

# CRS Report for Congress

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## **The Electoral College: Reform Proposals in the 107<sup>th</sup> Congress**

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# The Electoral College: Reform Proposals in the 107<sup>th</sup> Congress

## Summary

The United States Constitution provides for indirect election of the President and Vice President by a group of officials known collectively as the electoral college. For additional information on contemporary operation of the system, consult CRS Report RS20273, *The Electoral College: How It Works in Contemporary Presidential Elections*.

Critics contend that the electoral college is archaic and undemocratic, that it provides an unfair advantage to less populous states; that the “winner-take-all” provision, by which most states award all their electoral votes to the candidates winning the most popular votes, deprives many voters of any influence in the election; and that the system has the potential to elect a President who receives more electoral votes, but fewer popular votes, than his principal opponent. Further, they assert, the contingent election process, by which Congress elects the President and Vice President if no candidates receive an electoral college majority, is even less democratic. For additional information on contingent election, consult CRS Report RS20300, *Election of the President and Vice President by Congress: Contingent Election*. Supporters maintain that the electoral college is an integral element of the federal system, that the need to accrue state-by-state majorities is a strong support of the two party system, and that the system has delivered clear electoral mandates in all but four elections since 1804.

Following the closely contested presidential election of 2000, in which the winning candidates for President and Vice President gained fewer popular votes than their major party opponents, there was renewed congressional interest in electoral college reform. For additional information on electoral college contingencies and broader aspects of reform proposals, consult CRS Report RL30804, *The Electoral College: An Overview and Analysis of Reform Proposals*.

Seven proposals to reform the electoral college system were introduced in the 107<sup>th</sup> Congress. H.J.Res. 3 (Representative Green of Texas), and H.J.Res. 5 (Representative Delahunt), eliminating the electoral college and substituting direct popular election of the President; H.J.Res. 1 (Representative Clyburn), H.J.Res. 18 (Representative Engel), and H.J.Res. 37 (Representative Clement) incorporating the “district” method of awarding electoral votes; and H.J.Res. 17 (Representative Engel), providing for proportional award of electoral votes. H.J.Res. 25 (Representative Leach) was a hybrid plan. No action was taken on these measures, other than referral to the House Committee on the Judiciary. Instead, attention in the 107<sup>th</sup> Congress focused on election administration reform. For more information on this subject, please consult CRS electronic briefing book, *Election Reform*, available to Members of Congress and congressional staff at the CRS web site [<http://www.congress.gov/brbk/html/eberf1.shtml>]. This report will not be updated.

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# The Electoral College: Reform Proposals in the 107<sup>th</sup> Congress

## Introduction

American voters elect the President and Vice President of the United States under a complex arrangement of constitutional provisions, federal and state laws, and political party practices known as the electoral college system. Despite occasional close elections, this system has delivered uncontested results in 46 of 50 elections since adoption of the 12<sup>th</sup> Amendment, effective in 1804. Throughout this period, however, it has been the subject of persistent criticism and many reform proposals. In 2000, in an extremely close election, the presidential and vice presidential candidates who received a majority of electoral votes, and thus won the election, gained fewer popular votes nationwide than the electoral college runners-up. This situation, which was followed by a period of intense legal and political activity, generated renewed interest in Congress in proposals for reform.

## Direct Popular Election v. Electoral College Reform

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

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

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

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

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

Most versions of these plans would eliminate the office of elector, and award electoral votes directly to the candidates. In common with direct election, most would also require joint tickets of presidential-vice presidential candidates.

## **Electoral College Reform: Pro and Con in Brief**

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

- They assert that direct popular election would provide for a single, democratic, choice in which all the nation’s voters would directly elect the two highest ranking officials in the United States government, the President and Vice President.
- The candidates who won the most popular votes would always win the election, and in the event no one received at least 40% of the vote, a runoff election between the two leading tickets would decide the choice. (Some direct election proposals would substitute election by joint session of Congress for a runoff in the event no ticket received at least 40% of the vote.)
- Every vote would carry the same weight in the election, no matter where in the nation it was cast.

