

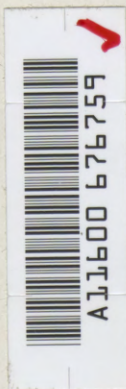
1042

J 89/2  
P 92/5/1963

Storage

# NOMINATION AND ELECTION OF PRESIDENT AND VICE PRESIDENT

Y4  
J 89/2  
P 92/5/  
963



## HEARINGS BEFORE THE SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS OF THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE EIGHTY-EIGHTH CONGRESS

FIRST SESSION

ON

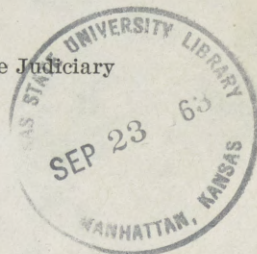
**S.J. Res. 1, S.J. Res. 8, S.J. Res. 12, S.J. Res. 13,  
S.J. Res. 24, S.J. Res. 27, and S.J. Res. 73**

PROPOSING AMENDMENTS TO THE CONSTITUTION RELATING  
TO THE METHOD OF NOMINATION AND ELECTION OF THE  
PRESIDENT AND VICE PRESIDENT

JUNE 4, 1963

(SUPPLEMENTAL TO HEARINGS HELD ON MAY 23, 26; JUNE 8,  
27, 28, 29, AND JULY 13, 1961—87TH CONGRESS, 1ST SESSION)

Printed for the use of the Committee on the Judiciary



U.S. GOVERNMENT PRINTING OFFICE  
WASHINGTON : 1963

4 Y  
5/28 L  
12/20 9  
EJP

COMMITTEE ON THE JUDICIARY

MOO

JAMES O. EASTLAND, Mississippi, *Chairman*

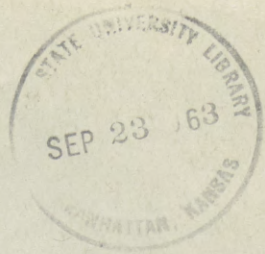
- |                                   |                                    |
|-----------------------------------|------------------------------------|
| ESTES KEFAUVER, Tennessee         | EVERETT MCKINLEY DIRKSEN, Illinois |
| OLIN D. JOHNSTON, South Carolina  | ROMAN L. HRUSKA, Nebraska          |
| JOHN L. MCCLELLAN, Arkansas       | KENNETH B. KEATING, New York       |
| SAM J. ERVIN, Jr., North Carolina | HIRAM L. FONG, Hawaii              |
| THOMAS J. DODD, Connecticut       | HUGH SCOTT, Pennsylvania           |
| PHILIP A. HART, Michigan          |                                    |
| EDWARD V. LONG, Missouri          |                                    |
| EDWARD M. KENNEDY, Massachusetts  |                                    |
| BIRCH BAYH, Indiana               |                                    |

---

SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS

ESTES KEFAUVER, Tennessee, *Chairman*

- |                                      |                                    |
|--------------------------------------|------------------------------------|
| JAMES O. EASTLAND, Mississippi       | EVERETT MCKINLEY DIRKSEN, Illinois |
| THOMAS J. DODD, Connecticut          | KENNETH B. KEATING, New York       |
|                                      | HIRAM L. FONG, Hawaii              |
| FRED P. GRAHAM, <i>Chief Counsel</i> |                                    |

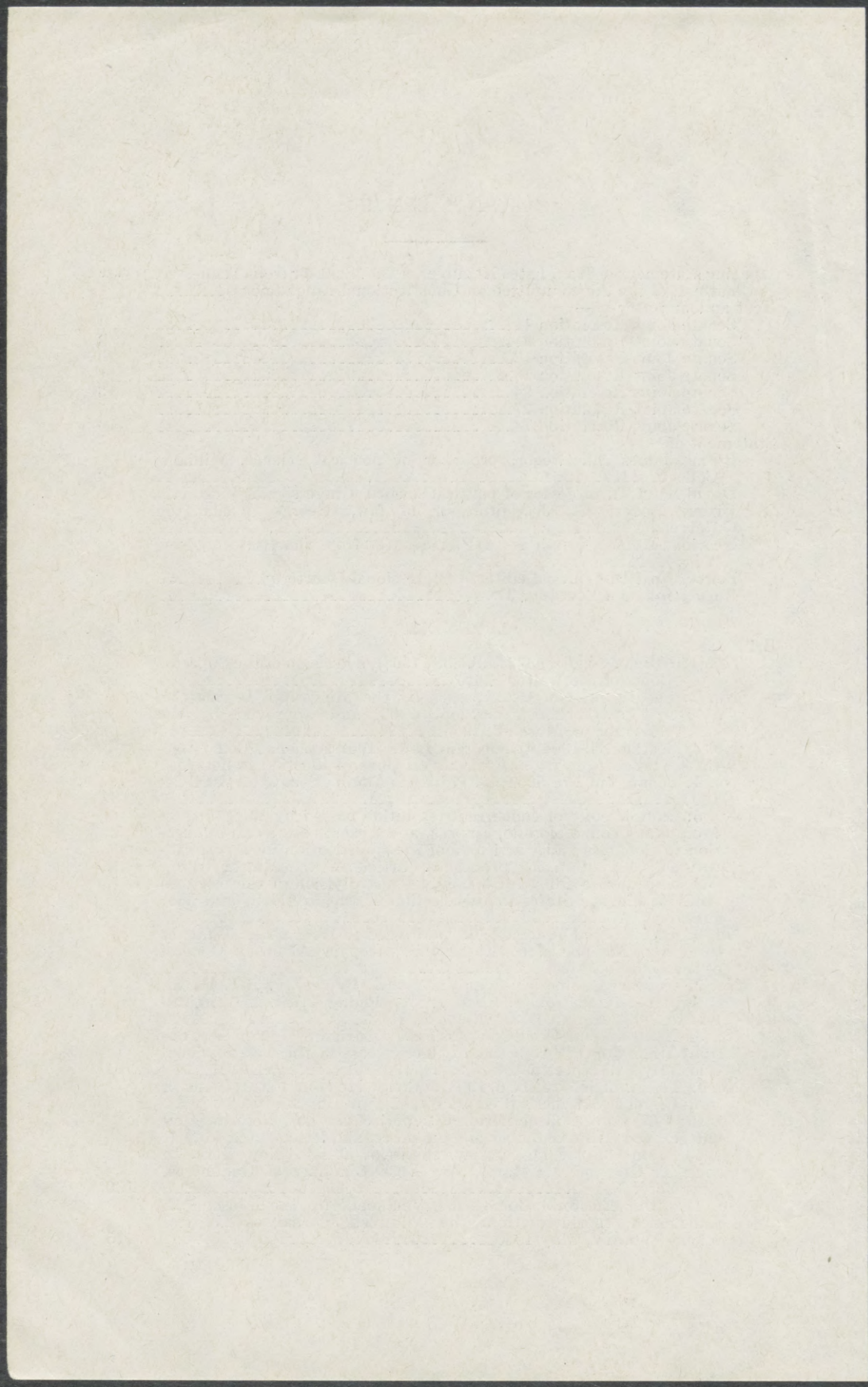


# CONTENTS

Opening statement of Hon. Estes Kefauver, a U.S. Senator from Tennessee, Chairman of the Subcommittee on Constitutional Amendments.....	Page 1
Text and summary of—	
Senate Joint Resolution 1.....	4
Senate Joint Resolution 8.....	8
Senate Joint Resolution 12.....	10
Senate Joint Resolution 13.....	11
Senate Joint Resolution 24.....	13
Senate Joint Resolution 27.....	15
Senate Joint Resolution 73.....	16
Statement of—	
Burns, James MacGregor, professor of political science, Williams College.....	19
David, Paul T., professor of political science, University of Virginia.....	31
Dixon, Robert G., Jr., professor of law, George Washington University.....	49
Keating, Hon. Kenneth B., a U.S. Senator from the State of New York.....	2
Peirce, Neal R., political editor, Congressional Quarterly.....	43
Rogge, John P., Houston, Tex.....	57

## APPENDIX

Exhibits:	
No. 1: <i>Gray v. Sanders</i> , 372 U.S. 368 (1963), a decision of the Supreme Court of the United States.....	69
No. 2: Senate bill No. 1522, passed by the Mississippi Legislature, first extraordinary session, 1963, and approved by the Governor on March 2, 1963.....	81
No. 3: Section 34-1904(a), Georgia Laws, 1962 session, titled "Elec- tions—Procedure To Place Names on General Election Ballots".....	82
No. 4: Senate bill No. 525, passed by the Florida Senate on April 24, 1963.....	83
No. 5: Sample copy of concurrent resolution passed by the States of Montana, Utah, Colorado, Kansas, and Texas; used as an applica- tion to Congress under article V of the Constitution for a constitu- tional convention to "propose an article or amendment to the Constitution providing for a fair and just division of the electoral votes within the States in the election of the President and Vice President".....	88
No. 6: Letter dated June 4, 1963, addressed to Hon. Estes Kefauver from Mr. Nicholas deB. Katzenbach, Deputy Attorney General of the United States.....	88
No. 7: "A More Competitive Party System?" by Prof. Paul T. David, excerpt reprinted from the book, "Continuing Crisis in American Politics," by Marian D. Irish, editor, 1963.....	89
No. 8: Analysis entitled "Congressional Districting Issue To Con- front High Court," from the advance release of the Congressional Quarterly Fact Sheet dated May 29, 1963.....	91
No. 9: Telegram dated June 5, 1963, addressed to Hon. Estes Kefauver from Clarence Mitchell, director, Washington Bureau, NAACP.....	99
No. 10: "Electoral College Reform," report of the Law Reform Com- mittee, New York Chamber of Commerce, and letter dated May 7, 1963, from Chester D. Pugsley, counselor at law, New York, to John T. Gwynne, secretary, New York Chamber of Commerce, New York, N.Y.....	100
No. 11: "Our Electoral College Gerrymander" by Prof. Joseph E. Kallenbach, reprinted from the <i>Midwest Journal of Political Science</i> , Vol. IV, May 1960.....	115



# NOMINATION AND ELECTION OF PRESIDENT AND VICE PRESIDENT

TUESDAY, JUNE 4, 1963

U.S. SENATE,  
SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS  
OF THE COMMITTEE ON THE JUDICIARY,  
*Washington, D.C.*

The subcommittee met, pursuant to notice, at 10:30 a.m. in room 2228, New Senate Office Building, Senator Estes Kefauver (chairman of the subcommittee) presiding.

