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Source: *American Bar Association Journal*, Vol. 54, No. 3 (MARCH, 1968), pp. 249-255

Published by: [American Bar Association](#)

Stable URL: <http://www.jstor.org/stable/25724341>

Accessed: 21/02/2015 23:33

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The Electoral College: Why It Was Created

by John D. Feerick

Mr. Feerick traces the development of our electoral college system for electing the President through the days of debate and vacillation as to the manner of selecting the Chief Executive which took place at the Constitutional Convention. He presents the arguments raised and the alternatives suggested then and observes that objection to legislative election of the President on the one hand and doubt about the capability of the people for choosing the Chief Executive on the other led to settlement on the electoral college system.

CONGRESS IS NOW engaged in a major study of our system of electing the President. It may conclude that the electoral college should be retained as is, or modified, or abolished in favor of direct popular vote. In considering the question of reform, it is helpful to review the intent of the framers of the Constitution. This article attempts to trace the development of the electoral college provision at the Constitutional Convention and to describe the lines of thinking that led to its adoption.

When the founding fathers met in Philadelphia in 1787, the United States extended from the Atlantic to the Mississippi and from the Great Lakes almost to the Gulf of Mexico, embracing approximately 880,000 square miles. The country's population was close to 4,000,000 (excluding Indians), of which almost 700,000 were Negro slaves (90 per cent living in the South) and more than 2,300,000 were white women and children.¹ Most of the population was concentrated near the coast. Approximately 97 per cent of the people lived in rural areas—on farms and plantations and in log cabins and shacks. About 100,000 people lived beyond the Appalachian Mountains. Only five cities had a population over 10,000. Philadelphia

was the largest city, with about 40,000 people. Virginia, with close to 700,000 inhabitants, was the most populous state.²

In the America of 1787 the forest was the dominant land feature and agriculture was the principal means of livelihood. Industry existed on a small-scale handicraft basis. There was an absence of power-driven machinery, books were scarce, schools and libraries were few, and poverty and illiteracy were common. Horseback, wagon, stagecoach, boat and foot were the main modes of transportation. But, "roads were bad, bridges few, ferries leaky, rivers whimsical, stagecoaches cranky, and inns ill-kept".³ To go by stagecoach from Boston to New York was a journey of from three to six days; from New York to Philadelphia, two or more days. In the South transportation was even poorer since roads and stagecoaches were almost nonexistent. The mail and word-of-mouth were the principal channels of communication. Newspapers were usually distributed on a weekly basis, had limited circulations and contained mostly local news.

In pre-Constitution America political parties did not exist, and the right to vote was limited to a small frac-

tion of the total population. Each of the thirteen states had a chief executive, a legislature and a judiciary. A bicameral legislature existed in all but two of the states.⁴ In eight states the executive was chosen by the legislature.⁵ In four of the five where the governor was elected directly, he was chosen by the legislature if he did not obtain a majority of the popular vote.⁶

At the national level, the Articles of Confederation, which had become effective on March 1, 1781, constituted the basic charter of government. They vested the authority of the government in a Congress in which each state had a single vote. The assent of nine

1. These statistics are based on the 1790 census. U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1957 7-16 (1960).

2. Next was Pennsylvania (434,373); then North Carolina (393,751); Massachusetts (378,787); New York (340,120); Maryland (319,728); South Carolina (249,073); Connecticut (237,946); New Jersey (184,139); New Hampshire (141,885); Georgia (82,548); Rhode Island (68,825); and Delaware (59,096).

3. ROSSITER, 1787; THE GRAND CONVENTION 25 (1966).

4. Georgia became bicameral in 1789 and Pennsylvania in 1790.

5. He was elected by the people in Connecticut, Massachusetts, New Hampshire, New York and Rhode Island.

6. In New Hampshire and Massachusetts the house of representatives nominated two from the four highest candidates, and the senate selected the governor from the two. In Connecticut and Rhode Island the legislature selected the governor.

of the thirteen states was required for important decisions and the unanimous consent of all thirteen was necessary to amend the articles. Congress had no power to tax, to regulate domestic and foreign commerce or to enforce its decisions. Moreover, there was no national judiciary or chief executive. The articles merely permitted Congress to create such "committees and civil officers as may be necessary for managing the general offices of the United States under their direction". Although the Congress was empowered to appoint one of its members to preside over it as "President", he was little more than a presiding officer, serving for no more than one term of one year in any three years.

