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The Electoral College: Reform Proposals in the 114th and 115th Congress

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Summary

American voters elect the President and Vice President of the United States indirectly, through presidential electors chosen by voters in the states—the electoral college. For further information see CRS Report RL32611, *The Electoral College: How It Works in Contemporary Presidential Elections*. Article II, Section 1 of the U.S. Constitution, as revised by the 12th Amendment in 1804, requires winning candidates for President and Vice President to gain a majority of electoral votes. Since 1804, Presidents who won a majority of electoral votes *and* at least a plurality of popular votes were elected in 49 of 54 presidential elections. In four elections, however—1876, 1888, 2000, and 2016—candidates were elected with a majority of electoral votes, but fewer popular votes than their principal opponents. In the presidential election of 1824, none of the four major candidates won a majority of electoral votes (or popular votes); the President, therefore, was chosen by contingent election in the House of Representatives. For information on contingent election, see CRS Report R40504, *Contingent Election of the President and Vice President by Congress: Perspectives and Contemporary Analysis*.

The election of Presidents who won a majority of electoral votes but fewer popular votes than their opponents is sometimes referred to, particularly by reform advocates, as an "electoral college misfire." This is possible because the Constitution requires a majority of electoral votes to elect the President, but it does not require a majority or plurality of popular votes to be elected. Critics of the electoral college have called for its reform or abolition since the earliest days of government under the Constitution. Proponents of reform, especially of direct popular election, claim the built-in potential for so-called misfires is undemocratic and cite it as a principal argument for change. For additional information on electoral college reform, see CRS Report R43824, *Electoral College Reform: Contemporary Issues for Congress*.

Although *reform* of the electoral college by constitutional amendment was proposed in Congress through the 1960s, the focus later turned to amendments that would *replace* it with direct popular election, which proponents claim would ensure that future Presidents received a popular vote majority or plurality. Reform or replacement proposals were once familiar items on the congressional agenda; for instance, 26 amendments were introduced to abolish or reform the electoral college in the 96th Congress (1979-1980). In recent years, however, the number of related constitutional amendments introduced in the House or Senate dropped from an average of eight per Congress for the 101st through 110th Congresses, to none in the 113th Congress (2013-2014). Moreover, none of the measures introduced received consideration beyond committee referral.

Following the 2016 election, however, four constitutional amendments introduced late in the 114th Congress proposed eliminating the electoral college and replacing it with direct election. To date in the 115th Congress, two amendments to establish direct popular election have been introduced: H.J.Res. 19, offered on January 5, 2017, by Representative Steve Cohen, would replace the electoral college with direct popular election of the President and Vice President by plurality vote. It would also authorize Congress to set voter qualifications, times, places, and manner of holding presidential elections, and other election-related policies. H.J.Res. 65, the "Every Vote Counts Amendment," introduced by Representative Gene Green on February 7, 2017, provides for direct popular election by plurality, and also provides Congress with additional authority over related activities. Both resolutions have been referred to the House Committee on the Judiciary and to its Subcommittee on the Constitution and Civil Justice. This report provides an analysis of these measures in the 115th Congress.

Contents

Introduction 1
Background: Electoral College Reform 2
The Electoral College by the Numbers 2
Why Reform the Electoral College? 2
Public Opinion and Electoral College Reform 3
Reform Options 3
Why Keep It? 4
Reform Efforts in Congress: The Historical Record 4
Electoral College Reform: Proposals in the 114th and 115th Congresses 6
114th Congress 6
House of Representatives 6
Senate 9
115th Congress 10
Trends in Electoral College Reform 12
Non-Congressional Activity 12
Trends in Proposed Amendments Introduced in Congress 12
Concluding Observations 14

Contacts

Author Information 15

Introduction

Article II Section 1 of the U.S. Constitution, as modified by the 12th Amendment, provides for an indirect election of the President and Vice President by presidential electors. Although the states are authorized to appoint them "in such Manner as the Legislature thereof may direct," today, presidential electors are themselves elected by qualified voters in all the states. In order to win, candidates must win a majority of the electoral votes. Although the words do not appear in the Constitution, the electors are known collectively as the electoral college, and this arrangement is generally referred to as the electoral college system. It has proved to be a durable institution or process, due in part to the fact that the U.S. Constitution is, by design, not easily amended. Its longevity may also be due to the fact that it has delivered a chief executive who commanded a majority of electoral votes in 53 of 54 presidential contests since the 12th Amendment took effect in 1804.[1] Also important from the standpoint of democratic principle and majority rule is the fact that the electoral college system has elected the candidates who won the most popular votes—"the people's choice"—in 49 of these 54 elections.

Despite its origins as the handiwork of the Constitution's framers, the electoral college system has been criticized as undemocratic, archaic, cumbersome, and weighted in favor of—or against—different states and groups since the first presidential elections. At the same time, electoral college defenders have asserted that it is a key foundation of federalism, it contributes to a stable and moderate political party system, and that it has delivered "the people's choice," the popular vote winner in 91% of presidential elections since 1804.

Congress actively considered electoral college reform for nearly 30 years between the late 1940s and 1979, bringing multiple proposals to the floor of the Senate and House of Representatives during this period. Reform advocates, however, were never able to achieve the two-thirds vote required to propose a constitutional amendment in both houses during the same Congress. By the early 21st century, the questions of reforming electoral college constitutional provisions or substituting direct popular election of the President and Vice President gradually disappeared from the congressional agenda.

