Electoral College - Its Defects and Dangers, The

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THE ELECTORAL COLLEGE—ITS DEFECTS AND DANGERS

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New York City

Election is in the air! The author’s views on the Electoral College will provide some timely material for further discussion on the 1968 presidential election procedures.

In a few months we will witness the operation of the electoral college system of electing the President and Vice President of the United States. Due partly to the appearance of George C. Wallace’s American Independent Party,1 the 1968 election could be decided in the House of Representatives, where each state has one vote regardless of its population.2 The election seems certain to point up the perils in our present system and underscore the conclusion reached by the American Bar Association Commission on Electoral College Reform:

“The electoral college method of electing a President of the United States is archaic, undemocratic, complex, ambiguous, indirect, and dangerous.”

Somehow the electoral college has managed to escape reform despite

1While Wallace may have difficulty qualifying as a minor party candidate in several states (e.g., Idaho, Ohio and Oklahoma), he is expected to qualify in a substantial majority of the fifty states. In the election of 1948, Senator Strom Thurmond’s States’ Rights Party qualified in slightly more than one-fourth of the states, while Henry Wallace’s Progressive Party appeared on the ballot in almost every state. Examples of other elections in which minor party candidates received electoral votes are in elections of 1892, 1912 and 1924.

2It is interesting to note that the five smallest states, with one Representative each and a combined population of about 1,700,000, have the same voting power as the five largest states, with a total of 154 Representatives and a combined population of 64 million. The former states are elections where: the popular vote loser was elected President; electors

Alaska, Delaware, Nevada, Vermont, and Wyoming; the latter, California, Illinois, New York, Ohio, and Pennsylvania. It should be pointed out that the Twenty-Third Amendment gives the District of Columbia, whose population is greater than that of eleven states, no voice at all in a contingent election. If an election were thrown into the House of Representatives, the twenty-six smallest states, with seventy-six Representatives (out of a total of 435) and a total population of about thirty-one million (out of a national total of about 180 million (based on 1960 census)), would be able to elect the President.

voted against their party nominees; voters were deprived of the opportunity of voting for major party candidates; Congress was called upon to choose the President or Vice President; and a shift of a few popular votes would have thrown the election into the House of Representatives or swung it to the other major candidate who had fewer popular votes.

Although our system of electing the President is now under scrutiny by Congress, reform does not appear imminent. As in the case of presidential inability, a tragedy or near crisis may be required before Congress finally takes action on the subject. The purpose of this article is to discuss the principal defects and dangers of our system.

1. The Popular Vote Winner Could Lose

Under Article II of the Constitution and the Twelfth Amendment, the election of the President and Vice President is entrusted not to the people but to electors chosen in the manner prescribed by the state legislatures. Each state is allotted as many electors as it has Senators and Representatives in Congress. All states have at least three electors, corresponding to the two Senators and at least one Representative to which they are entitled under the Constitution.

Although it has not always been the case and could be changed by the state legislatures in the future, electors are popularly elected today in every state and the District of Columbia. They usually run on party slates or on what is commonly referred to as a "general ticket," and are voted for as a unit. The slate of the party that receives the greatest number of popular votes in each state subsequently meet at their state capitol to choose the President and Vice President. In order to be elected President or Vice President, a candidate must obtain the votes of a majority of the total number of electors chosen (at present 270 out of a total of 538). Under our system a candidate can win the Presidency by concentrating on and winning the electoral votes of eleven large states plus one small state (or the District of Columbia).

The powers of the state legislatures has been characterized as "plen-ary." McPherson v. Blacker, 146 U.S. 1 (1892). In the early days of our country, electors were chosen by various methods, including by the legislatures themselves. It was not until 1832 that every state except South Carolina had abandoned the method of selection by the legislatures. South Carolina discontinued it in the 1860's. See Paulin, Political Parties and Opinions, 1788–1930, The Atlas of the Historical Geography of the United States (1932).

This power of the state legislatures to designate the method of selection was used by the Michigan legislature in 1892, which electoral votes from a general ticket system to a district system. (See note 8, infra). The legislature was controlled by Democrats and its action was motivated by a desire to split the state's electoral votes in the 1892 presidential election, since the Republican ticket was expected to carry the state. The constitutionality of this action was upheld by the Supreme Court in McPherson v. Blacker, supra.

5 The electors are selected on the Tuesday after the first Monday in November; they meet on the Monday after the second Wednesday in December (or forty-one days after the November election); and their votes are counted before a joint session of Congress on the following January 6. 3 U.S.C. §§ 1, 7, and 15 (1964).

