. amend. XII.

145. *Buckley v. Valeo*, 424 U.S. 1, 93-108 (1976).

146. *Katzenbach*, 384 U.S. at 650.

147. Williams and MacDonald also think a constitutional amendment would be required. Williams

As for Senate contingency elections of the Vice President, there is no way the procedure for such elections can be rewritten to comply with "one person, one vote" so long as the Senate is itself not apportioned according to population. This furnishes yet another, perhaps even stronger, reason that the Court is unlikely to disturb the constitutionally prescribed House procedure.

### 3. Controversies Over Appointments of Electors

The resolution of controversies over the appointment of electors is a matter of state law.<sup>148</sup> The Constitution provides, "[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."<sup>149</sup> This grants to the legislature of each state plenary and exclusive power to decide the method of choosing electors for that state.<sup>150</sup> Each state's power to provide how a "controversy or contest" regarding the appointment of electors is to be resolved is also reinforced by statutory provisions regulating the counting of the electoral votes. These provisions are embodied in the Electoral Count Act, which was enacted in reaction to the Hayes-Tilden counting disputes.<sup>151</sup> Under the codification of this Act at Section 5 of Title 3 of the United States Code, state determinations of controversies concerning the appointment of the electors "by judicial or other methods or procedures" should be made "at least six days" prior to the meeting of electors.<sup>152</sup> If a determination is made by such time, it will be "conclusive" and will "govern in the counting of the electoral votes" with respect to the ascertainment of the state's appointed electors.<sup>153</sup>

Section 5 does not indicate what weight Congress should accord a state's determination made after that time. In 1961, Congress deferred to the judicial determination of an election contest in Hawaii, although the court did not adjudicate the contest until after the meeting of the electors in that year.<sup>154</sup> This deference is consistent with Sec-

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& MacDonald, *supra* note 23, at 261.

148. As we point out, *infra* notes 275-81 and accompanying text, only where a state has not authoritatively determined a controversy as to the appointment of electors will Congress determine who are the lawful electors.

149. U.S. CONST. art. II, § 1, cl. 2 (emphasis added).

150. *Ray v. Blair*, 343 U.S. 214, 224-25 (1952); *McPherson v. Blacker*, 146 U.S. 1 (1892).

151. Act of Feb. 3, 1887, ch. 90, 24 Stat. 373 (codified as amended at 3 U.S.C. §§ 5, 6, 15 (1994)); see *supra* notes 70-77 and accompanying text. There is great variety in the methods chosen by the states for deciding such controversies. See, e.g., ARK. CODE ANN. § 7-5-319 (Michie 1993) (any candidate may petition the county board of election commissioners for a recount); ME. REV. STAT. ANN. tit. 21-A, § 732(2)(A) (West 1993) (if there is a tie vote for presidential electors, the legislature, by joint ballot of the members present, shall determine which are elected).

152. 3 U.S.C. § 5 (1994).

153. *Id.*

154. The Republican electors were initially declared elected on November 16, 1960. The election of the Republican electors was certified by the Acting Governor of Hawaii on November 28, 1960. Despite the objection of the Hawaii Attorney General, a recount was ordered to begin on December 13, 1960. Both sets of electors met on the appointed day (December 19), cast their votes for President and Vice President, and certified their own meeting and votes. On December 30, 1960 the court decided that the Democratic electors had won the election. The newly elected Governor of Hawaii certified the election of the Democratic electors on January 4, 1961, after he took office. This certification of the Governor was received by Congress on January 6, 1961, the day the electoral votes were counted.

tion 6 and also the rules of adjudication provided for Congress in Section 15 of Title 3.<sup>155</sup>

For the transmission of the appointed electors' names and credentials, the federal statute sets out a tripartite procedure. First, each governor is required "to communicate by registered mail under the seal of the State to the Archivist of the United States, a certificate of . . . ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of [the pertinent] State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast."<sup>156</sup> The duty to do so arises "as soon as practicable after the conclusion of the appointment of the electors in [the pertinent] State."<sup>157</sup> Second, the executive of each state is required to deliver to its electors six copies of the transmission certificate under the seal of the state. The duplicates of the certified popular vote and list of electors must be delivered to the electors on or before the day on which they meet to cast their votes. Third, if there has 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 electors of [that] State,"<sup>158</sup> the state executive is required "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 [has] been made."<sup>159</sup>

The Archivist of the United States first must ensure that all the certificates received from the state executives "be preserved by him for one year and shall be part of the public records of his office and . . . be open to public inspection."<sup>160</sup> Second, the Archivist, "at the first meeting of Congress thereafter," is required to "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."<sup>161</sup>

In 1967, a Mississippi District Court in *Penton v. Humphrey*<sup>162</sup> reviewed the constitutionality of this certification of electors under the federal statute and concluded in dictum that it did not conflict with the Twelfth Amendment of the United States Constitution.<sup>163</sup> In that case, an adult citizen and qualified voter of Jackson County,

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The Chair of the Joint Session of Congress, then Republican Vice President and defeated Republican presidential candidate, Richard M. Nixon, had in his possession certificates for both the Republican and Democratic electoral votes and certificates indicating that each set of electors were the lawfully chosen electors of that state. He announced to Congress that the certificate of the Governor, dated January 4, 1961, properly and legally portrayed the facts and that, in the absence of any objection, the votes of the Democratic electors were counted. Had the Democratic electors' votes not been counted or had the votes of the Republican electors been counted, the outcome of the 1960 presidential election would not have been affected. See 107 CONG. REC. 288-91 (1961).

155. See 3 U.S.C. §§ 6, 15 (1994).

156. 3 U.S.C. § 6 (1994).

157. *Id.*

158. *Id.* (emphasis added).

159. *Id.*

160. *Id.*

161. *Id.*

162. 264 F. Supp. 250 (S.D. Miss. 1967).

163. The plaintiff sought "to enjoin the appointment of presidential electors in any state by any method which is not designed to reflect the will of the people of the state as evidenced by its popular vote." *Id.* at 250. The court held that the defendants' motion to dismiss had merit on "all grounds." *Id.* at 251. Since plaintiff did not establish proper *in personam* jurisdiction over the defendants under Federal Rules of Civil Procedure 4(f) or proper venue, the court's reasoning as to the constitutionality of 3 U.S.C. § 6 was not essential to its holding. *Id.* Nevertheless, there are no other cases, and the

Mississippi, filed an action against the United States, Hubert H. Humphrey as President of the Senate, and the presidential electors to be appointed in the 1968 presidential election. The complaint alleged, *inter alia*, that the federal statute providing for the certification of the names of electors<sup>164</sup> violated the Twelfth Amendment.<sup>165</sup> The court said that the statute did not conflict with the Twelfth Amendment because "[t]he former refers to the certification of the identity of the electors, [and] the latter to the transmittal to the seat of government of the results of the electoral vote."<sup>166</sup>

## B. Balloting by the Electors

### 1. Meetings Provisions

The Constitution gives Congress the authority to determine the "Time" and "Day" when the electors vote.<sup>167</sup> Congress has designated the first Monday after the second Wednesday in December as the "Day" on which the electors "meet and give their votes."<sup>168</sup>

The Constitution requires Congress, if it exercises the authority to fix "[a] day on which they shall give their votes," to make that day "the same throughout the United States."<sup>169</sup> Apparently, therefore, the Framers anticipated that prejudice could result from electors voting on different days.

Most states, including all but one of those with 20 or more electoral votes, specify the time of day at which the electors convene.<sup>170</sup> However, the times specified for the electors' meetings vary greatly. The earliest meetings are in the morning in the Eastern time zone, and the latest in the mid-afternoon in the Pacific time zone. The statutes do not specify a time by or at which the electors' ballots must be cast.

The lack of a federal provision or state coordination of the time for elector meeting and balloting could lead to a "ripple" effect in the event of a national effort to influence electors to vote contrary to the popular vote in their respective states. Uniformity of time of meeting, and even more important, time of balloting, would make it more difficult for electors to vote with knowledge of how other states' electors have voted. Those who believe that electors should have discretion, at least in states that do not purport to bind their voting, presumably would not favor a uniform time of meet-

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court's reasoning is straightforward and convincing.

164. 3 U.S.C. § 6 (1994).

165. *Penton*, 264 F. Supp. at 251.

166. *Id.* at 252 n.1.

167. U.S. CONST. art. II, § 1, cl. 3; *see supra* note 93.

168. 3 U.S.C. § 7 (1994).

169. U.S. CONST. art. II, § 1, cl. 3. Senator Charles Pinckney, one of the two South Carolina signers of the Constitution, said of this provision that "the vote should be taken in such manner [secretly], and on the same day, as to make it impossible for the different States to know who the Electors are for, or for improper domestic, or, what is of much more consequence, foreign influence and gold to interfere." 10 ANNALS OF CONG. 129 (1800).

170. *See, e.g.*, CAL. ELEC. CODE § 25103 (West 1977) (the electors convene at 2:00 p.m.); FLA. STAT. ANN. § 103.061 (West 1992) (by 10:00 a.m.); ILL. REV. STAT. ch. 10, para. 5/21-4 (1995) (by 10:00 a.m.); MICH. COMP. LAWS § 168.47 (1993) (by 2:00 p.m.); N.Y. ELEC. LAW § 12-104 (Consol. 1995) (by noon); OHIO REV. CODE ANN. § 3505.39 (Anderson 1988) (by noon); 25 PA. CONS. STAT. § 3192 (1993) (by noon); TEX. ELEC. CODE ANN. § 192.006(a) (West 1986) (by 2:00 p.m.).



ing and balloting because it would not promote the exercise of that discretion. Those who believe electors have, or should have, no discretion should favor a uniform time, because it reduces the possibility of elector faithlessness.

It is not clear whether Congress has authority to enact a uniform time for electors' balloting. The Constitution uses two different words: "Time" for the popular vote and "Day" for the electors' vote.<sup>171</sup> Canons of interpretation suggest the Framers intended to express a difference of substance. But when Congress first determined the "Time" of Election Day, in 1792, it fixed only a period of days. This period was to be "within thirty-four days preceding the first Wednesday in December."<sup>172</sup> It was not until 1845 that Congress fixed a given day for appointment of electors.<sup>173</sup> Because the 1792 Congress included a large number of the Constitution's drafters, its early interpretation of "Time" to mean "time period" is highly probative.

