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The Electoral College: Reform Proposals in the 109th Congress

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The Electoral College: Reform Proposals in the 109th Congress

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 RL32611, *The Electoral College: How It Works in Contemporary Presidential Elections*, by Thomas H. Neale.

Despite occasional close elections, this system has delivered uncontested results in 46 of 51 elections since the 12th Amendment was ratified 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.

Three relevant proposed amendments have been introduced to date in the 109th Congress: H.J.Res. 8 (Representatives Brian Baird and William Delahunt); H.J.Res. 17 (Representative Eliot Engel and others); and H.J.Res. 36, (Representatives Jesse Jackson, Jr. and Barney Frank). All would eliminate the electoral college and substitute direct popular election, while H.J.Res. 8 and H.J.Res. 17 would also empower Congress to set federal standards for various aspects of voting registration and election administration procedures. All have been referred to the House Committee on the Judiciary, but no further action has been taken at the time of this writing.

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. This report will be updated as events warrant.

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The Electoral College: Reform Proposals in the 109th Congress

Introduction

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.¹ Despite occasional close elections, this system has delivered uncontested results in 47 of 51 elections since adoption of the 12th Amendment, effective in 1804. In three elections, the electoral college awarded the presidency to candidates who won fewer popular votes than their principal opponents, but a majority of electoral votes, and in a fourth, the House of Representatives decided the contest by contingent election, again choosing the candidate who won fewer popular and electoral votes than his principal opponent.²

The most recent instance in which the popular vote runner up received a majority in the electoral college occurred in 2000, when George W. Bush was elected President over his opponent, Al Gore, Jr., despite having won fewer popular votes than Gore nationwide. Extremely close and highly contested results in the pivotal state of Florida led to a bitter and protracted struggle that continued for over a month following election day. A Supreme Court decision³ ended further recounts, leading to certification of Bush electors in Florida, and the Republican candidate's subsequent election.

Following the 2000 presidential election, both the electoral college system and the shortcomings of election administration and voting technology, particularly in Florida, were widely criticized. While no substantive action was taken on electoral college proposals, Congress addressed the latter issue with the enactment of the Help America Vote Act, "HAVA" (P.L. 107-252), in 2002. This act established national

¹ For additional information on contemporary operation of the electoral college system, consult CRS Report RL32611, *the Electoral College: How It Works in Contemporary Presidential Elections*, by Thomas H. Neale.

² In the multiple-candidate election of 1824, the House of Representatives chose John Quincy Adams over Andrew Jackson, who enjoyed a popular and electoral vote plurality, in a contingent election. In 1876, Rutherford B. Hayes was chosen over popular vote winner Samuel Tilden by one electoral vote, after a protracted political conflict. In 1888, Benjamin Harrison won a majority of electoral votes, and was chosen over popular vote winner Grover Cleveland.

³ *Bush v. Gore*, 531 U.S. 989 (2000).

standards for voting systems and certain election procedures, and included a program of grants to assist state and local governments in meeting the act's goals.⁴

The successful passage of HAVA contrasted with almost complete lack of legislative activity in recent Congresses on proposed constitutional amendments that would eliminate or reform the electoral college system, and served to highlight the comparative difficulties faced by would-be electoral college reformers. The fundamentals of the electoral college system were established by the Constitution, and can only be altered by the much more difficult process of constitutional amendment, rather than by legislation. Moreover, HAVA's prospects for enactment were boosted by the fact that, while few would defend the failures in voting administration and technology that helped promote the act, the electoral college would arguably be enthusiastically supported in Congress and the public forum by its various advocates and defenders.

Notwithstanding these hurdles, however, amendments have been proposed to alter or eliminate the electoral college in almost every Congress since 1789. This report examines and analyzes alternative proposals for change, presents pro and con arguments, and identifies and analyzes related proposals introduced in the 109th Congress.

Alternative Approaches: Direct Popular Election v. Electoral College Reform

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

Direct Popular Election. The direct election alternative would abolish the electoral college, substituting a single, nationwide count of popular votes. The candidates winning a plurality of votes would be elected President and Vice President. Most direct election proposals would constitutionally mandate the joint tickets of presidential/vice presidential candidates already adopted in state law,⁵ 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. Alternatively, 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.

⁴ For additional information on HAVA, please consult CRS Report RL32685, *Election Reform: The Help America Vote Act and Issues for Congress*, by Eric Fischer and Kevin Coleman.