Present: Senators Kefauver, Dirksen, and Keating.

Also present: Fred Graham, chief counsel; Clyde Flynn, minority counsel; Angelina T. Gomez, clerk; and William H. Barr, research assistant.

Senator KEFAUVER. The meeting will come to order.

There is an almost unanimous consensus of opinion in this country that something should be done about the system of electing our Presidents and Vice Presidents. However, nothing has been done—primarily because the Congress has been unable to agree upon any one of the several suggested substitutes for the existing method.

In 1961, this subcommittee conducted an extensive series of hearings on the general subject of the electoral process. As part of those hearings, we considered in detail the alleged weaknesses of the present electoral college system, and we studied the various proposals which had been introduced to replace or modify the present system.

Based upon this inquiry, the subcommittee staff published a study of the electoral college and the operation and effect of the proposals which had been suggested to take its place.

There are now pending seven Senate joint resolutions which would change in some way the constitutional method of electing the President. Generally, they follow four basic approaches, all of which were thoroughly examined in the 1961 study.

They are first, retaining the unit method of casting each State's electoral votes, while eliminating the office of elector; second, the district system; third, the proportional system; and fourth, direct national election.

Although the basic reform proposals have not changed since 1961, it appears that extremely important and fundamental changes in our political structure may have taken place, or may have been set in motion, since the 1961 hearings. The basic philosophy of those who would retain the electoral college system essentially as it is was sum-

marized in 1956 in a speech on the Senate floor by Senator John F. Kennedy:

It is not only the unit vote for the Presidency we are talking about, but a whole solar system of governmental power. If it is proposed to change the balance of power of one of the elements of the solar system, it is necessary to consider the others.

The presidential element of the solar system has been left unchanged. But it may be that recent developments have triggered a radical and far-reaching shift in other elements of the solar system. In 1961, the Supreme Court handed down its historic reapportionment decision in the case of *Baker v. Carr*. The subsequent reapportionment actions in State legislatures across the country will necessarily result in a shift in political power from rural to urban and suburban voters. Thus, one element of our political solar system—the State legislatures—is destined to move into a new and different orbit of political representation.

Another fixture of the traditional electoral system has been the existence of a predictable number of one-party States and one-party areas. Recent elections have made it abundantly clear that these elements of the system are also changing, and the electoral college equilibrium of which Senator Kennedy spoke may be further threatened.

Finally, two States (Mississippi and Georgia) have passed new presidential laws since 1961, and in two other State legislatures (Florida and Louisiana), at least one house has passed a similar law, all of which are calculated to make possible the election of unpledged presidential electors. One other State (Alabama) already has a statute in effect which would allow unpledged electors to be placed on the ballot as nominees of a political party, although they would not intend to cast their electoral votes for the presidential nominee of the national party. This could result in the removal of these States, representing a total of 53 electoral votes, from the electoral equilibrium which has heretofore existed, with the possibility that the presidential election could be thrown into an entirely different arena, the House of Representatives, whereas we know under the present Constitution each State casts 1 vote.

The intent of this hearing will be to assess the extent and effect of these changes which have taken place since 1961, and to decide what, if any, modifications should be made in our system of presidential elections to maintain a fair political balance of power.

Senator Keating, the distinguished Senator from New York and member of this subcommittee is present and has a statement.

#### STATEMENT OF HON. KENNETH B. KEATING, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator KEATING. Thank you, Mr. Chairman.

The present method of electing the President and Vice President of the United States hardly has any rational justification.

It does not reflect either the intent of our Founding Fathers or the contemporary view of the Presidency.

The imperfections and inequities in the present system could be endlessly cataloged. Fundamentally, all of these relate to the fact that there is no assurance that the President elected by the electoral college is the choice of the people.

There have been, as you have said, many proposals for remedying this condition, but in my judgment only a direct election by popular vote would achieve the objectives of meaningful reform. Under the direct election system, there would be no unfairness either to large or small States or to rural or urban areas. Every citizen in every part of the Nation would speak with an equal voice and exercise the same weight in the choice of President. The guiding principle would be "one American, one vote," as it should be in our modern Republic.

The direct election system—such as is proposed in Senate Joint Resolution 73—is the only plan which would assure against the election of a President who received less votes than his opponent. Neither the district plan nor the proportional plan would satisfy this goal, and under both the possibilities of having a President chosen by mathematical accident rather than by the will of the people would persist.

There is another danger in the present system which only a direct election of the President can avoid and that is the danger that the President will be elected by the Members of Congress rather than by the people. Under the 12th amendment, a presidential election can be thrown into the House of Representatives if none of the candidates receives a majority of the votes in the electoral college. In this situation, the votes are taken by States, the total representation from each State having one vote. In some respects this is the most outrageous affront to majority rule in the present system.

Both the district and proportional plans would modify this procedure by providing for the joint participation of the Senate and House in the selection of the President with each House and Senate Member having one vote. This would be some improvement, but it would still weight the election in favor of the smaller States and because of the malapportionment of House districts, the results could be completely contrary to the choice of the national electorate.

In short, I don't believe that it will be enough to tinker with the present apparatus. The truth is that the present machinery is obsolete and there is a grave risk of a complete breakdown in its operation. Unfortunately, there is such wide disagreement as to what machinery should be developed to replace it, that it may require a breakdown before the necessary action is taken. I hope this will not be the case and that the attention this subcommittee is giving to this problem will serve as a catalyst for preventive action.

In some ways, the problem of dealing with the electoral college is symptomatic of the general apathy of Congress to electoral reform. Congressional malapportionment, as I have indicated, is another problem we have neglected for too long. Unreasonable residence requirements, discriminatory voting practices, inadequate absentee voting provisions, are some of the other conditions which distort the popular will and result in the election of national representatives who may not at all reflect the will of the people.

There is a relationship between all these conditions, and the task of perfecting the right of the franchise will not be completed until all have been dealt with. I know that the chairman of this subcommittee shares my deep concern with these conditions and it has been my privilege to join with him in a number of proposals for broadening the opportunities for full participation in our elections by all qualified citizens. I am confident, therefore, that these hearings on

the electoral college will do much to inform the public as to the problems which do exist and to point the way to their solution.

Mr. Chairman, there is one technical matter on which I would like to comment briefly.

A number of the electoral college resolutions, including Senate Joint Resolution 73, which I have introduced, do not refer specifically to the District of Columbia. Since we fought a hard battle not long ago to extend to the residents of the District of Columbia the right to vote for President and Vice President, I want to make it clear on the record that the District of Columbia is intended to be included in my resolution.

In fact, I would assume that the omission of the District of Columbia from any of these resolutions was inadvertent, and suggest that the staff be asked to prepare appropriate amendatory language for any that do not include the people who live in our Nation's Capital.

Thank you.

Senator KEFAUVER. Thank you.

I am certain that all of the resolutions intend not to exclude the District of Columbia, and the staff will be instructed to prepare the necessary amendments.

The ranking minority member of the subcommittee, Senator Dirksen, is here. Do you wish to make a statement?

Senator DIRKSEN. I have no preliminary statement at the moment, Mr. Chairman.

Senator KEFAUVER. Our chief counsel, Fred Graham, is on my right now. Minority Counsel Clyde Flynn is here. Also, our summertime legal assistant, William Barr, who is attending law school, will be with us.

Mr. Graham, do you have some matters to offer for the record?

Mr. GRAHAM. Mr. Chairman, at this time I wish to submit for printing in the record copies of the joint resolutions on the subject of electoral college reform which are now pending before this subcommittee. I also submit a summary of each resolution, which shall be printed in the record following the text of each resolution. These resolutions are:

S.J. Res. 1, S.J. Res. 8, S.J. Res. 12, S.J. Res. 13, S.J. Res. 24, S.J. Res. 27, S.J. Res. 73.

Senator KEFAUVER. Let them be printed together with the summaries.

(The documents referred to follow:)

#### SENATE JOINT RESOLUTION 1

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein),* That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid for all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States:

#### "ARTICLE —

"SECTION 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and together with the Vice President, chosen for the same term, be nominated and elected as hereinafter provided.

"SEC. 2. The official candidates of political parties for President and Vice President shall be nominated at a primary election by direct popular vote. Voters in each State shall have the qualifications requisite for electors of the most

numerous branch of the State legislature, but, in the primary election each voter shall be eligible to vote only in the primary of the party of his registered affiliation. The time of such primary election shall be the same throughout the United States, and, unless the Congress shall by law appoint a different day, such primary election shall be held on the first Tuesday after the first Monday in August in the year preceding the expiration of the regular term of President and Vice President. No person shall be a candidate for nomination for President or Vice President except in the primary of the party of his registered affiliation, and his name shall be on that party's ballot in all the States if he shall have filed a petition at the seat of the Government of the United States with the Secretary of State, which petition shall be valid only if (1) it is determined by the Secretary of State to have been signed on or after the first day of January of the year in which the next primary election for President and Vice President is to be held by a number of qualified voters, in any or all of the several States, equal in number to at least 1 per centum, but not more than 2 per centum, of the total number of popular votes cast throughout the United States for all candidates for President (or, in the case of the primary election first held after the ratification of this article, for electors of President and Vice President) in the most recent previous presidential election, and (2) it is filed with the Secretary of State not later than the first Tuesday after the first Monday in June of the year in which the next primary election for President and Vice President is to be held. No person's name shall appear on the ballot in any primary election as a candidate for nomination for both President and Vice President; but the foregoing shall not, except in the case of a runoff election, prohibit the name of a candidate for nomination for President, or the name of any other person, from being written on the ballot by the voters for nomination for Vice President, or the name of a candidate for nomination for Vice President, or the name of any other person, from being written on the ballot by the voters for nomination for President.

"Sec. 3. For the purposes of this article a political party shall be recognized as such if at any time within four years next preceding a primary election the Secretary of State determines such party has had registered as members thereof more than 5 per centum of the total registered voters in the United States.