The federal statute directs the electors to meet "at such place in each State as the legislature of such State shall direct."<sup>174</sup> The place of the meeting is not mentioned by the Constitution. Each state's electors usually meet at the state capital, in a specified office such as that of the secretary of state or lieutenant governor.<sup>175</sup>

All state laws should be revised to require the state's executive to give sufficient prior notice to the electors and alternates of the date, time and place of the electors' meeting. State laws should also require each elector and alternate to provide the state's executive immediate notice of any inability or intention not to attend the meeting.

The election laws of at least the twelve largest states fail to illuminate whether or not the electors' meetings are open to the public.<sup>176</sup> We favor open meetings of public bodies generally. Therefore, we recommend that electors' meetings be subject to the open meetings laws of all states. Here, open meetings would reduce or eliminate opportunities for manipulation of appointments of alternate electors, counting of ballots and certification of the votes.

State statutes are unclear about who presides over the meeting, who determines whether all electors are present, and who supervises the filling of vacancies when necessary. Likewise, the statutes are unclear as to who supervises the counting of the ballots, certification of the votes, and transmission of the certificates. Because the electors may be associated with a different political party than sitting state officers who are present, we believe the states should place responsibility for all these matters with the electors themselves. Consequently, we recommend that each state's statute provide that the first order of business at each electors' meeting be the election, from among the electors, of a presiding officer and secretary. The secretary should have a statutory duty to keep minutes of the meeting and file them with the state's archivist, secretary of state or other designated keeper of public records.

171. U.S. CONST. art. II, § 1, cl. 3.

172. Act of Mar. 1, 1792, ch. 8, 1 Stat. 239.

173. Act of Jan. 23, 1845, ch. 1, 5 Stat. 721.

174. 3 U.S.C. § 7 (1994).

175. See CONN. GEN. STAT. § 9-176 (1994); N.M. STAT. ANN. § 1-15-6(a) (Michie 1995); UTAH CODE ANN. § 20A-13-302 (1995).

176. See CAL. ELEC. CODE § 25105 (West 1995); FLA. STAT. ANN. § 103.061 (West 1992); GA. CODE ANN. § 21-2-11 (1993); ILL. REV. STAT. ch. 10, para. 5/21-4 (1995); MICH. COMP. LAWS § 168.47 (1995); N.J. REV. STAT. § 19:36-1 (1994); N.Y. ELEC. LAW § 12-104 (Consol. 1995); N.C. GEN. STAT. § 163.210 (1995); OHIO REV. CODE ANN. 3505.39 (Anderson 1988); 25 PA. CONS. STAT. § 3192 (1993); TEX. ELEC. CODE ANN. § 192.006(a) (West 1986); VA. CODE ANN. § 24.2-203 (Michie 1993). It is also not clear whether the "sunshine" or "open meeting" laws apply.

## 2. Vacancies

Although neither explicitly authorized nor required by the Constitution,<sup>177</sup> federal law provides that "[e]ach State may, by law, provide for the filling of any vacancies which may occur in its college of electors when such college meets to give its electoral vote."<sup>178</sup> The Constitution gives each state authority to determine the manner of appointment of electors for that state.<sup>179</sup> Therefore, the manner of filling vacancies in the office of elector, the manner of appointing alternate electors, and even the decision of whether alternates are appointed, would appear to be state issues. Sections 4 and 15 of the federal statute also recognize the filling of elector vacancies to be a matter for the states.<sup>180</sup> Section 15 provides in part that Congress shall count regularly given votes of elector successors or substitutes ascertained by state determination of a controversy under Section 5, if they "have been appointed to fill such vacancy in the mode provided by the laws of the State."<sup>181</sup> State practice at the time of the adoption of the Twelfth Amendment is confirmatory. For example, in 1802 the Pennsylvania legislature revised its general election law. The legislature, which was controlled by the Pennsylvania Republican Party, provided that if any electors were absent on the day they met to vote, the legislature could fill the vacancies by joint ballot.<sup>182</sup>

In some states, the vacancy-filling provisions operate only if the vacancy has a specified cause, such as death, refusal to serve or the failure to attend the electoral meeting.<sup>183</sup> If a vacancy in these states is otherwise caused, such as when an elector chooses not to vote or an elector bound by state law casts a "faithless" vote, the vacancy-filling provisions may not apply.

Some states provide for alternates to fill vacancies that may be known in advance of the meeting.<sup>184</sup> Forty-three states permit elector vacancies to be filled by vote of the electors present at the meeting.<sup>185</sup> Presumably, the electors will choose someone they believe will vote with them. Some states actually require that replacement electors must be of the same party as the winning slate.<sup>186</sup> These methods would seem to reduce the likelihood that an elector would vote other than in accordance with the popular vote.

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177. The Constitution authorizes the states "to appoint in such manner as the Legislature thereof may direct." U.S. CONST. art. II, § 1, cl. 2.

178. 3 U.S.C. § 4 (1994).

179. U.S. CONST. art. II, § 1, cl. 2.

180. 3 U.S.C. §§ 4, 15 (1994).

181. 3 U.S.C. § 15 (1994).

182. KURODA, *supra* note 37, at 167.

183. *See, e.g.*, N.Y. ELEC. LAW § 12-104 (Consol. 1995).

184. *See, e.g.*, ALASKA STAT. § 15.30.080 (1995).

185. Most of the 43 states require that a vacancy be filled by a majority vote of the electors present at the meeting. *See, e.g.*, N.Y. ELEC. LAW § 12-104 (Consol. 1995). Six states—Florida, Illinois, Nevada, New Jersey, New Mexico, and Tennessee—make other provisions. Arizona does not have elector vacancy provisions. In Illinois, Nevada, New Jersey and New Mexico, one way or another the victorious state party fills or participates in filling elector vacancies. There appears to be no provision for the filling of elector vacancies in the District of Columbia. *See* D.C. CODE tit. I, ch. 13. Florida's provisions appear to create opportunities for the appointment of electors who might deviate from the popular vote. If the vacancy occurs before the day of balloting, the Governor appoints the replacement. But if an elector is absent from the balloting meeting, the electors appoint a replacement in the presence of the Governor. FLA. STAT. ANN. § 103.061 (West 1992).

186. *See, e.g.*, OHIO REV. CODE ANN. § 3505.39 (Anderson 1988).

In some states, if the electors fail to elect a replacement elector because of a tie vote<sup>187</sup> or because the electors have not selected the replacement by a specified time, the governor has the power to decide. Others simply empower the governor to fill all vacancies.<sup>188</sup> These provisions create the possibility of appointment of an elector who may not vote in accordance with the popular vote.

State laws should include specific provisions for filling of vacancies. In *In re Corliss*,<sup>189</sup> one person selected by Rhode Island voters as a presidential elector was challenged and disqualified because he failed to meet the constitutional qualifications for the office.<sup>190</sup> The Supreme Court of Rhode Island held that the remaining electors could not elect a replacement for Mr. Corliss under the Rhode Island vacancy statute because his failure to qualify did not create a vacancy; it resulted in a failure of election. Furthermore, Corliss' disqualification did "not result in the election of the candidate next in vote, but in a failure to elect" the required number of presidential electors. The popular votes for Corliss were void, as much as if cast for one who is dead. If the electorate voted for Corliss in ignorance of his disqualification, his presence on the ballot must be presumed to have influenced the voters' choice of how to cast their remaining votes.<sup>191</sup> Consequently, "the selection of an ineligible candidate, not only rendered his election void, but in addition left one place in the electoral college unfilled."<sup>192</sup>

State legislatures should not rely on political parties to provide for instances where the parties' elector candidates die, are unable to vote on the appointed day or are disqualified following the election day vote. To do so is to take a chance that one or both political parties might not select alternates. This might leave the state without the full number of electors to which it is entitled under the Constitution, or could result in the splitting of the state's electoral vote if the only possible replacement appointment is of an elector from another political party, as in Oregon in 1876.<sup>193</sup>

Because the Constitution gives Congress the power to set the time for choosing electors<sup>194</sup> and Congress has done so,<sup>195</sup> an issue might arise where a state simply provides, as many do, that if a vacancy arises, the electors themselves shall fill the vacancy when they meet.<sup>196</sup> If no alternates were previously appointed, then the vacancy-filling electors would have been appointed on a different date from that provided by Congress. The federal statute delegates to the state legislatures authority to appoint electors on dates subsequent to that specified by Congress *only* when the state "has held an election for the purpose of choosing electors, and has *failed to make a choice*

187. See, e.g., MINN. STAT. § 208.06 (1995) (providing that the electors must appear before 9:00 a.m.).

188. See, e.g., N.M. STAT. ANN. § 1-15-7 (Michie 1995); FLA. STAT. ANN. § 103.021(5) (West Supp. 1996). Arizona has no provisions governing the filling of vacancies.

189. 11 R.I. 638 (1876).

190. *Id.* at 642-43. Corliss was a Commissioner of the United States Centennial Commission, a federal office.

191. *Id.* at 643-44; see also Dupre v. St. Jacques, 153 A. 240, 241 (R.I. 1931); Carpenter *ex rel.* Dexter v. Sprague, 119 A. 561 (R.I. 1923); Sanders v. Rice, 102 A. 914 (R.I. 1918).

192. DeCesare v. Bd. of Elections, 242 A.2d 421, 427 (R.I. 1968) (Joslin, J., dissenting).

193. See *infra* notes 298-300 and accompanying text.

194. U.S. CONST. art. II, § 1, cl. 2.

195. 3 U.S.C. § 1 (1994).

196. See *supra* note 185 and accompanying text.

on the day prescribed by law."<sup>197</sup> However, the need for alternates generally arises when the state *succeeded* in making a choice of elector on the day specified by Congress and that elector subsequently has become unable or unwilling to serve. This situation is not reached by the federal statutes' delegation of authority.

All state laws should provide for the filling of elector vacancies. To obviate the constitutional and political issues, we recommend that elector alternates be chosen at the same time as the slate of elector nominees. The vacancy provisions should include mechanisms to fill vacancies that occur either before or at the electors' meeting with alternates, and for the certification, in accordance with the federal statute,<sup>198</sup> of those chosen to fill the vacancies. Each state law should provide that a "vacancy" will result from an elector's resignation at any time, their absence at the time and place of the electors' meeting, or their inability or refusal to perform the electors' duties as specified in state law. Such duties presumably would include compliance with any state statute binding electors to follow the popular vote. Further, each state should provide that either the presiding officer or a secretary chosen from among the electors should take a roll call of the certified electors at the start of the electors' meeting. This officer would then ascertain whether one or more alternates must be substituted for any absent electors. Instead, Congress could modify its delegation of authority to set the date for choosing electors to include situations where electors are chosen but subsequently become unable or unwilling to serve.

