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THE ELECTORAL COLLEGE: PROPOSED CHANGES

by Ronald A. Dubner

Due to the broad language of the Constitution, an extensively criticized procedure for electing the President and Vice President of the United States has evolved. Article 2, section 1 of the Constitution sets out the basis for presidential election procedures:

Each state shall appoint, in such manner as the legislature thereof may direct, a number of Electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: but no Senators or Representatives, or Persons holding an office of Trust or Profit under the United States, shall be appointed an elector.¹

The twelfth amendment² states that the electors shall meet in their respective states and cast their votes for President and Vice President. The candidates who garner the majority of electoral votes are to be declared the winners. Should no candidate capture the majority of electoral votes for president, the House of Representatives shall choose from those candidates (not more than three) having the highest number of electoral votes.³ In the House of Representatives each state shall cast one vote for

¹ U.S. CONST. art. II, cl. 4.

² U.S. CONST. amend. XII.

The Electors shall meet in their respective States and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall 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 for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. 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. 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; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President, whenever the right of choice shall devolve upon them, before the fourth of March next following, then the Vice President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice President shall be the Vice President, if such number be a majority of the whole number of Electors appointed; and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.

³ *Ibid.* Note that if no candidate receives a majority of the votes for Vice President, the Senate is to elect one from the two candidates receiving the highest number of electoral votes.

the candidate of its choice, a majority being necessary for election. Before a vote can be taken, a quorum of two-thirds of the state delegations must be present.⁴

Dissatisfaction with this election procedure stretches back to the Constitutional Convention itself. Madison and Franklin, among others, favored a direct popular election.⁵ Representative William L. Smith of South Carolina offered the first proposal for the reformation of the electoral system in the form of a constitutional amendment in 1797. Between 1889 and 1966, over two hundred eighty amendments proposing modifications of the electoral system have been submitted to Congress.⁶ Despite these numerous proposals, Congress has never passed a constitutional amendment for ratification by the states.⁷ Nevertheless, reformers have continued to present suggested changes. In July 1966, the state of Delaware sought to enjoin the use of an integral part of the electoral process, the winner-take-all system (*i.e.*, the system by which the entire electoral vote of a state is cast for the candidate winning a plurality of the popular vote in that state). This motion was denied by the Supreme Court in a memorandum decision.⁸ Recently, the American Bar Association Commission on Electoral College Reform strongly advocated a revision of the election procedure.⁹ This constantly-increasing demand for reform calls for a re-evaluation of the virtues and defects of the present system and a similar analysis of the alternate methods of presidential election which have been proposed.

I. RETENTION OF THE PRESENT SYSTEM?

Various reasons have been submitted to explain the institution of the curious electoral system. It is argued that the Founding Fathers never intended the President to be a "man of the people," elected by strictly democratic procedures. The executive office was to be an elevated position; therefore, the election,

should be made by men most capable of analyzing the qualities adopted to the station, and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern a choice. . . .

⁴ *Ibid.*

⁵ TIENKEN, PROPOSALS TO REFORM OUR ELECTORAL SYSTEM 19 (1966) (hereinafter cited as TIENKEN).

⁶ *Id.* at 19-20.

⁷ The twelfth amendment was passed in 1804; however, this amendment only outlined the procedure to be followed in casting and counting the electoral votes. See notes 2 and 3 *supra* and accompanying text.

⁸ Delaware v. New York, 385 U.S. 895, *rehearing denied*, 385 U.S. 964 (1966).

⁹ AMERICAN BAR ASSOCIATION, REPORT OF COMMISSION ON ELECTORAL REFORM, ELECTING THE PRESIDENT (1967) (hereinafter referred to as ABA COMM'N REP.).

A small number of persons selected by their fellow citizens from the general mass will be most likely to possess the information and discernment requisite to such a complicated investigation.¹⁰

Not only was it considered dangerous to entrust the masses completely with the difficult task of making an intelligent choice; also considered as being present was the danger that the game of politics would lower the prestige of the presidency.¹¹ The President was to remain above the "vicious game of politics" under this theory. It has also been noted that this electoral procedure was intended to allow the states to retain their power and sovereignty. The electoral system was devised to maintain equal status by allowing each state to retain the right to determine how their electors would be chosen.¹² The procedure for deciding an election in the House of Representatives on the basis of one vote per state (when no candidate received a majority of the electoral vote) would insure further that all states, no matter how large or small, would have an equally powerful voice in the final selection of the President.¹³

Aside from these historical arguments, those who advocate retaining the electoral college point to several current considerations which support its retention. The present procedure is claimed to insure the continued existence of the two party system since new or minority parties are not able to develop voting appeal in enough states to be effective competition to the two major parties.¹⁴ Nevertheless, splinter parties do have leverage and bargaining power within certain "swing" states where their votes can effectively change the outcome of the election. In some areas minorities are thereby given a relatively powerful and much-needed voice in political controversy.¹⁵ The present electoral system magnifies clearly the importance of the urban areas since the larger numerical city vote can swing all of a state's electoral vote to the candidate representing urban interests. Congress, particularly the House of Representatives, however, is dominated

¹⁰ THE FEDERALIST NO. 68 (Hamilton).

