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The Electoral College: Reform Proposals in the 108th Congress

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Summary

American voters elect the President and Vice President of the United States under a complex arrangement of constitutional provisions, federal and state laws, and political party practices known as the electoral college system. For additional information on contemporary operation of the system, please see CRS Report RL32611, *The Electoral College: How It Works in Contemporary Presidential Elections*, by Thomas H. Neale.

Despite occasional close elections, this system has delivered uncontested results in 46 of 50 elections since adoption of the 12th Amendment, effective in 1804. Throughout this period, nevertheless, it has been the subject of persistent criticism and many reform proposals. Related measures fall into two basic categories: those that would eliminate the electoral college and substitute direct popular election of the President and Vice President, and those that would retain the existing system in some form and correct perceived defects.

For additional information on electoral college contingencies and broader aspects of reform proposals, please consult CRS Report RL30804, *The Electoral College: An Overview and Analysis of Reform Proposals*, by L. Paige Whitaker and Thomas H. Neale. Three proposed constitutional amendments to change or replace the electoral college system were offered in the 108th Congress. Section 4 of H.J.Res. 28 (Representative Jesse Jackson, Jr., and others) sought to “ensure that each Elector votes for the candidate for President and Vice President who received a majority of the popular vote in the State.” H.J.Res. 103 (Representative Gene Green and others) and H.J.Res. 109, (Representative Jesse Jackson, Jr., and others) and H.J.Res. 112 (Representative Zoe Lofgren) proposed replacing the electoral college system with direct popular election. In addition, another bill related indirectly to the electoral college system. H.R. 4867 (Representative Peter Deutsch and others) would have changed the requirements for congressional objections to the validity of electoral votes at the joint session of Congress at which electoral votes are counted and certified. No action beyond committee referral was taken during the 108th Congress on these measures.

A state electoral college reform proposal also attracted attention in the 2004 elections. In Colorado, voters rejected a state constitutional amendment that would have replaced the existing general ticket system with a rounded proportional method of allocating electoral votes.

This report remains available to Congress, but will be not be updated.

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The Electoral College: Reform Proposals in the 108th Congress

Alternative Approaches: Direct Popular Election v. Electoral College Reform

A wide range of proposals to reform presidential election procedures have been introduced over time. In recent decades, they have fallen into two categories: (1) those that seek to eliminate the electoral college system entirely, and replace it with direct popular election; and (2) those that seek to repair perceived defects of the existing system.

Direct Popular Election. The direct election alternative would abolish the electoral college, substituting a single, nationwide count of popular votes. The candidates winning a plurality of votes would be elected President and Vice President. Most direct election proposals would constitutionally mandate the joint tickets of presidential/vice presidential candidates already adopted in state law,¹ and set the minimum number of votes necessary to win election at 40% of those cast. In the event no presidential-vice presidential ticket were to attain the 40% threshold, most direct election measures would require the two tickets that received the most votes to compete in a subsequent runoff election. Some versions would provide for Congress, meeting in joint session, to elect the President and Vice President if no ticket received 40% of the vote.

Electoral College Reform. Reform measures that would retain the electoral college have included a range of different proposals, the most popular of which are listed below.² Most versions of these plans would eliminate the office of elector, and award electoral votes directly to the candidates, and would retain the requirement that a majority of electoral votes is necessary to win the presidency. In common with direct election, most would also require joint tickets of presidential-vice presidential candidates, a practice which is currently provided under state ballot laws.³

The Automatic Plan. This reform proposal would award all electoral votes in each state directly to the winning candidates who obtained the most votes

¹ This provision, currently in use in all the states, requires each voter to cast a single vote for a joint ticket for President and Vice President, thus insuring that the President and Vice President will always be of the same political party.

² For more detailed information on these reform options, consult CRS Report RL30804, *The Electoral College: An Overview and Analysis of Reform Proposals*, by L. Paige Whitaker and Thomas H. Neale.

³ See CRS Report RL30804.

statewide; in almost all versions, a plurality would be sufficient. This alternative would constitutionally mandate the “general ticket” or “winner-take-all system” currently used to award electoral votes in 48 states and the District of Columbia.