### 3. Balloting

At the fifty-one meetings of the appointed electors, the electors cast separate ballots naming the President and Vice President. The word "ballot" derives from the Renaissance or early Italian word for "little ball,"<sup>199</sup> describing the colored balls that voters dropped into a box to signify their wishes. Such balloting was anonymous. When paper ballots were introduced, the ballots were cast in secret.<sup>200</sup> The Constitution uses the word "ballot" in only two contexts: the voting by the presidential electors and the contingency election procedures in the House and Senate.<sup>201</sup> In all other election contexts the Framers use the words "choose" or "elect," which do not imply secrecy. Presumably, the Framers intended the use of the word "ballot" to be equivalent to "secret ballot."<sup>202</sup> Certainly the lame-duck Congresses of 1801 and 1825 so interpreted the instruction to ballot in contingency elections. The special rules adopted by the House to govern those contingency elections explicitly provided for secret ballots.<sup>203</sup>

197. 3 U.S.C. § 2 (1994) (emphasis added).

198. 3 U.S.C. § 15 (1994).

199. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 160 (2d ed. unabr. 1987).

200. See *Johnson v. Clark*, 25 F. Supp. 285 (N.D. Tex. 1938); *Brisbin v. Cleary*, 1 N.W. 825 (Minn. 1879); BLACK'S LAW DICTIONARY 143 (6th ed. 1990).

201. The word "Ballot" was used by the Framers for all three purposes in the original Constitution. U.S. CONST. art. II, § 1, cl. 3. In the Twelfth Amendment the word "ballot" was dropped in describing the Senate contingency election procedure for Vice President. U.S. CONST. amend. XII.

202. In an 1800 Senate debate, Senator Pinckney, a signer of the Constitution, said that the electors are "obliged to vote secretly." 10 ANNALS OF CONG. 129 (1800); accord BEST, *supra* note 23, at 36; PEIRCE & LONGLEY, *supra* note 12, at 103-04; Rosenthal, *supra* note 23, at 20 n.72. In 1801 and 1825 the House presidential election proceedings in their entirety were closed to the public. See GLENNON, *supra* note 21, at 48.

203. The secrecy of the balloting, both by individual representatives within each state delegation

A secret ballot is also consistent with the federal statutory instruction, that after the electors ballot, they *count*, certify, and transmit their vote.<sup>204</sup> Counting is necessary as a separate operation only if the vote is secret.<sup>205</sup> Notwithstanding this tradition, which is preserved today in *Robert's Rules of Order*,<sup>206</sup> a significant number of states have discarded tradition and the constitutional directive of secrecy while preserving the form of paper ballots.<sup>207</sup> It may not be a coincidence that, among the states whose practices we have been able to confirm, most of those still adhering to the secrecy of elector ballots do not seek to bind their electors to follow the popular vote. Most of the states which have discarded secret ballots have enacted binding statutes.<sup>208</sup> Certainly, states with binding statutes may have difficulty enforcing them if the ballots are secret. In fact, a few states with binding provisions enforce them by providing for automatic resignation if an elector votes for anyone other than her party's candidate.<sup>209</sup> If the ballot were secret, then unless the elector announced her vote, no one would know the identity of an elector who has "automatically resigned," so a vacancy could not be declared. We recommend that at least those states which choose not to bind their electors ensure the secrecy of their electors' ballots.

After the electors vote, they then "make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes

and by the delegations once the state's vote was determined, is implicit in the procedure adopted in 1801. 3 ASHER C. HINDS, *HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES* § 1982 (1907). The procedure was followed in 1825. *Id.* § 1984. Congress' understanding that these procedures insured secrecy of all voting is explicit in the debate preceding adoption of the 1825 rules. CONG. DEB. 430, 512, 514 (1825).

204. U.S. CONST. amend. XII; 3 U.S.C. §§ 9-11 (1994).

205. See *Presidential Succession Between the Popular Election and the Inauguration: Hearing Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 103d Cong., 2d Sess. 1, 15 n.26 (1994) [hereinafter 1994 HEARINGS] (S. HRG. No. 941) (statement of Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, U.S. Dep't of Justice).

206. *Robert's Rules of Order* is explicit in separating elections by ballot from all other methods of election. "Voting by ballot (slips of paper on which the voter marks his vote) is used when the secrecy of the members' vote is desired." Henry M. Roberts *ROBERT'S RULES OF ORDER NEWLY REVISED* 405 (9th ed. 1990) (emphasis in original).

207. In our telephone interviews with the offices of the secretaries of state of eleven states, we found that only three, Kansas, New York and Mississippi, still employ secret ballots. The others, including all seven states in which electors have cast faithless votes, employ open balloting, generally by requiring the electors to sign their ballots. Supporting Memorandum on file in the office of the authors.

Not only are these states not acting in accordance with the Constitution, but Ohio may be violating its own statute. The script of Ohio's electoral college meeting provides for elector voting by ballot to fill elector vacancies, for voting by ballot for President (but instructs each elector to sign as well as mark the ballot), and for voting by ballot for Vice President. *Proceedings of Ohio's 48th Electoral College Meeting held December 14 [sic], 1992*, at 8, 10-11 (unnumbered). The applicable Ohio statute provides for voting by ballot, 35 OHIO REV. CODE ANN. § 3505.39 (Anderson 1995). It also contains many provisions designed to ensure generally secret balloting. *Id.* at §§ 3505.10, 3505.18 ("No mark shall be made on any ballot which would in any way enable any person to identify the person who voted such ballot."), 3505.23. Since Ohio binds its electors to follow the popular vote, *id.* at § 3505.40, its apparent violation of the secret ballot for presidential electors may not be material, assuming the validity of its binding statute. See *Ray v. Blair*, 343 U.S. 214 (1952).

The eleven-state sample was not chosen randomly, but because the eleven had a history of faithless electors or cases involving binding of electors. Nevertheless, they constitute twenty percent of the total number of states.

208. These include Alabama, Mississippi, North Carolina, Ohio, Oklahoma, Tennessee, and Washington.

209. See, e.g., N.C. GEN. STAT. §§ 163-212 (1995).

for each."<sup>210</sup> The federal statute requires the electors to "make and sign six certificates of all the votes given by them . . . and . . . annex to each of the certificates one of the lists of the electors"<sup>211</sup> which the governor has furnished to them. Finally, the electors seal the certificates and certify upon each that the two lists of the votes given for President and Vice President, respectively, are contained in the certificates.<sup>212</sup>

### C. The Period Between Balloting and Counting the Certified Votes

Under federal law, after the electors have balloted and signed the certificates of their votes, they "dispose of the certificates" in the following manner:

(1) They "forward by registered mail" one such certificate to the President of the Senate, who is the Vice President of the United States at that time, at the seat of government.<sup>213</sup>

(2) They deliver two copies of the certificates to the secretary of state of their state, "one of which shall be held subject to the order of the President of the Senate, the other to be preserved by him for one year . . . open to public inspection."<sup>214</sup>

(3) On the day after the balloting, they "forward by registered mail two of such certificates . . . to the Archivist of the United States . . . one of which [is] held subject to the order of the President of the Senate. The other [is] preserved . . . for one year . . . open to public inspection."<sup>215</sup>

(4) They deliver the last certificate "to the judge [sic] of the district in which the electors . . . assembled."<sup>216</sup>

The federal statute provides that if the electors' certificates fail to reach the President of the Senate or Archivist of the United States "by the fourth Wednesday in December," which is two weeks following the balloting, "the President of the Senate or, if he be absent from the seat of government, the Archivist of the United States shall request by the most expeditious method available, the secretary of state of the [pertinent] State to send up the certificate and list lodged with him."<sup>217</sup> At the same time, "the President of the Senate or if he be absent from the seat of government, the Archivist of the United States," must "send a special messenger to the district judge in whose custody one certificate of votes from that State has been lodged."<sup>218</sup> The judge must transmit that list by such messenger to the seat of government.<sup>219</sup>

Although federal law sets forth the procedure step-by-step, not all states' laws conform.<sup>220</sup> Obviously, the electors should comply with federal law, and the states

210. U.S. CONST. amend. XII; see 3 U.S.C. § 8.

211. 3 U.S.C. § 10 (1994).

212. *Id.*

213. 3 U.S.C. § 11 (1994).

214. *Id.*

215. *Id.*

216. *Id.*

217. 3 U.S.C. § 12 (1994).

218. 3 U.S.C. § 13 (1994).

219. *Id.* If the person who has been appointed messenger to deliver the certificates of the electors' votes to the President of the Senate neglects to perform the services required, she or he can be fined \$1,000. 3 U.S.C. § 14 (1994).

220. Certain state statutes parrot the procedure mandated by 3 U.S.C. § 11 (1994) for the disposition of certificates. See, e.g., MONT. CODE ANN. § 13-25-105 (1995). Other state statutes, while they

should conform their laws. Furthermore, the statute assumes there is only one federal district judge in the district where the electors meet.<sup>221</sup> But today all federal judicial districts contain more than one judge. Congress should amend Title 3 to specify that, if there is more than one judge where each state's electors meet and vote, one certificate of the electors' votes be delivered to the *Chief* Judge of the *Federal* Judicial District.