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

- All the various mechanisms of the existing system, such as the contingent election process, would give way to these simple requirements.<sup>3</sup>

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

- The electoral college, they argue, is almost the antithesis of this simple and democratic concept. It is, they contend, philosophically obsolete: indirect election of the President is an anachronism that dates from the 18<sup>th</sup> century which has no place in the 21<sup>st</sup>.
- Moreover, the 12<sup>th</sup> Amendment provisions governing cases in which no candidate attains an electoral college majority (contingent election) are even less democratic than the primary provisions of Article I Section 1 (see footnote 3).
- By providing a fixed number of electoral votes per state that is adjusted only after each census, the electoral college does not accurately reflect state population changes in intervening elections.
- The two “constant” or “senatorial” electors assigned to each state regardless of population give some of the nation’s least populous jurisdictions a disproportionate advantage over more populous states.
- The office of presidential elector itself, and the resultant “faithless elector” phenomenon,<sup>4</sup> provide opportunities for political mischief, and deliberate distortion of the voters’ choice.
- By awarding all electoral votes in each state to the candidates who win the most popular votes in that state, the “winner-take-all” or “general ticket” system effectively disenfranchises everyone who voted for other candidates. Moreover, this same flawed arrangement is the centerpiece of one category of electoral college reform proposals, the Automatic plan.
- Finally, the electoral college system has the potential to elect presidential and vice presidential candidates who obtain an electoral college majority, but fewer popular votes than their opponents, as happened in 2000.

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

<sup>4</sup> Faithless electors are those who cast their votes for candidates other than those to whom they are pledged. Notwithstanding political party rules and state laws, most constitutional scholars believe that electors remain free agents, guided, but not bound, to vote for the candidates they were elected to support.

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

- They reject the suggestion that it is undemocratic. Electors are chosen by the voters in free elections, and have been in nearly all instances since the first half of the 19<sup>th</sup> century.
- The electoral college system prescribes a federal election of the President by which votes are tallied in each state. The founders intended that choosing the President would be the action of citizens of a federal republic, in which they participate both as citizens of the United States, and as members of their state communities.
- While electoral vote allocation does provide the “constant two,” or “senatorial” electors for each state, regardless of population, this is another federal element, and is no less justifiable than equal representation for all states in the Senate. Moreover, the same formula also assigns additional electors equal in number to each state’s delegation in the House of Representatives, which more than compensates for any minor distortion.
- Further, defenders reject the suggestion that less-populous states like Alaska, Delaware, and Wyoming, each of which casts only three electoral votes, are somehow “advantaged” when compared with California (55 electoral votes beginning in 2004), which casts more than 20% of the electoral votes needed to win the presidency.
- The electoral college system promotes political stability. Parties and candidates must conduct ideologically broad-based campaigns throughout the nation in hopes of assembling a majority of electoral votes. The consequent need to forge national coalitions having a wide appeal has been a contributing factor in the moderation and stability of the two-party system.
- The faithless elector phenomenon is unimportant. Only nine such electoral votes have been cast against instructions since 1820, and none has ever influenced the outcome of an election. Moreover, nearly all electoral college reform plans would remove even this slim possibility for mischief by eliminating the office of elector.

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

- Direct election proponents claim their plan is more democratic, and provides for “majority rule,” yet most direct election proposals require winning candidates gain as little as 40% of the vote in order to be elected. How can such plurality Presidents be reconciled with the concept of “majority rule”?
- As was demonstrated in the presidential election of 2000, close results in a single state in a close election are likely to be bitterly contested. Under direct election, every close contest could resemble the post-election struggles in 2000, but on a nationwide basis, as both parties seek gain every vote. Such rancorous

disputes could have profound negative effects on political comity in the nation, and possibly even the stability of the federal government..

## Reform Proposals in the 107<sup>th</sup> Congress

This section lists and examines proposed constitutional amendments introduced in the 107<sup>th</sup> Congress that sought to change or reform the presidential election system. These proposals were divided into two categories: those that sought to establish direct popular election, and thus eliminate the electoral college system entirely, and those that aimed at reforming the existing arrangements. Seven electoral college reform proposals were introduced in the 107<sup>th</sup> Congress: H.J.Res. 1, introduced by Representative Clyburn; H.J.Res. 3, introduced by Representative Green of Texas; H.J.Res. 5, introduced by Representative Delahunt; H.J.Res. 17 and H.J.Res. 18, both introduced by Representative Engel; H.J.Res. 25, introduced by Representative Leach; and H.J.Res. 37, introduced by Representative Clement. These measures took the form of joint resolutions, the customary vehicle for constitutional amendments.