In 2016, however, for the second time in 16 years, and for the fourth time in the nation's history, a President and Vice President were elected who won a majority of electoral votes, but fewer popular votes than their principal opponents. This outcome occurred because the system requires a majority of electoral votes, rather than of popular votes, to win the presidency. This feature, which is original to the Constitution, has been the object of both criticism and proposals for change since the early days of the republic; its recurrence in 2016 contributed to renewed interest among some in replacement of the electoral college by direct popular election. Following the election, four proposals to establish direct popular election were introduced in the last weeks of the 114th Congress, while two more have been offered to date in the 115th Congress. This report identifies and provides an analysis of these proposals and will be updated to report on any additional developments in electoral college reform.

[1] The exception was in 1824, when four candidates split the electoral vote for President, requiring contingent election of the President in the House of Representatives. For additional information on the contingent election process, see CRS Report R40504, *Contingent Election of the President and Vice President by Congress: Perspectives and Contemporary Analysis*, by Thomas H. Neale.

Background: Electoral College Reform

The Electoral College by the Numbers

Aside from the electoral vote majority requirement, the Constitution gave broad discretion to the states with respect to other elements of the system. Many of the additional features associated with the electoral college system are the product of federal and state laws and party actions.

1. With today's total of 538 electors, a majority of 270 is necessary to elect the President and Vice President.[2]
2. The voters elect presidential electors in all 50 states and the District of Columbia.
3. Candidates for the office of elector are nominated by the political parties in the states using a broad range of procedures.[3]
4. The electors are chosen on general election day, the Tuesday after the first Monday in November of presidential election years.
5. Forty-eight states and the District of Columbia award their electors on a winner-take-all basis known as the general ticket system. Maine and Nebraska award their electors on a basis of the states' congressional district and statewide popular vote winners.
6. In December, five weeks after the general election, the electoral votes are cast by the electors, who meet separately in their respective states.
7. By tradition, electors are expected, but not constitutionally required, to vote for the candidates to whom they are pledged.[4]
8. The electoral votes are counted by Congress on January 6 of the following year, when the winners are declared.
9. If no candidate receives a majority of electoral votes, then the President is elected by the House of Representatives and the Vice President by the Senate in a process known as contingent election.[5]

Why Reform the Electoral College?[6]

Critics of the electoral college have offered proposals for its reform or replacement since the early days of government under the Constitution.

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[2] For more detailed information and analysis of the contemporary operation of the electoral college, see CRS Report RL32611, *The Electoral College: How It Works in Contemporary Presidential Elections*, by Thomas H. Neale.

[3] These nominations are usually made by the political parties' state committees, or in the state party conventions. This process is different from the presidential candidates' nomination process.

[4] These are established in state law and compiled in U.S. Congress, Senate, *Nomination and Election of the President and Vice President of the United States, 2008*, S. Doc. 111-15 (Washington: GPO, 2010). This is the most recent edition of this publication available.

[5] For additional information on contingent election, see CRS Report R40504, *Contingent Election of the President and Vice President by Congress: Perspectives and Contemporary Analysis*, by Thomas H. Neale.

[6] For works generally favorable to electoral college reform, see Neal R. Peirce and Lawrence D. Longley, *The People's President: The Electoral College in American History and the Direct Vote Alternative*, revised edition (New Haven, CT: Yale University Press, 1981); and George C. Edwards III, *Why the Electoral College is Bad for America*, 2nd ed. (New Haven, CT: Yale University Press, 2011).

Constitutional and structural criticisms have centered on several of its features: critics note that it is not fully democratic, because it provides indirect election of the President. It can, they assert, result in (1) the election of candidates who win the electoral college but receive fewer popular votes than their opponents, an eventuality referred to by reform advocates as "wrong winner" or an electoral college "misfire"; and (2) contingent election in Congress if no candidate wins an electoral college majority. They further maintain that it results in electoral vote under- and over-representation in the states between censuses and House reapportionment and the reallocation of electoral votes. They also note that "faithless" electors can vote for candidates other than those to whom they are pledged.

Legislative and political criticisms include the winner-take-all or general ticket system mandated in all but two states, which is said to disenfranchise voters who prefer the losing candidates in the states; various asserted "biases" that are alleged to favor different states and groups; and the electoral college "lock," a phenomenon that has been claimed to provide a nearly insuperable advantage to one or the other of the political parties at various points in time.