¹¹ Martin, *The Election of the Electors by State Legislatures*, 19 ALA. LAWYER 260, 261-63 (1958).

¹² 3 DANIELS, *PRESIDENTIAL ELECTION REFORMS* 122-24 (1953). For the problems that placing such control in the states has created, see notes 25-29 *infra* and accompanying text.

¹³ The belief that the elections would often be thrown into the House was predicated on the assumption that numerous candidates would be running for the office. As a result, the votes would be divided among the candidates so that there would be little chance of one aspirant commanding a majority of the electoral vote. Of course, this was the theory before the advent of the two-party system; therefore the theory may no longer remain valid. Further, the need for equality among states which is gained by the House runoff appears to be less important than the preservation of the "separation of powers" which would be in danger by the representatives wielding the power of electing the president.

¹⁴ *Cf.*, note 13 *supra*. Although the system was based on the belief that there would be multiple parties running for the presidency and vice presidency, it is interesting to note that one of the great benefits argued for the current procedure is that it preserves the two-party system.

¹⁵ WILMERDING, *THE ELECTORAL COLLEGE* 89 (1958) (hereinafter cited as WILMERDING).

by the rural districts.¹⁶ The present electoral system thus tends to offset the rural influence in Congress. Proponents of the present system claim that a natural balance of interests is thereby created which adds to the stability of the government.¹⁷

The electoral vote tends to exaggerate the victor's majority. This exaggeration may prove beneficial to the solidarity of the political system since a substantial margin of victory in the electoral college can create a "fiction" of electorate popularity even though the winner might have won by a slim vote or may even have been a "minority" President. Especially after a bitter campaign, a large margin of the electoral vote may aid the new Executive in gaining support from the opposition.¹⁸ This theory was demonstrated in the 1960 election when John F. Kennedy won the vote by less than one per cent of the total ballots yet received a clear majority of sixteen per cent of the electoral vote. Undoubtedly the size of the electoral margin aided Kennedy in establishing himself as "a man of the people" in spite of his slim victory.¹⁹

Although critics claim that there is a marked inequality of influence on the final outcome in favor of the larger states, it is argued that the voters within each state have equal votes. Further, the ratio of voter-per-electoral tends to be lower in the smaller states.²⁰ Consequently, a voter in a smaller state has a more powerful individual voice relative to a voter in a larger state. As a result, although the larger state may have more political power because of its greater number of electoral votes, a voter in a smaller state has a more powerful individual influence since there are fewer voters per elector.²¹

The argument has been made that the existing system has been sufficiently flexible to meet such crises as minority Presidents and elections decided by the House.²² Thus, to institute a new and vastly different method of election in place of a proven system could be the beginning of the decay of our now-workable political system.²³ Some state that any amend-

¹⁶ CHAMBER OF COMMERCE OF THE UNITED STATES, REFERENDUM NO. 98, ELECTORAL COLLEGE REFORM 5-6 (1965) (hereinafter cited as CHAMBER OF COMMERCE REFERENDUM).

¹⁷ CHAMBER OF COMMERCE REFERENDUM at 6.

¹⁸ TIENKEN 25.

¹⁹ *Ibid.* The value of this argument is questionable since most people tend to look at the popular vote rather than the electoral vote.

²⁰ See note 21 *infra* and text accompanying note 63 *infra*.

²¹ Brief for Defendant, p. 16, *Delaware v. New York*, 385 U.S. 895 (1966). It was pointed out that in the 1964 election in New York which has 43 electors, 7,150,000 votes were tallied (a ratio of 166,279 votes per elector). In Delaware, with its three electors, 201,320 popular votes were cast (a ratio of 67,106 votes per elector). These unequal ratios would seem to violate the spirit of the recent "one man, one vote" decisions. *Westberry v. Sanders*, 376 U.S. 1 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963); *Baker v. Carr*, 369 U.S. 186 (1962). Presently these decisions have only been applied to state elections. See note 35 *infra*.

²² WILMERDING 46; Heinlein, *Presidential Election Procedures*, 35 U. CINC. L. REV. 1, 18 (1966).

²³ AMERICAN ENTERPRISE INSTITUTE, PROPOSALS FOR REVISION OF THE ELECTORAL COLLEGE SYSTEM 12 (1966).

ment of the present procedure will cause additional problems, both foreseeable and unforeseeable, so that nothing will actually be accomplished by the alterations.²⁴

Strong arguments for revision of the electoral college arise from basic weaknesses in this elaborate election procedure. No method of appointment of the electors is set out in the Constitution. This duty has been specifically delegated to the state legislatures, which are free to choose the electors in any manner they see fit.²⁵ Thus, the electors may be chosen by the popular vote of the entire electorate of the state, or selected by a certain segment of the voters, or appointed by the governor, state senate, or commission, ad infinitum as the state legislature so directs.²⁶ Likewise, there is no constitutional requirement that the elector honor his pledge to vote for his party's candidate. Only thirteen states and the District of Columbia have laws expressly directing the electors to honor their pledge to vote for their party.²⁷ Moreover, three states specifically authorize the nomination

²⁴ TIENKEN 26.