On February 21, 1787, the Congress decided that a constitutional convention should be held for the sole and express purpose of revising the articles. Thereupon, every state appointed delegates to attend, except Rhode Island, which opposed the movement toward a stronger national government. Seventy-four delegates were named but only fifty-five attended, of whom thirty-nine signed the final document. The group included the most prominent and influential men of the day—"thirty-nine former members of Congress, eight signers of the Declaration of Independence, twenty-one veterans of the Revolutionary War, seven who had been governors of states, and eight who had aided in the framing of state constitutions".⁷ Two were college presidents, three were or had been professors and more than one third were college graduates. Two-thirds were lawyers. Of the fifty-five delegates, five were under thirty years of age and four were sixty years or more. The average age was about forty-four. Generally, the framers were representative of the wealthier classes—merchants, bankers, professional men and plantation owners.

The Convention began its deliberations on May 25, 1787. Four days later, after the Convention had adopted its rules,⁸ the first plan for a national government was submitted by Edmund Randolph of Virginia. This plan (the Virginia Plan) recommended an entirely new framework of government consisting of an executive, a two-

house legislature and a judiciary. Both houses of the legislature were to be apportioned according to population. The lower house was to be elected by the people and the upper house was to be chosen by the lower from persons nominated by the state legislatures. The executive, whose term was not specified, was to be chosen by Congress and not eligible for re-election. The plan did not specify whether the executive should be single or plural. Another plan of government was introduced the same day by Charles Pinckney of South Carolina. Although the original of this plan has never been located, it is believed to have contained similar provisions regarding the executive.⁹

Various Plans for Choosing the President

On May 31 the convention resolved itself into a committee of the whole to discuss the Virginia Plan point by point. In committee, a number of proposals were made as to the method of electing the executive. It was proposed that the election be by the people;¹⁰ by Congress;¹¹ by the Senate alone;¹² by electors chosen by the people in districts within each state;¹³ by the state legislatures or by electors voting for candidates nominated by the state legislatures;¹⁴ or by the state executives, with each governor having as many votes as the state had in the election of the Senate.¹⁵

On June 13 the committee reported out the Virginia Plan, as amended. With respect to the executive, the committee recommended a single executive elected by Congress for seven years and not eligible for another term. It also suggested, to the dissatisfaction of the small states, that representation in both houses of Congress be proportional. On June 14 discussion of the Virginia Plan was postponed, at the request of William Paterson of New Jersey, so that another plan could be offered.

On the following day Paterson presented nine resolutions (the New Jersey Plan), which provided for the continuation of the Articles of Confederation with certain changes. The power of the Continental Congress was to be enlarged but the national gov-

ernment was not to be sovereign. There was to be a unicameral legislature in which each state would have one vote. The plan called for a supreme judiciary and a plural executive elected by Congress. The executive was to be ineligible for a second term and removable by Congress on application of a majority of the executives of the several states.

During the course of the intense debate which followed on whether the convention should proceed with the Virginia or New Jersey Plan, Alexander Hamilton of New York sketched his plan of government on June 18. It provided for an executive chosen for life by electors elected by the people in districts. Hamilton's plan was quietly received by the delegates and was never formally considered by the Convention.

On June 19 the convention rejected the New Jersey Plan and decided to proceed with discussion of the amended Virginia Plan. For the next few weeks the delegates devoted much of their time to the legislative article. When it appeared that they were irreconcilably at odds on a formula of representation in Congress, a committee of eleven was appointed to find a solution. On July 5 the committee suggested what became the Great Compromise of the Convention—an upper house in which all states would have

7. WARREN, *THE MAKING OF THE CONSTITUTION* 55 (1928).

8. It was decided, among other things, that not less than seven states would constitute a quorum and all questions would be determined "by the greater number of these which shall be fully represented", that each state would have one vote, and that any question already determined by a majority could be reconsidered.

9. See 3 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 606 (Farrand ed. 1911 & 1937) (hereinafter cited as *FARRAND*).

10. By James Wilson of Pennsylvania on June 1. This was the first proposal made in committee.

11. By Roger Sherman of Connecticut on June 1. He thought the executive should be absolutely dependent on Congress, since the latter's will was to be executed. His proposal was approved on June 2 by a vote of 8 to 2. Also approved was a provision that the executive be ineligible for a second term. 1 *FARRAND* 81, 87. A seven-year term was approved on June 1 and 2. On June 4 a motion was passed that there be a single executive.

