

CRS Report for Congress

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The Electoral College: Reform Proposals in the 108th Congress

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Summary

American voters elect the President and Vice President of the United States under a complex arrangement of constitutional provisions, federal and state laws, and political party practices known as the electoral college system. For additional information on contemporary operation of the system, please consult CRS Report RS20273, *The Electoral College: How It Works in Contemporary Presidential Elections*, by Thomas H. Neale. Despite occasional close elections, this system has delivered uncontested results in 46 of 50 elections since adoption of the 12th Amendment, effective in 1804. Throughout this period, nevertheless, it has been the subject of persistent criticism and many reform proposals. Related measures fall into two basic categories: those that would eliminate the electoral college and substitute direct popular election of the President and Vice President, and those that would retain the existing system in some form and correct perceived defects. For additional information on electoral college contingencies and broader aspects of reform proposals, please consult CRS Report RL30804, *The Electoral College: An Overview and Analysis of Reform Proposals*, by L. Paige Whitaker and Thomas H. Neale. One proposal to reform the electoral college has been offered to date in the 108th Congress, H.J.Res. 28, introduced by Representative Jackson of Illinois. Section 4 of the proposed amendment would “ensure that each Elector votes for the candidate for President and Vice President who received a majority of the popular vote in the State.” This report will be updated as legislative events require.

Alternative Approaches: Direct Popular Election v. Electoral College Reform

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

The direct election alternative would abolish the electoral college, substituting a single, nationwide count of popular votes. The candidates winning a plurality of votes

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

Reform measures that would retain the electoral college have included a range of different proposals, of which the most popular include:²

- the “automatic plan,” which would award all electoral votes in each state directly to the winning candidates who obtained the most votes statewide; this alternative constitutionally mandates the “general ticket” or “winner-take-all system” currently used to award electoral votes in 48 states and the District of Columbia;
- the “district plan,” which would award one electoral vote to the winning candidates in each congressional district, and an additional two electoral votes, reflecting the two “constant” or “senatorial” electoral votes assigned to each state, regardless of its population, to the statewide winners; this alternative constitutionally mandates the system currently used to award electoral votes in Maine and Nebraska;
- the “proportional plan,” which would award electoral votes in each state in proportion to the percentage of the popular vote gained by each ticket; and
- hybrid plans, which would combine various elements of different reform proposals.

Most versions of these plans would eliminate the office of elector, and award electoral votes directly to the candidates. In common with direct election, most also require joint tickets of presidential-vice presidential candidates, a practice which, as noted previously, is currently provided under state ballot laws.

Pro and Con in Brief

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

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

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

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

- They assert that direct popular election would provide for a single, democratic, choice in which all the nation's voters would directly elect the two highest ranking officials in the United States government, the President and Vice President.
- Further, the candidates who won the most popular votes would always win the election, and in the event no one received at least 40% of the vote, a runoff election between the two leading tickets would decide the choice. (Some direct election proposals would substitute election by joint session of Congress for a runoff in the event no ticket received at least 40% of the vote.)
- Every vote would carry the same weight in the election, no matter where in the nation it was cast.
- All the various and complex mechanisms of the existing system, such as the contingent election process, would be supplanted by these simple requirements.³

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

- The electoral college, some assert, is the antithesis of their simple and democratic proposal. It is, they contend, philosophically obsolete: indirect election of the President is an 18th century anachronism that dates from a time when communications were poor, the literacy rate was lower, and the nation had yet to develop the durable, sophisticated, and inclusive political system it now enjoys.
- Moreover, they find the 12th Amendment provisions governing cases in which no candidate attains an electoral college majority (contingent election) to be even less democratic than the primary provisions of Article I Section 1 (see footnote 3).
- By providing a fixed number of electoral votes per state that is adjusted only after each census, they maintain that the electoral college does not accurately reflect state population changes in intervening elections.
- The two "constant" or "senatorial" electors assigned to each state regardless of population give some of the nation's least populous jurisdictions a disproportionate advantage over more populous states, from this viewpoint.

³ In a contingent election, the President is elected in the House of Representatives, with each state casting a single vote, regardless of its population and the election results in that state. The Senate elects the Vice President in such cases, with each Senator casting a single vote.

- The office of presidential elector itself, and the resultant “faithless elector” phenomenon,⁴ provide opportunities for political mischief, and deliberate distortion of the voters’ choice.
- They argue that by awarding all electoral votes in each state to the candidates who win the most popular votes in that state, the “winner-take-all” or “general ticket” system effectively disenfranchises everyone who voted for other candidates. Moreover, this same arrangement is the centerpiece of one category of electoral college reform proposals, the automatic plan.
- Finally, the electoral college system has the potential to elect presidential and vice presidential candidates who obtain an electoral vote majority, but fewer popular votes than their opponents, as happened in 2000.