²⁵ WILMERDING 42-44. North Carolina, Tennessee, and Michigan are three states which took advantage of the privilege by choosing methods other than popular election to select their electors. In 1792, North Carolina divided the state into four districts with three electors from each district. The electors were appointed by the members of the legislature who represented the people of those districts. The Tennessee legislature partitioned the state into three districts and designated certain individuals who resided in that district to appoint electors. Thirty-three individuals were designated to select the electors. The rationalization set forth for this method was "that the said electors may be elected with as little trouble to the citizens as possible" and was employed only in 1796 and 1800. WILMERDING 45-46; Kefauver, *The Electoral College: Old Reforms Take On a New Look*, 27 LAW & CONTEMP. PROB. 188, 192 (1962).

²⁶ The electors eventually selected are originally nominated through internal party procedure. Thirty-five states nominate their electors at state political party conventions. These states are: Arkansas, California, Colorado, Connecticut, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming. Georgia, Massachusetts, New York, South Carolina, and Tennessee nominate their electors through the state committee of each political party. Delaware electors are nominated by the party organization which utilizes either the convention or state committee method. The nomination of electors in Louisiana is within the discretion of the state central committee of each political party, but generally the committee calls a state party convention. In Washington, D.C. the executive committee of each party nominates the electors. Arizona and Alabama use party primaries to choose electors. Alaska parties select electors at the state party convention or in any manner prescribed by the party by-laws. In Florida, upon recommendation of the state executive committee of each political party, the Governor nominates the electors. In Kentucky the electors are chosen either by a state convention or by primary. In Mississippi a state convention can select two groups of electors—one pledged to the party candidate and the other unpledged. A primary is then held to determine which group will be placed on the November ballot. If no primary is held, the unpledged electors appear on the ballot. In Montana the method is at the discretion of the party. In Pennsylvania the Presidential nominee of each party selects the electors. See TIENKEN 7-17. See also note 25 *supra*.

²⁷ Thirteen States and the District of Columbia have laws directing electors to honor their party candidates: Alaska, California, Connecticut, Colorado, Florida, Hawaii, Idaho, Maryland, New Mexico, Nevada, New York, Oklahoma, and Oregon. Apparently, there are no criminal penalties upon the electors' failure to honor their pledge except in New Mexico and Oklahoma which make breach of the elector's pledge a misdemeanor. Where primaries are used to nominate electors, papers must be filed by or in behalf of the candidates with a pledge to support the presidential nominee of their party. States which place the names of the national candidates and electors on the ballot, and thus seem to require a pledge to vote for the party's candidate, include Arizona, Georgia (where there are no voting machines), Idaho, Kansas, Louisiana, Montana, New York (where there are

of unpledged electors, who, by their very nature, are not required to pledge their vote for any candidate.²⁸ With this lack of control, it is not surprising that instances have been recorded when electors have not abided by the wishes of the populace.²⁹

Although the constitutionality of the above methods has never been challenged, certain language of the United States Supreme Court in *McPherson v. Blacker*³⁰ would seem to give judicial sanction to methods of selecting electors other than by popular vote. In this decision, the Supreme Court upheld a Michigan law which required that the electors be chosen from designated districts and that the elector must vote for the candidate chosen by the majority vote in his district. In so doing, however, the Court seemingly indorsed other methods of selecting electors by citing a statement of an 1874 Senate committee:

The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several states. They may be chosen by the legislatures, or the legislature may provide that they shall be elected by the people at large, or in districts, as are the members of Congress . . . and it is, no doubt, competent for the legislature to authorize the Governor, or the Supreme Court of the state or any other agent of its will, to appoint these electors. . . .³¹

Although the Constitution does not specifically require a state to cast all of its ballots as a unit, this practice has become firmly entrenched as the result of action of the individual state legislatures.³² The practice of

no voting machines), North Dakota, Oklahoma, South Carolina (when the parties so authorize), South Dakota, Tennessee, Vermont, Virginia, and Wyoming. The remaining states have the "short ballot" in the presidential election. Here only the names of the candidates for President and Vice President are listed. The implication is that these states expect the electors, if chosen, to vote for the candidate of their party. See TIENKEN 9-17. Although it has been held by the Supreme Court that a candidate for elector can be required by state law to pledge his vote for the party nominee, no decision has been rendered whether the elector can be compelled to honor his pledge. *Ray v. Blair*, 343 U.S. 214 (1952).

²⁸ Alabama, Mississippi, and South Carolina so authorize. In Alabama and Mississippi only the electors' names are placed on the ballot. South Carolina gives discretion to omit the names of the national candidates.