12. By John Rutledge of South Carolina on June 1.

13. By Wilson on June 2. Wilson's proposal, under which all of the electors would meet at one place, was rejected 8 to 2. Pennsylvania and Maryland cast their votes for it. 1 *FARRAND* 81.

14. By Elbridge Gerry of Massachusetts.

15. By Gerry on June 9. It was overwhelmingly defeated. 1 *FARRAND* 175, 176.

equal votes and a lower house with proportional representation. After days of debate, the Great Compromise was adopted on July 16 by a vote of 5 to 4.

On the next day the delegates focused on recommendations for the method of electing the executive. The pros and cons of direct election and a legislative election were vigorously debated. Gouverneur Morris and James Wilson of Pennsylvania supported the former, while George Mason of Virginia, Roger Sherman of Connecticut and Charles Pinckney of South Carolina urged the adoption of the latter. On the vote, direct election was defeated 9 to 1;¹⁶ election by electors appointed by the state legislatures was rejected 8 to 2;¹⁷ and election by Congress was approved 10 to 0. The delegates also agreed that there should be a single executive and that he should be eligible for re-election.

Two days later, on July 19, the delegates reconsidered the method of electing the President. Thereupon, direct election was proposed by Gouverneur Morris, who said: "If [the President] . . . is to be the Guardian of the people let him be appointed by the people." James Madison of Virginia added that "the people at large was . . . the fittest" source.¹⁸ Other suggestions advanced on July 19 were election by electors chosen by the people,¹⁹ by electors chosen by the state legislatures with one to three electors for each state depending on the state's population,²⁰ and by electors appointed by the state executives.²¹ Wilson observed that "the idea was gaining ground, of an election mediately or immediately by the people". Reversing its actions of July 17, the convention then decided that the President should be chosen by electors appointed by the state legislatures.²²

On the following day, July 20, the delegates turned their attention to the number of electors. Madison suggested that it either be made temporary or flexible so as to adjust to the increasing population of the states. Elbridge Gerry of Massachusetts proposed, as he had the previous day, that in the first election, the electors be allotted in the proportion of one each for Delaware, Georgia, New Hampshire and Rhode Island, two each for Connecticut,

Maryland, New Jersey, New York, North Carolina and South Carolina; and three each for Massachusetts, Pennsylvania and Virginia. Gerry's proposal passed 6 to 4.²³

In another turnabout, the convention on July 24 reconsidered the electoral plan, rejected it and reinstated election by Congress.²⁴ Following this action, Wilson made the interesting proposal that Congress select by lot not more than fifteen of its members as electors and that they proceed immediately to the choice of President. When a few delegates objected on the ground that the proposal left too much to chance, Wilson said it was not his best proposal, since "his opinion remained unshaken that we ought to resort to the people for the election". No vote was taken.

On July 25 the delegates once again reconsidered the method of electing the President. Among the proposals made, but not adopted, were that he be chosen by: Congress and, when running for re-election, by electors appointed by the state legislatures;²⁵ the chief executives of the states, with the advice of their councils or, if no coun-

cils, with the advice of electors chosen by their legislatures;²⁶ electors chosen by the state legislatures, with the votes of all states equal;²⁷ the people;²⁸ and the people of each state choosing its best citizen and Congress, or electors chosen by it, selecting the President from those citizens.²⁹

On July 26, after deciding that the President should be ineligible for a second term and be appointed for seven years, the convention adjourned so that its committee of detail could draft a constitution embodying the principles which had been adopted. On August 6 the committee reported, and in Article X of its report recommended a single executive chosen by Congress for a term of seven years and not re-eligible. During the next several weeks the report of the committee was examined clause by clause.

The recommendations regarding the election of the President were taken up on August 24. Daniel Carroll of Maryland promptly made a motion, seconded by Wilson, to substitute direct popular vote. The motion was rejected 9 to 2.³⁰ Gouverneur Morris then proposed that the President be selected by

16. Pennsylvania was the only state to vote in favor of the proposal. 2 FARRAND 32.

17. This method was recommended by Luther Martin of Maryland. See note 34 *infra*.

18. However, said Madison, "there was one difficulty . . . of a serious nature attending an immediate choice by the people. The right of suffrage was much more diffusive in the Northern than the Southern States; and the latter could have no influence in the election on the score of the Negroes. The substitution of electors obviated this difficulty and seemed on the whole to be liable to the fewest objections." 2 FARRAND 57.