⁵ 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.

Direct Popular Election: Pro and Con.

Pro. 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. In the event no one received at least 40% of the vote, the voters would be able to choose between the two ticket who gained the most votes in a runoff election. (Some direct election proposals would substitute election by joint session of Congress for a runoff if 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.
- Direct election would eliminate the potential complications that could arise under the current system in the event of a presidential candidate’s death between election day and the date on which electoral vote results are declared, since the winning candidates would become President- and Vice President-elect as soon as the popular returns were certified.⁶
- All the various and complex mechanisms of the existing system, such as provisions in law for certifying the electoral vote in the states and the contingent election process, would be supplanted by these simple requirements.⁷

Con. Electoral college defenders attempt to refute these arguments, pointing to what they assert are flaws in direct election:

- Direct election proponents claim their plan is more democratic, and provides for “majority rule,” yet most direct election proposals require that victorious candidates gain as little as 40% of the vote in order to be elected. How, ask its critics, could such plurality Presidents be reconciled with the concept of strict “majority rule” enshrined by direct election’s proponents?

⁶ For further information on the succession question, please consult CRS Report RL30804, *The Electoral College: An Overview and Analysis of Reform Proposals*, by L. Paige Whitaker and Thomas H. Neale, pp. 13-15.

⁷ 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.

- Further, they assert that direct election would 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 election might resemble the post-election contests in 2000, not just in one state, but also on a nationwide basis, as both parties seek to gain every vote. Such rancorous disputes could have profound negative effects on political comity in the nation, and, in the worst case, might undermine the stability and legitimacy of the federal government. To those who suggest that the struggle over Florida's popular vote returns in 2000 was unique, they could cite the example of Ohio in 2004, where multiple legal actions were pursued even though the popular vote margin for the winning candidates exceeded 118, 000.⁸

Electoral College Reform. Reform measures that would retain the electoral college in some form have included a range of different proposals, the most popular of which are listed below.⁹ Most versions of these plans would eliminate the office of elector, and award electoral votes directly to the candidates, and would retain the requirement that a majority of electoral votes is necessary to win the presidency. In common with direct election, most would also require joint tickets of presidential-vice presidential candidates, a practice which is currently provided under state ballot laws.

The Automatic Plan. This reform proposal would award all electoral votes in each state directly to the winning candidates who obtained the most votes statewide; in almost all versions, a plurality would be sufficient in individual states to win the state's electoral votes, while most versions provide for some form of contingent election in Congress in the event no candidate wins a nationwide majority of electoral votes. This alternative would constitutionally mandate the "general ticket" or "winner-take-all system" currently used to award electoral votes in 48 states and the District of Columbia.

Proponents of the automatic plan argue that it would maintain the present electoral college system's balance between federal and state power, and between large and small states. Proponents note that the automatic plan would eliminate the possibility of "faithless electors." Further, the automatic plan would help preserve the present two-party system, under a state-by-state, winner-take-all method of allocating electoral votes. This, they assert, is a strength of the existing arrangement, because it tends to reward parties that incorporate a broad range of viewpoints, and embrace large areas of the nation. Opponents, on the other hand, note presidential

⁸ Bush/Cheney: 2,859,764; Kerry/Edwards: 2,741,165. Ohio Secretary of State website, at [<http://www.sos.state.oh.us/sos/results/2004/gen/pres.htm>] .

⁹ 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, pp. 20-24.

elections are still indirect under the automatic system. They further assert that “minority”¹⁰ Presidents could still be elected under the automatic system, and it still provides no electoral vote recognition of the views and opinions of voters who chose the losing candidates.

The District Plan. This reform proposal would continue the current allocation of electoral votes by state, and, in common with most reform plans, would eliminate the office of presidential elector. It would award one electoral vote to the winning candidates in each congressional district (or other, ad hoc, presidential election district) of each state. The additional two electoral votes, reflecting the two “constant” or “senatorial” electoral votes assigned to each state, would be awarded to the statewide vote winners. This alternative would constitutionally mandate the system currently used to award electoral votes in Maine and Nebraska.¹¹

Proponents of the district plan argue that it would more accurately reflect the popular vote results for presidential and vice presidential candidates than the winner-take-all method, or the automatic plan, because, by allocating electoral votes according to popular vote results in congressional districts, it would take into account political differences within states.¹² They also suggest that in states dominated by one party, the district plan might provide an incentive for greater voter involvement and party vitality, because it would be possible for the less dominant party to win electoral votes in districts where it enjoys a high level of support. Opponents would note that the district plan retains indirect election of the nation’s chief executive, that the potential for “minority” Presidents would continue, and that it might actually weaken the two-party system by encouraging parties that promote narrow geographical or ideological interests and that may be concentrated in certain areas. In fact, they might suggest that adoption of the district plan would encourage gerrymandering, as the parties maneuvered for advantage in presidential elections.