²⁹ In 1796 three electors who were supposed to vote for Thomas Jefferson voted for John Adams. Those three electors were the difference in the election, Adams winning by a vote of 71 to 68. In the 1960 election, politicians from certain southern states contrived to bring together enough unpledged electors to prevent either nominee from winning a clear majority. Had the plan been successful, the election would have been thrown into the House, where each state has one vote. The "Solid South" would have been in a much stronger bargaining position to get major concessions on certain matters in the party platform (such as civil rights). See Heinlein, *supra* note 22, at 6. In 1824, an elector from New Hampshire voted for John Quincy Adams instead of for the candidate of his party, and as recently as 1960, an Oklahoma Republican elector cast his vote for Democrat Harry F. Byrd of Virginia. Although there has been little actual abuse, the danger is always present that electors will not honor the vote of the populace and vote for an unauthorized candidate. ABA COMM'N REP. 25.

³⁰ 146 U.S. 1 (1892).

³¹ *Id.* at 34-35.

³² Early in the life of the United States, the "alert" legislators in the various states recognized that institution of the winner-take-all system could further entrench the power of their party which was then in the majority. TIENKEN 18-19.

bloc voting emphasizes further the undemocratic aspect of the current system. Since just a few votes can change the outcome of the election within a state, the electoral tally often does not accurately reflect the popular vote. To the victor go all the electoral votes of that state even though he may win by a minimal fraction of a popular vote. In addition to the losing candidate's being deprived of any benefits from the popular vote captured in that state, the voter who supported the losing nominee finds that his vote is "cancelled out" at the state level.³³ In effect, the vote of a portion of the electorate will be more important than the vote of others in the final tally because of this "cancelling out" at the state level.³⁴ An attempt has been made to analogize this situation to the "one man, one vote" principle expounded by the Supreme Court. Although this doctrine has heretofore been applied only to the states, the Court's statements that all individual citizens have a constitutional right to have an equally powerful vote seems to create some doubt as to whether the "winner-take-all" principle is within the spirit of the Constitution.³⁵

Recently criticism has also focused on the unequal importance attached to individual states in presidential elections. The state unit system has made it imperative that candidates concentrate on securing the most populous states with their great numbers of electoral votes. A large state which is politically divided will take priority in the campaign,³⁶ and these "pivotal" states are the key to the election. New York, California, Illinois, and others become political gems for the nominees. To these states flow the promises and benefits from the party platforms. Meanwhile, the less populous as well as the one-party states are ignored in the rush for the grand prizes.³⁷ A corresponding problem is the disproportionate amount of influence which minority groups might exert within these populous states. Such groups could easily throw a close election to either candidate and thus might have a profound effect on the national outcome.³⁸ Further, the tre-

³³ *Hearings Before House Subcommittee on Judiciary To Amend the Constitution To Abolish the Electoral College System*, 82d Cong., 1st Sess., Ser. 7, at 11 (1952).

³⁴ This argument is made by the comparison of this state unit method to the Georgia "county unit" plan which operated on a winner-take-all basis at the county level for state elections. *Gray v. Sanders*, 372 U.S. 368 (1963); Brief for Plaintiff, pp. 61-63, *Delaware v. New York*, 385 U.S. 895 (1966). The Supreme Court struck down this plan on the basis that it destroyed voter equality.

³⁵ *Westberry v. Sanders*, 376 U.S. 1 (1964), *Gray v. Sanders*, *supra* note 34, and *Baker v. Carr*, 369 U.S. 186 (1962) indicate that there is an increasing trend to emphasize a constitutional right that an individual's vote should weigh equally to that of others within each state. See Brief for Plaintiff, pp. 50-52, *Delaware v. New York*, *supra* note 34. As yet, the Supreme Court has not chosen to apply this reasoning to the electoral system. *Delaware v. New York*, *supra* note 34.

³⁶ TIENKEN 28; Weschler, *Presidential Elections and the Constitution*, 35 A.B.A.J. 181, 272 (1949); See also Brief for Plaintiff, pp. 77-83, *Delaware v. New York*, 385 U.S. 895 (1966).

³⁷ Brief for Plaintiff, pp. 77-83, *Delaware v. New York*, 385 U.S. 895 (1966); CHAMBER OF COMMERCE REFERENDUM at 5.

³⁸ Weschler, *supra* note 36, at 270. As to the position that minorities are too powerful, one must be aware that often this is the only effective voice minority groups have. Further, minorities are not the only people voting with certain trends. For these groups to wield influence, other voters must side with minorities before they can turn the election.

mendous importance attached to winning the pivotal states may result in a more competent candidate's being passed over for a man who can win in these larger states.³⁹ The question which the delegates to the national party convention often ask is not whether the nominee can carry the nation or whether he is the most competent for the office, but rather whether he can win in such key states as New York, California, Pennsylvania, etc.⁴⁰

An examination of past presidential elections reveals the inequities which the electoral system has fostered. Fourteen times Presidents have been elected without capturing more than fifty per cent of the popular vote.⁴¹ In three of these instances, a candidate had actually commanded a plurality of the electorate but had been defeated in the electoral college.⁴² Twice the election has been thrown into the House of Representatives where the populace was ignored and political intrigues were apparent.⁴³

Pros and cons of the present electoral system have been presented. The positions of both sides have merit; nevertheless, the rising tide has been sweeping toward electoral reform. But before there can be reforms, there must be a consideration of alternative proposals.