"Sec. 4. Within fifteen days after such primary election, the chief executive of each State shall make distinct lists of all persons of each political party for whom votes were cast, and the number of votes for each such person, which lists shall be signed, certified, and transmitted under the seal of such State to the seat of the Government of the United States directed to the Secretary of State, who shall forthwith open all certificates and count the votes. The person receiving a majority of the total number of popular votes cast for presidential nominees by the voters of the party of his registered affiliation shall be the official candidate of such party for President throughout the United States, and the person receiving a majority of the total number of popular votes cast for vice presidential nominees by the voters of the party of his registered affiliation shall be the official candidate of such party for Vice President throughout the United States. If no person receives a majority of the total number of popular votes cast for presidential nominees by the voters of a political party, a runoff election to determine the nominee of such political party for President shall be conducted throughout the United States on the twenty-eighth day after the day on which the primary election was held. Such runoff election shall be between the two persons who received the greatest number of popular votes cast for presidential nominees by the voters of such political party in the primary election. If no person receives a majority of the total number of popular votes cast for vice presidential nominees by the voters of a political party, a runoff election to determine the nominee of such political party for Vice President shall be conducted throughout the United States on the twenty-eighth day after the day on which the primary election was held. Such runoff election shall be between the two persons who received the greatest number of popular votes cast for vice presidential nominees by the voters of such political party in the primary election. No person ineligible to vote in the primary election of any political party shall be eligible to vote in a runoff election of such political party. Within fifteen days after a runoff election for the nomination of a political party for President or Vice President, the chief executive of each State shall, in the case of a runoff election for nomination for President, transcribe on an appropriate document the names of the two persons on the party's ballot for nomination for President and the number of votes cast in such State for each, and, in the case of a runoff election for nomination for Vice President, transcribe on an appro-

appropriate document the names of the two persons on the party's ballot for nomination for Vice President and the number of votes cast in such State for each, which documents shall be signed, certified, and transmitted under the seal of such State to the seat of the Government of the United States, directed to the Secretary of State, who shall forthwith open all certificates and count the votes. The person receiving the majority of popular votes for President in a runoff election to elect a nominee for President shall be the official candidate of such political party for President throughout the United States. The person receiving the majority of popular votes for Vice President in a runoff election to elect a nominee for Vice President shall be the official candidate of such political party for Vice President throughout the United States.

"SEC. 5. In the event a person shall receive in any such primary election, as the result of write-in votes, a majority of the total number of votes cast by the voters of the party of his registered affiliation for nominees for President and a majority of the total number of votes cast by such voters for nominees for Vice President, such person shall declare which nomination he accepts; and a runoff election shall be conducted for the nomination such person does not accept between the two persons who received the next highest number of votes for such nomination.

"In the event a person shall receive in any such primary election, as the result of write-in votes, the highest or second highest number of votes cast by the voters of the party of his registered affiliation for nominees for President (and no person receives a majority) and the highest or second highest number of votes cast by such voters for nominees for Vice President (and no person receives a majority), such person shall declare the office for which he will be a candidate in the runoff election provided for in section 4 of this article and such person may not be a candidate for nomination for the other office. The runoff election for the nomination for such other office shall be between the two persons who received the next highest number of votes for such other office.

"In the event a person shall receive in any such primary election, as the result of write-in votes, a majority of the total number of votes cast by the voters of the party of his registered affiliation for nominees for President and the highest or second highest number of votes cast by such voters for nominees for Vice President (and no person receives a majority), or such person receives a majority of the total number of votes cast for nominees for Vice President and the highest or second highest number of votes cast for nominees for President (and no person receives a majority), such person may, in either such case, accept a nomination for the office for which he received a majority of the votes cast, and a runoff election shall be conducted for the other office between the two persons who received the next highest number of votes for such office; or, such person may refuse the nomination for the office for which he received a majority of the votes cast and declare himself a candidate in the runoff election provided for in section 4 of this article for the office for which he received the highest or second highest number of votes. If such person refuses the nomination for an office for which he received a majority of the votes cast, a runoff election shall be conducted for such office between the two persons who received the next highest number of votes for such office. Any runoff election provided for in this section shall be conducted at the same time, and the results thereof certified in the same manner, as provided for runoff elections under section 4 of this article.

"If, in any case in which a runoff election would otherwise be held, only one candidate of a party remains for nomination for President or Vice President, as the case may be, such candidate shall be the official candidate of such party for such office and no runoff election shall be conducted for such office.

"SEC. 6. In the event of the death or resignation of the official candidate of any political party for President, the person nominated by such political party for Vice President shall be the official candidate of such party for President. In the event of the deaths or resignations of the official candidates of any political party for President and Vice President, or in the event of the death or resignation of the official candidate of any political party for Vice President, a national committee of such party shall designate such candidate or candidates, who shall then be deemed the official candidate or candidates of such party, but in choosing such candidate or candidates the vote shall be taken by States, the delegation from each State having one vote. A quorum for such purposes shall consist of a delegate or delegates from two-thirds of the States, and a majority of all States shall be necessary to a choice.

"SEC. 7. The electoral college system of electing the President and Vice President of the United States is hereby abolished. The President and Vice President of the United States shall be elected at a general election by the people of the several States by direct popular vote of the qualified voters in each State who shall have the qualifications requisite for electors of the most numerous branch of the State legislature. The time of such election shall be the same throughout the United States, and unless the Congress shall by law appoint a different day, such election shall be held on the first Tuesday after the first Monday in November in the year preceding the expiration of the regular term of the President and Vice President. The names of candidates officially nominated in primaries as herein provided, and only such names, shall appear upon the official ballot in every State for the offices of President and Vice President but the foregoing shall not, except in the case of a runoff election, prohibit the names of a candidate for President, or the name of any other person, from being written on the ballot by the voters for Vice President or the name of a candidate for Vice President, or the name of any other person, from being written on the ballot by the voters for President.

SEC. 8. Within fifteen days after such general election, the chief executive of each State shall make distinct lists of all persons receiving votes for President and all persons receiving votes for Vice President, and the number of votes cast in such State for each, which list shall be signed, certified, and transmitted under the seal of such State to the seat of the Government of the United States, directed to the Secretary of State who shall forthwith open all certificates and count the votes. The person receiving a majority of the total number of popular votes cast for President shall be President, and the person receiving a majority of the total number of popular votes cast for Vice President shall be Vice President. If no person receives a majority of the total number of popular votes cast for President, a runoff election to choose the President shall be conducted throughout the United States on the twenty-eighth day after the day on which the general election was held. Such runoff election shall be between the two persons who received the greatest number of popular votes for President cast in the general election. If no person receives a majority of the total number of popular votes cast for Vice President, a runoff election to choose the Vice President shall be conducted throughout the United States on the twenty-eighth day after the day on which the general election was held. Such runoff election shall be between the two persons who received the greatest number of popular votes for Vice President cast in the general election. Within fifteen days after a runoff election to choose a President or Vice President, the chief executive of each State shall, in the case of a runoff election for President, transcribe on an appropriate document the names of the two persons on the ballot for President and the number of votes cast in such State for each, or, in the case of a runoff election for Vice President, transcribe on an appropriate document the names of the two persons on the ballot for Vice President, and the number of votes cast in such State for each, which document shall be signed, certified, and transmitted under the seal of such State to the seat of the Government of the United States, directed to the Secretary of State, who shall forthwith open all certificates and count the votes. The persons receiving the majority of popular votes for President in a runoff election for President shall be President. The person receiving the majority of popular votes for Vice President in a runoff election for Vice President shall be Vice President. No person constitutionally ineligible to the office of President shall be eligible to that of Vice President.

"SEC. 9. In the event a person shall receive in any such general election, as the result of write-in votes, a majority of the total number of popular votes cast for President and a majority of the total number of popular votes cast for Vice President, such person shall declare which office he accepts; and a runoff election shall be conducted for the office such person did not accept between the two persons who received the next highest number of votes for such office.

"In the event a person shall receive in any such general election, as the result of write-in votes, the highest or second highest number of popular votes cast for President (and no person receives a majority) and the highest or second highest number of popular votes cast for Vice President (and no person receives a majority), such person shall declare the office for which he will be a candidate in the runoff election provided for in section 8 of this article and such person may not be a candidate for the other office. The runoff election for such other office shall be between the two persons who received the next highest number of votes for such other office.

"In the event a person shall receive in any such general election, as the result of write-in votes, a majority of the total number of popular votes cast for President and the highest or second highest number of popular votes cast for Vice President (and no person receives a majority), or he receives a majority of the total number of popular votes cast for Vice President and the highest or second highest number of popular votes cast for President (and no person receives a majority), such person may, in either such case, accept the office for which he received a majority of the votes cast, and a runoff election shall be conducted for the other office between the two persons who received the next highest number of votes for such office; or, such person may refuse the office for which he received a majority of the votes cast and declare himself a candidate in the runoff election provided for in section 8 of this article for the office for which he received the highest or second highest number of votes. If such person refuses the office for which he received a majority of the votes cast, a runoff election shall be conducted for such office between the two persons who received the next highest number of votes for such office. Any runoff election provided for in this section shall be conducted at the same time, and the results thereof certified in the same manner, as provided for runoff elections under section 8 of this article.

"If, in any case in which a runoff election would otherwise be held, only one candidate remains for the office of President or Vice President, as the case may be, such candidates shall be deemed elected to such office and no runoff election shall be conducted for such office.

"SEC. 10. The Congress shall have power to enforce this article by appropriate legislation.

"SEC. 11. The Congress shall have power to provide by appropriate legislation for cases in which two or more persons receive an equal number of popular votes for President or Vice President in any such primary or general election.

"SEC. 12. The Congress shall have power to provide by appropriate legislation for methods of determining any dispute or controversy that may arise in the counting and canvassing of the votes for President and Vice President in any such primary or general election. The places and manner of holding such primary or general election shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations.

"SEC. 13. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the States within seven years from the date of the submission hereof to the States by the Congress."

#### SUMMARY OF SENATE JOINT RESOLUTION 1

Senate Joint Resolution 1 (by Senator Smith of Maine) abolishes the electoral college. It provides for direct election of the President and Vice President by popular vote and nomination of candidates by national primaries. In both primaries and the general election, runoff elections are held if no candidate receives a majority.

#### SENATE JOINT RESOLUTION 8

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States:*

#### "ARTICLE —

"SECTION 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during a term of four years, and together with the Vice President, chosen for the same term, be elected as provided in this Constitution. No person constitutionally ineligible for the office of President shall be eligible for that of Vice President of the United States.