#### D. Which Congress Counts the Electoral Votes?

The Act of the Continental Congress adopted on September 13, 1788 established that the terms of the first President, Vice President, and Congress would commence on the first Wednesday in March of 1789 following the election.<sup>222</sup> By the Act of March 1, 1792, Congress then provided that the terms of the President and Vice President would thereafter commence on the fourth day of March after the election.<sup>223</sup> The statute also provided that Congress would meet for the purpose of counting the electoral vote on the second Wednesday of February following an election.<sup>224</sup>

The Constitution requires Congress to assemble at least once a year, on the first Monday in December, unless Congress appoints a different day by statute.<sup>225</sup> In its first 140 years, Congress observed this requirement despite the fact that, in election years, the new Congress and President did not take office until March 4 of the succeeding year.<sup>226</sup> Consequently, instead of the incoming House or Senate, it was the outgoing Congress that elected the President or Vice President, if one or the other or both failed to obtain elector majorities.<sup>227</sup>

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apparently attempt to copy § 11, actually distort the federal statute's instructions. For example, the Arkansas statute requires the Governor to send a certificate of the electors' votes to the Secretary of State of the United States. ARK. CODE ANN. § 7-8-305(3) (Michie 1987). This requirement was put in the federal statutes in 1887. *See* Act of Feb. 3, 1887, ch. 90, 24 Stat. 373. In 1951, the Administrator of the General Services Administration of which the National Archives was then a part was substituted. Act of Oct. 31, 1951, ch. 655 § 6, 65 Stat. 711. In 1984, when the Archives were made independent, the Archivist was substituted. Act of Oct. 19, 1984, tit. I § 107, 98 Stat. 2291. The Arkansas provision was enacted in 1987, yet the Arkansas statute still concludes its requirement by stating "as required by the laws of Congress." ARK. CODE ANN. § 7-8-305(3). When state statutes distort 3 U.S.C. § 11, the state's electors should follow the procedure for the disposition of certificates set forth in the federal provision, as mandated by the United States Constitution's Supremacy Clause, and disregard the inconsistent state statutory requirements for disposing of the certificates. *See* U.S. CONST. art. VI, § 1, cl. 2.

221. This language was first enacted as part of the Act of Mar. 1, 1792, ch. 8, 1 Stat. 239, when each federal judge was appointed to a separate district.

222. CONGRESSIONAL RESEARCH SERVICE LIBRARY OF CONGRESS, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, S. DOC. NO. 16, 99th Cong., 1st Sess. 452 (1987) [hereinafter CRS CONSTITUTION AND ANALYSIS]; *see also* Act of Mar. 1, 1792 ch. 8, § 12, 1 Stat. 241.

223. Act of Mar. 1, 1792, ch. 8, 1 Stat. 239.

224. *Id.*; S. REP. NO. 26, *supra* note 99, at 2-6, *quoted in* CRS CONSTITUTION AND ANALYSIS, *supra* note 222, at 1861.

225. U.S. CONST. art I, § 4, cl. 2, *amended by* U.S. CONST. amend. XX § 2.

226. S. REP. NO. 26, *supra* note 93, at 2. These sessions of the old Congresses were popularly described as lame-duck sessions because the members of Congress who had not been reelected for another term were viewed as politically disabled and ineffective in their legislative functions during this period. *See* THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1078 (2d ed. unabr. 1987).

227. S. REP. NO. 26, *supra* note 93, at 4-5.

The Twentieth Amendment, ratified on January 23, 1933, provides in Section 1 that the terms of the President and Vice President end at noon on the 20th of January, the terms for Senators and Representatives end at noon on the third day of January, "and the terms of their successors shall then begin."<sup>228</sup> Section 2 of the Twentieth Amendment superseded Article 1, Section 4, Clause 2 of the original Constitution by providing that the annual assembly of Congress shall begin at noon on the third day in January unless it appoints a different day by law.<sup>229</sup> The legislative history of the Twentieth Amendment indicates that it was designed, in part, to ensure that the *new* Congress elect the President and/or Vice President in the event that the electoral college failed to do so.<sup>230</sup> In 1934, Congress made two additional changes. First, it changed the day the electors' meet to cast their ballots from the first Wednesday in January to the first Monday after the second Wednesday in December. Second, it changed the day Congress meets to count the electors' ballots from the second Wednesday in February to the sixth day of January.<sup>231</sup> Since then, these statutory provisions have remained unchanged.

Notwithstanding the assumptions of the Twentieth Amendment's supporters, an outgoing Congress and President still possess a great ability to affect this process. They retain the ability to amend statutes to accelerate the voting of the electors, to accelerate the counting of the ballots in joint session of the old Congress, and to accelerate the election of a President or Vice President by the lame-duck House or Senate if the electoral college fails to produce a majority. Nothing but popular opinion would seem to prevent such manipulative action by a political party which anticipates the loss of its control of Congress as a result of the election.

On several occasions, recently retired Senator Claiborn Pell (D-RI), at least once joined by former Senator Charles Mathias (R-MD), introduced joint resolutions proposing a Constitutional Amendment under which the terms of members of Congress and the President would begin more promptly after the November general election.<sup>232</sup> In his statement in support of the 1983 joint resolution, Senator Pell emphasized that the people, once they have spoken, want to see their new President (and Congress) in office. He observed that the two and a half month delay before inauguration has become a period of near paralysis during which, for example, "[a]s we learned painfully during the close of the Iranian hostage crisis in 1980-81, foreign governments defer dealing with a lameduck [sic] Presidential administration."<sup>233</sup> He said the earlier inauguration would permit the incoming President to submit his own budget. He furthermore notes that, disputed elections are few and usually quickly resolved. He then described the evils of lameduck sessions:

The dismal lameduck session of the 97th Congress is a vivid reminder that we pay a price for the leisurely implementation of the voters' election day mandate. The

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228. U.S. CONST. amend. XX, § 1.

229. U.S. CONST. amend. XX, § 2.

230. S. REP. NO. 26, *supra* note 93, at 4-5; H.R. REP. NO. 345, 72d Cong., 1st Sess. 4 (1932).

231. See Act of June 5, 1934, ch. 390, §§ 6-7, 48 Stat. 879 (current version at 3 U.S.C. §§ 5, 15 (1994)).

232. E.g., S.J. Res. 71, 103d Cong., 1st Sess. (1993); S.J. Res. 322, 102d Cong., 2d Sess. (1992); S.J. Res. 71, 100th Cong., 1st Sess. (1987); S.J. Res. 71, 98th Cong., 1st Sess. (1983).

233. 129 CONG. REC. 7054 (1983).



lame-duck session last December was almost a textbook example of the need to eliminate these postelection debacles; I know my colleagues who were here will not soon forget the all night sessions, the filibusters, and the endless parliamentary maneuvers thwarting the will of the majority of the Member [sic] of this body. Lame-duck sessions have never provided a climate for serious consideration of national policy; they are a contest between those who see advantages in immediate action and those who see advantage in awaiting the arrival of newly elected Members more favorable to their cause.<sup>234</sup>

Although Senator Pell's 1983 remarks evidenced no awareness of the implications of the proposed amendment for the contingency elections of the President and Vice President, Senator Mathias's remarks touched on the subject:

Another constitutional reform in the making would harmonize well with this proposal. Recently, I joined with Senator Pryor and many of my colleagues to sponsor Senate Joint Resolution 17, which would abolish the electoral college and provide for direct election of the President. The elimination of the charade of convening the electoral college would get rid of another justification for delaying inauguration.<sup>235</sup>

Neither Senator acknowledged the possible arguments against accelerating the beginning of the President elect's and Vice President elect's terms such as their need to rest from the campaign and to assemble a cabinet, a White House staff and a cadre of inferior Executive Branch officers. However, advancing the terms of the newly elected Congress would have the virtue of eliminating any possibility that a lame-duck Congress and President could alter the electoral college process to their political advantage. To us, it appears manifest that if the people have decided on a change in the political composition of the House and Senate at the same time they vote for a President and Vice President, then if the electors fail to reach a majority, the newly elected Congress should elect the President and Vice President.

Consequently, we recommend that at least a portion of Senator Pell's proposed Constitutional Amendment be adopted to provide for an accelerated meeting of the new Congress. Each new Congress should assemble on the first Monday in December and count the electors' ballots promptly thereafter. The electors should cast their ballots on the last Monday in November. This will give the states three weeks to resolve election contests and will provide a week for the transmittal of the electors' vote certificates. We take no position on whether the terms of the President and Vice President should be advanced as Senator Pell proposed.

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234. *Id.*

235. *Id.* at 7055.

## E. How Congress Counts the Votes

### 1. Counting

Under the Twelfth Amendment and federal statutes, the sealed certificates are opened before a joint session of Congress meeting in the House of Representatives.<sup>236</sup> The President of the Senate, that is the then-Vice President of the United States, unless the office is vacant, is the presiding officer of the joint session which is held at one o'clock in the afternoon on January 6 succeeding each presidential election.<sup>237</sup> He has the power to preserve order.<sup>238</sup> Four members of Congress are appointed before the session, two by each house, to act as "tellers" and handle the "certificates and papers purporting to be certificates of the electoral votes."<sup>239</sup> These certificates are "opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A."<sup>240</sup> The President of the Senate opens each certificate<sup>241</sup> and the tellers read them aloud "in the presence and hearing of the two houses."<sup>242</sup> The tellers make a list of the votes as they appear from the certificates.<sup>243</sup> After a determination of the count, the President of the Senate announces the "state of the vote" and declares "the persons, if any, elected President and Vice President of the United States."<sup>244</sup>

Upon the reading of each certificate, the President of the Senate calls for any objections.<sup>245</sup> Every objection must be made in writing, must "state clearly and concisely, and without argument, the ground thereof," and must be signed by at least one senator and one representative.<sup>246</sup> When an objection is made, received and read, the Senate withdraws to decide upon the objection and the Speaker of the House submits it to the House of Representatives for decision.<sup>247</sup>

The time for debate on an objection in each house is limited by statute. Each Senator and Representative may only address the objection once for five minutes.<sup>248</sup> After two hours of debate, it is the duty of the presiding officer of each house to put the main question to a vote without further debate.<sup>249</sup> No elector votes from any other state may be acted upon until the objection is finally resolved.<sup>250</sup>

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236. 3 U.S.C. § 15 (1994). The seating arrangement of the joint session is set forth in 3 U.S.C. § 16 (1994).

237. 3 U.S.C. § 15 (1994); *see, e.g.*, S. Con. Res. 1, 97th Cong., 1st Sess. (1981). However, joint resolutions have changed the date when January 6 has fallen on a Saturday or Sunday. *See, e.g.*, H.R.J. Res. 677, 100th Cong., 2d Sess. (1988).

238. 3 U.S.C. § 18 (1994).

239. 3 U.S.C. § 15 (1994).

240. *Id.*

241. U.S. CONST. amend. XII; 3 U.S.C. § 15 (1994).

242. 3 U.S.C. § 15 (1994).

243. *Id.*

244. *Id.* This announcement as well as the list of the votes is "entered on the Journals of the two Houses." *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. 3 U.S.C. § 17 (1994).

249. *Id.*; *see infra* notes 272-74 and accompanying text.

250. 3 U.S.C. § 15 (1994); *see infra* text accompanying notes 264-65.