Public Opinion and Electoral College Reform

Public opinion has consistently and historically supported reform. The Gallup Poll reported as early as 1967 that 58% of respondents supported direct election, compared with 22% who favored retaining the electoral college; Gallup's 2013 survey recorded that 63% of respondents favored an amendment providing for direct election, while 29% favored retention of the electoral college.[7] Following the 2016 election, however, Gallup reported a shift to greater support for the electoral college system by respondents who identified themselves as "Republican" or "Lean Republican." Conversely, already high levels of support for direct popular election among respondents who identified themselves as "Democratic" or "Lean Democratic" rose to new heights in the post-2016 election Gallup Poll.[8]

Reform Options

Reform options have included plans to remedy perceived flaws while retaining the basic electoral college system. Nearly all reform plans of the past century would start by eliminating the office of presidential elector but continue to award electoral votes; this would remove the potential for faithless electors, a major point of criticism of the existing system. Beyond this common feature, three principal options for reform have been advocated over time: the automatic plan, which would mandate the general ticket system in all states and the District of Columbia; the district system, adopted by Maine and Nebraska, which would allocate electoral votes by congressional district and at-large; and the proportional system, which would award electoral votes in direct proportion to the percentage of votes gained by the competing candidates in each state. Moving beyond "reform" of the system, the most popular proposal since the late 20th century has been to eliminate the electoral college system entirely and replace it with direct popular election of the

[7] Lydia Saad, "Americans Call for Term Limits, End to Electoral College," *The Gallup Poll*, January 18, 2013, at http://www.gallup.com/poll/159881/americans-call-term-limits-end-electoral-college.aspx.

[8] Republican support for direct popular election fell from 54% in 2012 to 19% in December 2016, while Democratic support rose from 69% to 81%. Influenced by the change in opinion among Republican respondents, overall support for direct election fell from 62% in favor and 35% opposed to 49% in favor and 47% opposed. Art Swift, "Americans' Support for Electoral College Rises Sharply," *The Gallup Poll*, December 2, 2016, at http://www.gallup.com/poll/198917/americans-support-electoral-college-rises-sharply.aspx.

President and Vice President, with either a plurality or majority of the popular vote necessary to win.[9]

Why Keep It?[10]

Electoral college supporters and those who favor a reformed electoral college system reject the claim that it is undemocratic, noting that electors are chosen by the voters in free elections. They assert that the electoral college system is a major component of American federalism, maintaining that the Constitution prescribes a federal election of the President by which votes are tallied in each state, and in which the voters act both as citizens of the United States and members of their state communities when choosing a President. They also cite federalism in defense of the allocation of electors among the states, and deprecate the claims that various groups or political parties are advantaged under the system. Further, they maintain that the electoral college system has historically promoted broad-based and generally moderate political parties. They reject the faithless elector argument: even counting the seven votes cast against instructions in 2016, unfaithful electors have never come close to influencing the outcome of an election. Moreover, they note, most electoral college reform plans would remove even this eventuality by eliminating the office of elector and awarding electoral votes directly. On a practical level, they note that the general ticket system actually tends to magnify the winning ticket's electoral vote margin beyond the popular vote margin, which they claim brings closure to the election process and promotes the winning candidates' legitimacy.[11]

Reform Efforts in Congress: The Historical Record

As noted previously, the electoral college system has been the subject of discussion and controversy since the first presidential elections. Reform proposals to remedy fatal defects in the original system, by which electors cast two undifferentiated votes for President, were introduced in Congress as early as 1797,[12] and a tie vote for President in the 1800 election led to the nation's first constitutional crisis. When the crisis was resolved by contingent election in the House of Representatives, Congress acted quickly to approve a proposal to require distinct ballots by the electors for President and Vice President. This measure was ratified in 1804 as the 12th Amendment, becoming the first, and to date the only, specific constitutional reform of the electoral college system. Since that time, amendments have been introduced to reform or replace it with direct popular election in almost every session of Congress. Estimates vary, but reform proposals number at least 752 through the 115th Congress.[13]

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[9] For more detailed information and analysis of electoral college reform, see CRS Report R43824, *Electoral College Reform: Contemporary Issues for Congress*, by Thomas H. Neale.

[10] For works generally favorable to the electoral college, see Martin Diamond, *The Electoral College and the American Idea of Democracy* (Washington: American Enterprise Institute, 1977); and Tara Ross, *Enlightened Democracy, The Case for the Electoral College* (Dallas, TX: Colonial Press, 2004).

[11] Judith A. Best, *The Choice of the People? Debating the Electoral College* (Lanham, MD: Rowman and Littlefield, 1996) pp. 10-16.

[12] Peirce and Longley, *The People's President: The Electoral College in American History and the Direct Vote Alternative*, p. 42.

[13] Sources include Herman V. Ames, "Proposed Amendments to the Constitution of the United States During the First Century of Its History," *Annual Report of the American Historical Association for 1896* (Washington: 1897), 1800-1896; various compilations, 1896-1972; Legislative Information System of the U.S. Congress, 1973-present, at http://www.lis.gov/.

For a period of almost three decades in the mid-20th century, Congress gave the issue of electoral college reform a prominent place on its agenda. Between the late 1940s through 1979, numerous electoral college reform proposals were introduced in both the House of Representatives and the Senate. They embraced a wide range of approaches to the question, but generally followed the outlines set out in the previous section: "ending it" by eliminating the entire electoral college system and establishing direct popular election, or "mending it" by reforming its more controversial provisions. The question of electoral college reform or replacement was actively considered throughout these years. In the post-World War II era, direct popular election became increasingly popular, but several versions of reform were also considered, most of which started with keeping electoral votes but eliminating the office of elector, thus ending the possibility of faithless electors. Proceeding from that baseline, the most prominent reform variants, as noted previously, included

- **the automatic plan/system**, which would award the popular vote winners in each state all that state's electoral votes;
- **the district plan/system**, which would award electoral votes to the popular vote winners in congressional districts and the two at-large or "senatorial electors" to statewide vote winners;[14] and
- **the proportional plan/system**, which would award electoral votes in each state in direct proportion to the number of popular votes won by competing candidates.