"SEC. 2. Each State shall be entitled to a number of electoral votes equal to the whole number of Senators and Representatives to which such State may be entitled in the Congress. There shall be held in each State an election to determine what candidates for the offices of President and Vice President shall receive the electoral votes of that State. The voters in such election shall vote for the candidate of a political party for President and for the candidate of the

same political party for Vice President. The candidate for President receiving the greatest number of popular votes in any State shall receive all of the electoral votes of that State for President, except that if the candidates of more than one political party receive an equal number of popular votes in any State and such number is greater than the number received by any other candidate, the electoral votes of the State shall be divided equally among the candidates of such parties. The candidate for Vice President of a party whose candidate for President receives electoral votes of a State for President shall receive the same number of electoral votes of such State for Vice President. If, in any State, the candidate of any political party for President receives popular votes as the candidate of more than one political party for President and different persons are the candidates of any of such parties for Vice President, the electoral votes of such State for Vice President shall be given to the candidate for Vice President of the political party as the candidate of which the candidate receiving the electoral votes of such State for President received the greatest number of popular votes. The voters in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature. The places and manner of holding such election shall be prescribed in each State by the legislature thereof, but the Congress may at any time by law make or alter such regulations. The Congress shall determine the time of such election, which shall be the same throughout the United States, and, unless otherwise determined by the Congress, such election shall be held on the Tuesday next after the first Monday in November of the year preceding the year in which the regular term of President and Vice President is to begin.

"Sec. 3. Within forty-five days after the election, the chief executive of each State shall make distinct lists showing the number of votes cast in such State for each of the candidates for the offices of President and Vice President, the names of the candidates receiving the electoral votes of such State, and the number of such electoral votes, which lists shall be signed, certified, and transmitted under the seal of such State to the seat of the Government of the United States directed to the President of the Senate. On the 6th day of January following the election, unless the Congress by law appoints a different day not earlier than the 4th day of January and not later than the 10th day of January, the President of the Senate shall in the presence of the House of Representatives open all the certificates and the result of the election shall then be ascertained. The person having the greatest number of electoral votes for President shall be the President, if such number is a majority of the whole number of the electoral votes; and if no person has such a majority, then from the persons having the highest numbers not exceeding three on the list of those receiving electoral votes for President, the House of Representatives shall choose immediately, by ballot, the President. In choosing the President the votes shall be taken by States, the representation from each State having one vote. A quorum for this purpose shall consist of a member or members from two-thirds of the States and a majority of all the States shall be necessary to a choice. The person receiving the greatest number of electoral votes for Vice President shall be the Vice President, if such number is a majority of the whole number of the electoral votes; and if no person has such a majority, then from the persons having the two highest numbers on the list of those receiving electoral votes for Vice President, the Senate shall choose the Vice President. A quorum for this purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. The Congress may by law provide for the case of the death of any person who, except for his death, would have been entitled to receive a majority of the electoral votes for President or Vice President.

"Sec. 4. Paragraphs 1, 2, and 3 of section 1, article II, of the Constitution, and the twelfth article of amendment to the Constitution are hereby repealed.

"Sec. 5. This article shall apply to the election of Presidents and Vice Presidents whose regular terms begin more than two years after its ratification.

"Sec. 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the States within seven years from the date of its submission to the States by the Congress."

#### SUMMARY OF SENATE JOINT RESOLUTION 8

Senate Joint Resolution 8 (introduced by Senator McGee) abolishes the electoral college but preserves the electoral votes of each State. The person receiving the highest number of popular votes is credited with all the State's electoral

votes. If no candidate receives a majority of the entire electoral vote, election is in the House of Representatives with each State having one vote and a majority of the whole number of States' votes being necessary for election.

---

SENATE JOINT RESOLUTION 12

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein),* That the following article is proposed as an amendment to the Constitution of the United States which shall be valid to all intents and purposes as part of the Constitution if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress :

“ARTICLE —

“SECTION 1. Each State shall choose a number of electors of President and Vice President equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be chosen an elector.

“The electors to which a State is entitled by virtue of its Senators shall be elected by the people thereof, and the electors to which it is entitled by virtue of its Representatives shall be elected by the people within single-electors districts established by the legislature thereof; such districts to be composed of compact and contiguous territory, containing as nearly as practicable the number of persons which entitled the State to one Representative in the Congress; and such districts when formed shall not be altered until another census has been taken. Before being chosen elector, each candidate for the office shall officially declare the persons for whom he will vote for President and Vice President, which declaration shall be binding on any successor. In choosing electors of President and Vice President the voters in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature, except that the legislature of any State may prescribe lesser qualifications with respect to residence therein.

“The electors shall meet in their respective States, fill any vacancies in their number as directed by the State legislature, and vote by signed ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each, excluding therefrom any votes for persons other than those named by an elector before he was chosen, unless one or both of the persons so named be deceased, which lists they shall sign and certify, and transmit sealed to the seat of government of the United States, directed to the President of the Senate; the President of the Senate shall, in the presence of the Senate and the House of Representatives, open all the certificates and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors chosen; and the person having the greatest number of votes for Vice President shall be the Vice President, if such a number be a majority of the whole number of electors chosen.

“If no person voted for as President has a majority of the whole number of electors, then from the persons having the three highest numbers on the lists of persons voted for as President, the Senate and the House of Representatives, assembled and voting as individual Members of one body, shall choose immediately, by ballot, the President; a quorum for such purpose shall be three-fourths of the whole number of the Senators and Representatives, and a majority of the whole number shall be necessary to a choice; if additional ballots be necessary, the choice on the fifth ballot shall be between the two persons having the highest number of votes on the fourth ballot.

“If no person voted for as Vice President has a majority of the whole number of electors, then the Vice President shall be chosen from the persons having the three highest numbers on the lists of persons voted for as Vice President in the same manner as herein provided for choosing the President. But no

person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.

"SEC. 2. The Congress may by law provide for the case of the death of any of the persons from whom the Senate and the House of Representatives may choose a President or a Vice President whenever the right of choice shall have devolved upon them.

"SEC. 3. This article supersedes the second and fourth paragraphs of section 1, article II, of the Constitution, the twelfth article of amendment to the Constitution and section 4 of the twentieth article of amendment to the Constitution. Except as herein expressly provided, this article does not supersede the twenty-third article of amendment.

"SEC. 4. Electors appointed pursuant to the twenty-third article of amendment to this Constitution shall be elected by the people of such district in such manner as the Congress may direct. Before being chosen as such elector, each candidate shall officially declare the persons for whom he will vote for President and Vice President, which declaration shall be binding on any successor. Such electors shall meet in the district and perform the duties provided in section 1 of this article.

"SEC. 5. This article shall take effect on the 1st day of July following its ratification."

#### SUMMARY OF SENATE JOINT RESOLUTION 12

Senate Joint Resolution 12 (introduced by Senator Mundt, with Senators Thurmond, McClellan, Hruska, Morton, Fong, Boggs, Stennis, Prouty, and Goldwater as cosponsors) preserves the electoral college, but provides for the selection of electors by single-elector districts with two electors being selected at large from the State. The districts are to be established by the State legislatures and each is to be composed of contiguous and compact territory and is to contain as nearly as practicable the number of persons entitling the State to one Representative in the Congress. It provides that before being chosen elector, each candidate for the office shall officially declare the persons for whom he will vote for President and Vice President, which declaration shall be binding on any successor. It allows any State to prescribe lesser qualifications with respect to residence therein. If no candidate for President receives a majority of the whole number of electoral votes, the Senate and House, assembled together and voting as individuals, elect from the three highest candidates. A majority of the combined authorized votes is necessary for election.

#### SENATE JOINT RESOLUTION 13

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States:*

#### "ARTICLE —

"SECTION 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years and, together with the Vice President, chosen for the same term, be elected as provided in this Constitution.

"SEC. 2. The nominees of each political party for election as President shall be nominated in primary elections held in the several States as provided by this section. The places and manner of holding such primary elections shall be prescribed in each State by the legislature thereof. Congress shall determine the time of such primary elections, which shall be the same throughout the United States. The voters in such primary elections in each State shall have the qualifications requisite for electors of the most numerous branch of the legislature of such State. Any such voter shall be eligible to vote only in the primary of the political party of his registered affiliation. No person shall be a candidate for nomination except in the primary of the political party of his registered affiliation, and the name of each such candidate shall appear on the ballot of that party in all of the States. A political party shall be recognized as such for the purposes of any primary election held pursuant to this article if at any time within four years preceding such election the number of its registered members shall have

exceeded 10 per centum of the total number of registered voters in the United States.

"Within fifteen days after any such primary, or at such time as the Congress shall direct, the official custodian of the election returns of each State shall make separate lists of all persons for whom votes were cast as nominee for President and the number of votes for each, which lists he shall sign and certify and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Speaker of the House of Representatives, open all certificates, and the votes shall then be counted.

"Each political party in each State shall be entitled to a number of nominating votes equal to the whole number of Senators and Representatives to which such State may be entitled in the Congress. Each person for whom votes were cast as nominee for President in any State shall be credited with such proportion of his party's nominating votes in such State as he receives of the total popular vote of his party therein for President. In making the computation fractional numbers less than one one-thousandth shall be disregarded unless a more detailed calculation would change the result of the election. The person having a majority of the nominating votes as nominee for President in the case of each party shall be the nominee of that party for President. If in any political party no person receives a majority of the nominating votes as nominee for President, then a second primary for that political party shall be held and the names of the two persons seeking the Presidential nomination of that party who have received the greatest number of nominating votes in the first primary shall appear on the second primary ballot, and the one person receiving the greater number of nominating votes in the second primary shall be the nominee of that political party for President.

"In the event of the death or resignation, prior to the election, of the nominee of any political party for President, the national committee of such party shall designate a successor, but in choosing such successor the vote shall be taken by States, the delegation from each State having one vote. A quorum for such purpose shall consist of a delegate or delegates from two-thirds of the States, and a majority of all States shall be necessary to a choice.