6 The electoral votes of New York (43),
While his popular vote nationwide might be less than 25 percent of the total these twelve states would give him a majority of the electoral votes. This disproportion between the popular vote and the electoral vote is due to a number of factors.

First, under the electoral college system, the candidate who wins the most popular votes in a state receives all of that state’s electoral votes. This is the “winner take all, loser take nothing” feature of the system. It cancels out at an intermediate stage all popular votes cast in a state for the losing candidates. As Senator Thomas Hart Benton of Missouri stated in 1824:

“To lose their votes is the fate of all minorities, and it is their duty to submit; but this is not a case of votes lost, but of votes taken away, added to those of the majority, and given to a person to whom the minority is opposed.” 7

Indeed, the “minority” may in fact be a majority because the popular votes of the losing candidates, when combined, could represent a substantial majority of the popular votes cast in the state. For example, in the 1948 election, the electoral votes of one-fourth of the states were cast for a candidate who had received only a minority of each state’s popular vote. This was due to the appearance on the ballot of minor party candidates who, together with the losing major party candidate, received a majority of the popular vote cast in these states. Consequently, in such states the candidate receiving the electoral votes actually was rejected by a majority of the voters.

The “winner take all” or “general ticket” aspect of the system, which is purely a product of state law, isolates a candidate’s popular votes in one state from those cast for him in another state.8 Thus, in 1960 Kennedy received 2,377,846 popular votes in Illinois while Nixon obtained 2,368,988 votes.9 Kennedy therefore received Illinois’ twenty-seven electoral votes. On the other hand, Nixon received 1,175,120 popular votes in Indiana and Kennedy 952,358 votes. Accordingly, Indiana cast its thirteen electoral votes for Nixon. What is noteworthy is that on a two state basis, Nixon received a substantial majority of the popular votes but less than one-third of their combined electoral votes.

In every election millions of popular votes are never reflected in any electoral votes. In 1924, for example, John W. Davis received 136 electoral votes in the states where he received about 2,000,000 popular votes. But he received no electoral votes for approximately another 8 The general ticket is not required by the Constitution or federal law. It developed so that each state could maximize its ability to influence the outcome of a presidential election. See Peirce, supra note 3 at 74-78.

9 The sources relied upon for the popular vote are: for the elections 1824 through 1916, Petersen, A Statistical History of the American Presidential Elections (1963); for the elections 1920 through 1964, Scammon, America at the Polls (1965). Since presidential elections are decided on the basis of electoral votes, there is no national agency charged with compiling and certifying the popular vote cast for presidential electors. As a result, differences exist among the various sources as to the popular vote. The sources used herein are regarded as the most authoritative. Peirce, supra note 3, at 302.

California (40), Pennsylvania (29), Illinois (36), Ohio (26), Texas (25), Michigan (21), New Jersey (17), Florida (14), Massachusetts (14), and Indiana (13) total 268.

6,000,000 popular votes. In 1928, 2,089,863 Democratic popular votes in New York and 1,067,586 in Pennsylvania failed to yield even one Democratic electoral vote. In 1932 Herbert Hoover received 15,760,684 popular votes, of which more than 13,600,000 were not reflected in any electoral votes for him. In 1944 Thomas E. Dewey received approximately 3,000,000 votes in ten states from which he received sixty-two electoral votes. In New York, on the other hand, he received 2,987,647 popular votes but no electoral votes.

A second factor that accounts for the disproportion between the popular vote and the electoral vote is that each state is entitled to at least three electoral votes regardless of size. As a result, the ratio of electoral votes to the population of the states (based on the 1960 census) varies greatly. It is one to 75,380 in Alaska; one to 170,129 in South Dakota; one to 294,781 in Oregon; and one to 392,930 in California. Although it would seem that the system favors the small states, the converse is actually the case, since the citizens of large states may potentially affect a greater number of electoral votes.  

A third factor is that a state's electoral votes remain the same regardless of voter turnout. Thus, in the 1964 elections, the popular vote in Connecticut and South Carolina, each of which has eight electoral votes, was 1,218,578 and 524,756, respectively. The voter turnout in Virginia, which has twelve electoral votes, was considerably less than in Connecticut.