The District Plan. This reform proposal would award one electoral vote to the winning candidates in each congressional district of each state, and an additional two electoral votes, reflecting the two “constant” or “senatorial” electoral votes assigned to each state, regardless of its population, to the statewide winners. This alternative would constitutionally mandate the system currently used to award electoral votes in Maine and Nebraska.

The Proportional Plan. This reform proposal would award electoral votes in each state in proportion to the percentage of the popular vote gained by each ticket. Some versions of the proportional plan would award electoral votes in proportions as small as thousandths of one vote, that is, to the third decimal point (“strict” proportional plans), while others would use various methods of rounding to award only whole numbers of electoral votes to competing candidates (“rounded” proportional plans). Voters in Colorado rejected a proposed state constitutional amendment at the November 2, 2004, general election that would have established a rounded proportional system in that state. For further information on this proposal, please consult CRS Report RL32611, *The Electoral College: How It Works in Contemporary Presidential Elections*, by Thomas H. Neale.

Pro and Con in Brief

As noted previously, proposals for electoral college reform fall into two basic categories: those that would eliminate the electoral college and substitute direct popular election of the President and Vice President, and those that would retain the existing system in some form and correct perceived defects.

Direct Popular Election. Proponents of direct popular election cite a number of factors in support of their proposal. At the core of their arguments, they assert that their process would be simple, national, and democratic:

- They assert that direct popular election would provide for a single, democratic, choice in which all the nation’s voters would directly elect the two highest-ranking officials in the United States government, the President and Vice President.
- Further, the candidates who won the most popular votes would always win the election, and in the event no one received at least 40% of the vote, a runoff election between the two leading tickets would decide the choice. (Some direct election proposals would substitute election by joint session of Congress for a runoff in the event no ticket received at least 40% of the vote.)
- Every vote would carry the same weight in the election, no matter where in the nation it was cast.

- All the various and complex mechanisms of the existing system, such as the contingent election process, would be supplanted by these simple requirements.⁴

Proponents assert that, in contrast, the electoral college system is cumbersome and potentially anti-democratic:

- The electoral college, some assert, is the antithesis of their simple and democratic proposal. It is, they contend, philosophically obsolete: indirect election of the President is an 18th century anachronism that dates from a time when communications were poor, the literacy rate was much lower, and the nation had yet to develop the durable, sophisticated, and inclusive political system it now enjoys.
- Moreover, they find the 12th Amendment provisions that govern cases in which no candidate attains an electoral college majority (contingent election) to be even less democratic than the primary provisions of Article II, section 1.⁵ (see footnote 3).
- By providing a fixed number of electoral votes per state that is adjusted only after each census, they maintain, the electoral college does not accurately reflect state population changes in intervening elections.
- The two “constant” or “senatorial” electors assigned to each state regardless of population give some of the nation’s least populous jurisdictions a disproportionate advantage over more populous states, from this viewpoint.
- The office of presidential elector itself, and the resultant “faithless elector” phenomenon,⁶ provide opportunities for political mischief, and deliberate distortion of the voters’ choice.
- They argue that by awarding all electoral votes in each state to the candidates who win the most popular votes in that state, the

⁴ In a contingent election, the President is elected in the House of Representatives, with each state casting a single vote, regardless of its population and the election results in that state. The Senate elects the Vice President in such cases, with each Senator casting a single vote.

⁵ For more detailed information on the contingent election process, please consult CRS Report RS20300, *Election of the President and Vice President by Congress: Contingent Election*, by Thomas H. Neale.

⁶ Faithless electors are those who cast their votes for candidates other than those to whom they are pledged. Notwithstanding political party rules and state laws, most constitutional scholars believe that electors remain free agents, guided, but not bound, to vote for the candidates they were elected to support. For further information, please consult CRS Report RL30804, *The Electoral College: An Overview and Proposals for Change*, by L. Paige Whitaker and Thomas H. Neale, pp. 9-10.

“winner-take-all” or “general ticket” system effectively disenfranchises everyone who voted for other candidates. Moreover, this same arrangement is the centerpiece of one category of electoral college reform proposals, the automatic plan.