"SEC. 3. The electoral college system of electing the President and Vice President of the United States is hereby abolished. The President and Vice President shall be elected by the people of the several States. The voters in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature. The places and manner of holding such election shall be prescribed in each State by the legislature thereof. Congress shall determine the time of such election, which shall be the same throughout the United States. Until otherwise determined by the Congress, such election shall be held on the Tuesday next after the first Monday in November of the year preceding the year in which the regular term of the President is to begin. Each State shall be entitled to a number of electoral votes equal to the whole number of Senators and Representatives to which such State may be entitled in the Congress.

"Within forty-five days after such election, or at such time as the Congress shall direct, the official custodian of the election returns of each State shall make distinct lists of all persons for whom votes were cast for President and the number of votes for each, and the total vote of the electors of the State for all persons for President, which lists he shall sign and certify and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate. On the 6th day of January following the election, unless the Congress by law appoints a different day not earlier than the 4th day of January and not later than the 10th day of January, the President of the Senate shall in the presence of the Senate and House of Representatives open all certificates and the votes shall then be counted. Each person for whom votes were cast for President in each State shall be credited with such proportion of the electoral votes thereof as he received of the total vote of the electors therein for President. In making the computations, fractional numbers less than one-thousandth shall be disregarded. The person having the greatest number of electoral votes for President shall be President, if such number be at least 40 per centum of the whole number of such electoral votes. If no person have at least 40 per centum of the whole number of electoral votes, then from the persons having the two highest numbers of electoral votes for President, the Senate and the House of Representatives sitting in joint session shall choose immediately, by ballot, the President. A majority of the votes of the combined authorized membership of the Senate and the House of Representatives shall be necessary for a choice.

"The Vice President shall be likewise elected, at the same time and in the same manner and subject to the same provisions, as the President, but no person constitutionally ineligible for the office of President shall be eligible to that of Vice President of the United States.

"The Congress may by law provide for the case of the death of any of the persons from whom the Senate and the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate and the House of Representatives may choose a Vice President whenever the right of choice shall have devolved upon them.

"SEC. 4. Whenever the powers and duties of the office of President shall devolve upon the Vice President or upon one of the persons designated by the Congress to act as President in the absence of a Vice President, and the date of the next general election for Senators and Representatives in Congress to be held more than ninety days after such powers and duties shall have so devolved is at least two years prior to the date on which the next regular quadrennial election for President is to be held, a special election shall be held in the several States for the purpose of choosing a President and Vice President. Such special election shall be held at the time of the next general election for Senators and Representatives in Congress, and, except as provided in this section, candidates for such special election shall be nominated and elected in the same manner as in the case of regular elections. The lists required by the first section of this article to be transmitted to the seat of the Government shall be transmitted within ten days after the election and shall be opened and the votes counted on the fifteenth day following such election. A President and Vice President elected at a special election held pursuant to this section shall take office on the fifth day following the day on which the result of such election shall have been determined and shall hold office until noon on the 20th day of January following the expiration of four years after the date on which they take office, and the terms of their successors shall then begin. Thereafter, except as provided in this section, the terms of the President and Vice President shall end at noon on the 20th day of January in each fourth year, and the terms of their successors shall then begin.

"SEC. 5. Paragraphs 1, 2, and 3 of section 1, article II, of the Constitution, and the twelfth article of amendment to the Constitution, and section 4 of the twentieth article of amendment to the Constitution, are hereby repealed.

"SEC. 6. The article shall take effect two years following its ratification.

"SEC. 7. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the States within seven years from the date of its submission to the States by the Congress."

#### SUMMARY OF SENATE JOINT RESOLUTION 13

Senate Joint Resolution 13 (by Senator Smathers) abolishes the electoral college and provides for division of each State's electoral votes in proportion to the popular votes received by each candidate. If no candidate receives 40 percent of the whole electoral vote, the Senate and House, assembled together and voting as individuals, elect from the two highest candidates. A majority of the combined authorized votes is necessary for election. It also provides for nomination by primary elections and for special elections when the Vice President succeeds to the Presidency and more than 2 years remain in the term of office.

---

#### SENATE JOINT RESOLUTION 24

*Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That an amendment is hereby proposed to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution only if ratified by three-fourths of the legislatures of the several States within seven years from the date of its submission by the Congress:*

#### "ARTICLE—

"SECTION 1. The President and Vice President of the United States shall be elected by the people of the several States and the District constituting the seat

of government of the United States. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature, except that the legislature of any State may prescribe less restrictive qualifications with respect to residence therein. The electors in the District shall have such qualifications as the Congress may prescribe. The places and manner of holding such election in each State shall be prescribed by the legislature thereof. The place and manner of holding such election in the District shall be prescribed by the Congress. Congress shall determine the time of such election, which shall be the same throughout the United States. Until otherwise determined by the Congress, such election shall be held on the Tuesday next after the first Monday in November of the year preceding the year in which the regular term of the President is to begin. The people of each State shall be entitled to cast a number of electoral votes equal to the whole number of Senators and Representatives to which such State may be entitled in the Congress. The people of the District shall be entitled to a number of electoral votes equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State.

"Within forty-five days after such election, or at such time as the Congress shall direct, the official custodian of the election returns of each State and the District shall make distinct lists of all persons for whom votes were cast by electors for President and the number of votes for each, and the total vote of the electors of the State or the District for all persons for President, which lists he shall sign and certify and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate. On the 6th day of January following the election, unless the Congress by law appoints a different day not earlier than the 4th day of January and not later than the 10th day of January, the President of the Senate shall in the presence of the Senate and House of Representatives, open all certificates and the votes shall then be counted. The person receiving the greatest number of votes for President in any State or the District shall receive all of the electoral votes of such State or the District. If two or more persons receive an equal number of votes in any State or the District, the electoral votes thereof shall be divided equally between such persons. The person receiving the greatest number of electoral votes for President shall be President, if such number be a majority of the whole number of electoral votes received by all persons. If no person receives such majority, then from the person having the two highest numbers of electoral votes for President the Senate and the House of Representatives sitting in joint session shall choose immediately, by ballot, the President. A majority of the votes of the combined authorized membership of the Senate and the House of Representatives shall be necessary for a choice.

"The Vice President shall be likewise elected, at the same time and in the same manner and subject to the same provisions, as the President, but no person constitutionally ineligible for the office of President shall be eligible to that of Vice President of the United States.

"The Congress may by law provide for the case of the death of any of the persons from whom the Senate and the House of Representatives may choose the President or Vice President whenever the right of choice shall have devolved upon them.

"SEC. 2. This article shall take effect on the tenth day of February next after one year shall have elapsed following its ratification."

#### SUMMARY OF SENATE JOINT RESOLUTION 24

Senate Joint Resolution 24 (by Senator Kefauver) abolishes the electoral college but preserves the electoral votes of each State. Electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature, but the legislature of any State may prescribe less restrictive qualifications with respect to residence therein. The electors in the District shall have such qualifications as Congress may prescribe. The electoral votes of each State or the District are awarded to the person receiving the greatest number of popular votes. If no person receives a majority of the whole number of electoral votes, the Senate and House in joint session elect from the two highest candidates. A majority of the votes of the combined authorized membership is necessary for a choice.

## SENATE JOINT RESOLUTION 27

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That an amendment is hereby proposed to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution only if ratified by three-fourths of the legislatures of the several States within seven years from the date of its submission by the Congress :*

## "ARTICLE —

"SECTION 1. The Executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected as provided in this Constitution.

"The office of elector of the President and Vice President, as established by section 1 of article II and the twelfth article of amendment to this Constitution, is hereby abolished. The President and Vice President shall be elected by the people of the several States and the District constituting the seat of government of the United States. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature, except that the legislature of any State may prescribe lesser qualifications with respect to residence therein. The electors in the District shall have such qualifications as the Congress may prescribe. The places and manner of holding such election in each State shall be prescribed by the legislature thereof. The place and manner of holding such election in the District shall be prescribed by the Congress. Congress shall determine the time of such election, which shall be the same throughout the United States. Until otherwise determined by the Congress, such election shall be held on the Tuesday next after the first Monday in November of the year preceding the year in which the regular term of the President is to begin. Each State shall be entitled to a number of electoral votes equal to the whole number of Senators and Representatives to which such State may be entitled in the Congress. The District shall be entitled to a number of electoral votes equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State.

"Within forty-five days after such election, or at such time as Congress shall direct, the official custodian of the election returns of each State and the District shall make distinct lists of all persons for whom votes were cast for President and the number of votes for each, and the total vote of the electors of the State or the District for all persons for President, which lists he shall sign and certify and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate. On the 6th day of January following the election, unless the Congress by law appoints a different day not earlier than the 4th day of January and not later than the 10th day of January, the President of the Senate shall, in the presence of the Senate and House of Representatives, open all certificates and the votes shall then be counted. Each person for whom votes were cast for President in each State and the District shall be credited with such proportion of the electoral votes thereof as he received of the total vote of the electors therein for President. In making the computation, fractional numbers less than one one-thousandth shall be disregarded. The person having the greatest number of electoral votes for President shall be President, if such number be at least 40 per centum of the whole number of such electoral votes. If no person has at least 40 per centum of the whole number of electoral votes, then from the persons having the two highest numbers of electoral votes for President the Senate and the House of Representatives sitting in joint session shall choose immediately, by ballot, the President. A majority of the votes of the combined authorized membership of the Senate and the House of Representatives shall be necessary for a choice.

"The Vice President shall be likewise elected, at the same time and in the same manner and subject to the same provisions, as the President, but no person constitutionally ineligible for the office of President shall be eligible to that of Vice President of the United States.

"The Congress may by law provide for the case of the death of any of the persons from whom the Senate and the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of death of any of the persons from whom the Senate and the

House of Representatives may choose a Vice President whenever the right of choice shall have devolved upon them.

"SEC. 2. This article shall take effect on the 10th day of February next after one year shall have elapsed following its ratification."

SUMMARY OF SENATE JOINT RESOLUTION 27

Senate Joint Resolution 27 (introduced by Senator Kefauver, with Senators Dodd, Kuchel, Randolph, Saltonstall, Sparkman, and Pell as cosponsors) abolishes the electoral college and provides for division of each State's electoral votes in proportion to the popular votes received by each candidate. It places the District of Columbia on the same basis as the least populous State. It provides that the State legislatures may prescribe lesser qualifications with respect to residence therein. The electors in the District shall have such qualifications as the Congress may prescribe. If no candidate receives 40 percent of the whole electoral vote, the Senate and House, assembled together and voting as individuals, elect from the two highest candidates. A majority of the votes of the combined authorized membership is necessary for election.