The popular vote cast in New Jersey was substantially more than that cast in Texas; yet, Texas awarded twenty-five electoral votes to the winning candidates while New Jersey could only give seventeen electoral votes. In Alaska, 67,259 voters influenced the assignment of three electoral votes, at a ratio of one electoral vote for every 22,419 voters. In New York, 7,166,275 citizens voted for forty-three electoral votes, at a ratio of one electoral vote for every 166,657 voters. In 1960, 6,506,578 persons voted in California, at a ratio of one electoral vote for every 203,330 voters.

This disproportion between the popular vote and the electoral vote can be found in every presidential election. For instance, in 1964 President Johnson received 61.1 percent of the popular vote and 90 percent of the electoral vote. In 1944 Franklin Delano Roosevelt received 53.4 percent of the popular vote and 81 percent of the electoral vote. In 1936 Alfred M. Landon received 36.5 percent of the popular vote but only 2 percent of the electoral vote. Roosevelt, on the other hand, obtained 60.8 percent of the popular vote and all but eight electoral votes. In 1912 Woodrow Wilson received 41.9 percent of the popular vote and 82 percent of the electoral vote.

The electoral college system has governed forty-five elections and has produced fourteen Presidents who did

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For a well-reasoned analysis of the citizen's voting power under the electoral college, see Banzhaf, "Reflections on the Electoral College; One Man, Two Votes: A Mathematical Analysis of the Electoral College," 13 Vill. L. Rev. 304 (1968).

11 A related factor is that the electoral votes assigned to each state do not reflect population changes occurring between censuses. The number of Representatives to which a state is entitled is determined after the completion of the decennial census. A presidential election which falls in the same year as a census is governed by the apportionment based on the census or a decade before.
not obtain a majority of the popular votes cast in the election.\textsuperscript{12} Indeed, on at least three occasions the losing candidate had more popular votes than the winner.

In the election of 1888 Grover Cleveland received 48.6 percent of the popular vote and 42 percent of the electoral vote, while Benjamin Harrison obtained 47.8 percent of the popular vote and 58 percent of the electoral vote. Although Cleveland had about 100,000 popular votes more than Harrison, Harrison was elected President, having won key states by small margins. A switch of a few thousand votes in New York would have given the election to Cleveland.

In the election of 1876 Democratic presidential candidate Samuel J. Tilden won a majority of the popular vote. He received approximately 250,000 votes more than Rutherford B. Hayes. Yet Tilden lost the election by one electoral vote (185 to 184) when the disputed electoral votes of four states were awarded to Hayes by an Electoral Commission created by Congress.\textsuperscript{13}

\textsuperscript{12} These Presidents and their popular vote percentages are: John Quincy Adams in 1824 (31.9 percent); James K. Polk in 1844 (49.6 percent); Zachary Taylor in 1848 (47.3 percent); James C. Buchanan in 1856 (45.6 percent); Abraham Lincoln in 1860 (39.8 percent); Rutherford B. Hayes in 1876 (47.9 percent); James A. Garfield in 1880 (48.3 percent); Grover Cleveland in 1884 (48.5 percent); Benjamin Harrison in 1888 (47.8 percent); Grover Cleveland in 1892 (46.0 percent); Woodrow Wilson in 1912 (41.9 percent); Woodrow Wilson in 1916 (49.3 percent); Harry S Truman in 1948 (49.6 percent); and John F. Kennedy in 1960 (49.5 percent).

\textsuperscript{13} For the story of how Tilden was robbed of the Presidency, see Haworth, \textit{The Hayes-Tilden Presidential Election of 1876} (1906); Koenig, \textit{The Election That}

In the election of 1824 Andrew Jackson received 42.2 percent of the popular vote and 38 percent of the electoral vote. John Quincy Adams received 31.9 percent of the popular vote and 32 percent of the electoral vote. Since no candidate received a majority of the electoral vote, the election was thrown into the House of Representatives and Adams was elected. Although Adams had fewer popular and electoral votes than Jackson, he was more successful in the political maneuvering in the House of Representatives and therefore was elected President.