### Direct Popular Election Proposals.

***H.J.Res. 3 (Representative Green of Texas).*** This amendment sought to establish direct election of the President and Vice President, with the President and Vice President elected “by the people” (Section 1), and “The persons having the greatest number of votes” (Section 3) were to be elected. Section 2 prescribed voting qualifications as the same for those for Senators and Representatives, but would have empowered the states to set less restrictive residence requirements. It also empowered Congress to set uniform national residence and age qualifications for voters. Section 4 mandated joint presidential-vice presidential candidacies and a single vote for both offices, and Section 5 authorized Congress to provide by law for cases in which a candidate died before the election, or in the event any election ended in a tie. Section 6 was a standard enacting clause.

Although H.J.Res. 3 included most of the provisions common to direct popular election proposals, it also had several distinguishing features.

First, it did not set a minimum percentage of popular votes as necessary for election. In contrast, many similar measures seek to require that the winning candidates receive at least 40% of the popular vote,<sup>5</sup> with the rationale that this percentage would constitute a minimum acceptable threshold for a mandate from the voters. If the 40% threshold were not attained, then these proposals would require a runoff election contested by the two presidential-vice presidential tickets that had gained the most popular votes. Other versions of direct election have provided that Congress, meeting in joint session, would elect the President and Vice President if no ticket attains the 40% vote threshold.

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<sup>5</sup> This provision anticipates a presidential election contested by three or more major candidates. It is interesting to note that the only President elected with less than 40% of the popular vote under the current electoral college system was Abraham Lincoln, who won with 39.8% in 1860.



Second, Section 2 would have empowered Congress (1) to set uniform residence requirements by law for voters for President, a function currently performed by the states; and (2) to set voting age qualifications by law. This latter provision of the section would appear to provide Congress with a substantial new power: the authority to lower (or raise) the voting age by law, rather than by constitutional amendment.

A third distinguishing feature of this amendment was found in Section 5. In this section, Congress was authorized to provide by law to name replacements in "... the case of the death of any candidate for President or Vice President *before* (emphasis added) the day on which the President-elect or Vice President-elect has been chosen..." At present, this is done through internal party rules. Section 5 would have empowered Congress to supplant these party procedures by legislation.

Finally, the seven-year time limit for ratification of this proposed amendment was included in the preamble to the resolution, rather than in the body of the amendment. This arrangement, which would have allowed Congress to extend the ratification time limit by joint resolution, was incorporated in all six reform measures pending in the 107<sup>th</sup> Congress.

**H.J.Res. 5 (Representative Delahunt).** This measure sought to establish direct popular election of the President and Vice President in Section 1. In common with H.J.Res. 3, it did not set a 40% popular vote threshold as a prerequisite to election. Section 2 set voting qualifications identical to those found in Section 2 of H.J.Res. 3. Section 3 mandated joint candidacies, and Section 4 would have empowered Congress to provide by law in the event of a tie vote. Section 5 sought to establish procedures for counting the votes and declaring the winners in Congress. Section 6 gave Congress the power to enforce the article by legislation, and Section 7 was a standard enacting clause. H.J.Res. 5 differed from H.J.Res. 3 in that it *did not* empower Congress to intervene in cases wherein a candidate died or left the ticket before the election. In common with H.J.Res. 3, the seven-year ratification deadline was incorporated in the preamble, and the ratification period could thus have been extended by Congress.

**Electoral College Reform Proposals (District Plan).** In brief, the district plan or system would require that electors or electoral votes be awarded on both a district and a statewide basis. Most versions of the district plan provide that the two electors representing the "constant two" or "senatorial" electors, provided to each state regardless of its population, would be awarded to the presidential-vice presidential ticket winning the most popular votes statewide. The remaining electors, equal in number to the state's House of Representatives delegation, and allocated according to existing congressional district boundaries,<sup>6</sup> would be awarded in each case to the ticket winning the most popular votes in that district.

The asserted advantage of this arrangement is that the allocation of electors by district would account for geographical differences in support for various candidates.

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<sup>6</sup> As noted earlier in this report, some versions of the district plan would empower the states to establish *ad hoc* presidential election districts for counting and awarding district electors under the district plan.