- Finally, the electoral college system has the potential to elect presidential and vice presidential candidates who obtain an electoral vote majority, but fewer popular votes than their opponents, as happened in 2000.

The Electoral College and Electoral College Reform. Defenders of the electoral college, either as presently structured, or reformed, offer various arguments in its defense:

- They reject the suggestion that it is undemocratic. Electors are chosen by the voters in free elections, and have been in nearly all instances since the first half of the 19th century.
- The electoral college system prescribes a federal election of the President by which votes are tallied in each state. The founders intended that choosing the President would be the action of citizens of a federal republic, in which they participate both as citizens of the United States, and as members of their state communities.
- While electoral vote allocation does provide the “constant two,” or “senatorial” electors for each state, regardless of population, defenders believe this is another federal element, and is no less justifiable than equal representation for all states in the Senate. Moreover, the same formula also assigns additional electors equal in number to each state’s delegation in the House of Representatives, which more than compensates for any minor distortion.
- Further, defenders reject the suggestion that less populous states like Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont and Wyoming, as well as the District of Columbia, each of which casts only three electoral votes, are somehow “advantaged” when compared with California (currently 55 electoral votes). These 55 votes alone constitute more than 20% of the electoral votes needed to win the presidency, thus conferring on California voters, and those of other populous states, a “voting power” advantage that far outweighs the minimal arithmetical edge conferred on the smaller states.⁷
- The electoral college system promotes political stability, they argue. Parties and candidates must conduct ideologically broad-based

⁷ For additional information on the voting power theory, please consult CRS Report RL30804, *The Electoral College: An Overview and Analysis of Proposals for Change*, by L. Paige Whitaker and Thomas H. Neale, p. 7.

campaigns throughout the nation in hopes of assembling a majority of electoral votes. The consequent need to forge national coalitions having a wide appeal has been a contributing factor in the moderation and stability of the two-party system.

- They find the faithless elector phenomenon to be a specious argument. Only nine such electoral votes have been cast against instructions since 1820, and none has ever influenced the outcome of an election. Moreover, nearly all electoral college reform plans would remove even this slim possibility for mischief by eliminating the office of elector.

Electoral college defenders also point to what they assert are flaws in direct election:

- Direct election proponents claim their plan is more democratic, and provides for “majority rule,” yet most direct election proposals require that victorious candidates gain as little as 40% of the vote in order to be elected. How, ask its critics, could such plurality Presidents be reconciled with the concept of strict “majority rule” enshrined by direct election’s proponents?
- Further, they assert that direct election will foster acrimonious and protracted post-election struggles. For instance, as the presidential election of 2000 demonstrated, close results in a single state in a close election are likely to be bitterly contested. Under direct election, those favoring an electoral college claim, every close contest could resemble the post-election contests in 2000, not only in one state, but also on a nationwide basis, as both parties sought to gain every vote. Such rancorous disputes could have profound negative effects on political comity in the nation, and possibly even the stability of the federal government.

Reform Proposals in the 108th Congress

H.J.Res. 28 (Representative Jesse Jackson, Jr., and Others).

H.J.Res. 28, a proposed constitutional amendment, was introduced by Representative Jesse Jackson, Jr., on March 3, 2003,⁸ and was subsequently cosponsored by 39 other Representatives.⁹ The resolution included several provisions designed to guarantee the right to vote in public elections, including the authorization of nationwide election performance standards established by Congress, and election day voter registration. Section 4 applied particularly to the electoral college, requiring states to: establish and abide by rules for appointing electors; conduct these elections, in effect presidential elections, on a day selected by Congress; and, most pertinently,

⁸ Proposed constitutional amendments are customarily introduced as House or Senate joint resolutions.

⁹ For a list of cosponsors, see under H.J.Res. 28, available at [<http://www.congress.gov/cgi-lis/bdquery/z?d108:H.J.Res.28:>] visited Sept. 16, 2004. Click on “Cosponsors.”

