



Also published on electionlawblog.org

December 13, 2016

Stop dreaming, the Electoral College is here to stay

by JOSHUA SPIVAK

Once again, we have a popular vote loser taking the White House, and once again we have criticism and fights over the existence of the Electoral College. The reason for why we have the Electoral College is poorly understood — supporters usually make the argument that it was designed to ensure that smaller states weren't swamped in a presidential vote.

A look at the contemporary discussions in the 1780s and James Madison's notes on the debate in the Constitutional Convention shows that this is incorrect — the Electoral College was actually created to both separate the powers and combat corruption from both foreign and domestic sources.

It is important to look at how the Convention arrived at an Electoral College. With the exception of the Pennsylvania delegates, popular election of the president didn't have much support. Instead, the first plan presented — the Virginia or Randolph Plan — proposed that the Executive be elected by the new legislature, which would eventually be called Congress.

This would have made perfect sense to the conventioners. At the time, in eight of the 13 states, Governors were selected by the state legislature, not the voters, and in two others states, the legislature made the choice if no candidate received an absolute majority.

Early on, the Conventioners adopted this view — on June 2, the convention voted to have the legislature elect the president. Pennsylvania Delegate and future Supreme Court Justice James Wilson, the leading proponent of the popular election of the president, first proposed a prototype of the Electoral College, which was rejected 8-2.

On June 9, they rejected an idea that the state Governors would choose the president, and Alexander Hamilton proposal for an Electoral College-type plan was rejected on June 18. On July 17, they returned to the issue and rejected both a popular vote method and a quasi-Electoral College approach, and reapproved the idea that the legislature would choose the president.

They reversed this action on July 19 and adopted a nascent Electoral College plan, but then reversed that on July 24. An Electoral College plan was defeated again on August 24. It was at only at the very end of the Convention on September 4-8, that a Committee of 11 put the Electoral College fully into play and the idea was adopted for good.

A look at Madison's notes shows that the Convention kept considering an Electoral College for specific reasons, one that was not focused on helping small states or ensuring that every part of the country was heard from — that was what the Senate was for.

Instead, the ideal of separation of powers between the branches and a desire to minimize corruption were the constant concerns of the Founding Fathers. At the Convention, Pennsylvania delegate Gouverneur Morris, who is credited with literally writing the Constitution, was concerned that "corruption and cabals" would be used to choose the president if Congress was given that direct power.

South Carolina's Pierce Butler also said that in choosing a president "[t]he two great evils to be avoided are cabal at home, & influence from abroad."

After the Convention, the major work in defense of the Electoral College, Alexander Hamilton's Federalist Papers #68, hit hard on the corruption angle. Hamilton claimed that the Electoral College was "almost the only part of the system, of any consequence, which has escaped without severe censure."

But his defense of the Electoral College method was not about fairness, but rather about not "corrupting the body of the people" or causing "[T]he business of corruption." Hamilton goes a step further as he states that in creating the Electoral College, a series of bodies that would meet in different states throughout the country, the convention was trying to prevent the desire of "foreign powers to gain an improper ascendant in our councils. How could they better gratify this, than by raising a creature of their own to the chief magistracy of the Union?"

But the creation of the Electoral College was not thought to be the final answer in choosing a president. The delegates wanted Congress to be limited in who they chose, but in many ways, Congress was ultimately expected to make the choice.

There was a clear belief that the Electoral College, meeting in 13 separate states, would regularly not be able to settle on one candidate to get an absolute majority, and the election itself would be thrown to the House — where ultimately the smaller states would have a larger role to play. The Electoral College would therefore operate as a nominating convention for the top five candidates.

A look at the record shows this was considered a very likely possibility in most elections. Delegate George Mason thought that "nineteen times out of twenty" the presidential choice would be thrown to Congress. The Anti-Federalist Paper #72 thought this was the arrangement, as it criticizes the Constitution: "And, after all (excepting some such change as is not likely to happen twice in the same century) to intrust Congress with the final decision at last?"

The Founding Fathers' ability to gauge the future failed them here in two respects. For one, they simply did not anticipate how quickly national political parties could form. By 1796, the first election without the unifying presence of George Washington, clear lines had formed. By 1800, Congress was deciding the presidency.

They also did not anticipate that the creation of the vice presidential position would complicate matters to such a degree that a 12th Amendment was deemed necessary. The 12th Amendment changed the Electoral College in numerous ways, most notably by completely rethinking the vice president as a running mate largely subservient to the president rather than a competitor and runner-up.

Following this amendment, Congress actually took on the role of presidential nominator with the rise of the "Congressional Caucus" system in the first decades of the 19th Century. But following the election of 1824, the second and final time that Congress actually decided the presidency (in favor of second place finisher John Quincy Adams instead of Andrew Jackson), the role of Congress in choosing presidents has been, with the exception of the disputed election of 1876, effectively theoretical.

There have been attempts to get rid of the Electoral College over the years, but barring a massive change of heart by Republicans, the Electoral College is here to stay. But it is important to understand its actual, widely ignored, roots.

The Electoral College wasn't really intended to replace popular vote; it was put in place instead of election by Congress. And the reason was not to help small states; it was to combat potential corruption in the election of a president.

Commentary by Joshua Spivak, a senior fellow at the Hugh L. Carey Institute for Government Reform at Wagner College in New York. He blogs at the Recall Elections Blog. Follow him on Twitter @recallelections.