Defenders of the electoral college, either as presently structured, or reformed, offer various arguments in its defense:

- They reject the suggestion that it is undemocratic. Electors are chosen by the voters in free elections, and have been in nearly all instances since the first half of the 19th century.
- The electoral college system prescribes a federal election of the President by which votes are tallied in each state. The founders intended that choosing the President would be the action of citizens of a federal republic, in which they participate both as citizens of the United States, and as members of their state communities.
- While electoral vote allocation does provide the “constant two,” or “senatorial” electors for each state, regardless of population, defenders believe this is another federal element, and is no less justifiable than equal representation for all states in the Senate. Moreover, the same formula also assigns additional electors equal in number to each state’s delegation in the House of Representatives, which more than compensates for any minor distortion.
- Further, defenders reject the suggestion that less-populous states like Alaska, Delaware, and Wyoming, each of which casts only three electoral votes, are somehow “advantaged” when compared with California (55 electoral votes beginning in 2004). These 55 votes comprise more than 20% of the electoral votes needed to win the presidency, thus conferring on California voters a “voting power” advantage that far outweighs the minimal arithmetical edge conferred on the smaller states.⁵

⁴ Faithless electors are those who cast their votes for candidates other than those to whom they are pledged. Notwithstanding political party rules and state laws, most constitutional scholars believe that electors remain free agents, guided, but not bound, to vote for the candidates they were elected to support. For further information, please consult CRS Report RL30804, *The Electoral College: An Overview and Proposals for Change*, by L. Paige Whitaker and Thomas H. Neale, pp. 9-10.

⁵ For additional information on the voting power theory, please consult CRS Report RL30804, *The Electoral College: An Overview and Analysis of Proposals for Change*, by L. Paige Whitaker and Thomas H. Neale, p. 7.

- The electoral college system promotes political stability, they argue. Parties and candidates must conduct ideologically broad-based campaigns throughout the nation in hopes of assembling a majority of electoral votes. The consequent need to forge national coalitions having a wide appeal has been a contributing factor in the moderation and stability of the two-party system.
- They find the faithless elector phenomenon to be a specious argument. Only nine such electoral votes have been cast against instructions since 1820, and none has ever influenced the outcome of an election. Moreover, nearly all electoral college reform plans would remove even this slim possibility for mischief by eliminating the office of elector.

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

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

Reform Proposals in the 108th Congress

H.J.Res. 28 (Representative Jackson of Illinois). At the time of this writing, one proposal for electoral college reform has been offered in the 108th Congress, H.J.Res. 28, introduced by Representative Jackson of Illinois on March 3, 2003.⁶ The resolution includes several provisions designed to guarantee the right to vote in public elections, including the authorization of nationwide election performance standards established by Congress, and election day voter registration. Section 4 applies particularly to the electoral college, requiring states to: establish and abide by rules for appointing electors; conduct these elections, in effect presidential elections, on a day selected by Congress; and, most pertinently, “ensure that each Elector votes for the candidate for President and Vice President who received a majority of the popular vote in the State or District.”⁷

Section 4 would affect the electoral college system in two ways. First, it would eliminate the faithless elector phenomenon by requiring electors to vote for the candidates who won the most votes. While the resolution would not *eliminate* the office of elector,

⁶ Proposed constitutional amendments are customarily introduced as House or Senate joint resolutions.

⁷ H.J.Res. 28, 108th Congress, Section 4.

as do many reform proposals, it would have a similar effect by *constitutionally binding* electors to vote for the candidates who won the most votes in their state or district. The second impact is that the resolution has the effect of incorporating either the winner-take-all (general ticket) system or the district system into the Constitution, which is currently silent on methods of allocating electoral votes. Section 4 thus implicitly authorizes the states to opt for either plan.

H.J.Res. 28 has received the customary referral to the Judiciary Committee, and may be further referred to the Subcommittee on the Constitution. No further action has been taken at the time of this writing.

Conclusion

The U.S. Constitution is not easily amended. Stringent requirements for proposed amendments, including approval by two thirds vote in both chambers of Congress, and three-fourths of the states, generally within a seven-year time frame, have meant that successful amendments have usually been the products of broad national consensus, a sense that a certain reform is urgently required, and active support by congressional leadership.⁸ Many observers assumed that the apparent “misfire” of the electoral college system in the 2000 presidential election would lead to serious consideration of reform proposals. Notwithstanding these circumstances, however, none of the seven electoral college reform resolutions introduced in the 107th Congress received more than routine referral.⁹ Attention, instead, focused on proposals for election administration reform, resulting in passage of the Help America Vote Act , P.L. 107-252.¹⁰

⁸ Article V of the Constitution also provides for amendment by a convention, which would be convened on the application of the legislatures of two thirds of the states. Any amendments proposed by such convention would also require approval of three fourths of the states. This alternative method, however, has never been used.

⁹ For further discussion of the hurdles faced by electoral college reform proposals, see CRS Report RL30844, *The Electoral College: Reform Proposals in the 107th Congress*, by Thomas H. Neale.

¹⁰ For additional information on the Help America Vote Act, please consult the CRS Briefing Book, *Election Reform*, available to Congress on the CRS Home Page at [<http://www.crs.gov/>]