19. By Rufus King of Massachusetts.

20. By Oliver Ellsworth of Connecticut. A substantially identical proposal was made by William Paterson.

21. By Gerry. Gerry's favorite proposal was for an election by the state executives.

22. This vote came about after the states had divided on Ellsworth's motion. See text accompanying note 20. A separate vote was taken on the question of whether the executive should be appointed by electors. It passed 6 to 3. Another then was taken on the question of whether the electors be appointed by the state legislatures. It passed 8 to 2. The convention rejected a motion that the President be made ineligible for re-election, and it approved a term of six years instead of seven.

23. 2 FARRAND 64. A motion by Ellsworth that two electors be given to New Hampshire, since its population was over 100,000, and to Georgia was defeated 7 to 3. No vote was taken on a motion by Williamson to amend Gerry's proposal so that in future elections the number of electors would be regulated by the number of representatives each state had in the House of Representatives. A motion by Gerry and Gouverneur Morris that the electors could not be members of Congress, officers of the United States, or candidates for President was passed.

24. The vote was 7 to 4. William Houstoun

of Georgia made the motion resulting in this vote. He argued that it was improbable "capable men would [serve as] . . . electors from the more distant states". During the debate Gerry, who felt the best men would so serve, suggested that the state legislatures vote for President in the same proportion as they would choose electors. If no candidate received a majority, the House would nominate two candidates from the four highest, and the Senate would choose the President from the two. There was practically no support for this proposal.

25. By Ellsworth. It was defeated 7 to 4.

26. By Gerry.

27. By Pierce Butler of South Carolina.

28. By Gouverneur Morris, John Dickinson of Delaware and Madison. Summarizing the defects in the various methods that had been proposed, Madison concluded that the choice lay between an election by electors chosen by the people and direct election. He stated that he liked direct election "best" and that, although he was from the South where the suffrage was limited, he was "willing to make the sacrifice", since "local considerations must give way to the general interest".

29. With respect to direct election, Hugh Williamson of North Carolina suggested on July 25 that each voter cast three votes. Gouverneur Morris and Madison favored the casting of two votes, one of which could not be cast for a person from the voter's own state. These proposals were designed to overcome the supposed partiality of the people to citizens of their own states.

30. By Dickinson, who regarded the people as the "best and purest source". In making this proposal, Dickinson said that the "greatest difficulty" with a popular vote "seemed to arise from the partiality of the States to their respective Citizens". His proposal was designed to turn that partiality to a "useful purpose".

31. 2 FARRAND 402. Pennsylvania and Delaware voted for the motion.



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electors chosen by the people. This proposal was defeated by a vote of 6 to 5.³¹ On the question of using electors to select the President, the states were equally divided and therefore the proposition failed.

One week later, on August 31, Wilson observed that the method of choosing the President had not been "yet finally determined . . .".³² A committee of eleven was then commissioned to report on those parts of the Constitution which had been postponed or not acted upon.³³

On September 4 the committee presented a partial report which recommended an office of Vice President and a change in the method of electing the President. It suggested that the President and Vice President be chosen for four-year terms by electors who, in

turn, would be selected in such a manner as the state legislatures might establish. Each state would be entitled to a number of electors equal to its total representation in Congress. The committee's plan called for the electors to meet in their respective states and vote by ballot for two persons for President, one of whom could not be an inhabitant of their state. These votes were to be listed, certified, sealed and sent to the President of the Senate, and then opened and counted. The person who received the greatest number of votes would be President provided that number were a majority of the number of electors. If more than one person had such a majority and the same number of votes, then the Senate would choose one of them for President by ballot. If no one had a majority, the Senate would choose the President from the five highest on the list. The Vice President would be the person having the greatest number of votes after the President had been chosen. If more than one had such a number, the Senate would choose the Vice President from among them.

On September 4, 5 and 6 vigorous debate took place regarding the proposed method of electing the President.³⁴ Said Wilson:

This subject has greatly divided the House and will also divide people out of doors. It is in truth the most difficult of all on which we have had to decide.

31. 2 FARRAND 404. The five voting in favor were Connecticut, Delaware, New Jersey, Pennsylvania and Virginia. The delegates also discussed on August 24 whether the election by Congress should be by a joint vote of both houses or by separate sessions. The former was approved.