“ensure that each Elector votes for the candidate for President and Vice President who received a majority of the popular vote in the State or District.”¹⁰

Section 4 would have affected the electoral college system in two ways. First, it would have eliminated the faithless elector phenomenon by requiring electors to vote for the candidates who won the most votes. While the resolution would not have *eliminated* the office of elector, as would many other reform proposals, it would have had a similar effect by *constitutionally binding* electors to vote for the candidates who won the most votes in their state or district. The second impact was that the resolution would have had the effect of incorporating either the winner-take-all (general ticket) system or the district system into the Constitution, which is currently silent on methods of allocating electoral votes. Section 4 thus implicitly authorized the states to opt for either plan.

H.J.Res. 28 was received the customary referral to the Judiciary Committee, and was later referred to the Subcommittee on the Constitution. No further action was been taken during the 108th Congress.

H.J.Res. 103 (Representative Gene Green and Others). This proposed constitutional amendment, introduced on September 14, 2004 by Representative Gene Green, was cosponsored by Representatives Brian Baird and William Delahunt. It proposed to eliminate the electoral college and provide for direct popular election of the President and Vice President.

The amendment would have provided for popular election of the President and Vice President, with voters casting a single vote for a joint ticket of candidates for these two offices. The latter requirement would ensure that the chief executive and the Vice President be nominees of the same party. Further, the resolution sought to guarantee nationwide uniformity on the ticket by requiring that the candidates must consent to having their names joined on the ballot with only one other person. The ticket winning the most votes would be elected; the winners would not need to gain a minimum percentage of votes, nor is there provision for a runoff if the minimum percentage is not attained.¹¹

Other sections of H.J. Res 103 dealt with issues in voter eligibility and election administration. Section 2 proposed to change the formula for voting eligibility in presidential elections from that provided in Article I, Section 1 of the Constitution: “Each State shall appoint, in such Manner as the Legislature thereof may direct....” to “The electors in each State shall have the qualifications requisite for electors of Senators and Representatives....” This would establish uniform voter qualifications for all federal elections. This section would, however, have permitted the state legislatures to provide “less restrictive qualifications with respect to residence....” It also would have empowered Congress to establish uniform residence and age qualifications. This was a considerable expansion of federal authority over the

¹⁰ H.J.Res. 28, 108th Congress, Section 4.

¹¹ Many direct popular election proposals would require the winning candidates to receive at least 40% of the votes in order to be elected. They usually also provide for a runoff between the two tickets gaining the most votes if that threshold is not attained.

election process, because it would permit Congress to raise or lower both voting age and residence requirements by legislation.¹² Finally, it would have eliminated the state legislatures' power to choose some other method of selecting electors. It may be recalled that in the early years of the republic, many state legislatures chose electors themselves, without any participation by the voting public. This practice declined throughout the first half of the 19th century, so that by 1868, electors were chosen by the voters in all states. During the controversy following the 2000 presidential election, there was some discussion as to whether the Florida legislature could reclaim its constitutional right to choose electors, in order to resolve disputes over the statewide winner. This provision would have eliminated such considerations in the future.

Section 5 empowered Congress to provide by law for the case of a tie vote, and for the death of any candidate who died before election day. The latter process is currently administered by the major parties through their internal rules.

H.J.Res. 103 was referred to the House Committee on the Judiciary and to the Subcommittee on the Constitution. No further action was taken during the 108th Congress.

H.J. Res 109 (Representative Jesse Jackson, Jr., and Others). This proposed constitutional amendment, introduced on October 8, 2004, by Representative Jesse Jackson, Jr., was cosponsored by Representatives John Conyers, Jr., Elijah Cummings, Dennis Kucinich, and Jerrold Nadler. It proposed to eliminate the electoral college and provide for direct popular election of the President and Vice President.

A notable feature of the amendment was that Section 1 of the amendment would mandate election by “direct vote of the citizens of the United States, *without regard to whether the citizens are residents of a state* [emphasis added].” Although the intent of this language was not clearly stated, the inference may be drawn that the amendment would extend the right to vote in presidential elections to citizens who reside in U.S. territories and the Commonwealth of Puerto Rico. All native born or naturalized residents of these jurisdictions are U.S. citizens, but at present they cannot vote for President and Vice President unless they are residents of and registered voters in one of the 50 states or the District of Columbia.

