# The Constitution's Wisdom and Failings—

# *Electing a President*

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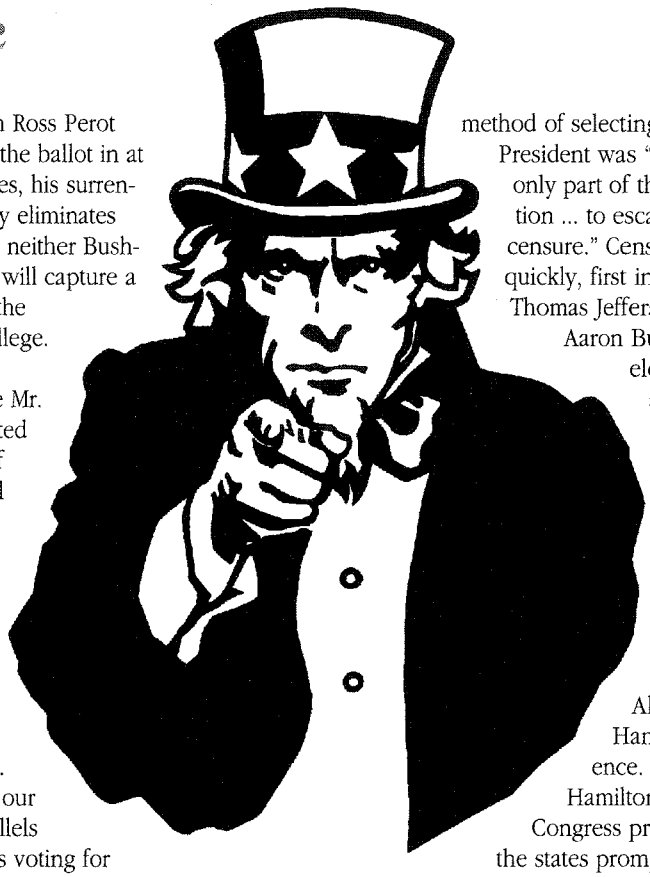
Our ritual for selecting a President rests on two prongs: a political and a constitutional process. First, a pattern of statutes and customs generates primaries, caucuses, petitions and conventions, designed to sift, winnow, torture and bore. The result after an evolution of 150 years—the November ballot names two major candidates and several lesser ones. The process weeds out the faint-hearted, the fanatic and the poor. Last week it weeded out the rich, so it passes the nondiscrimination test. To the Framers this political process, resulting in two party-backed candidates, was anathema. They drafted the Constitution hoping to avoid in America the kind of Whig vs. Tory partisanship observed in England.

In most years we automatically give formal obedience to the electoral college system established in 1787 by Article II, and in 1804 by the XIIth Amendment hurriedly ratified in reaction to the crisis of 1801 when we came close to electing Aaron Burr. The XXth Amendment of 1933 fills in some details, and sets inauguration day for January 20th. The XXVth Amendment of 1967 provides for filling physical (but not mental) vacancies in the Vice Presidency.



Although Ross Perot remains on the ballot in at least 24 states, his surrender probably eliminates the risk that neither Bush nor Clinton will capture a majority in the electoral college. Perhaps we should trace Mr. Perot's belated discovery of the electoral college to some deficiency in his education, but his critique of our system is not novel.

In form, our system parallels stockholders voting for directors, who in turn elect the company officers. It differs in that voters seldom know the identity of the electors. Nevertheless the law tells us that "a vote for the president ... is a vote for the electors..."

Alexander Hamilton defended the constitutional system with blissful innocence, saying in the Federalist Papers that the method of selecting the President was "almost the only part of the Constitution ... to escape severe censure." Censure came quickly, first in 1801 when Thomas Jefferson and Aaron Burr tied in electoral vote, and the House of Representatives after 35 ballots narrowly selected Jefferson, largely because of Alexander Hamilton's influence. Burr killed Hamilton to get even. Congress proposed, and the states promptly ratified the XII Amendment which placed the President and Vice President on separate ballots. In 1825 the choice again fell to the House of Representatives. Henry Clay threw his support to John Quincy Adams rather than to Andrew Jackson. Jackson won later, but never did have much use for Henry Clay.

The electoral college frustrated popular will three times: in 1824 when Jackson outpolled John Quincy Adams; in 1876 when Tilden outpolled Hayes; and in 1888 when Cleveland got more popular votes than Harrison.

But we've had close elections. A shift of 11,424 votes in 1960 would have elected Nixon. Dewey with 30,000 more votes in 3 states would have beaten Truman. But for 2,000 votes in California, Hughes would have beaten Wilson in 1916. Elections in 1876, 1884 and 1908 were also close.