Proposed amendments were the subject of hearings in the Senate and House Judiciary Committees on 17 different occasions between 1948 and 1979, and, most notably, electoral college reform proposals were debated in the full Senate on five occasions and twice in the House during this period. Proposals were approved by the necessary two-thirds majority twice in the Senate and once in the House, but never in both chambers during the same Congress.[15]

Following these three decades of legislative activity, the questions of revising electoral college constitutional provisions or substituting direct popular election of the President and Vice President gradually fell from the congressional agenda by the end of the first decade of the 21st century. This decline was reflected by the number of constitutional amendments to reform or abolish the electoral college introduced in the House or Senate during the ensuing three decades. Proposals to reform the electoral college system or adopt direct election declined from 26 in the 96th Congress (1979-1981) and an average of eight per Congress for the 101st (1989-1991) through 110th (2007-2009) Congresses, to none in the 113th Congress (2013-2015). Moreover, no electoral college reform proposal has received floor action since 1979.[16]

[14] Maine and Nebraska currently use the district system to award their electoral votes.

[15] For a detailed examination and analysis of these efforts, see Peirce and Longley, *The People's President,* rev. ed. chapters 6 and 7, pp. 131-206.

[16] In the 96th Congress, S.J. Res. 28, which would have provided for direct popular election of the President and Vice President, was debated in the Senate, but failed to win approval in the Senate on July 10, 1979; it gained 51 votes to 48, 15 votes short of the constitutional requirement of approval by two-thirds of Senators present and voting. The House did not act on electoral college reform in the 96th Congress.

Electoral College Reform: Proposals in the 114th and 115th Congresses

Following the presidential election of November 8, 2016, proposals to establish direct popular election of the President and Vice President were introduced in Congress for the first time since 2011. Four resolutions were offered late in the 114th Congress and two more have been offered to date in the 115th Congress. These measures were introduced as joint resolutions, the traditional legislative vehicle for proposed constitutional amendments. They fall into one of two categories; the first includes resolutions that would establish direct popular election but otherwise make few, if any, other changes in the Constitution. The second category would establish direct popular election, and would also enable Congress to provide by law for additional federal authority over a range of election-related issues. These vary from measure to measure, but generally include provisions to enhance and extend federal jurisdiction in such areas as residence standards, definition of citizenship, national voter registration, inclusion of U.S. territories and other associated jurisdictions in the presidential election process, establishment of an election day holiday, and ballot access standards for parties and candidates.

114th Congress

The following amendments were introduced in the 114th Congress; they are arranged by House and Senate origin and chronological order.

House of Representatives

H.J. Res. 102—The 'Every Vote Counts Amendment'

This measure was introduced on November 17, 2016, by Representative Gene Green and 19 co-sponsors.[17] This resolution included establishment of direct popular election and various other provisions.

- Section 1 of the proposed amendment provided for election of the President and Vice President "by the people of the several States" and the District of Columbia.
- Section 2 defined electors for these offices as persons eligible to vote for Senators and Representatives in Congress from each state, but authorized state legislatures to prescribe "less restrictive qualifications with respect to residence." It also authorized Congress to establish uniform residence and age requirements.
- Section 3 set a plurality requirement for election: "[t]he persons having the greatest number of votes ... shall be elected."
- Section 4 incorporated the traditional joint candidacies for President and Vice President as a constitutional requirement and prescribed that voters would cast a single vote for a joint candidacy.
- Section 5 authorized Congress to provide by law for the case of a candidate's death before the election, and for the case of a tie vote.

[17] H.J.Res. 102 co-sponsors included, in alphabetical order, Representatives Boyle, Brownley, Cicilline, Yvette Clarke, Cohen, Ellison, Garamendi, Huffman, Israel, Lieu, McGovern, Pocan, Schakowsky, Serrano, Sherman, Adam Smith, Swalwell, Vargas, and Vela.

- Section 6 set an effective date for the amendment of one year after the date of ratification, should it have been approved by the states.

H.J.Res. 102 was referred to the Subcommittee on the Constitution and Civil Justice of the House Judiciary Committee on December 5, 2016. No further action was taken.

Analysis

H.J.Res. 102 was an example of a presidential election reform measure that would provide for direct popular election while also enhancing congressional ability to legislate additional federal authority over the elections process.

For instance, Section 2 would have authorized Congress to "establish uniform age and residence qualifications." With respect to age, this would presumably have empowered Congress to set a lower voting age than 18, since the 26th Amendment effectively prohibits the denial of the right to vote to anyone age 18 or older.

With respect to residence, it would have provided Congress the authority to "establish uniform ... residence qualifications" and set "less restrictive [residence] qualifications" in the states. While two Supreme Court cases effectively limited state residency requirements in the 1970s,[18] legislation implementing this section would arguably constitute an extension of federal authority over a process that has traditionally been administered at the state level, and which has previously been considered a settled question.[19]

It may also be noted that H.J.Res. 102 included the customary seven-year ratification deadline for constitutional amendments. It is, however, specifically incorporated in the resolution's preamble or authorizing section, rather than the body of the amendment. This opens the possibility of extending the ratification deadline by congressional action and arguably avoids the amendment expiration issues most notably associated with the proposed Equal Rights Amendment.[20]

H.J. Res. 103

H.J.Res. 103 was introduced by Representative Charles Rangel on November 17, 2016. Representatives Steve Cohen and Jackie Speier joined as co-sponsors. It would have provided for direct election of the President and Vice President, expanded the right to vote in presidential elections, and established congressional authority to provide by legislation for certain elements of the presidential election process.