The Proportional Plan. This reform proposal would award electoral votes in each state in proportion to the percentage of the popular vote gained by each ticket. Some versions, known as “strict” proportional plans, would award electoral votes in proportions as small as thousandths of one vote, that is, to the third decimal point, while others, known as “rounded” proportional plans, would use various methods of

¹⁰ Presidents and Vice Presidents elected with an electoral vote majority, but fewer popular votes than their major opponents.

¹¹ The district plan is a permissible state option under the Constitution, which does not specify any particular method for awarding electoral votes. In fact, the district plan was widely used in the 19th century.

¹² The question of what districts would be used under a district plan has been considered over time. The use of either ad hoc presidential election districts, or existing congressional districts could be mandated, or states could be offered the option of using either method. The minimal population differences between congressional districts and the fact they are already in existence might argue for their use. On the other hand, in contemporary practice, congressional districts do not always follow the boundaries of existing political subdivisions, recognized regions, or less formal “communities,” thus vitiating one of the arguments in favor of the district system, that it takes into effect the different political leanings of different parts of a state.

rounding to award only whole numbers of electoral votes to competing candidates. Voters in Colorado rejected a proposed state constitutional amendment (Amendment 36) at the November 2, 2004, general election that would have established a rounded proportional system in that state.¹³ For further information on this proposal, please consult CRS Report RL32611, *The Electoral College: How It Works in Contemporary Presidential Elections*, by Thomas H. Neale.

Proponents of the proportional plan argue that it comes closer than other reform plans to electing the President and Vice President by popular vote, while still preserving the state role in presidential elections. They also assert that the proportional plan reduces the likelihood of “minority” presidents — those who win with a majority of electoral votes, but fewer popular votes than their chief opponent. They also suggest that it would more fairly account for public preferences, by allocating electoral votes within the states to reflect the actual support attained by various candidates, particularly in the strict, as opposed to rounded version of the proportional plan, while still retaining the role of the states. Opponents again suggest that it retains indirect election of the President, which they assert is inherently less democratic than direct popular election. They also note that the proportional plan could still result in “minority” Presidents and Vice Presidents, and might, by eliminating the magnifier effect of the automatic and district plans, actually result in more frequent electoral college deadlocks, situations in which no candidate receives the requisite majority of electoral votes.

Electoral College and Electoral College Reform: Pro and Con.

Pro. 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 in our constitutional system, and is no less justifiable than equal representation for all states in the Senate. Moreover, the same formula also assigns

¹³ The Constitution does not currently provide for fractions or parts of electoral votes, so a strict proportional system would require a constitutional amendment. Since a rounded proportional plan or system would award whole electoral votes, it is a permissible state option under the Constitution.

additional electors equal in number to each state's delegation in the House of Representatives, which more than compensates for any minor distortion.

- Further, defenders reject the suggestion that less populous states like Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont and Wyoming, as well as the District of Columbia, each of which casts only three electoral votes, are somehow “advantaged” when compared with California (currently 55 electoral votes). These 55 votes alone, they note, constitute more than 20% of the electoral votes needed to win the presidency, thus conferring on California voters, and those of other populous states, a “voting power” advantage that far outweighs the minimal arithmetical edge conferred on the smaller states.¹⁴
- 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.

Con. Supporters of direct election, and critics of the electoral college counter that the existing system is cumbersome, potentially anti-democratic, and beyond saving. The following asserted failings are frequently cited.

- The electoral college, direct election supporters assert, is the antithesis of their simple and democratic proposal. It is, they contend, philosophically obsolete: indirect election of the President is an 18th century anachronism that dates from a time when communications were poor, the literacy rate was much lower, and the nation had yet to develop the durable, sophisticated, and inclusive political system it now enjoys.
- Moreover, they find the 12th Amendment provisions that govern cases in which no candidate attains an electoral college majority

¹⁴ 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.