II. PROPOSED PLANS FOR REVISION

Three alternatives to the Electoral College have been suggested: (1) the district system; (2) the proportional plan; and (3) a direct election. There are variations of these plans which could be instituted, depending on the circumstances and the need for political compromise.

A. *The District System*

The district system, often referred to as the Mundt-Coudert plan,⁴⁴ would preserve the electoral college but would abolish the "winner-take-all" aspect of the present system on the state level. States would be divided

³⁹ TIENKEN 26; WILMERDING 94; Weschler, *supra* note 36, at 271.

⁴⁰ WILMERDING 94; CHAMBER OF COMMERCE REFERENDUM at 5.

⁴¹ TIENKEN 21-22.

⁴² The Jackson-Adams election in 1824. See note 43 *infra*. In 1876 Rutherford B. Hayes won in the electoral college while losing the popular vote count to Samuel J. Tilden by a margin of some 250,000 votes. Twelve years later in 1888, Grover Cleveland defeated Benjamin Harrison by 100,000 popular votes; yet the electoral vote was 233 for Harrison and 168 for Cleveland. DANIELS, *op. cit. supra* note 12, at 115.

⁴³ In 1824, Andrew Jackson won the largest number of popular votes, but no candidate captured the majority of the electoral vote. Intrigues blackened the election of 1800 when the House was called upon to decide between Thomas Jefferson and Aaron Burr. Thirty-five ballots were cast with no candidate able to muster the nine votes necessary for election. Jefferson won eight votes and Burr received six votes with two states not voting. Finally, on the thirty-sixth ballot, Alexander Hamilton, through his political manipulations, was able to block the election of Burr. As Jefferson became President, Hamilton and Burr intensified their feud which was to end in a duel and the death of Hamilton. Potts, *Problems Created by the Electoral College*, in 1 NUEA DEBATE HANDBOOK 165 (1949).

⁴⁴ WILMERDING 153.

into districts equal to the number of Representatives from that state. Each district would have one elector who would be bound to cast a vote for the candidate to whom he is pledged. Two electors-at-large would be selected by the entire electorate of the state, and they, too, would be required to honor their pledge.⁴⁵ The most appealing argument for utilizing this method is that the electoral vote would reflect more accurately the popular vote throughout the nation; therefore, the distortion caused by the state unit vote would be eliminated. Although a minority President could be elected, the chances of such an event occurring would be greatly lessened.⁴⁶ The presidential candidates would have to consider the entire nation and not just the most important states. No longer could the campaigns be concentrated on the larger and more doubtful states while those states in which the issue is settled or which are smaller and less important are ignored.⁴⁷

The district system probably would encourage the development of a second party in traditional one-party states. With the current state unit method, the party which is in the minority can never obtain tangible benefits unless it can capture a majority of the state's voters. Thus, little organizational work may be undertaken in many states by the minority party. With each district having a vote, the minority party would have an incentive to begin organizational work since it would not be necessary to capture the majority vote of the entire state to make its vote count. Under such circumstances, the minority party could begin activities within certain select districts and then gradually expand its machinery.⁴⁸ The present system, with the unlimited prerogative of the state legislatures in devising the method of selecting the electors and the unchecked power of the electors to vote as they choose, would be replaced with a nationally uniform procedure for presidential elections.⁴⁹

An effective voice in the election would be returned to the rural districts which, in recent years, have been subservient to the urban areas under the state unit method.⁵⁰ Opponents of the district system, however, point out that rather than merely restoring a voice to the rural areas, the countryside conceivably could dominate the executive as it has controlled the House. Certainly this would be true if the present House districts were adopted for the boundaries of the electoral districts. It then follows that the influence of the cities, where the great majority of the population now resides, would be significantly reduced. Minority groups who could draw on the entire state for their voting leverage under the state unit system

⁴⁵ TIENKEN 66; CHAMBER OF COMMERCE REFERENDUM at 8.

⁴⁶ TIENKEN 75-76; CHAMBER OF COMMERCE REFERENDUM at 9.

⁴⁷ TIENKEN 76; WILMERDING 140, 142; CHAMBER OF COMMERCE REFERENDUM at 9.

⁴⁸ TIENKEN 76; WILMERDING 135; CHAMBER OF COMMERCE REFERENDUM at 9.

⁴⁹ TIENKEN 9; CHAMBER OF COMMERCE REFERENDUM at 10.

⁵⁰ TIENKEN 77; CHAMBER OF COMMERCE REFERENDUM at 8.

would find that they no longer have the power to swing the state in one direction or the other. Instead, the minorities would have leverage in just a few districts in the state where they have a large representation; yet overall their power would be weakened. Adoption of the district system would probably silence the only effective voice of these groups.⁵¹

If the plan allows the state to determine the district boundaries, the party in command of the legislature undoubtedly would attempt to gerrymander the districts so as to preserve its power. It has been urged that the House districts be used to determine the electoral districts; to prevent the possibility of such gerrymandering. Unfortunately, however, the state legislatures determine the boundaries of the House districts so that the underlying problem would still exist.⁵²

One problem inherent in the current system which would remain with the district system concerns the cancelling out of votes. The elector would cast his vote for the candidate controlling the majority of votes in his district; thus the popular votes cast for the losing candidate in that district would have no place in the final count. Instead of remedying the present defect of "cancelling" votes, the district system would merely dilute the cancellation.⁵³ The possibility of electing a minority president, although lessened, would still be present.