Although President Kennedy is generally considered to have received about 112,000 popular votes more than Richard M. Nixon in 1960, it may be that Nixon actually had more popular votes than Kennedy. The problem arises as to the proper method of counting the popular votes cast in Alabama. In that state the Democratic slate of electors consisted of six unpledged electors, who eventually voted for Senator Harry F. Byrd, and five pledged electors, who eventually voted for Kennedy.\textsuperscript{14} The highest unpledged elector received 324,050 popular votes while the highest pledged received 318,303. In giving Kennedy a nationwide plurality of about 112,000, most authorities credit him with the 318,303 figure. It is argued that this is unfair because most, if not all, of the same voters also voted for unpledged electors opposed to Kennedy. It is also said that if the 324,050 unpledged votes and 318,303 pledged votes are both counted, then the Alabama Democratic votes are counted twice. In


\textsuperscript{14} See pages 320–321, infra.
order that those votes be counted only once, *Congressional Quarterly* has suggested dividing the 324,050 votes into eleven parts and awarding five-sixths (or 147,295) of them to Kennedy.\(^\text{15}\) When this is done, Nixon has approximately 58,000 more popular votes nationwide than Kennedy.

In several elections a shift of the popular vote in one or more states would have swung the election to the other candidate. In 1960 a change of about 4,500 votes in Illinois and 23,000 in Texas would have given the election to Nixon. In 1948 a shift of about 17,000 popular votes in Illinois, 9,000 in California, and 3,500 in Ohio would have brought victory to Dewey, with Truman having over 2,000,000 more popular votes. In 1928 a shift of fewer than 500,000 votes in several states would have meant victory for Alfred E. Smith, who would have had approximately 5,000,000 fewer popular votes than Hoover. In the elections of 1844, 1880, 1884 and before 1884 a shift of a few popular votes in only one state would have made the popular vote loser President.

2. *Congress Could Elect the President and Vice President*

Under Article II of the Constitution, as amended by the Twelfth Amendment, if no candidate for President receives a majority of the electoral votes when they are counted (i.e., January 6) the House of Representatives chooses the President from the candidates having the top three numbers. In the voting, each state is entitled to one vote regardless of its population. By House rules, the vote is awarded to the candidate who receives a majority of the votes cast by the states delegation.\(^\text{16}\) If the delegation is evenly divided, the state has no vote. To be victorious in the House, the Constitution requires that a candidate obtain the votes of a majority of all the states. A quorum consists of a member or members from two-thirds of the states.

If no candidate for Vice President receives a majority of the electoral votes, the Senate chooses the Vice President from the candidates with the highest two numbers. A quorum for this purpose consists of two-thirds of the whole number of Senators, and a majority of the whole number is necessary to a choice.

Since the House selects the President and the Senate the Vice President, there could be a President from one party and a Vice President from another. This is possible because the political composition of each body might be different; the method of voting and the requirement for election differ in each; and the number of candidates considered by each is not the same. Moreover, under present contingent election procedure, the Senate could reach a decision while the House deadlocked. If such a deadlock continued until January 20, the Vice President elect would, under the Twentieth Amendment, act as President until the House reached a decision and the President qualified.\(^\text{17}\)

\(^{15}\) See *Congressional Debates* 361, 490–510 (1824–1825), where the rules adopted by the House of Representatives for the 1824 election are set forth and debated. See Peirce, *supra* note 3, at 335–37.

\(^{16}\) The Amendment further provides that “Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified,
On four occasions in American history Congress has been intimately involved in the election of the President or Vice President. Each occasion was marked by a high degree of partisan politics and emphasized the undesirability of involving Congress in a contingent election.

In the election of 1800 Thomas Jefferson and Aaron Burr each received the same number of electoral votes. The Democratic-Republican electors voted for both Jefferson and Burr, intending that the former be President and the latter be Vice President. The lame duck House of Representatives therefore was required to choose between them for President. For thirty-five ballots, taken over a one-week period without any adjournments, neither could obtain the necessary votes of nine states. On each of the thirty-five ballots, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified. The present succession law covers these contingencies, extending the line of succession to the Speaker of the House of Representatives, then to the President pro tempore of the Senate, and then to the members of the Cabinet in the following order: Secretary of State, Secretary of Treasury, Secretary of Defense, Attorney General, Postmaster General, Secretary of Interior, Secretary of Agriculture, Secretary of Commerce, and Secretary of Labor. 3 U.S.C. § 19 (1964).

The tie occurred because under the original Constitution there was no separate balloting for President and Vice President. Each elector simply cast two votes. The person with the highest number, if a majority of the total number of electors appointed, was elected President. The person with the most electoral votes after the President was chosen was elected Vice President. The Twelfth Amendment was adopted in 1804 so as to provide for separate votes for President and Vice President.