For instance, in a state with a “rural-urban” split, urban congressional district electoral votes might be awarded to one ticket on the basis of the popular vote in these congressional districts, while the preferences of voters in rural districts, who might favor different candidates, would also be recognized by awarding electors to the candidates who won these districts. The statewide winners would receive a bonus, in the form of the electors or electoral votes representing the “constant two” or “senatorial” electors. In contrast, the winner-take-all, or general ticket, system awards all electoral votes to the candidates who receive the most votes statewide.<sup>7</sup>

***Electoral vote distribution in the 2000 presidential election under the district plan.***

If the district plan had been in place on the national level for the presidential election of 2000, it would have yielded the following national electoral vote results: George W. Bush, 298 (compared with the 271 he received under the winner-take-all or general ticket system), and Al Gore, Jr., 249 (compared with the 266 he received under the current arrangement).<sup>8</sup> For an illustration of how the district plan would have worked in one state casting an average number of electoral votes, consider Missouri, with 11 electoral votes in the 2000 election.<sup>9</sup> Under the district plan, Republican nominee Bush would have received eight electoral votes for the congressional districts he won, plus an additional two for having won the popular vote statewide (compared with all 11 of the state’s electoral votes he gained under the winner-take-all or general ticket system). Democratic nominee Gore would have received three electoral votes for the three congressional districts he won (compared with none under the winner-take-all or general ticket system).

***H.J.Res. 1 (Representative Clyburn).*** This measure proposed reform of the existing electoral system through the district system. Section 1 would have provided for allocation of electors according to the district plan, but it is worth noting that the resolution retained the office of presidential elector. In contrast, many electoral college reform plans offered in past Congresses proposed to eliminate electors and retain electoral votes, on the grounds that eliminating electors would automatically eliminate the faithless elector phenomenon. Further, H.J.Res. 1 did not mandate joint presidential and vice presidential candidacies, implicitly leaving this

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<sup>7</sup> For information on comparative electoral vote results in the 1992, 1996, and 2000 elections under the district and general ticket systems, consult *The 1992, 1996, and 2000 Presidential Vote: The Winner Take All, Proportional, and District Systems Compared*, CRS Congressional Distribution Memorandum, by David C. Huckabee (Washington: December 26, 2000). Available to Members of Congress and congressional staff from the author. It should be noted that congressional district presidential returns for all states will not be available before the second quarter of 2001.

<sup>8</sup> Source for district totals: “Presidential Results by Congressional Districts[—]Much Ado About Nothing?”, Press Release, Polidata Political Analysis, March 17, 2001, available at [<http://www.polidata.org>], visited February 5, 2003. It should be noted that one District of Columbia elector pledged to Vice President Gore did not cast a vote, resulting in an electoral vote total of 537 in the 2000 presidential election.

<sup>9</sup> Dividing 50 states and the District of Columbia into the total of 538 electoral votes yields an average of 10.55 electoral votes per jurisdiction.

requirement as a state option. Finally, unlike the current system, it did not require a majority of electoral votes to win the presidency and vice presidency. Section 2 provided for election districts, granting states the option to use existing congressional districts, or to establish *ad hoc* presidential election districts. Section 3, providing presidential electors for the District of Columbia, would have incorporated provisions of the 23<sup>rd</sup> Amendment, thus superseding it. Section 4 empowered Congress to provide by law for cases in which any candidate were to die before election day, or for any election tie.

H.J.Res. 1 included a distinctive variation on the district plan model: the measure would implicitly have retained the sometimes-criticized contingent election process provided under the 12<sup>th</sup> Amendment. In contrast, some district system plans offered in past Congresses proposed to eliminate the contingent election process, substituting in its place election by a joint session of Congress in cases where no presidential-vice presidential ticket won an electoral vote majority.

**H.J.Res. 18 (Representative Engel).** This proposal would also have incorporated the district plan. Unlike H.J.Res 1, Section 1 of the amendment eliminated the office of presidential elector, awarding electoral votes directly to winning candidates. It did not mandate joint presidential/vice presidential candidacies, implicitly leaving this requirement as a state option. Unlike the current system, it would not have required a majority of electoral votes to win the presidency: Section 1 stated that the candidates “having the greatest number of electoral votes” would be elected. Sections 2 and 3, respectively, provided for contingent election of the President by the House of Representatives and the Vice President by the Senate in case of an electoral vote tie. These sections retained the 12<sup>th</sup> Amendment’s procedure by giving each state a single vote in the House and each Senator a vote in the contingent election. Section 4 provided for election districts, granting states the option to use existing congressional districts or to establish *ad hoc* presidential election districts. Section 5 superseded the 23<sup>rd</sup> Amendment by providing that the District of Columbia “be treated as if it were a State” in presidential elections. The District, however, would have been excluded from the contingent election process.