- Section 1 proposed direct election of joint tickets of candidates for President and Vice President. It also extended the right to vote for President to "qualified electors of the ... territories." It defined "electors" as persons qualified to vote for the most numerous branch of the legislature in their jurisdiction.

[18] *Oregon v. Mitchell*, 400 U.S. 112 (1970,) and *Dunn v. Blumstein*, 405 U.S. 330 (1972).

[19] According to the National Conference of State Legislatures, at present, "26 states have durational residency requirements, ranging from as short as 10 days to as long as 30. The remaining 24 states do not have durational residency requirements but may impose a cutoff date for registering to vote prior to an election." National Conference of State Legislatures, The Canvas: States and Election Reform, "Voter Registration Is All About Residency and Domicile," Issue 69, May 2016, at http://www.ncsl.org/Documents/Elections/The_Canvass_May_2016.pdf.

[20] For additional information on the proposed Equal Rights Amendment, see CRS Report R42479, *The Role of the Environmental Review Process in Federally Funded Highway Projects: Background and Issues for Congress*.

- Section 2 would have empowered Congress to choose the time, place, and manner of holding the election, determine entitlement to inclusion on the presidential ballot, and provide for counting and declaration of the vote.

H.J.Res. 103 was referred to the Subcommittee on the Constitution and Civil Justice of the House Judiciary Committee on December 5, 2016. No further action was taken.

Analysis

H.J.Res. 103 proposed elimination of the electoral college system and its replacement by direct popular election of the President and Vice President. It also would have authorized Congress to provide by legislation for certain aspects of the presidential election process.

Since Section 1 did not set a margin for victory, a plurality of the popular vote presumably would have been sufficient to elect. Arguably its most significant provision would have been Section 1's extension of the right to vote in presidential elections to qualified electors in U.S. territories. This would have been the first amendment specifically aimed at expansion of the presidential electorate since the 23rd Amendment authorized voting for presidential electors in the District of Columbia.

The section's definition of electors notably proposed language similar to that of the Constitution's Article 1, Section 2, which similarly defined qualified electors for the House of Representatives as those qualified to vote for "the most numerous branch of the legislative body where they reside."

Section 2 of the resolution would have added additional authority to regulate the "times, places, and manner" of holding presidential elections. Here again, the resolution drew on language from the Constitution, in this case Article I, Section 4, clause 1, with respect to elections for Senators and Representatives. Another noteworthy provision of this section was the extension to Congress of authority over "entitlement to inclusion on the ballot" and "the manner in which the results of the election shall be ascertained and declared." These functions have traditionally been provided for in state law and administered by state election authorities.

H.J.Res. 103 incorporated the seven-year ratification window for constitutional amendments in its authorizing section or preamble, thus opening the possibility of extending the ratification deadline by congressional action.

H.J. Res. 104

This resolution was introduced by Representative Steve Cohen on December 1, 2016. Representative Jim Cooper joined as a co-sponsor. It proposed elimination of the electoral college system and its replacement by direct popular election of the President and Vice President. It also would have empowered Congress to provide by legislation for authority over certain elements of the presidential election process.

H.J.Res. 104 was distinguished by its inclusion of a comprehensive preamble, which presented a range of arguments in favor of replacement of the electoral college system by direct popular election. These noted the evolution of democratic government since the Constitution was drafted in 1787; cited constitutional amendments that guarantee universal suffrage and the right to vote; noted the spread of modern information technology that ensures nationwide availability of information on the presidential candidates and the election process; quoted Thomas Jefferson's assertion that "as new truths are discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times.... "; and traced the growth of the right to vote and the development of universal suffrage in the United States.

The resolution was also noteworthy in that it did not set the customary seven-year ratification deadline for ratification. It would, therefore, have been eligible for ratification indefinitely.

- Sections 1 and 2 provided for direct election; set qualifications for electors as those eligible to vote for the most numerous chamber of their state legislature; and empowered Congress to establish uniform age qualifications.
- Section 3 established the traditional joint candidacies for President and Vice President within the Constitution, while eliminating the arguably archaic prohibition[21] against electors voting "for a candidate for President or Vice President because either candidate, or both, are inhabitants of the same state as the elector."
- Section 4 established a plurality requirement for the popular vote winners.
- Section 5 authorized Congress to determine the "times, places, and manner of holding such elections and entitlement to inclusion on the ballot."
- Section 6 authorized Congress to provide for death or disqualification of a candidate before the election or for the case of a tie vote in any election.
- Section 7 provided that the amendment would have taken effect on January 1 of the year following ratification.

Analysis

H.J.Res. 104 included many provisions similar or identical to H.J.Res. 102, the Every Vote Counts Amendment, including direct election on a plurality basis, joint tickets, congressional authority over voter qualifications, "times, places, and manner" of holding presidential elections, and instances in which candidates may have died or been disqualified before the election.