Jefferson received the votes of eight states, Burr of six states, and two states were evenly divided. On the thirty-sixth ballot, Jefferson received the votes of ten states and won. His election was made possible because members of the Federalist Party in the delegations of the states which had been evenly divided either absented themselves or cast blank votes. As a result, only Democratic-Republicans were left in those states and they cast the votes of their states for Jefferson. Of the ten states voting for Jefferson, two had awarded their electoral votes to John Adams, and three had divided their votes among Jefferson, Burr, Adams and Pinckney.

The House of Representatives had to choose the President again in the election of 1824. Andrew Jackson, John Quincy Adams and William H. Crawford were the candidates with the highest three numbers of electoral votes. Adams was elected on the first ballot, receiving the votes of thirteen of the twenty-four states. Andrew Jackson received the votes of seven states and Crawford of four. A change of only one vote in any of six state delegations would have prevented Adams' election. It is interesting to note that following the election of 1824, a major effort was made in Congress to remove the contingent election from the House. In 1826, the House itself passed a resolution to this effect by a vote of 138 to 52. No action was ever taken in the Senate.

In the election of 1836 the Senate chose the Vice President when no candidate for that office received a majority of the electoral votes. The choice was between the incumbent

18 The tie occurred because under the original Constitution there was no separate balloting for President and Vice President. Each elector simply cast two votes. The person with the highest number, if a majority of the total number of electors appointed, was elected President. The person with the most electoral votes after the President was chosen was elected Vice President. The Twelfth Amendment was adopted in 1804 so as to provide for separate votes for President and Vice President.

Vice President, Richard Mentor Johnson, and Francis Granger. Johnson was selected by a vote of 33 to 16. It is noteworthy that he received the votes of several Senators whose states had given their electoral votes to Granger. Similarly, Granger received the vote of a Senator whose state had awarded its electoral votes to Johnson. Moreover, both Johnson and Granger received the votes of Senators whose states had awarded their electoral votes to other vice presidential candidates.

In the election of 1876 a question aroused over the awarding of the electoral votes of four states, each of which had sent double sets of electors to the President of the Senate. A Republican-controlled Senate and a Democratic House could not agree on which returns to accept. A bipartisan Electoral Commission was formed by Congress to resolve the controversy. The Commission, consisting of eight Republicans and seven Democrats, awarded the votes to Hayes, the Republican candidate, by a strict party vote of eight to seven.

On other occasions elections came within a hairline of being thrown into the House of Representatives. In 1960 a change of 4,480 votes in Illinois and 4,491 in Missouri would have sent the election of President to the House and that of Vice President to the Senate. The 1948 election was another such occasion, illustrating what can happen when there are strong minor party candidates. The candidacies of Senator Strom Thurmond, whose intention it was to throw the election into the House, and Henry A. Wallace, made that election extremely close. Truman was elected President with 303 electoral votes and 24,179,345 popular votes. Dewey received 189 electoral votes and 21,991,291 popular votes.

Thurmond received 39 electoral votes and 1,176,125 popular votes. Wallace received 1,157,326 popular votes and although he did not obtain any electoral votes, his presence on the ballot in New York reportedly caused Truman to lose New York while his absence from the ballot in Illinois was allegedly responsible for Truman's success in that state.

In the 1948 election, had there been a slight shift of the popular vote in three states (California, Illinois and Ohio), Dewey would have won, with Truman having more popular votes. Had there been such a shift in two of these states (as, for instance, of 16,807 votes in Illinois and 3,554 votes in Ohio), the election would have been thrown into the House of Representatives. Who would have won in the House can only be surmised, since no party had control of the necessary number of state delegations (i.e., then twenty-five). The 1948 congressional elections had given the Democrats control of twenty-one state delegations; the Republicans, of twenty; and the Dixiecrats, of four. Three state delegations were evenly divided. Thus, if the election had gone into the House, the Dixiecrats would have held the balance of power and likely would have been able to exact a price for their votes.20

20 As for the coming presidential election, the 1968 congressional elections will determine the political alignment of Congress at the time the electoral votes are counted on January 6, 1969. In the present House of Representatives, the Democrats control 248 seats (including the New York 18th District of Adam C. Powell) and twenty-nine state delegations, while the Republicans control 187 seats and eighteen state delegations. Three state delegations are evenly divided between the parties. All 435 seats in the House will be up for election. Of the 100 Senate
AUGUST, 1968

3. Electors Could Disregard the Will of the People

When the people go to the polls in November in each presidential election year, they vote for electors, and the winning electors choose the President and Vice President in December.21 In more than two-thirds of the states, the names of the electors do not appear on the ballot, but rather the names of the presidential and vice presidential candidates. In all but one of the remaining states, the names of the candidates and the electors are set forth on the ballot. The voter normally must choose, as a unit, the slate of electors of one of the parties. In some states, however, the voter can choose between electors on different slates or write-in the name of an elector. Alabama is unique in that the names of the electors appear but not those of the candidates.