After the houses have voted separately, they reconvene, and the presiding officer announces the decision on the objections submitted.<sup>251</sup> The joint session may not be dissolved until the count of all electoral votes has been completed and the result declared.<sup>252</sup> No recess may be taken, except when an objection has arisen regarding the counting of the electoral votes or some other aspect of the electoral vote.<sup>253</sup> If this occurs, each house may, acting separately, direct a recess of such house, but not beyond ten o'clock the next morning unless the next calendar day is a Sunday.<sup>254</sup>

This statutory voting procedure has been observed since 1793,<sup>255</sup> but was not enacted until 1877.<sup>256</sup> The text of the Constitution does not clearly assign the task of counting the electoral votes. The pertinent provision, carried from the original Article II, Section 1 to the Twelfth Amendment, states; "The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the certificates, and the Votes shall then be counted." Several nineteenth century commentators have argued about whether the passive construction used for the last phrase was meant to assign power and responsibility for the counting to the President of the Senate or to Congress as a whole, ignoring the possibility that the phrase means what it says and commands that the electors' vote be counted.<sup>257</sup>

The first implementing statute enacted by Congress, in 1792, followed the Constitution in using the passive construction.<sup>258</sup> This statute was not amended until 1877, immediately preceding the count of the Hayes-Tilden electoral vote. The new procedure specified the appointment of two tellers "on the part of" the Senate and the House of Representatives who, after the certificates were opened by the President of the Senate, would read the certificates to the assembled Congress, make lists of the votes, and hand the final ascertainment or count back to the President of the Senate, who would then "announce the state of the vote, and the names of the persons, if any, elected."<sup>259</sup> As refined in 1887, this procedure is still in use today.<sup>260</sup>

251. 3 U.S.C. § 15 (1994).

252. 3 U.S.C. § 16 (1994).

253. *Id.*

254. *Id.*

255. 3 ANNALS OF CONG. 873-74 (1793); *see also* 6 ANNALS OF CONG. 1536, 1538-39 (1797); Spear, *supra* note 73.

256. Act of Jan. 29, 1877, ch. 37, 19 Stat. 227.

257. *See, e.g.*, Burgess, *supra* note 73, at 638, 645-48; DAVID A. MCKNIGHT, THE ELECTORAL SYSTEM OF THE UNITED STATES 18 (1878) (Chancellor Kent "presumes" that the President of the Senate counts the votes in the absence of legislation to the contrary and Joseph Story asserts that the question of who is empowered to count the votes is "an important one."); *see generally* Spear, *supra* note 73.

258. "Congress shall be in session . . . on the second Wednesday in February succeeding every meeting of the electors and the said certificates [of the votes of the electors in each state], or so many of them as shall have been received, shall then be opened, the votes counted, and the persons who shall fill the offices of President and Vice President ascertained and declared, agreeably to the constitution." Act of Mar. 1, 1792, ch. 8, § 5, 1 Stat. 240; *see generally* Spear, *supra* note 73.

259. Act of Jan. 29, 1877, ch. 37, 19 Stat. 227.

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 . . . ; 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 as in this act provided, the result of the same shall be delivered to the President

## 2. Enforcing Procedures for Debate

The procedural requirements of the current statute were enforced during the 1969 debates on an objection to North Carolina's vote.<sup>261</sup> The Senate met in morning session on January 6, 1969, the day the electoral votes were counted, in order to permit more time for debate prior to the time the two hour limitation would take effect.<sup>262</sup> Senator Mike Mansfield (D-MT), Majority Leader, obtained unanimous consent that, until the Senate proceeded to the House to count the electoral votes, the Senate would discuss the issues which were expected to arise during the joint session.<sup>263</sup> The House of Representatives did not meet beforehand to discuss these issues.

Prior to the joint session of Congress, during the morning session of the Senate, Senator Curtis (R-NE) inquired whether it would be possible to request unanimous consent that all electoral votes other than those of North Carolina be counted, the result be declared and certified, and the vote in question be deferred for further deliberations.<sup>264</sup> In an advisory opinion, the President *pro tempore* stated that under the wording of the statute, considered in connection with the Constitution, no final declaration of the vote can be made until after the two bodies have separately considered each objection that might be entered. The Chair further stated that he "doubt[ed] very seriously that the unanimous-consent request would be in order."<sup>265</sup>

When the Senate withdrew from the joint session to discuss the objection to the North Carolina vote, Senator Edmund S. Muskie (D-ME) submitted a unanimous consent request that, in order to allow for a full and free debate, the statutory five minutes per senator limitation be eliminated.<sup>266</sup> The President *pro tempore* stated that unanimous consent requests which are in conflict with statutes or even with the Constitution can be received and entertained in the Senate,<sup>267</sup> although the chair is not permitted to enter any ruling that purports to pass upon the legality of a unanimous consent agreement.<sup>268</sup> The President *pro tempore*'s different responses to these two unanimous

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of the Senate, who shall thereupon announce the state of the vote, and the names of the persons, if any, elected, which announcement shall be deemed sufficient declaration of the persons elected . . . . Upon such reading of any such certificate or paper when there shall be only one return from a State, the President of the Senate shall call for objections, if any . . . . 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 . . . .

*Id.*

260. See 3 U.S.C. § 15 (1994). Although the 1877 statute was the first to specify the appointment of tellers from each house, the procedure had been in use since 1793 and was proposed in bills debated in Congress in early 1800, prior to that year's presidential election. See KURODA, *supra* note 37, at 78-81.

261. The substance of this debate on a faithless vote by a North Carolina elector is discussed in Ross & Josephson, *supra* note 19.

262. 115 CONG. REC. 197-98 (1969).

263. *Id.*

264. *Id.* at 198.

265. *Id.*

266. *Id.* at 210.

267. *Id.*

268. *Id.* at 211.

consent requests may have reflected the fact that Senator Curtis' request would have affected the procedures of the House of Representatives sitting in joint session with the Senate, whereas Senator Muskie's would affect only the procedures of the Senate, and the Constitution gives to each house of Congress the exclusive power to establish the rules of its own proceedings.<sup>269</sup> Senator Muskie's unanimous consent agreement was not adopted, however, because Senator Edward Brooke (R-MA) objected.<sup>270</sup>

During the Senate debate following withdrawal from the joint session, there was only one deviation between the Senate's debate procedures and the statutory debate time limitation. Senator Everett Dirksen (R-IL) was Minority Leader in control of time for the Republicans. When his five minutes expired, Senator Dirksen wished to take two minutes "on the house." He designated Senator Barry Goldwater (R-AZ) as the next speaker, Senator Goldwater was recognized, and Senator Dirksen then spoke on his time. While no objection was raised, the presiding officer required Senator Goldwater to remain on his feet while Senator Dirksen spoke.<sup>271</sup>

An interesting set of parallel parliamentary exchanges occurred in the two houses. In the course of each house's debate, one member moved to table the objection to the counting of the North Carolina vote.<sup>272</sup> Points of order were raised to each motion to table on the ground that the statute requires the question to be put,<sup>273</sup> and the presiding officer of each house ruled each motion to table not in order.<sup>274</sup>

## F. Congress' Counting of the Electors' Votes

### 1. Lawful Appointment Controversies

The Electoral Count Act limits congressional discretion in counting the electoral vote by establishing a sequence of rules concerning determinations of elector legitimacy.<sup>275</sup> The act's legislative history shows that it was designed to require Congress to accept any determination by authorized state officials of an appointment controver-

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269. U.S. CONST. art. I, § 5, cl. 2.

270. 115 CONG. REC. 211 (1969). Senator Brooke noted that elimination of the five minute limitation could result in one senator using the full one hour of time allotted to the majority. He concluded that such action would frustrate the intent of the statute. *Id.*

271. *Id.* at 223.

272. *Id.* (Sen. Dirksen (R-IL)); *see also id.* at 170 (Rep. Ford (R-MI)). Representative Ford argued that, although the statute does impose limitations on the debate, the language of the statute does not preclude a traditional parliamentary procedure. *But see* 3 U.S.C. § 15 (1994) (no votes from any other state may be acted upon until an objection is finally disposed of).

273. 115 CONG. REC. 223 (1969) (Sen. Kennedy (D-MA)); *id.* at 170 (Rep. O'Hara (D-MI)); *see* 3 U.S.C. § 17 (1994) (after two hours of debate, "it shall be the duty of the presiding officer of each House to put the main question without further debate.").

274. 115 CONG. REC. 223 (1969); *id.* at 170.

275. Act of Feb. 3, 1887, ch. 90, 24 Stat. 373.

sy.<sup>276</sup> It also provides that Congress may act in each case specified by the statute only by concurrent action, i.e., the two houses must vote separately and must agree.<sup>277</sup>

Congress must count electoral votes "regularly given" by electors whose appointment has been "lawfully certified" by the state executive<sup>278</sup> and from whose state only one return has been received.<sup>279</sup> Unless both houses of Congress determine the votes were not "regularly given," the state's certification of the electors' appointment is conclusive.

Section 15 of Title 3 requires that, where more than one return or paper purporting to be a return has been received from a state and there has been a state determination of the controversy respecting which set of electors is lawful "in the mode provided by the laws of the State,"<sup>280</sup> Congress must accept the state's determination of the proper electors. However, the statute still raises the issue whether the votes to be counted were "regularly given." This rule appears to give more conclusive effect to the state determination of the controversy than does Section 5, which states that the state determination will be conclusive only if made at least six days prior to the meeting of the electors. Even if not made at least six days prior to the voting of the electors, Congress is commanded to accept the state's determination of who are the appointed electors. We recommend that Congress clarify Sections 5 and 15 to make clear that any authoritative state determination is conclusive.

Section 15 also specifies that if there develops a vacancy on the state determined board of electors, the votes of the successors or substitutes for those electors must be counted.

If more than one return is received by Congress from two or more state authorities purporting to have made determinations of the appointment controversy, then Congress must decide which determination is authorized by the state's law and may count only votes of the electors supported by the authorized tribunal.<sup>281</sup> Of course, this only

276. See HOUSE SELECT COMMITTEE ON THE ELECTION OF PRESIDENT AND VICE-PRESIDENT, MEETING OF THE ELECTORS OF PRESIDENT AND VICE-PRESIDENT, ETC., H.R. REP. NO. 1638, 49th Cong., 2d Sess. 2 (1886) ("Congress having provided by this bill that State tribunals may determine what votes are legal coming from that State, and that the two Houses shall be bound by that determination, it will be that State's own fault if the matter is left in doubt.").