32. This was underscored when the convention, by a vote of 9 to 1, eliminated the reference to the legislative method in that portion of the committee of detail's report dealing with the first election. See FARRAND 180, 480.

33. Its members were Abraham Baldwin of Georgia, David Brearley of New Jersey, Pierce Butler of South Carolina, Daniel M. Carroll of Maryland, John Dickinson of Delaware, Nicholas Gilman of New Hampshire, Rufus King of Massachusetts, James Madison of Virginia, Gouverneur Morris of Pennsylvania, Roger Sherman of Connecticut and Hugh Williamson of North Carolina. Because its delegates were absent, New York was not represented on the committee.

At this juncture in the convention the alignment of many delegates on the question was fairly clear. Sherman, Rutledge, Randolph, Pinckney, Houston, Spaight and Mason had expressed their support for an election by Congress. Wilson, Madison, Morris, Dickinson and Carroll, on the other hand, had advo-

The Reasons for the Electoral College

At the outset of the debate on September 4 Gouverneur Morris listed the committee's reasons, and his own, for the creation of the electoral college. If the President were elected by Congress, he said, there would be the danger of intrigue and faction, the inconvenience of an ineligibility for re-election required by that method and the difficulty of finding a body other than Congress to handle impeachments. Morris continued, "No body had appeared to be satisfied with an appointment by the Legislature. . . . Many were anxious even for an immediate choice by the people." "It was an indispensable necessity", he said, that the President be independent of Congress. He declared that the electoral method avoided the "great evil of cabal" and made it "impossible also to corrupt" the electors, since they were to vote at the same time throughout the United States and at a great distance from each other. Morris stated that the Senate was selected for the contingent election "because fewer could then, say to the President, you owe your appointment to us".

During the debate several delegates strongly objected to the proposal on the ground that most elections would be thrown into the Senate.³⁵ They said variously that no candidate would obtain a majority of the electoral votes because the electors would be attached

ated direct election. Additionally, Madison, Morris and Wilson, along with Hamilton and King, also had indicated their support for a system of electors chosen by the people. Gerry, Ellsworth, Butler, Luther Martin and Paterson had proposed a system of electors chosen by the state legislatures. Williamson had criticized the introduction of Presidential electors, particularly those chosen by the people. 1 FARRAND 81; 2 FARRAND 58, 100. He felt electors would make the government more complex and would not be persons of the highest caliber. Caleb Strong of Massachusetts had expressed a similar view. 2 FARRAND 100.

34. The electoral college plan seems to have been patterned after the Maryland system of electing state senators under the constitution of 1776. Senators were chosen by forty electors who, in turn, were selected on a county basis by the qualified voters. Each county selected two electors except Annapolis and Baltimore, which chose one each. The electors took an oath to select as senators persons "as they, in their judgment and conscience, believe best qualified for the office"—men "of the most wisdom, experience and virtue". See ANDREWS, HISTORY OF MARYLAND: PROVINCE AND STATE 330-331 (1929). This system was replaced by popular election in 1837.

35. These were Mason, Hamilton, Pinckney, Rutledge and Williamson.

to citizens of their own states or would be strangers to the candidates and unable to judge and decide on their merits. Other delegates felt that persons of national reputation would increase as intercourse among the states increased. To them, the possibility of the Senate electing the President was remote.

In order to prevent a contingent election, Mason and Hamilton suggested the elimination of the requirement that the President obtain a majority of the electoral votes. The objection that a person could be elected with a small number, said Hamilton, was offset by the fact that "the Senate may take the candidate having the smallest number of votes, and make him President". Mason's motion to eliminate the majority vote was defeated 9 to 2, as was a subsequent motion by Madison and Williamson to reduce the required vote to one third.³⁶

Another subject of discussion was whether the contingent election should be assigned to the Senate.³⁷ Gerry suggested that the contingent election be by six Senators and seven Representatives chosen by joint ballot of both houses. Wilson suggested that it be given to Congress. He argued that if the Senate were to select, it would try to scatter the electoral votes to get the election before it. The President then would "not be the man of the people as he ought to be, but the Minion of the Senate". Wilson was also among the delegates who felt the Senate was not suitable because of its roles in the impeachment, treaty-making and appointive processes. Others believed that the small states would have too much influence in selecting the President, while some delegates argued that it was proper for small states to have such an influence, since it would balance the influence of the large states in the original election. Sherman argued that if Congress were to select, the vote should be taken by states in view of the advantage the large states would have in nominating candidates.