A variation of the district system has been suggested which would function as outlined but which would eliminate the office of elector. It would seem a simple matter to tally the vote from each district, report the results, and place the electoral vote in the column of the candidate who captures the majority vote of the district. Critics of the electoral college claim that there is no need for the "middle man" in the election process since the result would be the same with or without him.⁵⁴ The intermediate elector is just another person on the ballot to confuse the issues; therefore, it is argued that his removal would not be harmful but would be beneficial and would simplify election procedures.

In addition to the criticism leveled generally at the district system, two specific criticisms are leveled at this variation. First, the district plan with the retention of the electors is said to be the most logical type of reform and the type requiring the minimum amount of alteration of the present system. It is believed that this more moderate approach should be taken in the reform of such an important matter as the election of the President.⁵⁵ Second, the states'-rights elements contend that to abolish the electoral college would result in a reduction of the power and sovereignty

⁵¹ *Ibid.*

⁵² WILMERDING 151-55.

⁵³ CHAMBER OF COMMERCE REFERENDUM at 9.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

of the states.⁵⁶ This argument is used in opposition to any plan that would abolish the electoral college.⁵⁷ Its supporters do not seem to consider that even under the orthodox Mundt-Coudert procedure the elector's vote will be nothing more than a rubber stamp for the majority of the electorate of his district and that continued existence of the formal office would be of no consequence to the retention of state sovereignty.

B. *Proportional System*

Between the extremes of election reform lies the proportional plan. Although the electoral college itself would be abolished, the concept of the electoral vote would remain in the final tally. The winner-take-all method would be abolished and replaced by a system whereby each presidential candidate would receive the same proportion of the electoral vote as his share of the popular vote of that state. The electoral vote to be divided among the candidates would automatically be computed from the total number of votes allotted to the state. The proportion would be figured to the third decimal place to insure greater accuracy. Under an additional feature of the plan, the winning candidate need collect only forty per cent of the electoral vote. If no candidate captured the "magic" percentage, the combined houses of Congress would select one candidate from the two top vote-getters.⁵⁸ The election results unquestionably would more accurately reflect the popular vote of each candidate than either the state unit or district plans. "Cancellation" of minority votes and distortion in the final election results would be eliminated.⁵⁹

This plan would more nearly vest the power to elect the President in the people. When amended, the Constitution would firmly establish that power in the electorate, subject to the formality of apportioning the electoral vote. Since only a forty per cent electoral vote would be necessary to elect the President, the election would be less likely to go to Congress. Only on rare occasions would an election be taken out of the hands of the people and be put into the hands of legislators.⁶⁰ The bargaining power of the states would be placed on a more equal plane. No longer would there be key, pivotal states which would benefit disproportionately in campaign attention. The population and not the states as such would be the dominant factor for the parties to consider.⁶¹

The proportional system also would tend to heighten two-party competition. Campaigning would be far more attractive in states where previously it was not possible to organize political machinery to capture the entire

⁵⁶ WILMERDING 140.

⁵⁷ For examples of state power, see notes 25-29 and accompanying text.

⁵⁸ TIENKEN 86-87; Kefauver, *supra* note 25, at 202; Weschler, *supra* note 16, at 183.

⁵⁹ TIENKEN 101-03; CHAMBER OF COMMERCE REFERENDUM at 10.

⁶⁰ *Ibid.*

⁶¹ TIENKEN 108-10; CHAMBER OF COMMERCE REFERENDUM at 10.

state. With the realization that it does not have to carry the entire state to obtain votes for its candidate, the minority party should find the incentive to build party machinery and to campaign vigorously.⁶² Thus new vitality would be injected into the life of the two-party system which, at times, has appeared to be in danger of dissolving into a one-party structure in certain states.

Opponents of the proportional system argue that it still does not guarantee election of the most popular candidate since, under the present apportionment of the electors for each state, a pronounced inequality exists in the number of popular votes represented by each electoral vote. An example is demonstrated by some available figures compiled in 1948. In California, one electoral vote represented 160,842 popular votes cast; while in North Carolina the ratio was one electoral vote for every 17,821 popular votes which were cast.⁶³ The result is that it would be possible to elect a minority President if the victorious candidate collected most of his electoral votes from the states with a higher ratio of electoral votes to actual ballots cast. Conversely, the losing party might command the majority of the popular and electoral vote of states such as California where it takes more popular votes to win the electoral vote.