277. 3 U.S.C. § 15 (1994). Section 15 refers four times to actions of the two houses in its provisions for objections to electors or electors' votes. Each time it uses the word "concurrently." Twice it also uses the phrase "acting separately." We believe that no substantive issue is raised, notwithstanding the canon of statutory construction that all words in a statute must be given meaning. "Concurrently" means "acting in conjunction." THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 425 (2d ed. unab. 1987). Concurrent resolutions of Congress are those that, unlike joint resolutions, do not require action of the President. The two houses of Congress have no constitutional power to act together. U.S. CONST. art. I, § 7, cls. 2, 3. Section 15 itself says, before instructing Congress on what to do in the various eventualities, that "[w]hen all objections . . . to any vote or paper from a State shall have been . . . read, the Senate shall thereupon withdraw . . . for its decision; and the Speaker . . . shall, in like manner, submit such objections to the House . . . for its decision." 3 U.S.C. § 15 (1994). Section 15's penultimate sentence says, "[w]hen the two Houses have voted, they shall immediately again meet." These directions for separate house actions apply to each set of objections, state by state. *Id.*

278. See 3 U.S.C. § 6 (1994).

279. "[N]o electoral vote or votes from any State which shall have been *regularly given by electors* whose appointment has been *lawfully certified* . . . 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*." 3 U.S.C. § 15 (1994) (emphasis added).

280. *Id.*

281. *Id.* Again, the statute still raises the issue whether the votes to be counted were "regularly

matters if the different state authorities reach different conclusions as to who are the legitimate electors.

Where more than one return has been received from a state and no state determination of the appointment controversy has been made in accordance with state law, only those "lawful" (not "regularly given") votes which the two houses concurrently decide were cast by the "lawful electors" appointed in accordance with the laws of the state are counted.<sup>282</sup> But, if the two houses cannot agree, the executive of the state's certification under seal of one slate determines which electors are appointed. If the two houses disagree and the executive of the state certified the appointment of one set of the electors, Congress must count the votes of those certified electors.<sup>283</sup>

By implication, the two houses have the power to decide concurrently, in the absence of an authoritative state determination of an appointment controversy, that the electors whose appointment was certified by the state's executive were not the lawful electors of the state. In that case, the executive's certification of the elector slate is not conclusive in determining the controversy. This is the only case in which a congressional determination concerning legitimacy of electors' appointment will prevail over that of any state authority.

Barring a situation in which two governors certify competing slates,<sup>284</sup> the only case not provided for in this detailed set of rules are where: (1) Congress receives more than one return from a state; (2) the state executive has failed to certify the appointment of any set of electors; and either (3) there has been no state determination of the appointment controversy and the two houses cannot agree which slate of electors is valid under state law or (4) there have been conflicting state determinations of the controversy and the two houses cannot agree on which state determination was the lawful one. In either unlikely case, it would appear that the two houses of Congress must continue meeting until they agree on which electors are the lawful electors of the state, for "[n]o 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,"<sup>285</sup> and the "joint meeting shall not be dissolved until the count of electoral votes shall be completed and the result declared."<sup>286</sup> Nor may Congress consider any other business until the counting of the electoral votes has been completed.<sup>287</sup>

given."

282. *Id.*

283. *Id.*

284. John W. Burgess, writing contemporaneously with the adoption of the Electoral Count Act, said that the statute also fails to cover conflicting elector appointment certificates from two persons claiming to be the state executive. Burgess, *supra* note 73, at 651. This seems a remote contingency today, but was a real issue for the 1877 Congress, as Burgess well knew. See *infra*, text accompanying notes 290-97.

Burgess' further contention, that rejection of any electors should reduce the required majority, *id.*, ignores the explicit language of the Twelfth Amendment: "The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed." U.S. CONST. amend. XII.

285. 3 U.S.C. § 15 (1994).

286. 3 U.S.C. § 16 (1994).

287. This is implicit in the demands of Title 3 of the U.S.C. §§ 15, 16 and 17. It has been the policy followed by the presiding officer since the earliest days of the republic. In 1877, debate lasted a month and a day, and no other business was transacted. PEIRCE & LONGLEY, *supra* note 12, at 55-56.

Similarly, the Twelfth Amendment requires, and clause 3 of Article II, § 1 before it required, that the House "choose *immediately*, by ballot, the President" if no candidate receive a majority of the

If the House and Senate cannot agree, the provisions of the Twelfth and Twentieth Amendments take over.<sup>288</sup> They provide that, if the Senate has chosen a Vice President by the beginning of the presidential term on January 20, the Vice President shall act as President until a President is elected by the House and qualifies, but if the Senate also has not elected a Vice President by that time, Congress's statutory provisions for presidential succession will govern.<sup>289</sup>

## 2. The 1876-77 Election under the Electoral Count Act

As we have seen, the Electoral Count Act<sup>290</sup> was adopted to prevent another stalemate in Congress over counting contested electoral votes such as that which led to the unconstitutional 1877 Electoral Count Commission. Three out of four of the 1877 appointment controversies apparently would have been settled by the statute. At least one of these three controversies would have been settled differently and would have resulted in Tilden's election.

Congress received two sets of elector vote certificates, one from Democratic electors and one from Republicans, for each of Florida, Louisiana and South Carolina. In each case, early popular voting returns indicated victory by the Democrats' Tilden but were tainted by allegations of widespread voting fraud. Republican Reconstruction governments controlled each of these state governments, including the election machinery, and rival vote certifications were submitted by the Democratic and Republican electors in each state.

In Florida, the State Board of Canvassers and Governor certified the Republican Hayes electors, but the state court decided that the Tilden electors had won the state.<sup>291</sup> Without carefully analyzing a full set of 1876 Florida statutes to determine whether the State Board of Canvassers or the state court was the final authority for purposes of determining elector appointment controversies, one cannot be certain whether the Electoral Count Act would have changed the result of the Florida count. However, it seems more likely that the state court determination of the controversy would have been controlling if the Electoral Count Act had been in place, which would have ensured Tilden's election.

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electors' vote. U.S. CONST. art. II, § 1, cl. 3, *amended by* U.S. CONST. amend. XII (emphasis added). In 1801 the House interpreted this language as prohibiting its attention to any other business until a President had been selected by the House. As a result, all business presented to the House by either President Adams, the Senate or any other source during the six days of House voting on the election of Jefferson and Burr was deferred until after the vote. 10 ANNALS OF CONG. 1025 (1801). This interpretation of the constitutional mandate appears correct. In 1825 there was only one vote by the House, so the issue did not arise. PEIRCE & LONGLEY, *supra* note 12, at 51.

288. Between 1865 and 1876 the two houses of Congress had in effect a rule that would have disqualified the returns of any state where one house of Congress objected. PEIRCE & LONGLEY, *supra* note 12, at 54; L. Kinvin Wroth, *Election Contests and the Electoral Vote*, 65 DICK. L. REV. 321, 328-31 (1961).

289. 3 U.S.C. § 19 (1994) provides that if there is neither a President nor a Vice President, the House Speaker shall act as President, if he resigns as Speaker and as a Representative. If there is no Speaker or the Speaker fails to qualify, the President *pro tempore* of the Senate acts as President if he resigns both offices. If these provisions fail, the cabinet officers act in order of departmental seniority beginning with the Secretary of State.

290. Act of Feb. 3, 1887, ch. 90, 24 Stat 373.

291. PEIRCE & LONGLEY, *supra* note 12, at 53-54.



Louisiana had two sitting governments, one Democratic and one Republican. Two canvassing boards delivered different election results to two governors who separately certified the two different slates to Congress.<sup>292</sup> Apparently there was no independent "determination of the controversy" by an authorized state tribunal, so this conflict would not have been resolved for Congress by the Electoral Count Act.<sup>293</sup> Under the Supreme Court's opinion in *Luther v. Borden*,<sup>294</sup> it is within Congress' powers as "the political department" of the United States government to determine what government is the established one in a state.<sup>295</sup> Therefore, putting the intervention of the Electoral Commission to one side, Congress was within its prerogative to count the Hayes votes, implicitly determining the validity of the Republican Reconstruction government in Louisiana.

In South Carolina, the State Board of Canvassers certified only the Republican electors.<sup>296</sup> Consequently, Congress would have been required by the Electoral Count Act to count the Republican votes for Hayes, as it did following the Electoral Commission's report.<sup>297</sup>

The fourth appointment controversy arose in the state of Oregon, where the voters had elected a Republican slate. One Republican elector was a postmaster ineligible to serve under the Constitution.<sup>298</sup> He resigned as an elector right after the election, but there were no alternates from which to fill the vacancy. Oregon's Republican Governor therefore certified one Democratic elector along with the two remaining Republican electors. The postmaster also resigned his position as postmaster, whereupon the remaining Republican electors reelected him to fill his own vacancy and sent a second set of three certified votes to Congress.<sup>299</sup> Under the Electoral Count Act, the two houses of Congress could have agreed to ignore the Governor's certification. However, given the partisan split between the Senate and the House, which gave rise to the expedient of the Electoral Commission, the Act likely would have required Congress to count the Democratic vote for Tilden on the basis of the Governor's certification.<sup>300</sup> The Commission appointed by Congress simply disregarded this certification by the Governor despite the absence of any more authoritative state determination of the controversy. Because Tilden was only one electoral vote short of an absolute majority of the total electoral vote, that one Oregon vote would have guaranteed his election.

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292. *Id.* at 54.

293. *See supra* note 284.

294. 48 U.S. (7 How.) 1 (1849).

295. *Id.* at 42.

296. PEIRCE & LONGLEY, *supra* note 12, at 53.

297. *Id.*

298. U.S. CONST. art. II, § 1, cl. 2.

299. PEIRCE & LONGLEY, *supra* note 12, at 53-54. Despite the differences in the electoral vote count that would have resulted from greater congressional deference to state resolutions of these appointment controversies, the decision to elect Hayes is still considered appropriate by some scholars. The widespread intimidation of African-Americans by white voters in the South is thought to have lowered Hayes' popular vote in all the disputed states more than enough to account for Tilden's apparent popular vote victory. *See* BEST, *supra* note 23, at 24-25, 53.

300. *See supra* text accompanying note 283.