The electors who are chosen in each state must meet at their state capitol forty-one days later to select the President and Vice President. Although they are expected to vote for their party nominees, there is nothing in the Constitution which specifically binds them to do so. On the contrary, the evidence is compelling that the Framers of the Constitution contemplated the electors as distinguished citizens who would exercise intelligent and independent judgment in casting their votes.22 The growth of political parties frustrated this design and gave rise to our present system whereby each party nominates a slate of electors pledged to their party nominees. Most voters know little, if anything, about these electors, who, in most cases, receive their position as a reward for past services rendered the party.

The pledged elector is so integral a part of the present system that his defection or exercise of independent judgment would be a serious threat to the stability of the electoral process. Despite practice, party loyalty oaths and, in about one-third of the states,23 the existence of laws (whose consti-
stitutionality is in doubt) requiring elec-
tors to vote for their party nominees, some recent electors have violated their pledges and voted against the candidates of their party.24

In 1960 Henry D. Irwin of Oklahoma was chosen a Republican elec-
tor in that state as a result of the Republican ticket (Nixon and Lodge) carrying the state by a substantial major-
ity of the popular vote. When Oklahoma’s “electoral college” met forty-one days later, Irwin broke his party oath and voted for Senators Harry F. Byrd for President and Barry H. Goldwater for Vice President, neither of whom were candidates. Irwin, relying upon his so-
called constitutional freedom to vote for whom he pleased, said he wanted to insure “a return to respect for the


24 The question of whether a presiden-
tial elector can be compelled to vote for his party nominees is in much doubt. There is considerable support for the view that electors are not legally obligated to vote for their party nominees. It is pointed out that in writing the Constitution, the Framers intended the electors to be free agents; that when electors broke their pledges in the past, their votes were counted by Congress; and that several state decisions have said in clear terms that electors cannot be compelled to vote in a certain way. Opinion of the Justices, No. 87, 250 Ala. 399, 34 So.2d 598 (1948); State ex rel. Beck v. Hummel, 150 Ohio St. 127, 146, 80 N.E.2d 899, 909 (1948); Breidenthal v. Edwards, 57 Kan. 332, 339, 46 Pac. 469, 471 (1896); contra, Matter of Thomas v. Cohen, 146 Misc. 836, 841-42, 262 N.Y. Supp. 320, 326 (Sup. Ct., 1933). The Supreme Court has never squarely passed on the issue. See Ray v. Blair, 343 U.S. 214 (1952); see generally, Kirby, “Limitations on the Power of State Legislatures over Presidential Elections,” 27 Law and Contem-

Constitution by the election of a con-
servative coalition government.”25

Four years earlier, in the election of 1956, the Democratic Party was the victim of the defection of an elec-
tor. W. F. Turner was elected a Democratic elector in Alabama by virtue of the Democratic ticket of Stevenson and Kefauver obtaining 56.5 percent of the popular vote in the state. When the Alabama “electoral college” met in December 1956, Turner voted for Judge Walter B. Jones of Alabama for President. When his fellow electors pointed out that he was under an obligation to vote for Stevenson because he had signed the party loyalty oath, Turner replied: “I have fulfilled my obligations to the people of Alabama. I am talking about the white people.”26

In the election of 1948 a Tennessee elector running on both the Demo-
cratic and States' Rights tickets was elected as a result of the popular vote in Tennessee for the Democratic ticket. He cast his vote for the States' Rights candidate who received only 13.4 percent of the popular vote in the state. Although he had said he would vote this way prior to the election, the Democratic voters had no opportunity to cast a vote for a full slate of Democratic electors who intended to vote for the party nomi-

25 Hearings Before the Senate Judiciary Subcommittee on Constitutional Amend-
ments on Nomination and Election of President and Vice President and Qualifi-
26 The New York Times, December 18, 1956, p. 34.
27 For other examples of defecting elec-
tors, see Wilmerding, The Electoral Col-
The unfaithful pledged elector is that of the unpledged elector. Several southern states have laws permitting the election of unpledged electors who are free to vote as they please. These electors run with the hope, if elected, of using their votes in the electoral college to achieve certain objectives. For example, their strategy may dictate that they vote for neither major candidate so as to throw the election into the House of Representatives; or that they make a deal with one of the major parties and cast their electoral votes for its nominees.