**H.J.Res. 37 (Representative Clement).** This district plan amendment would have awarded electors on the basis of congressional districts (Section 1), as well as on a statewide basis (Section 2). Section 3 provided the current allocation of three electoral votes for the District of Columbia, but required these votes to be cast by general-ticket or winner-take-all method. Significantly, this measure retained the office of presidential elector, although it eliminated the possibility of faithless electors by requiring in Sections 1 and 2 that electors must vote for the candidates who received the most votes. H.J.Res. 37 did not seek to grant the states the option to establish *ad hoc* presidential election districts as an alternative to congressional districts for the choice of district electors. Section 4 provided for contingent election of the President by the House of Representatives in the event no candidate received a majority of electoral votes. It did not, however, specify whether voting in the contingent election would be by Representatives *per capita*, rather than by states, as is currently required under the 12<sup>th</sup> Amendment. Finally, the amendment did not provide for separate contingent election of the Vice President in the Senate, so it could be inferred that this function would also be performed by the House of Representatives.

**Electoral College Reform Proposals (Proportional Plan).** The proportional plan would allocate electoral votes in each state in a direct ratio to the percentage of the vote gained by each candidate in that state. In the interests of fairness and accuracy, most such proposals would require that the electoral vote be expressed in hundredths, that is, to the third decimal point. Many, though not all, proportional plan amendments would also require that candidates gain a minimum of 5% of the popular vote in a state in order to win any share of its electoral votes. It is argued that this threshold would be high enough to deter splinter or fringe parties, but low enough for a new party or independent candidacy that enjoyed a reasonable level of support to compete in the contest for electoral votes. Some, but not all, proportional plan amendments would require a candidate to win a plurality of at least 40% of electoral votes nationwide in order to be elected. These plans generally would provide for election by a joint session of Congress in the event no candidate attained the 40% threshold. Proponents argue that the proportional system provides for the fairest and most accurate accounting of candidate support in each state.

***Electoral vote distribution in the 2000 presidential election under the proportional plan.*** If the proportional plan had been in place on the national level for the presidential election of 2000, without the 5% threshold incorporated in some proposals<sup>10</sup>, it would have yielded the following national electoral vote results: George W. Bush, 259.483 electoral votes (compared with the 271 he received under the winner-take-all or general ticket system), and Al Gore, Jr., 258.517 (compared with the 266 he received under the current arrangement.<sup>11</sup> Various independent and minor party candidates would have received 20.001 electoral votes under the proportional system.<sup>12</sup> Again considering Missouri with its 11 electoral votes as an example, Republican nominee Bush would have received 5.547 electoral votes under the proportional plan (compared with all 11 of the state's electoral votes he gained under the winner-take-all or general ticket system). Democratic nominee Gore would have received 5.179 votes (compared with none under the current system). Independent or minor party candidates would have received 0.274 of Missouri's 11 electoral votes in the 2000 presidential election under the proportional plan.<sup>13</sup>

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<sup>10</sup> Minor party and independent candidates would be credited with electoral votes for any popular votes they received. Some versions of the proportional plan would require such candidates to receive at least 5% of the popular vote in any state in order to qualify for electoral votes.

<sup>11</sup> See footnote 8 for an explanation of the missing electoral vote in the 2000 results. Although Bush would have won only a plurality (48.320%) of electoral votes under the proportional plan, it should be recalled that most versions of this plan require a 40% plurality to elect.

<sup>12</sup> U.S. Library of Congress, Congressional Research Service, *The 1992, 1996, and 2000 Presidential Vote: The Winner Take All, Proportional, and District Systems Compared*, CRS Congressional Distribution Memorandum, by David C. Huckabee (Washington: December 26, 2000), p. 49. Available to Members of Congress and congressional staff from the author.

<sup>13</sup> *Ibid.*, p. 47.