(contingent election) to be even less democratic than the primary provisions of Article II, section 1.¹⁵

- By providing a fixed number of electoral votes per state that is adjusted only after each census, they maintain, the electoral college does not accurately reflect state population changes in intervening elections.
- The two “constant” or “senatorial” electors assigned to each state regardless of population give some of the nation’s least populous jurisdictions a disproportionate advantage over more populous states, from this viewpoint.
- The office of presidential elector itself, and the resultant “faithless elector” phenomenon,¹⁶ 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 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.
- Although all states currently provide for choice of electors by popular vote, state legislatures retain the constitutional option of taking this decision out of the voters’ hands, and selecting electors by some other, less democratic means.¹⁷ This option was, in fact, discussed in Florida in 2000 during the post-election recounts, when some members of the legislature proposed to convene in special session and award the state’s electoral votes, regardless of who won the popular contest in the state. The survival of this option demonstrates that even one of the more “democratic” features of the electoral college system is not guaranteed, and could be changed arbitrarily by politically motivated state legislators.

¹⁵ For more detailed information on the contingent election process, please consult CRS Report RL32695, *Election of the President and Vice President by Congress: Contingent Election*, by Thomas H. Neale.

¹⁶ 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.

¹⁷ U.S. Constitution, Article II, Section 1, clause 2: “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....” Emphasis added.

- 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, 1888, and 1876. While a system that allows such a miscarriage of the popular will might have been acceptable in the 19th century, opponents maintain that it has no place in the 21st.

Reform Proposals in the 109th Congress

H.J.Res. 8.

H.J.Res. 8, the Every Vote Counts Amendment, was introduced on January 4, 2005, by Representative Gene Green, and was cosponsored by Representatives Brian Baird and William D. Delahunt. The amendment would provide for direct popular election of the President and Vice President and would also empower Congress and the states to establish voter qualifications with respect to age and residence.

Sections 1, 3, 4, and 5 deal with the election process. Section 1 specifies election by “the people of the several States and the district constituting the seat of government.” This provision recapitulates existing requirements of state residence (or residence in the District of Columbia), and implicitly excludes Puerto Rico and U.S. territories.¹⁸ Section 3 sets a plurality, rather than a majority requirement for election. Section 4 establishes in the Constitution the joint candidacies currently provided in state law.¹⁹ Section 5 empowers Congress to provide by law for: (1) the death of candidates prior to election day; and (2) any tie vote in a presidential election. This language appears to give Congress broad authority in these situations, extending to such options as rescheduling elections in case of candidate vacancies that occurred close to election day, or providing for a second round election, or election by Congress, in the event of a tie. It is less clear whether the amendment would make an implicit grant of authority to Congress to intervene in the process of replacing party candidates under such circumstances, a process which the parties historically have addressed through internal procedures. If so, this would constitute a considerable departure from current practice and political tradition by empowering Congress to intervene in the internal workings of the political parties.

Section 2 contains three elements relating to voter qualifications. First, it specifies that voters for President and Vice President “shall have the qualifications requisite for electors of Senators and Representatives....” This sentence builds on,

¹⁸ A number of election proposals in recent years have suggested that inhabitants of these jurisdictions should also have the right to vote for President and Vice President, based largely on the fact that they are U.S. citizens. See, for instance, H.J.Res. 109, 108th Congress (introduced by Rep. Jesse Jackson, Jr. and others), which provided for election by “the citizens of the United States, without regard to whether the citizens are residents of a state.” For additional information on this proposal, please consult CRS Report RL32612, *The Electoral College: Reform Proposals in the 108th Congress*, by Thomas H. Neale.