C. ABA Proposals—the Direct Election

The direct election plan calls for the Chief Executive to be chosen solely by popular vote.⁶⁴ Strongly advocating this plan is the "blue ribbon" panel which comprises the American Bar Association Commission of Electoral Reform.⁶⁵ This commission made certain specific proposals for revision of the present system, including:

- (1) Provide for the election of the President and Vice President by direct, nationwide vote.

⁶² TIENKEN 105-07; CHAMBER OF COMMERCE REFERENDUM at 10.

⁶³ WILMERDING 113-15. See also note 21 *supra*.

⁶⁴ WILMERDING 95.

⁶⁵ ABA COMM'N REP. Included in the panel were Chairman Robert G. Storey, Dean Emeritus of Southern Methodist University School of Law, President of the Southwestern Legal Foundation, and past President of the American Bar Association; Henry Bellmon, Governor of Oklahoma; Paul Freund, Professor of Constitutional Law at Harvard Law School; E. Smythe Gambrell, Georgia Attorney and former President of the American Bar Association; Ed Gossett, Texas Attorney and former member of Congress (1939-1951); William T. Gossett, Michigan attorney and former President of the American Bar Association; William J. Jameson, U.S. District Court Judge for Montana and past ABA President; Kenneth B. Keating, Associate Judge of the New York Court of Appeals, former United States Representative and Senator; Otto E. Kerner, Governor of Illinois; James C. Kirby, Jr., Professor of Constitutional Law, Northwestern University Law School, and former Chief Counsel to the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee; James M. Norbit, Jr., Deputy United States Representative to the United Nations and President of Howard University; Herman Phleger, California attorney and former legal advisor to the Department of State; C. Herman Pritchett, Professor of Political Science, University of Chicago, and past President of American Political Science Association; Walter P. Reuther, President of United Automobile Workers Union; and Whitney North Seymour, New York attorney and former President of ABA.

- (2) Require a candidate to obtain at least forty per cent of the popular vote in order to be elected President or Vice President.
- (3) Provide for a national runoff election in the event no candidate receives at least forty per cent of the popular vote.⁶⁶

Proponents of the direct election claim that this plan would most effectively bring the democratic process to bear upon election of the President. Votes would not be cancelled out at the district or state level, and the selection would reflect the true choice of the people without the distortions which result from the electoral college. No longer would there be the "landslides" of 1936 or 1952 where sixty per cent of the popular vote commanded ninety-eight per cent of the electoral vote or where fifty-five per cent drew eighty per cent. Each ballot would count toward the final tally, and each would be of equal weight in the final determination of the victor. The assurance that each individual vote would be considered in tabulating the final result might have the foreseeable result of greater participation and interest in the balloting. The President would be more a "man of the people" rather than a man of the states or of the electors.⁶⁷ Further, under the direct election, a candidate other than one receiving a plurality of the vote could not be elected. Campaign strategy might be changed. Since each individual vote would be of precisely the same weight in determining the final outcome, the parties would need to divide their time and campaign promises more equally throughout the nation. Although the candidates would still find it advantageous to spend more time and effort in the cities and larger states with their greater number of voters, no hopeful would dare ignore the areas which have traditionally voted for his party since no "winner-take-all" system would protect him by "drowning" the minority vote.

The direct election should be distinguished from all other alternatives which are based on an apportionment of electoral votes. Since electoral votes are allocated among the states according to population as determined by the census, certain factors necessarily cause a disproportionate distribution of actual effective votes. Because the census is taken only once every ten years, shifts in population among the states during that period dictate that the apportionment of votes is not always reflective of the states' actual population. The electors are allocated according to population and not to the number of eligible voters. Further, each state automatically gets two electoral votes, one representing each senator, thus creating a built-in factor of disproportion. Under the direct election system, however, each

⁶⁶ ABA COMM'N REP. 3. The Commission was unanimous that there should be fundamental reform. Thirteen of the fifteen members favored the direct vote with only Ed Gossett and Herman Phleger favoring other views. However, the latter two did agree to support the majority. See 35 U.S.L. WEEK 2488 (1966).

⁶⁷ WILMERDING 96.

vote cast would be truly of equal weight. Selection of a candidate would be determined solely by the eligible voters and not by weight of the elector allocations within a territorial division. In this manner, not only would people be encouraged to vote, but also the actual votes cast would be determinative of the outcome.

The direct election plan would be simpler to administer than any of the other alternatives since it would require only the tabulation of the popular vote. The selection of the electors, the apportionment of electoral votes, and the formality of the electors casting votes are excess motions which would be eliminated. Voting qualifications could be made more uniform throughout the country. Further, the election would become a national activity rather than a federative conglomeration. The result would be an election procedure based on the democratic procedures which are the theoretical bases of the American political system.⁶⁸