## THE RATIONALE FOR THE ELECTORAL COLLEGE

The 1787 Constitutional Convention voted 60 times before agreeing on a system for selecting the President. They waffled, they disagreed, and only reached consensus in the last week.

They voted five times to have the President appointed by Congress, and once they voted against that. Once they favored electors chosen by state legislators, twice against. They rejected the option of choosing a President as if passing a law seemed unsatisfactory because this would give one house a veto.

The long debates reveal broad agreement only on the points that the President should be mature, that is, over the age of 35, enjoy enough independence from the Congress to check that body, but not be so strong as to become a tyrant.

Hamilton feared that a President chosen by the Congress would be susceptible to Congressional influence, a body beset with intrigue and corruption. If Congress appointed the President, the President could act independently only if denied another term. However, a one-term President might be so independent as to tyrannize. But if allowed another term, the President might succumb to the temptation of currying favor from the Congress to gain re-election.

A direct popular election might produce demagogues, because of an ill informed populace. Furthermore a majority candidate might not emerge. Southern representatives, knowing their areas harbored large numbers of non-voting slaves feared a dilution of power in a national popular election.

Madison opposed popular election on other grounds: he argued that voters would prefer a fellow resident. The Constitution, therefore, requires that at least one of the candidates voted on by the electoral college "not be an inhabitant of the same state" as the electors. Thus if both President and Vice Presidential candidates came from Texas, the Texas electors could cast their ballot for only one, not both.

Several Framers, including Gouverneur Morris, preferred a monarchy or at least an executive holding office for life. Perhaps if George Washington had a handsome son of proper age and demeanor the monarchical idea would have been more popular.

Madison first proposed the electoral college system (July 19, 1787), but the Convention rejected the idea, although a system of electing selected citizens and authorizing them to pick political leaders existed in Massachusetts and Maryland. After many many votes the Convention voted that the President, all officers, ambassadors, and the Supreme Court would be appointed by the Congress. Nobody felt happy with this conclusion, so they elected a committee of eleven to reconsider. In six days, led by Madison, that committee revived and proposed the electoral college system with the Senate directed to choose should no majority emerge. Madison's drafts ought to placate all factions and largely succeeded. Look what they did.

They placed no limits on presidential terms—pleasing the advocates of a powerful executive;

They overcame fears of subservience to Congress by giving the choice to electors who could not be members of Congress;

They reassured those worried about creating a power hungry authority by providing that the electors from the various states never be permitted to meet together in one place!

The Convention relieved fears that the Senate held too much power by giving the House of Representatives power to break deadlocks. Then they honored the wishes of small states by directing that voting be by states and not by individuals.

Nearly everyone in Philadelphia knew the nation would select George Washington whatever method the Constitution specified. I expect that the delegates did not anticipate any subsequent candidate would garner a majority of electoral votes, and that they expected elections in the Congress (whether House or Senate) to be commonplace for Washington's successors.

Alexander Hamilton became the most vocal supporter of the electoral college system. Hamilton feared the masses and argued, therefore, that we rely on the wisdom of the few:

"The immediate election shall be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable 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 such complicated investigations."

This sounds like an intelligent board of directors actively seeking the best possible CEO. Notice that Hamilton does not advise choosing politicians—perhaps he, like the late Oscar Levant, thought a politician as one "who'll double-cross that bridge when he comes to it."

Hamilton also feared emotional decision-making marked by tumult and disorder:

"The choice of several, to form an intermediate body of electors, will be much less apt to convulse the community with any extraordinary or violent movements, than the choice of one who was himself to be the final object of the public wishes."

These wise and dispassionate electors must not, however, be allowed to convene all together lest the passions of a few infect the judgment of the whole.

". . . as the electors, chosen in each State, are to assemble and vote in the State in which they are chosen, this detached and divided situation will expose them much less to heats and ferments, which might be communicated from them to the people, than if they were all to be convened

at one time, in one place. ... Nothing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption."