¹⁹ See footnote 5.

and explicitly extends to the presidential electorate, existing constitutional voter qualifications stated in Article I, Section 2 (for the House), and the 17th Amendment (for the Senate), and as further defined and guaranteed by the 14th, 15th, 19th, 24th, and 26th Amendments. Next, it empowers the states to set “less restrictive qualifications with respect to residence....” In contemporary practice, most states have reduced voting residence requirements to an average of 30 days. Since the states already possess the power to reduce or eliminate these periods, this section may perhaps be regarded as providing encouragement, admonishment, or a constitutional imprimatur to efforts to adopt shorter residency requirements for voters, or to eliminate them altogether. Finally, Section 2 empowers Congress to “establish uniform residence and age requirements.” Here again, this provision would constitute a mandate for a potential broad expansion of congressional power. Voting residence requirements, as noted previously, have been traditionally a state responsibility, but the amendment would vest in Congress authority to supersede state laws in this area, at least for presidential elections. Similarly, Congress would be empowered by the amendment to establish a lower voting age for presidential elections.²⁰

Section 6 of the proposed amendment sets the time when it would come into force if ratified, that is, for the first presidential election that occurs one year or longer after the date of the amendment’s ratification. For instance, if the amendment were successfully proposed by Congress, and ratified by the states in 2009, it would be effective with the presidential election of 2012.

H.J.Res. 8 was referred to the House Committee on the Judiciary on January 4, 2005, and to its Subcommittee on the Constitution on March 2. No further action has been taken to date.

H.J.Res. 17.

H.J.Res. 17 was introduced on February 9, 2005 by Representative Eliot Engel, and was cosponsored by Representatives Lane Evans, Barney Frank, Alcee Hastings, and Michael McNulty. The amendment would provide for direct popular election of the President and Vice President. It also includes various other election administration provisions.

Section 1 would establish direct popular election, and includes, in its second sentence, a provision specifying that U.S. citizens may register and vote in a state without regard to whether they are citizens of that state. This sentence would not affect current practice, as the right to vote is currently guaranteed to citizens over the age of 18 by the 15th, 19th, and 26th Amendments. The impact of this section would, however, be further expanded by the requirements of Section 5, as noted later in this section.

²⁰ Although H.J.Res. 8 does not specify a vehicle by which Congress could effect these changes, statute law seems to be the likely candidate. Since the amendment refers explicitly to presidential elections only, a further constitutional amendment would probably be required if these provisions were to apply to other elections as well, such as those for state and local elected officials.

The first part of Section 2 would establish procedures for: (1) state action on popular vote results; (2) transmission of returns to Washington; and (3) the joint session of Congress at which the state returns would be counted and the President and Vice President declared elected. This section would supersede existing statutory provisions governing electoral votes contained in 3 U.S.C. 2-18. The second part of Section 2 would establish 40% of the popular vote as the minimum required to win the presidency. If no joint ticket of candidates for President and Vice President received at least this percentage, then the amendment requires a second election, contested by the two sets of candidates who received the highest number of popular votes. This provision, which is intended to guarantee that any person elected President has the support of a substantial plurality, if not a majority, of the voters, has been included in many earlier reform proposals.

Section 3 would require Congress to enact legislation that would: (1) establish presidential election day as a national holiday; and (2) set national standards for voting registration for the presidential elections. Both these provisions would break new ground for federal involvement in elements of election administration that have traditionally been the responsibility of state governments. Proposals to establish election day as a legal public holiday have been discussed for many years. Proponents argue that this would lead to higher voter participation rates, while opponents assert: (1) that it would have only limited effect, since the holiday would probably be observed primarily by public sector employees; (2) that there is no guarantee that time off would promote turnout; and (3) that the costs to federal, state, and local treasuries of a paid holiday would need to be weighed against any small benefit obtained.²¹ Proposals to establish national voter registration have also been considered in many Congresses over the years. Here again, this would constitute a potential for further involvement in functions once performed almost exclusively at the state level. On the other hand, the course of federal legislation over the past 20 years may argue that this may be part of an evolving trend. For instance, the Uniformed and Overseas Citizens Absentee Voting Act of 1986, the National Voter Registration Act of 1993, and the Help America Vote Act of 2002 all established national standards applicable to federal elections in the fields of voter registration and election administration.²²

Section 4 would establish a timetable for the amendment, which would become effective with the first presidential election held at least one year after the effective ratification date of the amendment.

²¹ For further information, please consult CRS congressional distribution memorandum, *Making Election Day a Holiday or Moving Election Day to Saturday and Sunday: A Pro and Con Analysis*, by Kevin J. Coleman. Available to Members of Congress and congressional staff from the author.

²² For further information, please consult CRS Report RS20764, *The Uniformed and Overseas Citizens Absentee Voting Act: Background and Issues*, by Kevin J. Coleman; CRS Report RL31105, *The National Voter Registration Act of 1993: History, Implementation, and Effects*, by Government and Finance Division; and CRS Report RL32685, *Election Reform: The Help America Vote Act and Issues for Congress*, by Eric A. Fischer and Kevin J. Coleman.