**H.J.Res. 17 (Representative Engel).** This proposal would have incorporated the proportional plan or system of awarding electoral votes, while requiring candidates to receive at least 5% of popular vote in a state to gain any of its electoral votes. It is worth noting that it did not set a 40% national plurality threshold of electoral votes in order for a presidential or vice presidential candidate to be elected, instead stating that, “The candidate having the greatest number of electoral votes ...” shall be elected. It should also be noted that the proposal did not provide a constitutional requirement for joint presidential/vice presidential candidacies, leaving this question to the states to determine. Finally, it retained a contingent election mechanism by providing for election of the President in the House of Representatives (with each state casting a single vote) and the Vice President in the Senate (with each senator having a single vote) in the event of an electoral vote tie. The District of Columbia would not have participated in a contingent election under this proposal.

**Electoral College Reform Proposals (Hybrid plans).** These proposals would establish procedures that include elements of other reform measures.

**H.J.Res. 25 (Representative Leach).** This proposal was highlighted by several major elements.

First, in Sections 5 and 6, it would have provided states with the option of awarding electoral votes by either the general ticket or winner-take-all system (Section 5), or by the district system.

Second, Section 8 of this resolution incorporated an innovation generally known as the “National Bonus Plan.”<sup>14</sup> This arrangement would retain the current allocation of electoral votes (538) among the states, but would also create an additional 102 national bonus electoral votes: two for each state and the District of Columbia, thus resulting in a total of 640 electoral votes. The additional national bonus electoral votes would be awarded *en bloc* to the candidates who won the most *popular* votes, as opposed to *electoral* votes. The candidates winning a majority of the combined total of state electoral votes and national bonus electoral votes (321 of 640) would be elected. The purpose of the national bonus electoral votes would be to eliminate a major electoral college contingency: presidential elections in which candidates who had a majority of electoral votes were elected, but whose opponents won more popular votes. Awarding the 102 national bonus electoral votes to the popular vote winners would eliminate this contingency in almost every conceivable election scenario. It would also magnify the electoral vote margin in close elections, thus arguably conferring greater legitimacy on the winning candidates.

It is difficult to project electoral vote distribution in the 2000 presidential election under H.J.Res. 25's version of the national bonus plan, as it would have given states the option to use any of three methods to award their electoral votes. What can be stated with accuracy, however, is that Vice President Gore would have

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<sup>14</sup> The National Bonus Plan was originally conceived in 1977 by a Twentieth Century Fund Task Force. See Twentieth Century Fund, *Winner Take All* (New York: Holmes & Meier, 1978).

won the presidency under either the winner-take-all (general ticket), district, or proportional systems, because he gained a nationwide plurality of popular votes, and would thus have been awarded 102 additional electoral votes as the “national bonus.”<sup>15</sup>

A third innovation in H.J.Res. 25 was found in Section 10, which would have provided for contingent election in the event no candidates received an electoral college majority. According to this proposal, the contingent election could have been conducted in two rounds. The first round would replicate the existing arrangement, in which the President is chosen in the House of Representatives from among the three candidates winning the most electoral votes, with each state casting a single vote, and the Vice President is chosen by the Senate from among the two leading candidates, with each Senator casting a single vote. H.J.Res. 25, however, also provided that if no candidate were to attain the requisite majority in the first round of contingent election, a second round was to be held. While Senate procedures would have remained unchanged in the second round, each Representative would have cast a single vote for President in the second round, rather than each state casting a single vote, a major departure from existing arrangements. A majority of the whole number of Senators and Representatives would have been necessary to elect both the President and Vice President.

Aside from these notable characteristics, H.J.Res. 25 shared several elements common to electoral college reform proposals. Section 1 implicitly eliminated the office of elector, while retaining electoral votes. Section 2 provided for joint presidential-vice presidential candidacies. Section 3 vested authority for the “times, places, and manner of holding” elections with Congress. Section 4 provided for retention of current allocation formulas for state electoral votes.

## Action in the 107<sup>th</sup> Congress

Congressional interest in presidential election reform has generally been dependent on the immediacy of the situation. Historically, sudden and intense concern has arisen with the possibility that a President and Vice President might be elected with a majority of electoral votes, but fewer popular votes than their major party opponents. For instance, following the three candidate 1968 election,<sup>16</sup> the

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<sup>15</sup> The Vice President received 50,992,335 votes, or 48.4% of the popular vote, to Governor Bush’s 50,445,156, which comprised 47.9% of the popular vote. Other candidates received 3,868,994 votes, or 3.7% of the popular vote. Source: *Congressional Quarterly’s Guide to U.S. Elections*, 4<sup>th</sup> ed. (Washington: CQ Press, 2001), vol. 1, p. 688.