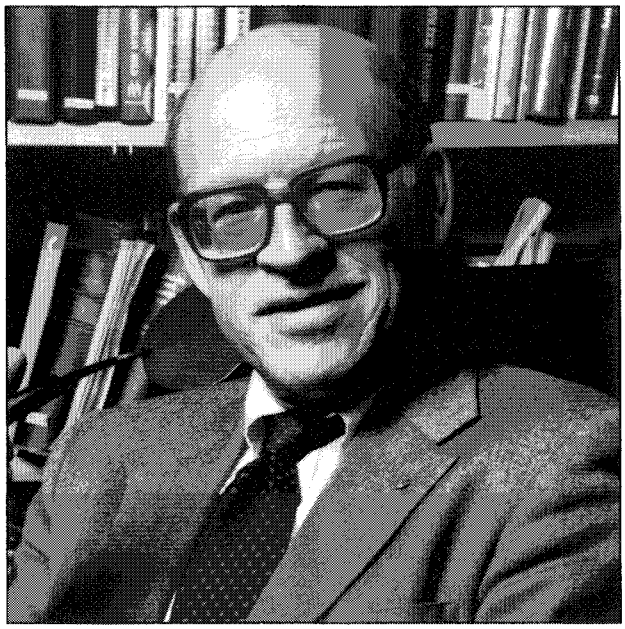
That electors may neither be members of Congress nor hold any federal office reinforces their dispassion. Electors may not hold "Office of Trust or Profit under the United States." Thus military officers and Postal Service employees need not apply.

"They have not made the appointment of the President to depend on any pre-existing bodies of men, who might be tampered with beforehand to prostitute their votes; but they have referred it in the first instance to an immediate act of the people of America, to be exerted in the choice of persons for the temporary and sole purpose of making the appointment. And they have excluded from eligibility to this trust, all those who from situation might be suspected of too great devotion to the President in office. No senator, representative or other person holding a place of trust or profit under the United States, can be of the numbers of the electors. Thus without corrupting the body of the people, the immediate agents in the election will at least enter upon the task free from any sinister bias. Their transient existence, and their detached situation, already taken notice of, afford a satisfactory prospect of their continuing so, to the conclusion of it. The business of corruption, when it is to embrace so considerable a number of men, requires time as well as means."

Nearly 30 years ago the Supreme Court cast doubt on Hamilton's support of the electoral college idea. In a footnote in Gray v. Sanders, Justice Douglas asserts that subsequent constitutional doctrine, forbidding voting discrimination on the basis of race and gender, and selecting Senators by popular vote "shows [Hamilton's] conception belongs to a bygone day...." Perhaps it does, but we must pass a constitutional amendment to change the system we labor with today.

## THE SYSTEM TODAY

Each state chooses electors "in such manner" as it wishes. The text of the Constitution (which in my mind is not irrelevant) allows a state, by law, to cancel the November election and direct other means to select electors. Indeed we find electors selected in diverse ways:



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"by the legislature itself on joint ballot; by the legislature through a concurrent vote of the two houses; by vote of the people for a general ticket; by vote of the people in districts; by choice partly by the people ... and partly by the legislature; [etc. etc.]...."

The electors voting for George Washington received appointment from legislatures in 5 states, and from districts within the other states voting. Not until after 1832 did most states select electors in a general election. Each state has as many electors as Senators and Members of the House of Representatives combined as determined by the 1990 census. Wisconsin, then has 11 electors, the District of Columbia, under the XXIII Amendment gets three.

## WINNER TAKES ALL

Because each state's laws so provide, the winner in each state gets all that state's electors, unless an elector betrays the trust. Constitutional challenges to the winner-take-all rule fail, because nothing in national law or the Constitution forbids it. Theoretically, states could divide themselves into districts and allot each district one electoral vote, or give one electoral vote to each congressional district. They won't do this, in part because the current system gives large voting power to people in large states, and to people in areas where politicians have power to deliver the votes. Nixon would have beaten Kennedy in 1960 if we'd divided the electoral vote by congressional district.

## SELECTING ELECTORS IN WISCONSIN

Wisconsin political parties select candidates for the electoral college in a party convention consisting of the party candidates for the state legislature together with state officers (if members of that party) and the holdover state senators. They meet at 10:00 a.m. on the first Tuesday in October. Wisconsin law requires each party or candidate to nominate two electors from the state at large, and one from each congressional district for a total of 11 for each party. Thus party politics dominates the nomination of electors. If a candidate from a smaller party, Ross Perot, for example, wishes to be on the ballot, that candidate must also file a list of his electors by the 2nd Tuesday preceding the November election. No ballot in Wisconsin identifies these people. If it did you'd not recognize the non-Rotarians, or the candidates to whom they're pledged. Some years ago a lower court in New York declined to require the names of electors on the ballot.

After the November election each county clerk sends the results, enumerating votes for each party's panel of electors, to the State Elections Board. The Board of State Canvassers (the Chair of

the Elections Board, the Attorney General and the State Treasurer) routinely certifies these totals to the Governor. Now the Governor has a problem: Wisconsin law tells him to report results immediately to the Administrator of General Services in Washington. National law commands the Governor to report to the Archivist of the United States. The obvious solution—send the results to both.