### 3. Votes "Regularly Given"

We now reach the most vexatious question concerning Congress' counting of the electors' votes: what does it mean that Congress may assert the power to count only elector votes which are "regularly given?" As we have seen, Section 15 refers four times to counting elector votes "regularly given" and once to counting "lawful votes." The legislative history deals inconclusively with distinctions Congress may have intended by these two terms. We discuss "regularly given" in our separate article on elector discretion.<sup>301</sup>

### G. Campaign Finance Regulation for Electors' and House and Senate Votes

According to author James Michener, after their respective 1968 and 1976 defeats, presidential and vice presidential candidates Hubert H. Humphrey and Robert Dole both said that "had the results been closer they would, the morning after the election, have gone seeking Presidential electors whom they might divert from the winning side to vote for the apparent losers, converting them into winners."<sup>302</sup>

Human nature suggests that if the electors' votes are going to be close, candidates and their parties will be strongly tempted to campaign for them. Yet, it appears that the giving of the votes of the electors, the counting of the electors' votes by Congress, and any contingency elections in the House and Senate are not elections for purposes of the Presidential Election Campaign Fund Act<sup>303</sup> or the Federal Election Campaign Act of 1971<sup>304</sup> (hereinafter "Campaign Acts"). Thus, no public financing would be available as candidates and their parties try to influence the votes of the electors, the counting of their ballots at the joint session of Congress, or any votes of the House and Senate for President or Vice President, respectively. Nor would contributions to or expenditures by candidates, political committees, or parties be disclosed or regulated.

The Federal Election Campaign Act of 1971, as codified and amended (the "FEC Act"), defines a "contribution" to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any *election* for Federal office . . . ."<sup>305</sup> The word "election" is defined by the FEC Act to mean:

- (A) a *general*, special, primary or runoff election;
- (B) a convention or caucus of a political party which has authority to nominate a candidate;
- (C) a primary election held for the selection of delegates to a national nominating convention of a political party; or

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301. Ross & Josephson, *supra* note 19.

302. 1979 *Hearings supra* note 77, at 74.

303. 26 U.S.C. §§ 9001-13 (1994).

304. 2 U.S.C. §§ 431-55 (1994).

305. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, §301, 86 Stat. 3,11-12 (codified as amended at 2 U.S.C. § 431(8)(A)(i) (1994)) (emphasis added).

(D) a primary election held for the expression of a preference for the nomination of individuals for election to the office of President.<sup>306</sup>

The voting by the electors or by the House and Senate in choosing the President and Vice President are not any of the above.

Similarly, Section 9002 of the Presidential Election Campaign Fund Act defines the term "presidential election" to mean "the *election of* presidential and vice-presidential *electors*."<sup>307</sup> Thus, the voting by the electors themselves or by the House and Senate is not covered.

The FEC Act and Presidential Electors and Political Activities Act were amended and codified in section 591(a) of Title 18 of the United States Code, entitled Elections and Political Activities. Both before and after 1972, and until its repeal in 1980,<sup>308</sup> this section had almost identical effects.

This conclusion of inapplicability is confirmed by the legislative histories of both Campaign Acts. References too numerous to cite to "voters" make it clear that Congress was concerned with voting by citizens, not the constitutional balloting by electors, let alone by Representatives or Senators, none of whom are ever mentioned in the legislative history.

This conclusion is also confirmed by the relevant regulations of the Federal Elections Commission (FEC). Neither the constitutional balloting of the electors, the determination of their credentials, nor the counting of their votes by Congress are a primary or runoff election, caucus or convention. The FEC defines "general election" as either "(1) [a]n election held in even numbered years on *the Tuesday following the first Monday in November . . . [or,] (2) An election which is held to fill a vacancy in a Federal office (i.e., a special election) . . .*"<sup>309</sup> By law, the electors "meet and give their votes on the first Monday after the second Wednesday in December . . ."<sup>310</sup> and the electoral votes are counted on the next January 6.<sup>311</sup> For this reason, paragraph (1) is inapplicable. Paragraph (2) is inapplicable on its face.

That post-general election actions are not elections is also confirmed by the regulations which provide that contributions or expenditures with respect to a recount or election contest are not contributions or expenditures for purposes of the regulations.<sup>312</sup> Finally, the FEC makes no effort to regulate the expenditures of electors, unlike those of convention delegates.<sup>313</sup>

Despite the apparently clear exclusion of electors' voting from each of these relevant statutes or regulations, the FEC in May 1993 initiated a Matter Under Review (MUR) regarding expenditures by the 1988 Dukakis for President Campaign for legal services in connection with elector issues. The FEC asserted that the law firm and lawyers who provided such services thereby made campaign contributions subject to regulation under the FEC Act.<sup>314</sup>

306. Federal Election Campaign Act of 1971, Pub. L. No. 92-225, §301, 86 Stat. 3, 11 (codified as amended at 2 U.S.C. §431(1) (1994)) (emphasis added).

307. 26 U.S.C. § 9002 (10) (1994) (emphasis added).

308. Pub. L. No. 96-187, § 301(a), 93 Stat. 1339, 1368 (1980).

309. 11 C.F.R. § 100.2(b) (1995) (emphasis added).

310. 3 U.S.C. § 7 (1994).

311. 3 U.S.C. § 15 (1994).

312. 11 C.F.R. §§ 100.7(b)(20), 100.8(b)(2) (1995).

313. *Id.* § 110.14.

314. FEC MUR 3449, May 4, 1993, May 7, 1993 21 FEC Record No. 10, at 4 (Oct. 1995). One

In November 1994, a partner in the law firm and the chair of the Democratic National Committee's advisory lawyers group submitted a petition to the FEC for the issuance of a rule-making on the issue.<sup>315</sup> In their petition, they pointed out the factors that make campaigns for elector votes and for congressional votes in the event of a contingency election likely. Especially significant are third-party presidential candidacies and the ambiguity and lack of uniformity of laws governing electors' votes for President and Vice President. The FEC did not include any recommendation for congressional action on these issues in its February 2, 1995 legislative action recommendations to the President.

In a May 1995 letter, the FEC informed the law firm that the Commission would take no further action against the firm. The following month, the FEC revised its regulations governing public financing of presidential primary and general election candidates.<sup>316</sup> At that time the Commission announced that it had decided to address the electoral college issues raised by the petitioners in a separate rule-making procedure.<sup>317</sup> The FEC has now made the MUR public.<sup>318</sup>

At least one Senator has addressed this issue. In 1992, then Senator Alan Cranston (D-CA) introduced a bill to amend the Federal Election Campaign Act of 1971 to expand the definition of general elections to include the electoral college and House and Senate presidential elections.<sup>319</sup> No counterpart was introduced in the House. The bill was not the subject of any hearings, and there have been no subsequent legislative developments.

Such campaign regulation should be within Congress' authority. The Supreme Court has upheld Congress' regulation, through the Federal Corrupt Practices Act of 1925,<sup>320</sup> of political committees that sought to influence the election of presidential and vice-presidential electors in two or more states.<sup>321</sup> Challengers to the regulation maintained that, because "the power of appointment of presidential electors [is] expressly committed by Section 1, Article II, of the Constitution to the states,"<sup>322</sup> congressional involvement beyond that expressly sanctioned by the Constitution to determine "the time of choosing the electors, and the day on which they shall give their votes"<sup>323</sup> is unconstitutional. The Court disagreed. It reasoned that Congress had not, in purpose or effect, interfered with the states' powers to appoint electors and determine the manner of appointment. Furthermore, the statute regulated only political com-

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of the authors of this article was a partner and the other was an associate in that law firm and, with others affiliated with that law firm, provided those legal services. The Dukakis/Bentsen Committee, Inc. responded in a letter dated June 3, 1993 to the Chairman of the Commission making essentially the arguments set out in this section of this article. A complete description of the MUR 3449 procedure and a full set of the materials produced in the matter are on file at the offices of the authors.

315. Rulemaking petition: Notice of Availability, 59 Fed. Reg. 63,274 (1994).

316. Public Financing of Presidential Primary and General Election Candidates, 60 Fed. Reg. 31,854 (1995).

317. *Id.*

318. See 21 FEC Record No. 10, at 4 (Oct. 1995); Notice of Disposition of Petition for Rule-Making, Electoral College Expenditures, 60 Fed. Reg. 56,268 (1995).

319. S. 2876, 102d Cong., 1st Sess. (1992).

320. Ch. 368, tit. III, 43 Stat. 1053, 1070, *repealed by* Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3, 20 (1972).

321. *Burroughs v. United States*, 290 U.S. 534, 544 (1934). *Burroughs* was cited approvingly in *Buckley v. Valeo*, 424 U.S. 1, 14 n.16 (1976).

322. *Burroughs*, 290 U.S. at 544.

323. See U.S. CONST. art. II, § 1, cl. 4.

mittees which, because of their interstate reach, could not be regulated adequately by the states.<sup>324</sup> The Court concluded "[the statute] in no sense invades any exclusive state power."<sup>325</sup>

The lack of regulation in this area cries for a remedy. Since the Federal Election Commission has not acted and may not have the power to act, Congress should do so promptly.

#### IV. CONCLUSION AND SUMMARY OF RECOMMENDATIONS

Have we, in the process of preparing this article, reached a view about the retention, modification or elimination of the electors? We have. In more than two hundred years, defects of the electoral system have only three times—in 1801, 1825 and 1877—been a substantive factor in choosing a President, and only once, in 1837, a Vice President. The Twelfth Amendment remedied the defect that led to the crisis of 1801. The electoral commission that gave rise to the reconstruction compromise of 1877 almost certainly was unconstitutional and hopefully will not be repeated. The impetus for the commission was the divided Congress, but the procedural statute enacted ten years later, still in effect in substantially the same form in Title 3 of the United States Code, was another giant step towards making sure that what happened in 1876 and 1877 will not happen again.<sup>326</sup>

The college appears to have one major and one minor advantage over any alternative. The major advantage is its tendency, especially when combined with use of the general ticket and "unit rule," to marginalize third parties and exert a moderating influence on the political delegates of the two predominant parties.<sup>327</sup> The minor, but potentially crucial, advantage is the safety valve of elector discretion, if only to respond to events between election day and the casting of the electors' ballots. This safety valve has, thankfully, been needed only once,<sup>328</sup> but would be difficult to replace.<sup>329</sup>

324. *Burroughs*, 290 U.S. at 544.

325. *Id.* at 545.