SENATE JOINT RESOLUTION 73

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein),* That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by conventions in three-fourths of the several States:

"ARTICLE —

"SECTION 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during a term of four years, and, together with the Vice President, chosen for the same term, shall be elected by votes cast by the people of the several States. No person constitutionally ineligible for the office of President shall be eligible for that of Vice President of the United States.

"The Congress shall determine the time of such election, which shall be the same throughout the United States. Until otherwise determined by the Congress, such election shall be held on the Tuesday next after the first Monday in November of the year in which the regular term of the President and Vice President, as herein provided, is to begin.

"The persons voting in each State in such election shall have the qualifications requisite for persons voting for members of the most numerous branch of the legislature of that State. The places and manner of holding such election shall be prescribed in each State by the legislature thereof, but the Congress may at any time by law make or alter such regulations. The candidates for the offices of President and Vice President shall be selected in such manner as the Congress shall by law provide. The names of the candidates so selected shall be placed on the ballot in each State, and shall so appear thereon that a single vote will be cast by each voter for the candidate of a political party for the office of President and the candidate of the same party for the office of the Vice President.

"Sec. 2. Within two weeks after such election, the chief executive of each State shall make distinct lists showing the number of votes cast in such State for the candidates of each political party for the offices of President and Vice President, which lists shall be signed, certified, and transmitted under the seal of such State to the seat of the Government of the United States directed to the President of the Senate.

"On the twenty-first day following such election the President of the Senate shall open all certificates in the presence of the Speaker of the House of Representatives and the Chief Justice of the United States, and the votes shall then be counted. The candidates for the offices of President and Vice President having the greatest number of votes shall be President and Vice President, respectively. If two or more candidates shall have an equal number of votes for President and Vice President and such number is greater than that received by any other candidate, the candidate shall be deemed elected who shall have received the greatest number of the votes in each of the greatest number of States. The Congress may by law provide for the case wherein one or more of the persons.

referred to in the first sentence of this paragraph are unable to be present on the day fixed for the opening of the certificates, declaring who shall act in their places.

"Sec. 3. The terms of the President and Vice President shall end at noon on the first day of December in the fourth year of their term; and the terms of their successors shall then begin.

"Sec. 4. The first, second, third, and fourth paragraphs of section 1, article II, of the Constitution, the twelfth article of the amendment to the Constitution, that part of section 1 of the twentieth article of amendment to the Constitution which refers to the terms of the President and Vice President, and section 4 of the twentieth article of amendment to the Constitution are hereby repealed.

"Sec. 5. This article shall take effect on the first day of June following its ratification.

"Sec. 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in three-fourths of the several States, as provided in the Constitution, within seven years from the date of its submission to the States by Congress."

#### SUMMARY OF SENATE JOINT RESOLUTION 73

Senate Joint Resolution 73 (introduced by Senator Keating) abolishes the electoral college and provides for direct election by popular vote. The candidate having the greatest number of votes is elected. It also advances to December 1 the date when the President assumes office. Ratification of this amendment is to be by conventions within the States, rather than by State legislatures.

Mr. GRAHAM. The relevant constitutional provisions were printed in the record of the 1961 hearings, and need not be printed again at this time.

On March 18, 1963, the Supreme Court of the United States rendered its decision in the case of *Gray v. Sanders*. The Court in that case held that the Georgia unit system of casting and tabulating votes in Democratic primaries was unconstitutional. The defendants had argued that the primary system was patterned after the electoral college system of casting all of a State's electoral votes in a unit. The Court's opinion discussed the electoral college system in considerable detail, and I now submit a copy of the opinion to be entered at this point in the record.

Senator KEFAUVER. Let it be printed in the appendix of the record. I think that would be better.

(The opinion referred to is listed as "Exhibit No. 1" in the appendix.)

Mr. GRAHAM. The report of the 1961 hearings of this subcommittee, part 4, pages 715-732, contained a detailed study by the Legislative Reference Service of the various State presidential election laws. At that time, 31 States used the so-called short ballot, where only the name of the presidential and vice presidential candidates are placed on the ballot. A vote for the candidates is considered a vote for the electors nominated by that party, and the electors are accordingly considered bound to vote for the party nominees. Sixteen States had laws allowing the names of the candidates to be printed on the ballot, with the names of the party electors to be listed below.

The same inference that the elector is pledged to vote for the party nominee exists in this situation. Three States had statutes stating that the ballot could list only the names of the electors, and not those of the presidential nominees: Alabama, Arkansas, and Georgia. Under this type of statute, a number of "unpledged electors" can be placed under a party label, thus displacing electors who would be committed

to the national candidate, and holding the electoral votes in reserve, to be cast as the individual elector saw fit.

In recent months, several States have taken legislative action to change their election laws to allow or encourage the election of unpledged presidential electors. On March 2, 1963, Mississippi enacted a new election law of this type. I now submit a copy of it to be printed in the appendix to the record.

(The election law referred to is listed as "Exhibit No. 2" in the appendix.)

Mr. GRAHAM. Georgia changed its statute, but the new statute still appears to give the respective political parties in the State the discretionary power to leave the name of the presidential and vice presidential nominees off the ballot, and substitute in their place a slate of unpledged electors. I now submit a copy of it, to be printed in the appendix to the record.

(The statute referred to is listed as "Exhibit No. 3" in the appendix.)

Mr. GRAHAM. In 1961, Arkansas repealed its "unpledged elector" statute and adopted the short ballot system, so that Arkansas laws do not appear at this time to allow the election of unpledged electors.

In the legislatures of two other States, Florida and Louisiana, at least one house has passed a similar "unpledged elector" bill. At this time, I submit for the appendix a copy of the bill that has been passed by the Florida Senate. The Louisiana bill<sup>1</sup> will be added to the record if it is passed by the legislature in time to be included herein.

(The bill referred to is listed as "Exhibit No. 4" in the appendix.)

Mr. GRAHAM. During the past year an organized effort has been made to persuade the various State legislatures to apply to Congress under article V of the Constitution for a constitutional convention to—

propose an article or amendment to the Constitution providing for a fair and just division of the electoral votes within the States in the election of the President and Vice President.

It is significant to note that this resolution attempts to restrict such a convention so that it could not consider direct election of the President, or the present unit system of casting electoral votes. It could, however, propose the district system, or the proportional system, or some other system of dividing each State's electoral votes.

At this time, I submit for the appendix a copy of the resolution which has been passed in five states—Montana, Utah, Colorado, Kansas, and Texas. Two other States—Arkansas and South Dakota—have passed resolutions which are different in wording, but which would have approximately the same effect.

(The resolution referred to is listed as "Exhibit No. 5" in the appendix.)

Mr. GRAHAM. Mr. Chairman, I also submit for the record a letter dated June 4, 1963, from Mr. Nicholas deB. Katzenbach, Deputy Attorney General of the United States.

Senator KEFAUVER. Let his letter be printed in the appendix to the record. We will incorporate by reference into this record the prior testimony of Mr. Katzenbach given at the hearings of June 28,

<sup>1</sup> The bill was defeated in the Louisiana Senate on June 6, 1963, by a vote of 20 to 18. The Florida Legislature adjourned without taking further action on senate bill No. 25.

1961, which are printed at pages 363 through 391 of the record of those hearings.

(The letter referred to is listed as "Exhibit No. 6" in the appendix.)

Senator KEFAUVER. Mr. Flynn, do you have anything for the record?  
Mr. FLYNN. No, Mr. Chairman.

Senator KEFAUVER. Our first witness this morning is Dr. James MacGregor Burns, professor of political science at Williams College, Williamstown, Mass. He is a distinguished authority on the subject of the American Presidency. Most recently, he has been widely acclaimed for his penetrating analysis of the Presidency and Congress in his book entitled "Deadlock of Democracy."

He is the author of a number of other books, including "Congress on Trial," "Roosevelt: The Lion and the Fox," and "John Kennedy: A Political Profile."

Professor Burns was a Democratic candidate for Congress in Massachusetts in 1958. Although defeated, he gained 45 percent of the vote in a district that has elected a Democrat only once since the Civil War.

Will you come around, Dr. Burns? We are delighted to have you here. See if your microphone works.

Dr. BURNS. Yes, Mr. Chairman.

Senator KEFAUVER. You have a statement which you have been good enough to prepare?

Dr. BURNS. Yes, sir.

Senator KEFAUVER. The statement in full will be printed in the record, and you may go ahead and proceed.

**STATEMENT OF DR. JAMES MacGREGOR BURNS, PROFESSOR OF  
POLITICAL SCIENCE, WILLIAMS COLLEGE, WILLIAMSTOWN,  
MASS.**

Dr. BURNS. Mr. Chairman, my name is James MacGregor Burns. I am professor of political science at Williams College, in Williamstown, Mass.

Mr. Chairman, this subcommittee deserves the gratitude of all Americans—especially political scientists—for the searching and conscientious examination it has given to major problems of American Government. Many of these problems are not very glamorous; they are simply important. Reform of the electoral college in particular is a highly complex problem that needs confrontation by the best minds in the Senate and outside.

The sad fact is, however, that despite all the work that this subcommittee has done, and all the studies and proposals that have been developed outside the subcommittee, we seem to be no closer to effective reform of the electoral college and of other faulty parts of our governmental system than we were 5 or 10 or 20 years ago. Why is this the case? And what can be done about it?

The answer to the first question is clear. The electoral college is not just a technical electoral procedure. It is steeped in politics—it affects the balance of parties, the power of interest groups, the strength of ideologies, the fates of politicians. Hence it cannot be considered apart from the political context in which it operates. It is part of the whole solar system of our Government, as Senator Kennedy said years ago, and any effort to change it will disturb

the whole system. This is not an argument against changing it, but an argument for considering change in a politically realistic context. Reform has proved impossible because politicians have feared that it might upset or threaten political arrangements that they have found congenial, or at least predictable and dependable.

The hearings of this subcommittee testify to the excellent discussions that have been held over the pros and cons of the electoral college and other arrangements. I offer nothing on substantive questions of reform because I believe that the subject has been exhaustively and in many cases brilliantly examined. The big job of this committee now, it seems to me, is to devise a strategy to bring about the changes that so many Americans, including many Senators, evidently favor.