## THE ELECTORAL COLLEGE MEETS

Wisconsin and national law require the Governor to send six duplicate certified originals to the selected electors "at the state capital" on the first Monday after the 2nd Wednesday in December. Presumably the Governor enjoys some power between November and December to identify the selected electors, if someone contested the election. Obviously litigation may decide that point, but normally the electoral college meets uneventfully.

In 1988 Kevin Kennedy, Executive Director of the State Election Board, convened Wisconsin's winning electors, all Democrats. They promptly selected Suellen Albrecht and Tom Loftus as co-chairs and in their 36-minute meeting cast their written ballots for Dukakis & Bentsen, which they thereafter signed and certified. Then they gratuitously moved to deplore the attacks and negative campaigning of 1988 (naming no one) and called upon Congress to abolish the electoral college. On this point electors Tom Loftus and John Galanis dissented.

Six sealed and certified certificates record Electoral College decisions, and the law guards against their loss by requiring them to be sent:

One to the President of the Senate (in Washington);

Two to the Secretary of State of the State (Douglas LaFollette) who preserves one as a public record, and the other to be held, if the President of the U.S.Senate wants it;

Two to the Archivist of the United States;

One to Federal Judge Barbara Crabb. The design thwarts attempts to hide, destroy or delay reporting the electoral college vote. Drafters of the statutes appear driven by the fear of corruption.

## THE FAITHLESS ELECTOR WHEN WINNER DOESN'T TAKE ALL

Wisconsin law says that the presidential electors "shall vote" for the candidates of the political party that nominated them. What about the rogue elector who decides to desert the party? The text of the XIIth Amendment, and the purpose of the Framers, leads me to conclude that an elector has a free choice, and no court or state legislature can say otherwise.

Most electors act as party lackeys, no matter how otherwise independent and distinguished. The President of Harvard, for example, selected in 1876 as an elector pledged to President Hayes, refused to switch his vote to Tilden who had more popular votes. He declined saying he must abide by his party's choice. We've had five exceptions. One Plummer, an elector pledged to James Monroe, instead voted in 1821 for John Quincy Adams, legend tells us because Plummer thought that the honor of a unanimous vote should be accorded only to George Washington, but probably because he wanted to emphasize the ability of the younger Adams. Other faithless electors voted in 1948, 1956 and 1960. Double-crossers of this stripe, said a former President, might be lynched.

A political party can rightfully require a loyalty oath from an otherwise eligible presidential elector, and some jurisdictions require a loyalty oath by law. Scholars argue on both sides, but I'm dubious about enforceability if an elector breaks the promise. However, a party may discharge any electoral candidate who refuses to promise party loyalty in advance.

In any event if the November election is close and contested, you must expect litigation in the state or federal courts on vote fraud, and contests initiated in state courts if electors betray the voter choice. In a close election the practical value of allowing free choice in the Electoral College lies in keeping the choice out of the House of Representatives, because here defects in our Constitution become most apparent.

## COUNTING THE ELECTORAL VOTES

The Constitution fails to specify who counts the electoral college vote, but Congress does. National law establishes the procedure by which the Congress, in a joint session under the Vice President (Mr. Quayle), counts the electoral votes. We have no President-elect until Congress counts and records the votes.

The statute details the precise time, procedure, even the seating, and directs how to contest electoral college results. For the most part each state must resolve issues of vote fraud. This statute avoids the impasse occurring in 1876 when Rutherford Hayes received 165 electoral votes to James Tilden's 184, just one short of a majority. Double sets of electoral votes had come from Oregon, Florida, South Carolina and Louisiana in dispute. Congress, then controlled by Democrats in the House and Republicans in the Senate, avoided the impasse by creating a special Electoral Commission to which it delegated power. Justice Bradley of this commission cast the deciding vote, giving the necessary 20 votes to Hayes, some argue on partisan grounds, but my reading of his reasoning suggests otherwise. Bradley, a giant on the Supreme Court, wrote nothing in his opinion that suggests susceptibility to corruption. Congress accepted the decision. Hayes solaced the Democrates with a promise to withdraw the federal troops occupying the South.

If no candidate receives an electoral majority, the XIIth Amendment commands the House to "choose immediately" among the top three, and now it becomes interesting. Each state votes as a unit: "the votes shall be taken by states, the representation from each state having one vote...." This system assures the influence of small states.

Consider these facts if the House of Representatives chooses the President.