Section 5, defines the term “state” as including “the several States, the District of Columbia, and any other Commonwealth, territory, or possession of the United States.” This section would thus expand the presidential vote to include such U.S. territories as American Samoa (whose residents are U.S. nationals, but not U.S. citizens), Guam, and the U.S. Virgin Islands, as well as the Commonwealth of Puerto Rico, and presumably, to the Commonwealth of the Northern Marianas, which is in political union with the United States.

H.J.Res. 17 was referred to the House Committee on the Judiciary on February 9, 2005. No further action has been taken to date.

H.J.Res. 36.

H.J.Res. 36 was introduced on March 2, 2005, by Representative Jesse L. Jackson, Jr., and was cosponsored by Representative Barney Frank. Section 1 of the proposed amendment would provide for direct popular election of the President and Vice President, by the “citizens of the United States,” specifying a single vote for a joint candidacy for those offices. It further specifies that the election shall be conducted “without regard to whether the citizens are residents of a state.” The implications of this latter provision are arguably substantial. For instance, it could be interpreted to require that state and local election authorities accept the vote of any person who could prove citizenship status, without regard to existing residence or voter registration requirements, thus superseding these systems.

Section 2 specifies that the candidates who jointly receive the greatest number of votes shall be elected, provided that number is a majority. In this provision the proposed amendment differs from many direct election proposals; these more commonly require a 40% plurality, or a simple plurality, to win (see H.J.Res. 17). While establishing this majority requirement, H.J.Res. 36 omits any procedures for cases in which a majority is not obtained. The lack of such procedures could present problems in presidential elections wherein no candidate wins a majority.²³ On the other hand, Section 3 could arguably provide for such situations, and various others, as it would empower Congress to “enforce and implement this article by appropriate legislation.” This relatively broad legislative mandate could arguably be interpreted to include such non-majority elections, and other eventualities.

Section 4 would establish a timetable for the amendment, which would become effective with the first presidential election held at least one year after the effective ratification date of the amendment.

H.J.Res. 36 was referred to the House Judiciary Committee on March 2, 2005. No further action has been taken on the resolution to date.

²³ For instance, in four of the 12 elections held between 1960 and 2004, Presidents were elected with a plurality, but not a majority, of the popular vote (1960, 1968, 1992, and 1996). *America Votes 23: A handbook of contemporary American election Statistics* (Washington: CQ Press, 2001), pp. 9, 13, 17.

Concluding Observations

Trends in Electoral College Reform Proposals.

Although the volume of electoral college reform proposals introduced has remained steady over the past several Congresses, two trends are noticeable to the long term observer. First, the volume of proposed amendments that would *reform* the electoral college, as opposed to those that would *eliminate* the electoral college and substitute direct popular election, has declined almost to zero. Second, the scope of proposed direct popular election amendments is arguably evolving in the direction of greater complexity and detail.

It is unclear whether the first development reflects a decline in support for the electoral college, as it exists, or as reformed, a lack of organized interest in these reform proposals, or simply the absence of a sense of urgency on the part of Members who might be inclined to support or defend the current system in some form. It is arguable that, if a direct election amendment gained broad congressional support and began to move through Congress toward proposal to the states, Members who support the current system in some form would coalesce in ad hoc groups to defend the electoral college; alternatively, they might be spurred by the prospect of action to propose reform measures. This was the case the last time a direct election amendment came to the floor (in the Senate), during the 95th Congress (1979-1980).²⁴

Another apparent trend is that more recent reform proposals go beyond the concept of simply substituting direct election for the electoral college. In the past two to three Congresses, these amendments have been more likely to include provisions that would enhance and extend the power of the federal government to regulate in such areas as residence standards, definition of citizenship, national voter registration, inclusion of U.S. territories and associated areas in the presidential election process, establishment of an election day holiday, etc. .²⁵ This trend arguably reflects frustration on the part of many voters and their elected representatives over the uncertainties and inconsistencies in local election administration procedures that were revealed in the 2000 and 2004 presidential elections. If the amendments in which such proposals are incorporated were proposed and ratified, they would set broad national election standards, which would supersede many current state practices and requirements.