326. See *supra* notes 290-300 and accompanying text.

327. BEST, *supra* note 23, at 204, 206-07; HARDAWAY, *supra* note 23, at 122; JAMES A. REICHLEY, *THE LIFE OF THE PARTIES: A HISTORY OF AMERICAN POLITICAL PARTIES* (1992). But see RICHARD L. BURRILL, *CONTROVERSY OVER THE PRESIDENTIAL ELECTORAL SYSTEM* (1975) (argues that the present system encourages splinter groups that wish to control the balance of power in the electoral college); Hoffman, *supra* note 98.

328. Candidate Horace Greeley died in 1872 between the election and the casting of the electors' votes. Most of his electors scattered their votes among other candidates. Congress refused to count the votes of the three who voted for Greeley anyway. BEST, *supra* note 23, at 175-76. President Taft's Vice President and running mate, James S. Sherman, died on October 30, 1912, before the electoral college had met. Since Taft was not reelected, however, the exercise of elector discretion was not material to the outcome. *Id.* at 176.

329. The Twentieth Amendment specifies in § 3 what happens if a President elect dies or fails to qualify or has not been chosen by the beginning of the term. It also authorizes Congress to provide by law for the case where neither a President elect nor Vice President elect has qualified. In § 4 Congress is authorized to provide by law for the case of the death of any of the persons from whom the House or Senate must select a President or Vice President in the event of a contingency election.

The legislative history of the Twentieth Amendment makes clear that a person becomes President elect or Vice President elect when the electors, not the voters, cast their ballots. H.R. REP. NO. 345, *supra* note 195, at 2-3. The House report uses the term "President elect" to refer only to the period after the electors have voted, and observes that "Presidential electors, and not the President are chosen at the November election." *Id.* at 5. It further observes that should a nominee die before election day or between election day and the electors' vote, no further constitutional provision is necessary because the "electors . . . would be free to choose a President." *Id.* at 5. The conference committee adopted the language and policy of the House provision on the President elect. H.R. REP. NO. 633, 72d Cong.,

On the other hand, the laws we have examined present numerous opportunities for disorder and disruption. Many elements present the obvious potential for manipulation: elector meetings not subject to open meetings laws, elector meetings run by a state official of a different party than the elected slate of electors, electors voting by secret or open ballot (depending upon the political atmosphere and incentives provided for "faithless" votes), uncertainty regarding the filling of elector vacancies, an unlikely but statistically possible tie in the popular vote of a state, lack of any regulation of campaigns for elector votes especially in states where electors are not bound and differences in the times at which different states' electors cast their votes. In a highly competitive three or two-party race, these statutory issues could permit determined candidates possessing ample resources many opportunities to affect the election of our chief executive.

Most of these issues would be eliminated by elimination of the electors themselves. But the current two-tier structure for presidential elections has served the country well to date. As we have shown, only the election of 1824-25 is a precedent for any likely problems we face with the electoral college today. Attempts to significantly change the workings of the elector system or to inaugurate direct election of the President and Vice President have repeatedly failed. There is no reason to believe another such attempt will succeed any time soon.

The college's defects can be ameliorated substantially by adoption of the recommendations in this article. We hope the states and Congress will act. We encourage the Commissioners on Uniform State Laws to take the lead and draft a model act for the states.<sup>330</sup>

We summarize the recommendations we have made as follows:

1. Alternates for presidential electors should be nominated by the political parties when they select elector candidates and be elected by popular vote on election day.<sup>331</sup>

2. A designated state officer should give notice to elector nominees and alternates of their nomination and of any statements they must file with the state.

3. A designated state officer should give advance written notice to the electors and alternates of the date, time and specific place of the electors' meeting.<sup>332</sup>

4. Each elector and alternate should be required to provide, on the day before the electors' meeting, written notice to the designated state officer that he or she will attend the meeting.<sup>333</sup>

5. The electors' meeting should be subject to each state's open meetings law, and if no such law exists, the meeting should be made open to the public by specific statute.<sup>334</sup>

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1st Sess. 4 (1932). *But see* Akhil R. Amar, *Presidents, Vice Presidents and Death: Closing the Constitution's Succession Gap* 48 ARK. L. REV. 215 (1995).

In 1994, the Senate Judiciary Committee's Subcommittee on the Constitution held a hearing relating to the death of a President-designate between the general election and the inauguration. No bill was before the Committee, none appears to have been introduced, and the Committee seems not to have reported on this subject. *See* 1994 HEARINGS, *supra* note 205, at 1.

330. We recognize that some states may need to amend their constitutions as well.

331. *See supra* notes 194-97 and accompanying text.

332. *See supra* text following note 175.

333. *See supra* text following note 175.

334. *See supra* note 176 and accompanying text.

6. A presiding officer and secretary should be elected by the electors with statutory duties, including filing minutes of the electors' meeting with the state archivist or other appropriate officer.<sup>335</sup>

7. A roll call of the electors and alternates present at the electors' meeting should be taken either by the secretary or presiding officer.<sup>336</sup>

8. All states should have vacancy provisions, including mechanisms for filling vacancies before and at the electors' meeting, and for the certification of those chosen to fill the vacancies. Should the vacancy occur prior to the electors' meeting, the vacancy should be filled by the alternates in the order named on the ballot. If the vacancy occurs at the electors' meeting, the vacancy should be filled from the alternates present, either in the order named on the ballot or alphabetically by last name. As soon as a vacancy is filled, the governor should certify the new elector(s) as provided by federal law.<sup>337</sup>

9. A "vacancy" should result from an elector's resignation, absence at the electors' meeting, or inability at any time to perform the elector's duties for any cause.<sup>338</sup>

10. If the presidential candidates with the largest number of popular votes tie, the electoral vote should be split between the tied candidates. If the number of tied candidates does not divide evenly into the number of electors, the number of elector votes remaining after an equal division among the tied candidates should not be certified or counted.<sup>339</sup>

11. Where state law is inconsistent with Title 3 of the United States Code, state law should be amended to conform with Title 3.<sup>340</sup>

12. At the least, states that choose to bind their electors to follow the popular vote should adopt uniform times for the casting of their ballots. Having a uniform time would, to some degree, remove the danger of a "ripple" effect of elector defections.<sup>341</sup>

13. States that choose to bind their electors should release them in the event the presidential or vice presidential candidate to whom they are committed dies, resigns, becomes disabled, or is otherwise judged unfit for the office between election day and the time the electors vote.<sup>342</sup>

14. States that choose not to bind their electors should ensure the secrecy of their electors' ballots.<sup>343</sup>

We recommend that Congress amend Title 3 of the United States Code as follows:

1. Although the constitutional authority for Congress to appoint a uniform time throughout the United States for choosing electors is not clear, if Congress is con-

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335. See *supra* text preceding note 177.

336. See *supra* text following note 198.

337. See *supra* notes 189-93 and accompanying text.

338. See *supra* note 198 and accompanying text.

339. See *supra* text following note 198.

340. See *supra* note 220 and accompanying text.

341. See *supra* text accompanying notes 170-71.

342. See Ross & Josephson, *supra* note 19.

343. See *supra* notes 199-212 and accompanying text.

cerned about a "ripple effect" on election day, it should designate a uniform time period for voting that takes into account the different time zones in the country.<sup>344</sup>

2. Until such time as all states have adopted our recommendation to require the political parties to select and place on the ballot alternate electors at the same time as the main elector candidates, Congress should broaden its statutory delegation of authority to the states for setting the time for choosing the electors. In addition to the authority now granted, this expanded provision should authorize the states to appoint electors on a date subsequent to that specified by Congress whenever one or more of the electors chosen by the state on the date specified has died, resigned, or been otherwise disqualified.<sup>345</sup>

3. If Congress believes that electors should follow the popular vote, then Section 7 should provide a uniform time for convening states' electors' meetings and their balloting. Congress may also decide, as we have,<sup>346</sup> that binding electors is an issue that should be left to the states, consistent with the constitutional policy of leaving the appointment of electors to each state. However, those who believe electors should be bound would gain comfort from establishing a uniform time for electors' balloting.<sup>347</sup>

4. Section 5, concerning state determinations of controversies or contests involving the appointment of electors, should be amended so that any state determination is conclusive and will govern the counting of the electoral votes by Congress. Currently, this is provided in Section 15, but the states should continue to be encouraged to resolve such controversies prior to the electors' meeting as provided in the present Section 5.<sup>348</sup>

5. Section 11 should specify that one certificate of the electors' votes be delivered to the Chief or Acting Chief Judge of the Federal Judicial District where the state's electors' meeting took place.<sup>349</sup>

6. Congress should also amend Section 7 of Title 3 to move the date on which the electors vote to the last Monday in November. Assuming adoption of the Constitutional amendment we recommend in the last paragraph of this section, Congress should amend Section 15 of Title 3 to change its counting of the electoral votes to a day in the first full week of December and Section 1 of Title 2 so that its own terms commence on the first Monday in December following each election.<sup>350</sup>

Other desirable federal statutory amendments concern campaign contribution disclosure and campaign financing contribution and expenditure laws. The present laws do not apply to the electors' balloting, to the counting of the electors' votes by Congress, or to the election of a President by the House or of a Vice President by the Senate. This is a serious gap. If the popular vote and the workings of the electoral college do not decisively elect a President and Vice President, we may expect the candidates and their parties to lobby the electors and Congress vigorously. Congress should consider whether public financing should be available for these purposes. It should

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344. See *supra* notes 93-96 and accompanying text.

345. See *supra* text accompanying note 183 and accompanying and following notes 194-198.

346. See Ross & Josephson, *supra* note 19.

347. See *supra* notes 167-76 and accompanying text.

348. See discussion *supra* part II.A.3 and text accompanying notes 275-80.

349. See discussion *supra* part II.C

350. See *supra* notes 222-35 and accompanying text.



certainly require disclosure of contributions and expenditures for these purposes and regulate them if constitutionally possible.<sup>351</sup>

Our sole recommendation for constitutional reform stems from our concern about House election of a President. The Twentieth Amendment took a giant step forward by reducing the possibility that a lame-duck House or Senate could elect the President or Vice President if the electors' vote does not. That possibility remains if the outgoing Congress and President enact a law to bring forward the times of the electors' casting and/or Congress' counting of their votes. This risk could be reduced or eliminated by a constitutional amendment making the term of the newly elected Congress start earlier than January of the next year.<sup>352</sup>

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351. See discussion *supra* part II.G. Cf. *Buckley v. Valeo*, 424 U.S. 1 (1976) (deciding the constitutionality of various provisions of the Federal Election Campaign Act of 1971).

352. See discussion *supra* part II.D.