It seems clear that merely proposing electoral college reform is not effective. Certainly the experience of 1956 would suggest that even when a great majority of Senators seem to be agreed on a proposal, ultimately that majority splits apart and erodes when all the political implications are brought into view. To be sure, many Senators still agree that something must be done about faulty mechanics of the electoral college, which Senator Kefauver has aptly described as a "loaded pistol" pointed at our form of government and which his earlier remarks today again emphasized.

But if the American people did not become aroused enough over this loaded pistol in the wake of the 1960 election, with all the potentials for chaos if not disaster in that situation, when will they become aroused? Only after it might be too late—and this is just what this subcommittee wishes to avoid.

May I suggest two alternative strategies of effective reform of the electoral college and of other faults in our system:

The first strategy would be to take the simplest, most noncontroversial, and most urgent aspect of electoral college reform—abolition of electors and the use only of electoral votes—and make this part of a package of "housekeeping" constitutional amendments that would arouse wide, bipartisan support from Americans. Such a package might include the item veto for the President; modernizing residence requirements for presidential elections; new provisions for presidential disability; and rescheduling the time of national conventions, the presidential election, the beginning of the presidential term, and the convening of Congress, in accordance with proposals made to this subcommittee.

Possibly the 4-year term for Representatives has aroused enough support in the Nation, as the 4-year term for Governor has done in many States, to be included in such a package. This committee might think of others, and some of the ones I have suggested might seem too controversial for such a housekeeping package. Whether such amendments should be included in one grand amendment, or in separate amendments, is a question beyond my competence to answer; the important thing would be to present the proposals to Congress and to the American people and, of course, to the State legislatures, as a package, to be voted on in relation to one another. I believe that such a package would tap the great interest of Americans in a more efficient National Government, without arousing excessive party or factional feeling. Possibly such a package could be negotiated between the

two-party leaderships, or between the "in" and "out" parties in Congress.

The second alternative strategy is quite different from the first. It is to confront directly the main forces battling over electoral college reform and to find a basis of reconciliation between them. Put most simply, these forces are twofold. The first comprises those who believe that the present electoral college system puts too much influence into the hands of organized minority groups in the big pivotal States—minorities that tend to be liberal or liberal Democratic in their outlook—and who wish to divest the electoral college of this bias toward the big cities and the big urban minorities. The other force comprises those who grant that the Presidency is "gerrymandered" in a liberal direction by the "winner-take-all" mechanism, but who assert that they will never give up this liberal bias as long as a conservative bias exists in Congress—that is, in its districting, its one-party constituencies, its rules that play into the hand of conservative blocs in the House and Senate.

Effective electoral college reform has been crushed underfoot in the battle between these forces. Is there any basis of compromise?

I can speak only for myself, but I raise the question of whether the liberals might not accept the so-called district plan of electoral college reform if two things were made absolutely definite.

The first would be the abolition of electors, so that the problem Senator Kefauver has rightly raised questions about—the possibility that presidential elections might become heavily affected by personality campaigns between locally popular candidates for elector—would no longer exist.

The second requirement would be more important and doubtless more difficult to establish. This would be the agreement by the two sides on provisions that would guarantee the fairest possible districting of congressional constituencies. Provision would have to be made, as part of the overall settlement between the two contending forces, for some kind of nonpartisan commission, composed of geographers, demographers, and others, that would lay down tests for congressional districts; the House of Representatives would have to undertake categorically not to admit to membership candidates from districts adjudged by the commission to be unfairly constituted.

Opponents of the district method of electoral reform believe that none of the proposals (so far advanced by proponents of the method) to provide equitable districting for the electoral districts actually guarantees fairness in the drawing of those districts. Neither Congress nor most of the State legislatures have shown themselves willing to end gerrymandering. It is not enough to give Congress the power to exclude candidates from improperly drawn districts; Congress has had this power and has refused to exercise it. The power and the desire to end congressional gerrymandering must be built into the institutions and processes of our Government, I think, before those benefiting from the present "presidential gerrymander" will be willing to give it up.

Such an undertaking to abolish congressional gerrymandering will, incidentally, meet another problem much discussed before this subcommittee—whether electoral districts under a new electoral college system would need to be constituted on separate boundaries from con-

gressional districts—that is, electoral districts under the so-called district plan. If the congressional districts were fairly drawn, they could also serve as the constituencies for district electors.

Indispensable to either or both of the above strategies for reform is one other step. This is the establishment of a high-level, blue-ribbon Presidential commission charged with the duty of surveying the strengths and weaknesses of our whole system of government, or at least the Federal Government.

I urge this not only because a commission composed of the wisest men in and out of Government would itself come up with important findings and significant new proposals. I urge it also because I think we will need this kind of commission, with the prestige of a Hoover Commission, to arouse and inform public opinion.

We will also need strong support of the committee's findings from the President. In the past 2 years President Kennedy has taken a rather detached view of congressional and other forms of reform. I believe that few reforms, big or small, are possible until he throws himself into the battle with the energy and understanding that he displayed in the famous Senate battle over electoral college reform in 1956.

May I remind you in conclusion that history holds some lessons for those who shy away from any kind of institutional change. The alternative to gradual, persistent, moderate, evolutionary change—the kind of change reflected in many proposals made to this committee—is quick, violent, explosive change.

As the chairman mentioned, the invitation to appear before this committee reached me when I was in the Soviet Union last month; and a historian cannot observe that country without reflecting on the continuing impact of the explosive forces for change piling up in Russia for years before 1917, and released thunderously and cruelly, at the expense of enormous suffering, in the years afterward. I predict no such fate for this country.

I do feel, however, that we face a creeping social crisis, as we fail to meet the mounting needs of education and health, as we fail to deal with the dire needs and ills of the big cities.

Clearly we confront a steaming social crisis in the South and in localities in the North, as we see on every front page. Unless we can strengthen our Government to deal with these social and racial crises, through gradual but steady reform of governmental institutions, in order that Government can act to anticipate and avert acute emergency and violence—unless we can do this, I believe that we will face a serious constitutional crisis in our National Government before the end of this decade.

Thank you very much.

Senator KEFAUVER. Dr. Burns, we thank you very much for your statement, and it certainly will receive a great deal of consideration.

I think there is much basis for the statement of what may happen unless certain things are given consideration and acted upon very soon.

I do not exactly understand your package proposal, however. We find it difficult or impossible to get one proposal through Congress, and if you put several in one package, I am certain it would be much more difficult to get the necessary two-thirds approval in the Senate and in the House.

Dr. BURNS. Well, my theory there, Mr. Chairman, is that some of these more mechanical proposals such as Presidential disability, which has never been sufficiently taken care of constitutionally, would be so clearly desirable that the whole package could be presented to the people as essentially a mechanical improvement without involving the fates and fortunes of parties and interest groups and leaders, so that the overall strength of all the reforms, some of which could be rather easily dramatized, like the item veto for the President, might enable all of the amendments to get through if they were considered at a time when the spotlight could be put on them, both in Congress and in the State legislatures.

Senator KEFAUVER. Having had some experience in this field, I think the second alternative might have better success in Congress.

You have suggested some way of trying to get the sponsors of the various electoral amendments on a common ground. Do you think, sir, it is going to be possible under the district plan to get electoral districts which would be separate from the congressional districts?

Dr. BURNS. I think this would be inadvisable. I do feel our electoral system and our local voting arrangements are complex enough without setting up a new electoral district system. That is why I feel such an electoral district system could be set up only on the basis of congressional districts, and this could be done only if congressional districts were fairly apportioned.

Senator KEFAUVER. Senator Dirksen, do you have some questions?

Senator DIRKSEN. Well, I suppose, Dr. Burns, when you speak of a package, you are thinking of it in terms of a vehicle to carry some controversial items?

Dr. BURNS. Some of these items would be more controversial than others.

But I think at least abolishing electorates and substituting simple mechanical electoral votes will not be considered controversial. I think this in itself does not have enough political sex appeal. This is a terribly complicated problem, as you know, to arouse much interest on the part of people. But I think the simple electoral change combined with the others might arouse great interest.

Senator DIRKSEN. Well, consider for a moment your proposal to include in this package the item veto. Resolutions to amend the Constitution including the item veto for the President have been introduced ever since I have been around these diggings, and that goes back 30 years. But it has always been controversial, and much of the controversy has been that what you are actually doing is transferring the appropriating power to the President and out of the hands of Congress, which in the Constitution is given exclusive powers to appropriate.

Is that not true; is that not the nub of the controversy?

Dr. BURNS. Senator Dirksen, I have always felt that the item veto might be a device that would arouse a great deal of support from the Republican Party, because here is a device that prevents the President from adding anything to an appropriation bill, enables him only to cut something out of an appropriation bill, and what could suit the Republican Party more than that?

Senator DIRKSEN. Well, I do not look at it in the partisan political frame. I am thinking that giving the President the weapon to modify the appropriation bill after the Congress has impressed its

will on it, and insofar as he may modify, to giving him the appropriating power; I do not say that I am opposed to it, but I am trying to summarize what I think was the residual argument against the proposition over a long period of time.

Dr. BURNS. It has been adopted in a number of States.

Senator DIRKSEN. I know it has.

Now, I notice you include here modernizing residence requirements for presidential elections. Obviously that has merit.

I know of no reason why a citizen should be precluded from voting for the President and Vice Presidential candidate simply because he moves from Chicago to Elgin, Ill., or moves from Rock Island across the Mississippi to Davenport, in Iowa. But by changing his residence obviously he loses his vote. And that is certainly without controversy insofar as I can tell.

Now, the distinguished chairman of this committee can tell you all the differences we have had about Presidential disability and the line of succession, what should constitute disability, and who should take over, how long the authority shall be vested in a caretaker, if you want to call him that. But we have had that discussion, I do not know how many times. And we have never been able to resolve it. So it is certainly in a field of controversy.

Now, you mention rescheduling the time of national conventions. Are you thinking of making that a constitutional provision?

Dr. BURNS. I assume that rescheduling conventions could be brought about either as a result of other constitutional changes that, practically speaking, would require or make desirable a different time for the conventions, although I am not sure that it would be unconstitutional to prescribe in an amendment a time after which the national party conventions could not meet.

Senator DIRKSEN. Of course, there is neither a constitutional proposal nor anything in the statute dealing with scheduling of national conventions. That is a matter entirely within the hands of the political party in each case and, more particularly, its executive committee. Obviously they spar around some for an advantageous date.