This eventuality raises two possible issues. The first is the question of whether such federal involvement in traditionally state and local practices would impose additional costs on state and local governments, and thus be regarded as an “unfunded mandate.” One response by the state and local governments might be to call for federal funding to meet the increased expenses imposed on them by federal

²⁴ For an account of action in both the 94th and 95th Congresses, consult Neal R. Peirce and Lawrence P. Longley, *The People’s President: The Electoral College in American History and the Direct Vote Alternative*, rev. ed. (New Haven, CT: Yale University Press, 1981), pp. 198-206

²⁵ See, for instance, H.J.Res. 17, above, and H.J.Res. 103 and H.J.Res. 109 in the 108th Congress.

requirements. Precedent for this exists in the grant program incorporated in HAVA. The second issue is related, and centers on perceptions as to whether such an amendment would be regarded as federal intrusion into state and local responsibilities. For instance, a more far-reaching scenario might include the gradual assumption of the entire election administration structure by the federal government. In this hypothetical case, questions could be raised as to (1) the costs involved; (2) whether a national election administration system could efficiently manage all the varying nuances of state and local conditions; and (3) under these circumstances, what would be the long term implications for federalism? Conversely, it could be argued that a national election administration structure is appropriate for national elections, and that state local concerns are counterbalanced by the urgent requirement that every citizen be enabled and encouraged to vote, and that every vote should be accurately counted.

Prospects for Change in the Contemporary Context.

Some observers assumed that action of the electoral college in 2000, in which George W. Bush was elected with a slight majority of electoral votes, but fewer popular votes than Al Gore, Jr., would lead to serious consideration of proposals to reform or eliminate the electoral college. Notwithstanding these circumstances, however, none of the proposals introduced in either the 107th or the 108th Congress has received more than routine committee referral.²⁶ In the 107th Congress, attention focused on proposals for election administration reform, resulting in passage of the Help America Vote Act (P.L. 107-252) by the 107th Congress in 2002. This legislation, as noted earlier in this report, has substantially extended the role of the federal government in the area of voting systems and election technology through the establishment of national standards in these areas and the provision of aid to the states to improve their registration and voting procedures and systems.²⁷

Other factors may also contribute to the endurance of the electoral college system. Perhaps foremost is the fact that the U.S. Constitution is not easily amended. Stringent requirements for proposed amendments, including passage by a two-thirds vote in each chamber of Congress, and approval by three-fourths of the states, generally within a seven-year time frame, have meant that successful amendments are usually the products of broad national consensus, a sense that a certain reform is urgently required, or active long-term support by congressional leadership.²⁸ In many

²⁶ 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.

²⁷ For additional information on the Help America Vote Act, please CRS Report RL23685, *Election Reform: The Help America Vote Act and Issues for Congress*, by Eric A. Fischer and Kevin J. Coleman.

²⁸ Article V of the Constitution also provides for amendment by a convention, which would assemble on the application of the legislatures of two-thirds of the states. Any amendments proposed by such a convention would also require approval of three-fourths of the states. This alternative method, however, has never been used.

cases, all the aforementioned factors contributed to the success of an amendment.²⁹ Further, while the electoral college has always had critics, it has ratified the people's choice in 47 of 51 presidential elections held since ratification of the 12th Amendment, a success rate of 92.2%.³⁰ In the final analysis, given the high hurdles — both constitutional and political — faced by any proposed amendment, the electoral college system seems likely to remain in place unless or until its alleged failings become so compelling that large concurrent majorities in Congress, the states, and among the public, are disposed to undertake its reform or abolition.

²⁹ These conditions have been met in some cases only after a long period of national debate; for example, the 19th Amendment, which extended the right to vote to women, was the culmination of decades of discussion and popular agitation. In other instances, amendments have been proposed and ratified in the wake of a sudden galvanizing event or series of events. An example of this may be found in the 25th Amendment, providing for presidential succession and disability, which received a tremendous impetus following the 1963 assassination of President John F. Kennedy.

³⁰ The exceptions, as noted earlier, were the elections of 1876, 1888, and 2000, when candidates were elected who had a majority of electoral votes, but fewer popular votes than their major opponents. The one case in which the electoral college was hopelessly deadlocked occurred in 1824, when contingent election resolved an electoral college deadlock. Even in this case, the President, John Quincy Adams, was able to govern successfully, despite criticism that he was selected in the House of Representatives.