Madison expressed the view that a contingent election by Congress should be rendered remote. He reasoned that if Congress, in which large states would predominate, had the final choice, the large states would devote

most of their time to nominating candidates instead of concentrating on an "effectual appointment". If the Senate, in which small states would be predominant, had the final say, the large states would do their utmost to make the first election conclusive.

The Convention Finally Decides

On September 6, the convention made its final decisions: that the President be selected by electors chosen by the state legislatures (9 to 2); that a vote of a majority of the electors appointed be necessary for election as President (8 to 3); and, on motion by Sherman, that the contingent election of the President be by the House of Representatives, with each state having one vote (10 to 1).³⁸

On September 7 the electoral college proposal was amended, on Gerry's motion, to require a concurrence of a majority of all the states in the election of the President by the House of Representatives.³⁹ On the following day the Constitution was referred to a committee of style empowered to "revise the style of and arrange the articles agreed to by the House". The committee made no substantive changes in the electoral college method,⁴⁰ and on September 17 the Constitution was

sent to the states for ratification by popularly elected conventions.

There was little discussion in the ratifying conventions regarding the method of electing the President. In the North Carolina, Pennsylvania, South Carolina and Virginia conventions, delegates stressed that the people would have a vital role in selecting the President under the electoral college system. Thus, at the Pennsylvania convention James Wilson stated that the choice of President "is brought as nearly home to the people as is practicable. With the approbation of the state legislatures, the people may elect with only one removed."⁴¹ At the South Carolina convention, Charles Cotesworth Pinckney asserted that the President was "to be elected by the people, through the medium of electors chosen particularly for that purpose".⁴²

The electoral college provision underwent some criticism at the Virginia convention. James Monroe said that since the President was to be elected by electors, he would "owe his election . . . to the state governments, and not to the people at large" as he "ought to . . .".⁴³ George Mason argued that it would not be "once out of fifty" that the President would be chosen by the people in the first instance, because a majority of the votes of all

36. Gerry voiced the objection that a one-third vote would put the election into the hands of three or four states. In reply, Williamson remarked that less than one sixth of the people would have the power in the Senate, since seven of the thirteen states had less than one third of the population. The motion was defeated 9 to 2.

37. A related question involved was as to the number of candidates to be considered in the contingent election. The committee of eleven recommended five so that "obscure characters" would be excluded.

38. The committee's recommendations regarding the Vice President were accepted. Other motions which passed on September 5 and 6 were that: the electoral votes be counted in the presence of the Senate and House of Representatives; the election be on the same day throughout the United States; a member or members from two thirds of the states be required for a quorum in the House; no person be appointed an elector who was a member of Congress or held an office of profit or trust under the United States; and that the President and Vice President be elected for four years and be eligible for re-election. Among those motions which failed were that: discussion of the legislative method be resumed; all the electors meet at the seat of the national government and decide without any reference to the Senate; the majority be of the electors "who voted"; the contingent election be in Congress and the vote be by states; and that a majority of the House be present at the contingent election.

39. Prior to this motion, a majority of the states present could elect the President, provided there was a quorum of two thirds of the states. Madison noted during the September 7 discussion that "the representatives of

a minority of the people, might reverse the choice of a majority of the States and of the people". 2 FARRAND 536.

40. Although the method of selecting the electors was left to the state legislatures, it is interesting to note that when the report of the committee on style was considered on September 12, Madison remarked: "He [the President] is now to be elected by the people and for four years." 2 FARRAND 587. It is also noteworthy that Mason, in referring to the proposal which passed the convention on July 19 (i.e., selection by electors appointed by the state legislatures), stated on July 26: "It has been proposed that the election should be made by Electors chosen by the people for that purpose." 2 FARRAND 119. Similar expressions regarding the role of the people appear in Nos. 39, 64, 68 and 69 of THE FEDERALIST. See also text accompanying notes 41-42 *infra* and note 43.

41. 2 ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 512 (2d ed. 1836).

42. 4 *id.* at 304.