The same language in Section 1 might also have had implications for the conduct of election administration in the United States. As noted above, Section 1 states that “The President and Vice President shall be elected jointly by the direct vote of the citizens of the United States, *without regard to whether the citizens are residents of a state* [emphasis added].” This language could arguably be interpreted as conferring on the federal government the authority to establish and maintain a nationwide system of voter registration and election administration, at least for presidential elections. In theory, a citizen would be able to vote for President and

¹² These requirements are currently established by state law, voting age is universally set at 18 years, while most states require 30 days residence in their jurisdiction before allowing a person to register to vote.

Vice President anywhere in the nation. This would supersede the current practices of registration, voting, and counting and verifying the presidential vote state by state, functions that have been traditionally performed by state and local election authorities. It would not, however, have affected current practices for Senate and House elections, because it referred specifically only to the presidential contest.

Section 2 of the amendment provided for majority election; that is, in order to win, a joint ticket for President and Vice President would require an absolute majority of votes cast. It would not, however, have provided for a runoff election or election in Congress in the event a majority were not attained, features found in some direct election proposals. It is therefore unclear what mechanism would be available in cases where no candidates received the requisite majority. These have occurred frequently in recent years: no candidates received a popular vote majority in the presidential elections of 1992, 1996, and 2000.¹³ Section 3 did, however, authorize Congress to “enforce this article through appropriate legislation.” It is thus arguable that this section would have granted implicit authority to Congress to provide for elections in which no candidates received the requisite majority of popular votes.

H.J.Res. 109 was referred to the House Committee on the Judiciary, and subsequently to the Subcommittee on the Constitution, but no further action was taken during the 108th Congress.

H.J.Res 112 (Representative Zoe Lofgren). This proposed constitutional amendment, introduced on November 18, 2004, by Representative Zoe Lofgren, proposed to eliminate the electoral college and provide for direct election of the President and Vice President.

Voting qualifications in Section 2 closely resembled existing qualifications, in that “[t]he electors in each State shall have the qualifications requisite for electors of the most populous branch of the legislature of the state; although Congress may establish uniform age qualifications.” The latter clause of this sentence would, however, have apparently empowered Congress to adjust the voting age for President either upward or downward by law.

Under Section 3 of this proposal, each voter would cast a single vote for a joint ticket of presidential and vice presidential candidates, thus establishing existing state requirements as part of the Constitution. This section also specifically permitted candidates on the same ticket to be from the same state, eliminating the current requirement that when electoral college electors vote, at least one of the candidates “shall not be an inhabitant of the same state with themselves....”¹⁴

Section 4 provided for election by plurality, in that the candidates “having the greatest number of votes” would be elected. There would thus be no need for either

¹³ In 1992, the winning Clinton/Gore ticket received 43.0% of the popular vote; in 1996, Clinton/Gore received 49.2%; and in 2000, the (George W.) Bush/Cheney ticket received 47.9%. Source: *Congressional Quarterly’s Guide to U.S. Elections*, 4th ed. (Washington: CQ Press, 2001), pp. 686-688.

¹⁴ U.S. Constitution, 12th Amendment.

a second round if a certain threshold of popular support were not attained, or for any form of contingent election, as required in some direct election proposals. Section 6, however, empowered Congress to provide by law for tied elections, or for cases in which any candidate either died or was otherwise disqualified before the election. This language would appear to have given Congress broad authority in these situations, extending to such options as rescheduling elections in case of candidate vacancies that occurred close to election day, or providing for a second round election in the event of a tie. It is less clear whether the amendment would make an implicit grant of authority to Congress to intervene in the process of replacing party candidates under such circumstances, a process which the parties historically have addressed through internal procedures.

Finally, Section 5 empowered Congress to provide by law for the “times, places, and manner of holding such elections....” This language parallels that found in Article I, Section 4 of the Constitution,¹⁵ but the section went on to include “entitlement to inclusion on the ballot shall be determined by Congress.” This language would have provided a substantial new power to the legislative branch in that Congress could supersede existing state laws on ballot access, legislating nationwide standards, or perhaps making ad hoc determinations as to ballot access in any particular presidential election cycle.

H.J. Res. 112 was referred to the House Committee on the Judiciary on November 18, 2004, but no further action was taken during the 108th Congress.