Heading the opponents of the direct election are the states'-rights advocates. At this point, they become quite vocal on the dangers of the loss of state sovereignty and the destruction of the federal system. "Another step will be taken down the road to centralized government and socialism. America will become a democracy, and no democracy has yet survived in history."⁶⁹ This argument is reinforced by their claim that the states' function of setting the voting qualifications of their citizens will thus be assumed by the national government and that this power will soon be extended from the presidential elections to the congressional elections.⁷⁰ Opponents of direct election argue further that the advantage of the two electoral votes automatically accorded to each state would be lost. These votes, representing the Senators of the state, have placed the states on a more equal basis. With the abolition of the electoral system and the institution of direct election, they say that the more populous states would continue to maintain their importance. While the "key" states have been those commanding the greatest number of electoral votes due to their large population, simple mathematics dictate that the emphasis would continue to be on the populous states.⁷¹ As a result, rural areas will be left at a disadvantage since the overwhelming amount of campaign time and promises will be spent on the urban areas where most citizens now reside. These opponents of direct election predict that the rural areas with their relatively sparse population would be virtually ignored in an attempt to win over the masses in the cities, thus depriving a critical segment of the nation of an effective voice in the selection of a Chief Executive.⁷²

⁶⁸ ABA COMM'N REP. 6; TIENKEN 52; WILMERDING 96.

⁶⁹ 35 U.S.L. WEEK 2488 (1966).

⁷⁰ TIENKEN 57-61; CHAMBER OF COMMERCE REFERENDUM at 7.

⁷¹ TIENKEN 56-57; CHAMBER OF COMMERCE REFERENDUM at 7.

⁷² AMERICAN ENTERPRISE INSTITUTE, *op. cit. supra* note 23, at 14.

As pointed out by the opponents of the proportional system, all of the votes would be counted in the final tally, with no cancellation of votes at either the district or state level. Rather than being a boon to the American political system, it is argued that this will be a burden since an outgrowth of minority parties might occur which could destroy our solidly based two-party system. Likewise, minority groups would lose the leverage which they possessed under the electoral system; thus, there might be a loss of the political effectiveness of these groups.⁷³

The conservative element argues that such a vigorous overhaul of the political system which has worked effectively for almost two hundred years would not be wise. Instead, a more moderate approach should be adopted. If specific improvements are found to be needed, they should be instituted; however, conservatives would retain the general plan now in effect for presidential elections.⁷⁴

The requirement that a candidate receive at least forty per cent of the popular vote may create some controversy. The ABA Commission supports the forty per cent rule since it is believed to have many functional advantages. It is argued that the percentage is low enough to prevent frequent runoff elections since one candidate would usually receive at least that proportion of the popular vote. Nevertheless, the percentage is considered to be sufficiently high to protect the two-party system from disintegrating into splinter groups. With this forty per cent requisite, third parties would have little hope of becoming an important factor in a presidential election. Even if a third party should force a runoff, it is unlikely that this "mon-grel" would be one of the two top contestants.⁷⁵ Runoff elections are favored over placing the final determination in the House in order to keep the selection of the President in the hands of the people.⁷⁶

III. CONCLUSION

Since any procedure for presidential elections has its advantages and disadvantages, the institution of any reform proposal should hinge upon two questions: Are the current defects so great as to require reform? Does a more workable alternative exist?

It is the viewpoint of the American Bar Association Commission on Electoral Reform that "[T]he electoral college method of electing a President of the United States is archaic, undemocratic, complex, ambiguous, indirect, and dangerous."⁷⁷ The Commission is quick to point out that there

⁷³ *Ibid.*

⁷⁴ TIENKEN 62-63.

⁷⁵ ABA COMM'N REP. 4-5.

⁷⁶ *Id.* at 4-10.

⁷⁷ *Id.* at 3-4.

is no perfect solution to this matter, but it believes that its recommendations are the most workable of the alternative plans.⁷⁸

The rumblings of the electoral reformers are growing louder each day; legislators continue submitting their proposed constitutional amendments; Delaware even tries to enjoin the use of the winner-take-all system by a suit in the Supreme Court of the United States.⁷⁹ With the American Bar Association Commission Report, there comes the strongest and most authoritative appeal for electoral reform. Cited in the report is a poll by Senator Quentin Burdick (D., N.D.) which illustrated that fifty-nine per cent of the two thousand state legislators responding favored the direct election of the President.⁸⁰

The time is ripe to bring about a much-needed reform in a vital political area. The inequities of the present system with the winner-take-all procedure and indirect elections justify the crusaders' cries for alterations. Whatever the intent of the Founding Fathers in setting out the broad constitutional language, the contemporary conditions require amendments. The office of the President is now considered to represent the people; therefore the voters should be able to select the candidate. Because of compulsory education, mass communication in radio, television and newspapers, the overwhelming percentage of the voters are assured of having access to information sufficient to make an intelligent choice. Although many groups argue that the district or proportional system is the best alternative, it is difficult to justify any system which foreseeably might allow election of a candidate who was not the popular choice of the entire electorate. The direct election does away with all inequities of any "indirect" election system. The "independent" elector, the "cancellation" of votes at the state or district level, the disproportionate ratio of voters to electors among the states will no longer be factors in upsetting presidential elections. It is submitted that the direct election system would cure these defects and would give to each voter an equal voice in the election of the President.

⁷⁸ *Id.* at 4.

⁷⁹ *Delaware v. New York*, 385 U.S. 895 (1966).

⁸⁰ ABA COMM'N REP. 7.