The non-inclusion of the customary seven-year ratification deadline was arguably particularly noteworthy in H.J.Res. 104. Amendments that are proposed without this provision are theoretically capable of being ratified for an indefinite period after Congress proposed them. This was the case of the 27th Amendment, which was proposed without a ratification deadline in 1789, languished for two centuries, and was ultimately revived and ratified in 1992.[22]

Senate

S.J. Res. 41

This resolution was introduced on November 15, 2016, by Senator Barbara Boxer. She was joined by three co-sponsors: Senators Dianne Feinstein, Kirsten E. Gillibrand, and Bill Nelson.

- Section 1 authorized direct popular election of a joint ticket for President and Vice President by "qualified" electors of the states, the territories, and the "District constituting the seat of Government.... " It defined electors as those

[21] The 12th Amendment, in an effort to discourage presidential electors from voting exclusively for candidates from their home states, requires electors under the existing system to "vote by ballot for President and Vice President, *one of whom, at least, shall not be an inhabitant of the same state as themselves* [emphasis added]."

[22] Richard B. Bernstein, "The Sleeper Awakes: The History and Legacy of the 27th Amendment," *Fordham Law Review*, vol. 61, issue 3, 1992, pp. 497-557, at http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=3017&context=flr.

qualified to vote for the most numerous branch of the legislature where they reside.

- Section 2 authorized Congress to determine "the time, place, and manner of holding the election, standards for ballot inclusion, and procedures by which the results may be "ascertained and declared."

S.J.Res. 41 was referred to the Senate Committee on the Judiciary on November 15, 2016. No further action was taken.

Analysis

S.J.Res. 41 incorporated provisions similar to those included in contemporary related House of Representatives proposals. The resolution would have established direct popular election, presumably on a plurality basis, although this is not specified in the measure. It would also have established the familiar and traditional joint ticket of presidential and vice presidential candidates as part of the Constitution, and made reference to the original constitutional language governing qualification for electors of the House of Representatives. As with H.J.Res. 103, it would have expanded the right to vote in presidential elections to qualified voters in U.S. territories. Also in common with previously-cited contemporary House measures, it would have provided congressional authority over the "time, place, and manner" of holding presidential elections, ballot access, and procedures concerning ascertainment and declaration of result.

115th Congress

Two amendments to establish direct popular election have been introduced to date in the 115th Congress, both in the House of Representatives.

H.J.Res. 19

This resolution was introduced on January 5, 2017, by Representative Steve Cohen. To date, he has been joined by five co-sponsors.[23] It is identical to H.J.Res. 104 in the 114th Congress. The resolution also opens with an identical preamble citing the sponsors' justification for electoral college reform.

- Sections 1 and 2 would provide for direct election; set qualifications for electors as those eligible to vote for the most numerous chamber of their state legislature and empower Congress to establish "uniform age qualifications," here again presumably lower age qualifications, but not higher than those established by the 26th Amendment.
- Section 3 would extend constitutional authorization to the traditional joint candidacies for President and Vice President, while eliminating the arguably archaic prohibition[24] against electors voting "for a candidate for President or Vice President because either candidate, or both, are inhabitants of the same state as the elector."

[23] H.J.Res. 19 co-sponsors include, in alphabetical order: Representatives Julia Brownley, Jim Cooper, John Garamendi, Jared Polis, and Darren Soto.

[24] The 12th Amendment, in an effort to discourage presidential electors from voting exclusively for candidates from their home states, requires electors under the existing system to "vote by ballot for President and Vice President, *one of whom, at least, shall not be an inhabitant of the same state as themselves* [emphasis added]."

- Section 4 would implicitly set a plurality requirement for the popular vote winners.[25]
- Section 5 would authorize Congress to determine the "times, places, and manner of holding such elections and entitlement to inclusion on the ballot.... "
- Section 6 would authorize Congress to provide for death or disqualification of a candidate before the election or for the case of a tie vote in any election.
- Section 7 provides that the article would take effect on January 1 of the year following ratification.

H.J.Res. 19 was referred to the House Committee on the Judiciary on January 5, 2017, and to its Subcommittee on the Constitution and Civil Justice on January 11.

Analysis

With respect to voting age, the provisions of Section 2 would arguably empower Congress to set a lower voting age than 18, since the 26th Amendment effectively prohibits the denial of the right to vote to anyone age 18 or older. Another noteworthy provision in H.J.Res. 19 is the absence of the traditional seven-year ratification deadline. As noted previously, amendments proposed without a ratification deadline, either in the preamble/authorizing resolution, or in the body of the amendment, are theoretically capable of being ratified for an indefinite period after Congress sends them to the states. For example, as noted previously, the 27th Amendment was proposed without a ratification deadline in 1789; after nearly two centuries of neglect, it was revived and ratified in 1992.

H.J.Res. 65—The 'Every Vote Counts Amendment'

The proposal was introduced on February 7, 2017, by Representative Gene Green, who has been joined by 23 co-sponsors at the time of this writing.[26] The amendment is identical to H.J.Res. 102, introduced by Representative Green in the 114th Congress.