<sup>16</sup> Contestants in the 1968 election included Democratic nominee (and Vice President) Hubert H. Humphrey, Republican nominee Richard M. Nixon, and a major third party challenger, American Independent Party candidate George C. Wallace. At times during the campaign, it appeared that Wallace might deprive either major party candidate of an electoral college majority, leading to contingent election. Moreover, Wallace stated publicly that he might be prepared to shift his electoral votes to a major party candidate in return for policy concessions, particularly in the area of civil and voting rights, a suggestion denounced by both Nixon and Humphrey. Although Nixon eventually won with a modest  
(continued...)

House of Representatives approved a direct election amendment in 1969 (H.J.Res. 681, 91<sup>st</sup> Congress), only to have the Senate version of the proposal (S.J.Res. 1, 91<sup>st</sup> Congress) fall victim to a filibuster. Interest revived following the closely contested election of 1976.<sup>17</sup> In the subsequent 96<sup>th</sup> Congress, Sen. Birch Bayh, chairman of the Senate Judiciary Committee's Subcommittee on the Constitution, guided S.J.Res. 28, a direct popular amendment proposal, to the Senate floor for debate and a vote in 1979, but the proposal failed to obtain the necessary two-thirds majority, gaining 51 favorable votes to 48 in opposition.<sup>18</sup> Finally, and most recently, hearings were held on three direct election amendments (S.J.Res. 297, S.J.Res. 302, and S.J.Res. 312, 102<sup>nd</sup> Congress) on July 22, 1992, when it seemed possible that Ross Perot's independent candidacy in the 1992 presidential contest might deadlock the electoral college and lead to contingent election.

Congressional action on electoral college reform proposals has also historically been dependent on the interest and advocacy of senior Members in either chamber. For instance, Senator Birch Bayh was a determined and influential proponent of direct popular election. As chairman of the then-Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, he was able to guide direct election amendments to the Senate floor twice in one decade (1970, 1979), albeit unsuccessfully.

The 1992 hearings were the most recent congressional action on any electoral college reform measure, aside from introduction and *pro forma* committee referral prior to the presidential election of 2000. As it became apparent that this election would be closely contested, congressional concern over the various contingencies inherent in the electoral college system grew. Five related measures were introduced late in the second session of the 106<sup>th</sup> Congress, but due to the constraints of time and a full post-election legislative agenda, no further action was taken prior to adjournment.

Given the closeness of the election, and the political and legal turbulence that occurred in its aftermath, it seemed possible that the 107<sup>th</sup> Congress would give substantial attention to a wide range of election reform proposals, among them such

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<sup>16</sup> (...continued)

popular vote plurality and a more comfortable electoral college majority, the concern caused by these political developments contributed to the sense of urgency surrounding congressional consideration of election reform proposals in 1969-1971.

<sup>17</sup> Democratic nominee Jimmy Carter won over Republican President Gerald R. Ford in 1976 by a popular vote margin of 1.7million votes, and by a narrow electoral vote margin of 297 to 240 (with one faithless Republican elector who voted for the Libertarian Party candidates). After the election, statisticians calculated that a switch of 9,246 Carter votes in Hawaii and Ohio to Ford would have changed the electoral vote margin to 269 for Ford and 268 for Carter, and one vote for the Libertarian Party candidate, thus leading to contingent election. Here again, the closeness of the race, and the potential for "bargaining for electoral votes" helped spur Congress into active consideration of reform measures.

<sup>18</sup> Mindful of the previously cited 1970 filibuster, Democratic leadership in 1979 agreed that the House would not bring a reform measure to the floor unless and until the Senate passed a direct election amendment by the required two-thirds majority.

measures as had been previously introduced, that sought either to eliminate the electoral college system or attempted to reform it. Attention, however, focused on proposals for election administration reform in the 107<sup>th</sup> Congress, resulting in passage of P.L. 107-252, the Help America Vote Act, in 2002, which was a major expansion of federal involvement in an area that had traditionally been a state responsibility. The Act addressed issues associated with election administration by setting new requirements for improvements to voting systems, providing grants to the states to improve voting administration, and establishing a new federal entity, the Election Administration Commission, to administer these programs and monitor state compliance with the Act's provisions. For additional information on election administration and the Help America Vote Act, please consult the CRS briefing book page, *Overview and Implementation of the Help America Vote Act*, available to congressional offices at [<http://www.congress.gov/brbk/html/eberf4.html>].