H.R. 4867 (Representative Peter Deutsch and Others). This bill, introduced on July 20, 2004, by Representative Peter Deutsch, and cosponsored by Representatives Alcee Hastings and Corinne Brown, would have affected the electoral college indirectly. It proposed to change the procedures under which Congress counts and certifies electoral votes as set out in Title 3, Section 15 of the *U.S. Code*. Currently, in order for congressional objections to the validity or legality of electoral votes to be in order,¹⁶ such objections must be filed in writing, and be signed by one Senator and one Representative. H.R. 4867 would have amended that requirement, making it possible for a valid objection to be filed and signed by “at least one Senator or Member of the House of Representatives.” The bill was referred to the Committee on House Administration and also to the Committee on Rules for a period to be determined subsequently by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned. No further action was taken during the 108th Congress.

This bill arguably arose from the context of the 2001 electoral vote count joint session of Congress, during which several Representatives sought to introduce objections to the electoral vote returns from Florida. None of these objections had been signed by a Senator, so they could not be entertained by the Vice President,

¹⁵ “The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof: but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”

¹⁶ This procedure applies to both individual electoral votes, as well as electoral vote returns for entire states.

who presided over the session. For additional information on the electoral vote count session and its procedures, Members of Congress and their staff should consult CRS Report RL32717, *Counting Electoral Votes: An Overview of Procedures at the Joint Session, Including Objections by members of Congress*, by Jack Maskell, available to Members of Congress and congressional staff from the author.

Concluding Observations

Some observers assumed that action of the electoral college in 2000, in which George W. Bush was elected with a majority of electoral votes, but fewer popular votes than Al Gore, Jr., would lead to serious consideration of proposals to reform or eliminate the electoral college. Notwithstanding these circumstances, however, none of the proposals introduced in either the 107th or the 108th Congress received more than routine committee referral.¹⁷ In the 107th Congress, attention focused on proposals for election administration reform, resulting in passage of the Help America Vote Act (P.L. 107-252) by the 107th Congress in 2002. This legislation has substantially extended the role of the federal government in the area of voting systems and election technology through the establishment of national standards in these areas and the provision of aid to the states to improve their registration and voting procedures and systems.¹⁸

Other factors may also contribute to the endurance of the electoral college system. Perhaps foremost is the fact that the U.S. Constitution is not easily amended. Stringent requirements for proposed amendments, including passage by a two-thirds vote in each chamber of Congress, and approval by three-fourths of the states, generally within a seven-year time frame, have meant that successful amendments are usually the products of broad national consensus, a sense that a certain reform is urgently required, or active support by congressional leadership.¹⁹ In many cases, all the aforementioned factors contributed to the success of an amendment.²⁰ Further, while the electoral college has always had critics, it has consistently produced a President and Vice President in all but two of the 55 presidential elections held under

¹⁷ For further discussion of the hurdles faced by electoral college reform proposals, see CRS Report RL30844, *The Electoral College: Reform Proposals in the 107th Congress*, by Thomas H. Neale.

¹⁸ For additional information on the Help America Vote Act, please CRS Report RL32685, *Election Reform: The Help America Vote Act and Issues for Congress*, by Eric A. Fischer and Kevin J. Coleman.

¹⁹ Article V of the Constitution also provides for amendment by a convention, which would assemble on the application of the legislatures of two-thirds of the states. Any amendments proposed by such a convention would also require approval of three-fourths of the states. This alternative method, however, has never been used.

²⁰ These conditions have been met in some cases only after a long period of national debate; for example, the 19th Amendment, which extended the right to vote to women, was the culmination of decades of discussion and popular agitation. In other instances, amendments have been proposed and ratified in the wake of a sudden galvanizing event or series of events. An example of this may be found in the 25th Amendment, providing for presidential succession and disability, which received a tremendous impetus following the 1963 assassination of President John F. Kennedy.

the Constitution.²¹ Given the high hurdles — both constitutional and political — faced by any proposed amendment, it seems likely to remain in place unless or until its alleged failings become so compelling that large concurrent majorities in the public, the Congress, and the states, are prepared to undertake its reform or abolition.

²¹ The exceptions were 1800 and 1824, in which contingent election resolved electoral college deadlock.