43. 3 *id.* at 488. In contrast, Edmund Randolph, who preferred election by Congress, stated at the Virginia convention: "How is the President elected? By the people—the same day throughout the United States—by those whom the people please." *Id.* at 201. Madison declared that there was no better way than the electoral college of selecting the person in whom the people would place their "highest confidence". *Id.* at 494. He also pointed out that the contingent election provision, while objectionable, was designed to give small states an advantage to compensate for the advantage possessed by large states in the electoral voting for President. *Id.* at 495.

the electors was required for election.⁴⁴ Mason further argued that by allowing the House of Representatives to choose from the five highest, persons with small numbers of votes would be “constantly” elected.

Generally, the electoral college was favorably considered in the ratifying conventions. Said Alexander Hamilton in No. 68 of *The Federalist*:

The mode of appointment of the chief magistrate of the United States is almost the only part of the system, of any consequence, which has escaped without severe censure, or which has received the slightest mark of approbation from its opponents.

Hamilton added that if the electoral college method “be not perfect, it is at least excellent”.

The Framers’ Reasons for Creating the College

In retrospect, it is clear that the framers settled upon the electoral college partly because of the objections to a legislative election. While election by Congress received the stamp of approval on several occasions at the convention, the predominant view among the delegates seemed to be that such a method would involve cabal, corruption and possible foreign influence. It also was felt that under that method, the President would have to be ineligible for a second term; otherwise, he would be too dependent on Congress, since he would have to court its members for re-election. An ineligibility requirement was not favored because, among other things, it would remove some of the incentive for doing a good job and would deprive the country of further service from Presidents who had demonstrated a capacity to govern.

Another reason for the adoption of the electoral college was the strong feeling of many delegates that the method of electing the President should involve the people and have their confidence. “It was desirable”, said Hamilton in No. 68 of *The Federalist*, “that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided.” Direct election, which had impressive support, was rejected largely because of the belief that the people did not possess the necessary knowledge

and judgment to vote for President. Mason, who favored an election by Congress, had this to say on July 17:

[I]t would be as unnatural to refer the choice of a proper character for chief Magistrate to the people, as it would, to refer a trial of colours to a blind man. The extent of the Country renders it impossible that the people can have the requisite capacity to judge of the respective pretensions of the Candidates.

On July 25 Gerry argued that the “ignorance of the people” would make it possible for an organized group such as the Society of the Cincinnati⁴⁵ to “in fact elect the chief Magistrate in every instance, if the election be referred to the people”. It was also asserted during the debates that the people would be partial to candidates from their own states, so that a popular vote would favor the large states; that the people would be unable to give one candidate a majority of the votes; and that direct election would place the Southern states at a disadvantage due to limited suffrage.

The Electoral College—“Free of Cabal”

When direct election failed to muster enough support for passage, Madison, Wilson and Morris, the leading supporters of that method, turned their attention to and became the chief architects of the electoral college. They, as others, believed that the college would bring the election as close to the people as possible, except for direct election itself, and would be free of cabal and corruption. The delegates felt they had sufficiently guarded against cabal and corruption by having the President elected by electors chosen specially for that purpose instead of by a pre-established body which could be tampered with; by excluding from eligibility as electors those who might be partial to the President in office; by requiring the electors to assemble on the same day within their respective states, which would expose them to fewer pressures than if they were all to meet together at one place; by requiring the electoral votes to be listed, certified, sealed and sent to the President of the Senate, and then opened and counted by him

before a joint session of Congress; and by directing the House of Representatives to choose the President immediately in the event no one had a majority.

The evidence is compelling that most of the framers envisioned a system under which persons of the highest caliber would be chosen as electors. These electors would meet quadrennially in their respective states on the same day; examine and consider the merits of qualified persons for President; and, exercising their own judgment, cast two intelligent electoral votes for the persons of their choice. In casting their votes, they would take into account the views of the people, but not be bound by them.⁴⁶ It appears that many of the framers assumed that the state legislatures would provide for a popular election of electors.⁴⁷

The assignment of a number of electoral votes to each state in accordance with the state’s representation in Congress does not appear to have been, as often is contended, a compromise of any significance between large and small states. Indeed, the debates are practically silent regarding this provision. Rather they reveal that the large-small state compromise in the electoral college area was with respect to the contingent election provision, under which each state would have one vote in the House of Representatives regardless of its population. This equal-

44. Mason declared that the electoral college was “a mere deception—a mere *ignis fatuus* on the American people,—and thrown out to make them believe they were to choose” the President. “The people will, in reality, have no hand in the election.” *Id.* at 493.