First, the new House with many new and unacclimated members must choose. We don't know what political, economic and social forces act upon the members, and new members may be less predictable than veterans;

Second, the winner requires 26 votes out of the total of 50. We can safely assume all state delegations will show up.

Third, the District of Columbia, with its three electoral votes under the XXIII Amendment, has no role whatsoever. It

isn't represented in the House.

Fourth, 21 states have an even number of Representatives. If some states were evenly divided they might fail to agree on the single ballot required. Some members might desert their party, or be tempted to vote their district. However, the House has strong incentive to decide because their failure to select a President means that the person selected as Vice President by the Senate becomes Acting President of the United States until the House does its job.

Statutes specify the procedure—the critical point is that the House must sit in continual session until they do their job—a notable and praiseworthy command.

Now the Senate chooses from the top two Vice-Presidential candidates, and the Senators vote as individuals, not by state. What if the 100 Senators divide 50-50? Unlikely, to be sure, but conceivable. Could the current Vice President (who holds office until noon on January 20th) vote to break a deadlock? The text gives no clear answers, but I don't think so—the Vice President's power allows him to vote to break a deadlock, but I'd argue that the Vice President is not a Senator within the meaning of the XII Amendment. Mr. Quayle's lawyers might argue differently. Let's pray the issue never arises.

## THE DEATH OF A CANDIDATE

Before the general election each party's rules allow a substitute candidate chosen under party rules. In the unfortunate event that a candidate dies after the general election, the merits of the electoral college system become clearer.

We've never experienced the death of a winning candidate after an election, but before the meeting of a state's electoral college. However, Horace Greeley, who lost the general election to Grant, was entitled to 66 electoral votes when he died three weeks later. Some of the electors voted for Greeley anyway (better Greeley dead than Grant alive); the others divided their votes among four others. The incident's a weak precedent, but illustrative of the need for electoral college choice. I expect the electors would be likely to abide by the dictates of their party, substitute the Vice Presidential candidate on their ticket, and leave open the vexing question of selecting a new Vice President.

If the winning candidate dies after the electoral college meets, but before Congress counts the votes, we're in murkier waters. Let's assume that the various Governors have certified the electoral votes and sent them to the Archivist who in turn has passed them on to the tellers selected by House and Senate. Someone observes that the candidate's dead. Thereafter, a Senator and a Member of the House may offer a written objection. Because no live candidate received a majority in the electoral college, I believe the text of the statute means that the choice of a President falls to the House of Representatives. The House then must vote under the rules of the XII Amendment and the national statutes, and they're restricted to a choice among the top three candidates, of whom only two remain alive.

In this unhappy setting I'd expect the House might, either be hopelessly divided, because the text of the XII Amendment says they must choose "from the persons having the highest numbers not exceeding three on the list of those voted for as President [by the Electoral College]." Members might favor the winning Vice Presidential candidate, but that person was not on the list for President. However, Congress might, by law, and acting under the Necessary and Proper Clause, make a constitutional interpretation advancing the winning Vice Presidential candidate to the Presidential list, and vote accordingly. If, however, the House favored the losing Presidential candidate, they'd inspire a violent reaction. Another solution is to allow the statute on presidential succession to operate. 3 U.S.C. 19 establishes the pecking order if no President or Vice President survives: Speaker of the House, President pro tempore of the Senate; Secretary of State, Secretary of the Treasury and down the list of the Cabinet (Secretary of Education and of Veteran's Affairs rank at the bottom).

Meanwhile the Senate would have to choose a Vice President who will become acting president if the House remains deadlocked in its business. But whom to choose? The Constitution appears to restrict the Senate to choosing among the top two candidates. If one has advanced to the Presidency because of the House's action, the Senate has only one choice, the losing candidate. That person would not enjoy much legitimacy.

We observe a complicated, and, under some facts, uncertain system. Whatever happens in November we'll have a qualified President or Acting-President on January 20. The XX Amendment allows Congress to legislate here, and they have.

## THE FINAL SOLUTION

How do we evaluate the system? You may agree with Ambrose Bierce who defines the President as "the leading figure in a small group of men of whom—and of whom only—it is positively known that immense numbers of their countrymen did not want any of them for President."

On the other hand, according to Alexander Hamilton, the system produces the perfect President.

"The process of election affords a moral certainty, that the office of President will never fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications. Talents for low intrigue, and the little arts of popularity, may alone suffice to elevate a man to the first honors in a single State; but it will require other talents, and a different kind of merit, to establish him in the esteem and confidence of the whole Union, or of so considerable a portion of it as would be necessary to make him a successful candidate for the distinguished office of President of the United States."