The most conspicuous use of the unpledged elector occurred in the election of 1960. In the June 1960 Democratic primary in Alabama, five pledged and six unpledged electors were chosen. This combination slate was selected by the voters in November rather than the Republican slate of eleven pledged electors. In the electoral voting on December 19, 1960, the five pledged electors voted for Kennedy and Johnson while the six unpledged electors voted for Senator Harry F. Byrd for President and Senator Barry H. Goldwater for Vice President.

Also in the 1960 election, separate Democratic slates of pledged and unpledged electors were run in Louisiana and Mississippi due to party quarrels. The pledged slate won in Louisiana and lost in Mississippi. However, in Louisiana an unsuccessful attempt was made after the election to suspend the state’s electoral laws and appoint independent electors. The eight unpledged Mississippi electors cast their votes for President for Byrd.

Following the November 1960 voting, Republican elector Irwin of Oklahoma took part in a movement designed to elect a President other than Kennedy or Nixon. The plan focused on getting the unpledged electors and pledged electors of both parties to join together so that neither major candidate would be able to obtain a majority of the electoral votes. Although the plan was unsuccessful, it caused concern at the time.

In the 1964 election, the Democratic slate of electors chosen in the Alabama primary were all unpledged. As a result, the Democratic voters of Alabama were afforded no opportunity in November 1964 to register a vote for Johnson and Humphrey. Since the Republican Party carried the state, its slate of pledged electors became Alabama’s “electoral college” in December.

While defecting electors and unpledged electors have not yet changed the outcome of an election, they could do so in any election where the electoral voting is close.

4. The Death or Withdrawal of a Candidate Could Cause a Crisis

Under the electoral college system, a number of contingencies can occur as a result of the death or withdrawal of a presidential or vice presidential candidate.

A. Vacancy Before Election Day

The death of a candidate before the election is not provided for by law. Both major parties, however, have empowered their national committees

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28 Senate Hearings 415.
29 Senate Hearings 596–656.
to fill a vacancy occurring on the ticket. Alternatively, the Republican national committee could convene a new national convention. If congress saw fit, it could change the date of the election, since that is a matter governed by federal statute.

In the election of 1912, Vice President James S. Sherman, who was running for re-election, died six days before election day. His name, along with Taft's, appeared on the ballot throughout the country, and they received three and one half million popular votes. It was not until after the November voting for elections that the Republican national committee filled the vacancy. Its appointee, Nicholas Murray Butler, then President of Columbia University, received the eight electoral votes that would have gone to Sherman. In 1860 the Democratic national committee filled the vacancy which occurred when Senator Benjamin Fitzpatrick of Alabama declined the vice presidential nomination after the convention had adjourned. Herschel V. Johnson, a former governor of Georgia, was selected.

B. Vacancy Between Election Day And Convening of the Electoral College

Another contingency not provided for by law is the death of a candidate in the forty-one day period between election day and the meeting of the electors in December. The procedures of the political parties for filling vacancies would still be in effect. It is likely that the electors pledged to the deceased candidate would vote for the new nominee, who, in the event of the death of the presidential nominee, probably would be his running mate.

This contingency occurred during the election of 1872. Shortly after the election Democratic presidential candidate Horace Greeley died. No one was appointed to fill the vacancy. When the electors met, Greeley's sixty-six electoral votes were scattered among four candidates, except for three which were cast for Greeley himself. Since Greeley was not alive when the three votes were cast, they were not counted. Greeley's vice presidential running mate, B. Gratz Brown of Missouri, received eighteen of the sixty-six votes. Senator Thomas Hendricks of Indiana, who had not even been a candidate for the Democratic nomination, received forty-two of the votes.

C. Vacancy After Electoral College Meets

Another area of uncertainty, which is in need of clarification, is the death of a candidate in the period after the electors vote in December and before their votes are counted on January 6. Undoubtedly, a debate would ensue in Congress as to whether the votes of a dead man could be voted. This author is of the view that they should be because of the Twelfth Amendment, which requires the President of the Senate to count all electoral votes so long as the persons were alive when the votes were cast. The counting is a non-discretionary act. If this view be correct, Congress would declare the President elect and Vice President elect. If the President elect had died, the Vice President elect would become President on Amendment. He would be empow-

51 This Amendment provides that if a President elect dies before the time fixed for his term to begin, the Vice President elect becomes President. See note 17, supra.
ered, under the Twenty-Fifth Amendment, to nominate a person to fill the vacancy in the Vice Presidency. Congress then would have to vote on the nomination. If a majority of each House approved, the nominee would become Vice President. Similarly, if the Vice President elect had died, the President elect, upon becoming President, would be so authorized to nominate a person to fill the vacancy.