- Section 1 would provide for election of the President and Vice President "by the people of the several States" and the District of Columbia.
- Section 2 defines electors as persons eligible to vote for Senators and Representatives in Congress from each state, but authorizes state legislatures to prescribe "less restrictive qualifications with respect to residence." It also authorizes Congress to establish uniform residence and age requirements.
- Section 3 sets a plurality requirement for election: "[t]he persons having the greatest number of votes ... shall be elected."
- Section 4 incorporates the traditional joint candidacies for President and Vice President into the Constitution and prescribes that voters would cast a single vote for a joint candidacy.
- Section 5 authorizes Congress to provide by law for the cases of a candidate's death before the election, and for the case of a tie vote.

[25] "The pair of candidates having the greatest number of votes for President and Vice President shall be elected."

[26] H.J.Res. 65 co-sponsors include, in alphabetical order, Representatives Brendan Boyle, Julia Brownley, David Cicilline, Yvette Clarke, Steve Cohen, Joe Courtney, Peter DeFazio, Keith Ellison, Adriano Espaillat, John Garamendi, Al Green, Jared Huffman, Daniel Kildee, Ted Lieu, James McGovern, Mark Pocan, Janice Schakowsky, José Serrano, Brad Sherman, Darren Soto, Eric Swalwell, Juan Vargas, and Filemon Vela.

- Section 6 sets an effective date for the amendment of one year after the date of ratification, should it be approved by the states.

H.J.Res. 65 was referred to the House Judiciary Committee on February 7, 2017, and to its Subcommittee on the Constitution and Civil Justice on February 14.

Analysis

H.J.Res. 65, like its 114th Congress predecessor, H.J.Res. 102, would provide for direct popular election on a plurality basis, while also incorporating joint presidential-vice presidential tickets into the Constitution. It also proposes congressional authority to provide by law for certain elements of the presidential elections process traditionally administered by the states, such as age and residence requirements, the former presumably within the requirements of the 26th Amendment, as identified previously. H.J.Res. 65 follows traditional amendment procedures by establishing the customary seven-year ratification window in its preamble, rather than in the body of the amendment. This arguably makes it possible for Congress to extend the ratification deadline by congressional action.

Trends in Electoral College Reform

Aside from the introduction of new proposals late in the 114th and the early 115th Congress, the question of electoral college reform has been largely absent from the congressional agenda in recent years. The issue has, however, been the subject of considerable action in the states and the non-governmental sector over the past decade.

Non-Congressional Activity

Following the presidential elections of 2008 and 2012, a number of states considered alterations in their provisions for awarding electoral votes. Pennsylvania, Wisconsin, and Virginia all considered the district system; Colorado voters rejected a proposal to incorporate a proportional system for awarding votes in that state, while Nebraska considered abandoning the district system and a return to the general ticket, winner-take-all method of awarding electoral votes. To date, however, none of these initiatives has been enacted in the states. They are identified and analyzed in CRS Report R43824, *Electoral College Reform: Contemporary Issues for Congress*.

In the non-governmental sector, a public interest organization, National Popular Vote, Inc., has proposed the National Popular Vote initiative (NPV), which would establish direct election of the President and Vice President through an interstate compact. The origin of, asserted rationale for, and progress of the NPV are examined in CRS Report R43823, *The National Popular Vote Initiative: Direct Election of the President by Interstate Compact*.

Trends in Proposed Amendments Introduced in Congress

Within the context of contemporary congressional interest in electoral college reform and direct election of the President and Vice President, two trends may be identified.

- Amendments introduced in the past decade have all embraced the “end it” option, substituting direct popular election for the electoral college. No proposal to reform the electoral college has been introduced since the 107th Congress.
- The scope of proposed direct popular election amendments has arguably evolved in complexity and detail.

Given the contemporary context, some observers might suggest that the first development reflects a decline in electoral college support, lack of interest in reform proposals, or, alternatively, the absence of a sense of urgency on the part of its potential defenders. There is at present no organization of electoral college advocates or defenders, but that may be due to the issue's relative dormancy in recent years. If a proposal for direct election appeared to be developing momentum in Congress, however, it is arguably likely that supporters of the electoral college would coalesce to defend the current system, reformed, or "as is," if its existence were seriously challenged.

The second noteworthy trend in congressional proposals for reform is that, in addition to proposing direct popular election of the President and Vice President, some of them have also included provisions that would enable Congress to provide by law for enhanced federal authority in areas traditionally administered by state and local governments. Some of these elements, most notably "times, places, and manner," uniform residence standards, and candidate vacancy provisions, have been included in most reform proposals since the 1970s, and are derived from similar constitutional language. Other provisions, such as those providing a definition of citizenship for the purposes of voting, national voter registration, inclusion of U.S. territories and other associated jurisdictions in the presidential election process, establishment of an election day holiday, and congressionally-legislated federal ballot access standards for parties and candidates, are proposals that have more recently appeared in reform measures. If approved and ratified, an amendment that includes provisions such as these would provide Congress with enhanced authority to provide by law for broad national election standards, potentially superseding a range of current state, local, and political party practices and requirements, at least with respect to presidential elections.[27]

The prospect of an enlarged federal role in the administration of presidential elections raises several potential issues.