45. This was an association of army officers formed at the close of the Revolutionary War to perpetuate friendships, promote the welfare of the country and aid members and their families. Membership was restricted to officers and was also hereditary. George Washington was the society’s first president.

46. Alexander Hamilton expressed in No. 68 of *THE FEDERALIST* the widely held view that under the electoral college system the election of the President “should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favourable to deliberation and to a judicious combination of all the reasons and inducements, which were proper to govern their choice. A small number of persons, selected by their fellow citizens from the general mass, will be most likely to possess the information and discernment requisite to so complicated an investigation.” See also No. 64.

47. In the early days of the nation, however, the state legislatures used a variety of methods of selecting the electors, including election by the legislatures themselves. See Paullin, *Political Parties and Opinions, 1788-1930*, *THE ATLAS OF THE HISTORICAL GEOGRAPHY OF THE UNITED STATES* (1932).

ity of voting was designed to compensate small states for the advantage possessed by large states in the electoral voting. A number of the framers were of the view that most elections would actually be decided in Congress.

An examination of Presidential elections from 1789 to the present makes it plain that the system which emerged in practice is not the system contemplated by the founding fathers.⁴⁸ As a Senate select committee stated in 1826:

In the first election held under the Constitution, the people looked beyond these agents, fixed upon their candi-

dates for President and Vice President, and took pledges from the electoral candidates to obey their will. In every subsequent election the same thing has been done. Electors, therefore, have not answered the design of their institution. They are not the independent body and superior characters which they were intended to be. They are

not left to the exercise of their own judgment; on the contrary, they give their vote, or bind themselves to give it, according to the will of their constituents. They have degenerated into mere agents, in a case which requires no agency, and where the agent must be useless, if he is faithful, and dangerous if he is not.⁴⁹

48. It should be noted that the Twelfth Amendment, adopted in 1804, effected several changes in the electoral college framework. It provided for separate votes for President and Vice President; required each to obtain a majority of the total number of electors appointed; reduced to three the number of candidates to be considered by the House of Representatives in a contingent election for President; and in the contingent election for

Vice President, limited the Senate's choice to the candidates having the highest two numbers.

49. SENATE SELECT COMMITTEE, RESOLUTIONS PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, S. REP. NO. 22, 19th Cong., 1st Sess. 4 (1826). See generally AMERICAN BAR ASSOCIATION COMMISSION ON ELECTORAL COLLEGE REFORM, ELECTING THE PRESIDENT (1967).

Law Firms Included in 1967 Census of Business

FOR THE FIRST time in a business census, law firms will take an active part in developing the over-all picture of the nation's economy by participating in the 1967 economic censuses, according to the United States Department of Commerce's Bureau of the Census. No previous attempt has been made to provide a detailed picture of law firm business like that provided by the regular economic censuses for the retail, wholesale and service trades and the mining and manufacturing industries.

Law firms being canvassed in the census received census questionnaires by mail in February to obtain data

covering 1967. Completion of these questionnaires is required by law. All answers on the census forms are confidential and are used only to produce statistics.

All law firms taking part in the census are asked to complete and return their reports as soon as possible after receiving them, although the due date is April 30, 1968. Census Bureau officials indicate they prefer to have forms returned promptly even if it is necessary to use some estimates. This will tend to reduce the reporting burden and will speed up publication of reports.

Census questionnaires have been sent to all of the large law firms and a

scientifically selected sample of smaller firms with employees. Government administrative records will be used to provide information for small firms without employees.

Results of the 1967 census of business will be published in a series of reports to begin appearing late in 1968. Data for law firms will be published in a separate report containing summary information for the United States as a whole, for the states and for standard metropolitan statistical areas. The report will also contain detailed information on the nature and form of practice, classes of client, expenses and receipts, payroll and employment.

TAX PROCEEDINGS

The Section of General Practice offers to members of the American Bar Association a free copy of the proceedings of the tax program sponsored by the Section of General Practice in co-operation with the Section on Taxation

Place: Honolulu, Hawaii
 Time: August 8, 1967
 Subjects: Tax problems in marriage, divorce, and separation
 Tax problems in real estate acquisition and disposition
 Tax problems in estate planning and implementary instruments
 Litigation and deductible legal fees
 Attorney's personal tax problems

Copies of these proceedings may be secured at no cost upon request to the Section of General Practice, American Bar Association, 1155 East 60th Street, Chicago, Illinois 60637.