Congress has the power under the Twentieth Amendment to provide for the case of death of any of the persons who would be considered in a contingent election by the House or Senate. No implementing legislation, however, has ever been passed.

Conclusion

The defects discussed in this article are not all that inhere in the present system. The “winner take all” feature gives excessive power to organized groups, particularly in states where there is effective two-party competition, since they may be able to swing the entire electoral vote of the state from one candidate to the other. This feature also places an undue premium on the effects of fraud, accident and other factors, since a slight change in the popular vote may influence the disposition of all of a state's electoral votes.

The election of 1916 illustrates how the entire electoral vote of a state may be determined by a minor incident. In that election Charles Evans Hughes, while campaigning in California, failed to pay a courtesy call on California's Governor Hiram Johnson.32 This so-called snub supposedly resulted in Hughes' loss of California's electoral votes and, as a consequence, of the election. Had Hughes carried California, which he lost by 3,806 votes, he would have won the election notwithstanding that Wilson would have had about 580,000 more popular votes.

The intervention of presidential electors sometimes leads to confusion or causes a state to lose some of its electoral votes. For example, in the 1948 election, only the names of the electors of the Progressive Party appeared on the ballot in Ohio. On the other hand, only the names of the Democratic and Republican candidates appeared. Many thousands of voters were confused by this arrangement and erroneously voted for some Progressive electors and either Truman or Dewey. These votes subsequently had to be invalidated. In several other elections, presidential electors either failed to vote at the appointed time or had their votes rejected for technical reasons in the electoral college.33

Another defect recently came to public attention. This is the Twelfth Amendment's requirement that electors cannot cast their votes for President and Vice President for persons both of whom are "inhabitants" of the same state as themselves. They can vote for just one "inhabitant" of their state. This provision was based on the view of the Framers that electors would be partial to citizens of their own state and therefore would cast their two electoral votes

32 The fact seems to be that Hughes made numerous attempts to see Johnson in California. Roseboom, A History of Presidential Elections 385-386 (1965).

33 E.g., the elections of 1816, 1820, 1836, 1868 and 1880. See Memorandum on The Electoral College Prepared by the Staff of the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, 87th Cong., 1st Sess. 15-16 (1961).
in favor of such citizens. It was thought that if the electors were required to cast one of their votes for an inhabitant of another state, persons of national reputation would be elected President and Vice President. The development of political parties and nominating conventions have made this requirement obsolete. In order to get around the provision, it has been suggested that one of a team of candidates from the same state could become an "inhabitant" of another state after the November voting and before the electoral voting. It is arguable that the spirit, if not the letter, of the Constitution would be violated by such a maneuver. The real solution is to eliminate the provision altogether.

Because of the deficiencies in the present system, numerous proposals for reform are now pending in Congress—\textsuperscript{34} the "unit vote" proposal, which would write into the Constitution the present practice whereby the candidate who wins the most popular votes in a state receives all of its electoral votes; the "proportional vote" proposal, which would divide the electoral vote of each state among the candidates in proportion to the division of the popular vote in the state; the "district vote" proposal, which would divide each state into electoral districts comparable to congressional districts, the popular winner in each district would receive one electoral vote, and the popular winner in the state would receive two votes; and "direct election," which would abolish the electoral college altogether and provide for a nationwide popular vote. Almost all of the electoral proposals would abolish the office of elector.

Whatever one's preference, it is clear that the need for \textit{substantial} reform of some type is urgent.\textsuperscript{35}

\textsuperscript{34} See "Proposals to Reform Our Electoral System, \textit{supra} note 21.

\textsuperscript{35} Direct election has been endorsed by the American Bar Association and The Association of the Bar of the City of New York. See "Election the President," \textit{supra} note 3; and Comm. on Fed. Legisl. of N.Y.C.B.A., \textit{A Report on the Proposed Constitutional Amendment Providing for Direct Election of President and Vice President} (1967).

[End]

\textbf{Live Under Law}

Let us for God's sake resolve to live under the law.