- Would expanded federal involvement in traditionally state and local practices impose additional responsibilities and uncompensated costs on state and local governments? If so, such requirements might be considered to be unfunded mandates, as they could impose additional costs on sub-federal governments, and as such would be subject to points of order on the floor of both the House and Senate.[28] One response by the affected state and local governments might be to call for federal funding to meet the increased expenses imposed by federal requirements. Precedent for this exists in the grant program incorporated in the Help American Vote Act of 2002 (HAVA).[29]
- Alternatively, would some election-administration functions formerly performed at the state and local level be transferred to the federal government? If so, what level of administrative support and infrastructure would be required, and what would the costs be of federal assumption of the management of substantial elements of the presidential election process?

[27] Congressional authority over federal elections stems from Article I Section 4, clause 1 of the Constitution for Congress, and Article II, Section 1, clause 4 for presidential electors. For further information and a detailed analysis of this authority, consult CRS Report RL30747, *Congressional Authority to Direct How States Administer Elections*, by Kenneth R. Thomas.

[28] For additional information, please consult CRS Report R40957, *Unfunded Mandates Reform Act: History, Impact, and Issues*, by Robert Jay Dilger.

[29] Help America Vote Act (HAVA): P.L. 107-252; 116 Stat. 1666.

- A related issue centers on perceptions that such an amendment and resultant legislation might be regarded as federal intrusion in state and local responsibilities. For instance, a far-reaching scenario could include the gradual nationwide assumption of election administration by the federal government. In this hypothetical case, questions could be raised by opponents 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) what would be the long-term implications for federalism. Conversely, it could be asserted by supporters that (1) a national or federal election administration structure is appropriate for national elections; (2) state or local concerns are counterbalanced by the urgent requirement that every citizen be enabled and encouraged to vote; and (3) every vote should be accurately counted.

Concluding Observations

The electoral college system has endured since the first presidential elections in 1789, notwithstanding over 700 reform proposals, three decades of congressional action from the 1940s through the 1970s, and the fact that in two of the five most recent elections a President has been elected with an electoral college majority but fewer popular votes than his principal opponents. What are some of the constitutional and political elements that may have contributed to its longevity?

Perhaps the most important factor contributing to the durability of the electoral college is Article V of the Constitution, which establishes procedures for constitutional amendments. The founders intentionally made it difficult to revise the Constitution, establishing requirements for three separate super-majority votes: by two-thirds in both houses of Congress and in three-quarters of the states. To this may be added the fact that Congress exercises still further influence on the amendment process because it can choose ratification by state legislatures, or by ad hoc state ratification conventions, at its discretion. In practice, the standard for ratification is even higher, since it is customary to attach a seven-year deadline for ratification to all proposed amendments. To date, no electoral college reform amendment has been able to meet these exacting requirements, notwithstanding sometimes vigorous action in Congress over the years.

Most successful constitutional amendments have emerged as responses to the stimulus of sudden transformative events, such as the 22nd Amendment, which established a two-term limit for Presidents in most instances, or benefitted from the "ripeness" of an idea that had been before the public for many years, such as the 26th Amendment, which extended the right to vote to citizens 18 years of age or older. Sometimes both factors contributed to the successful proposal and ratification of a proposed change to the Constitution, as was the case with the 25th Amendment, which governs presidential succession and disability.[30]

Committed and persistent advocacy and leadership among senior Members of both houses of Congress is another factor that has proved essential to the success of proposed constitutional amendments.

[30] The 22nd Amendment was widely viewed as a response to the unprecedented election of President Franklin D. Roosevelt as President four times. Setting the voting age at 18 had been debated for many years, during which time a favorable national consensus gradually emerged, before the 26th Amendment was proposed and ratified. The assassination of President John F. Kennedy provided a galvanizing impetus to congressional action on issues—presidential succession and disability—that had been discussed and debated since the disability of President Woodrow Wilson in 1919-1921, if not before.

Public awareness of the issue in question and a broad national consensus that reform was necessary have also historically contributed to the success of proposed amendments.

The 12th Amendment, to date the only major constitutional change to the electoral college system that met these qualifications, was a direct response to turmoil accompanying the presidential election of 1800. The failure of the original constitutional electoral college provisions led to a constitutional crisis that, once surmounted, motivated Congress to propose, and the states to ratify, the 12th Amendment, in what could be described as record time, considering the era. Although "public opinion" in its modern sense can scarcely be said to have existed at the time, America's political elites had been strongly influenced by the election and its aftermath. Today, by comparison, although substantial majorities of Americans, as measured by survey research, approve of direct popular election, neither a compelling national consensus nor the urgency of reform has been demonstrated with respect to the electoral college.

Finally, as noted above, successful amendments have almost always depended on support and focused effort by congressional leaders who helped move amendments through the legislative process in both chambers of Congress to proposal to the states and ratification by them. For instance, both the 25th and 26th Amendments enjoyed the approval and active support of then-House Judiciary Committee Chairman Emanuel Celler and Senator Birch Bayh, then-Chairman of the Senate Judiciary Committee's Subcommittee on the Constitution.

In summation, demonstrated need for an amendment, and in some instances demonstrated urgency, widespread awareness of, and a favorable consensus toward, the measure among the public, and committed congressional involvement, particularly in guiding proposals through the rigors of the amending process, have been key to the success of constitutional amendments in the past. The concurrent alignment of these factors would arguably be necessary for the advancement of electoral college reform in the 115th Congress.

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