And I doubt very much whether there would be any virtue in trying to include that in the statute, and certainly not within the Constitution.

Then the beginning of the presidential term, what specifically have you in mind there?

I say what do you have in mind about the change in the beginning of the presidential term, if any?

Dr. BURNS. There has been some discussion before this subcommittee of the possibility of a presidential term beginning earlier to enable the President to make a start somewhat earlier with his fiscal and budgetary plans for the new year.

There has also been discussion of a shorter campaign period in connection with the problem of campaign financing. I am raising this only in relation to that kind of problem.

Senator DIRKSEN. Of course, that is a partisan matter not covered by statute either. Your campaign begins usually when your convention is over, and then runs on to election day.

But going back now to the beginning of the presidential term, you had a great deal of discussion about the fact that the time between an election and the investiture of the President is almost all too short for the purpose of getting a program, getting up his agenda of nom-

inees for different offices in the executive branch, and so forth. Was it your idea it should be set back or it should be set forward?

Dr. BURNS. Well, we have a double problem there, because that period of waiting for a new President to take office is also a very difficult period for the country. It is a period sometimes of drift and even crisis, as in the case in 1932; although, of course, there was a longer period then.

I raise this only in connection with the possibility of keeping the time at about the same length as it is now, but enabling inauguration day to come perhaps in December.

Senator DIRKSEN. In December?

Dr. BURNS. In December or perhaps at the very beginning of January; of having the election campaigns come to an end in early October or mid-October, or some other date, as has been suggested before this committee.

Senator DIRKSEN. Had you ever contemplated the general idea of having a very simple inaugural of the President, without fanfare, and then holding the inaugural ceremonies during the Cherry Blossom Festival in the spring?

Dr. BURNS. No, sir; I never have.

Senator DIRKSEN. Well, it has been discussed, as you know, before this committee.

Senator KEFAUVER. We have trouble enough trying to get the cherry blossoms to bloom during festival time.

Senator DIRKSEN. Well, of course, we know when the cherry blossoms will be out. We have these smart people in Agriculture who squirt them with hormones to speed them up, squirt them with a different hormone to hold them back. So that is one of the great obstetrical phenomena of this time.

Now, you speak about the dates of convening of Congress. Have you something specific in mind, other than the 3d of January as provided by the Constitution, or any date set by the Congress?

Dr. BURNS. I think if the President were inaugurated early in December, Congress might still convene at the same time it does. This would enable the President to work up his proposals, budgetary, legislative and others, and have these ready to present to Congress when it convenes in January.

Senator DIRKSEN. Of course, the difficulty is that you can now foresee the workload, and it is possible that Congress can conceivably be in session—

Dr. BURNS. But this might be a lame duck Congress, and he might be arranging his program in connection with a new Congress, presumably.

Senator DIRKSEN. But I am speaking of the length of Congress now. It is conceivable that it will run all through the year. So if you set your date for the convening of the new Congress in December, you are forcing adjournment of the old Congress before its work is completed.

Dr. BURNS. Yes. Well, this would be an argument for early January convening of Congress.

Senator DIRKSEN. And then you have the idea of a 4-year term for Representatives. Do you want to elaborate on that—

Dr. BURNS. I favor—

Senator DIRKSEN (continuing). Except as a part of the package.

Dr. BURNS. I beg your pardon?

Senator DIRKSEN. Except as a part of the package.

Dr. BURNS. I favor the 4-year term for Members of the House of Representatives, because this, to begin with, would enable the Representatives to be chosen at the same time as the President.

I think that national debate and discussion are best conducted during the presidential year when two effective candidates can pose national issues in terms of which congressional candidates can carry on their own debates and discussions.

I favor it also because the so-called midterm congressional elections often produce deeper divisions between the President and the House of Representatives, and I think it is very important in this day and age to enable both the President and Congress to have 4 years to undertake the programs on which they were elected.

And I am not sure that this would be a very controversial proposal, again because of the number of States that have substituted 4-year gubernatorial terms for 2-year terms.

Granted, this is a very different office, but I think the people might approach congressional terms with the same attitude that they did gubernatorial terms.

Senator DIRKSEN. It seems to me, however, Dr. Burns, that you lump all these items in a package, just set up so many initial targets to shoot at, and I think you would compound rather than simplify your difficulties.

If your prime purpose was electoral reform, I am of the opinion that, if you are going to get electoral reform, you take that and nothing else for a single constitutional amendment in the hope that you get the job done.

Dr. BURNS. Well, Senator Dirksen, so many years have gone by, as you know, many, many years, and indeed decades, where people have made these sensible proposals for electoral college change, as you yourself have done, with so little action, it seems to me it is time to cast about for another strategy that might hold out more hope for this kind of reform.

It seems to me the burden of proof is on those who think that one further recommendation from a Senate committee might do the trick. It has not done the trick, and it has not done the trick in the House of Representatives either, from their committees.

Senator DIRKSEN. Well, you are a historian and political scientist. You know there have been periods as long as 70 years when the Constitution was not amended. I think 70 years was probably the period that I recall. Then we got into the area of 1913. There we came along with the income tax, direct election of Senators, and several others in that general area. So I do not know that the time period is particularly persuasive.

Probably the fault is ours that we have not given enough attention to it, and maybe the fault lies in the fact that there actually has been no great ground swell among the public that I can see. If it is there, it has not disclosed itself in the communications that come to the desks of Congressmen and Senators.

Maybe the fault is that you and your associates in the field of political science have failed to indoctrinate the young hopefuls as you have sent them abroad into the political arena. They just have not carried the message to Garcia.

Dr. BURNS. Senator, I disagree with you. I think you and your colleagues have given a great deal of attention to this problem and, speaking of the students, I have thought so well of the hearings of this subcommittee that I have assigned these to my students in college for their outside work. Because I think this electoral college problem reveals so much of more serious governmental problems in the country.

I do agree with you that the question has not been sufficiently well posed with the people, and this is why I think we need Presidential leadership as well as congressional leadership.

Senator DIRKSEN. You express a preference, or is it right to say that you express a preference for the district electoral system, or at least the district electing idea without the electoral? Substantially the general principle involved in the proposal made by Senator Mundt, of South Dakota; is that what you had in mind?

Dr. BURNS. I am flatly against Senator Mundt's proposal unless there are two absolute guarantees. One is the substitution of electoral voters for electors; and, secondly, as I point out in my statement, a commission or some device that would categorically end the gerrymandering in the House of Representatives.

Senator DIRKSEN. Well, now, amplify your opposition to the selection of electors on a district basis, and particularly on a congressional district basis.

Dr. BURNS. First, because congressional districts are, in many cases, gerrymandered today with the large urban and especially suburban areas receiving insufficient representation.

And secondly, because—

Senator DIRKSEN. Well, stop right there.

Dr. BURNS. Yes, sir.

Senator DIRKSEN. Now, are we not in a fair way to getting that cured as a result of Supreme Court decisions and what amounts virtually to a mandate to the respective States? How many States now have modified their congressional districts to comport with the Supreme Court decisions?

Dr. BURNS. This is a modification of the districts or State legislatures?

Senator DIRKSEN. Yes.

Dr. BURNS. The Supreme Court—we cannot predict what the Supreme Court will do, if anything, in connection with congressional gerrymandering.

Senator DIRKSEN. Will not the same thing apply so far as congressional districts are concerned?

Dr. BURNS. Not necessarily, because the Supreme Court might rule that Congress does have the power to exclude men elected from gerrymandered districts, and might leave this to Congress itself.

Senator DIRKSEN. But in the main, the States have made pretty fair progress in that field, have they not?

Dr. BURNS. I would say probably on the whole.

Senator DIRKSEN. We have a mandate in Illinois to reexamine the matter once every 10 years. I have not examined all the statutes, but I would assume that that sounds rather logical, and that other States would do maybe likewise to keep their congressional districts in pretty fair balance.

Dr. BURNS. There has been rather remarkable progress in several States. In other States there has been no progress. In some States there has been even a step backward.

I do not think we can expect the State legislatures themselves, gerrymandered in many cases, to take many forward strides toward redistricting their own State legislative districts, unless the Supreme Court keeps prodding and pushing them year after year. There are many ways of evading the Supreme Court here. And in any event, it may take a very long time before this gets around to the House of Representatives.

Senator DIRKSEN. Can you foresee that we have the difficult problem of setting up separate electoral districts in every State where you have a fair parity of votes?

Dr. BURNS. I think the State legislatures as constituted today would set up electoral districts that were themselves gerrymandered.

But even beyond that, Senator Dirksen, I would be very disturbed to see a presidential election conducted in terms of separate congressional or electoral districts. The presidential election is the one time when the American people can act together as one combined, even consolidated group of people dealing with national alternatives, concentrating on national problems. And I would hate to see this election process—and I think the presidential election process is one of the great American contributions to the art of government—I would hate to see this thing reduced to a series of perhaps rather petty campaigns in local districts—unless the other part of the bargain were accepted; unless there were an end of gerrymandering and the end of electors as individuals.

Senator DIRKSEN. Well, you are actually making a partial argument for direct election of President and Vice President.

Dr. BURNS. Ideally, I would prefer direct election of the President.

But I am making this compromise today because those of us who have stood by our specific proposals and who have not been willing to compromise on some effective basis have, I think, stood in the way of electoral college reform—but if no such compromise were possible, I would certainly retreat to the best proposal, which I think is direct election.

Senator DIRKSEN. Well, in sum, then, what you are presenting to the committee this morning is a strategy rather than a substantive proposal.

Dr. BURNS. That is true.

Senator DIRKSEN. In other words, some kind of a vehicle to get this done, either the carrot on the stick or a little bit of honey and sugar, whatever it takes, in order to get it done?

Dr. BURNS. I think strategy is inseparable from substance here.

What I have tried to present is the kind of proposal that perhaps could be agreed on that would receive sufficient support for it to go through. So that I hope it is an effective strategy based on the desirable substance.

Senator KEFAUVER. Professor Burns, just one other question.

I am very much concerned—and I think the country should be concerned—about the fact that three States have, by statute, taken away even any moral obligation for electors to vote for the nominee of the party, and in two other States such proposals have passed one of the

houses of the legislature. What do you think about this? Is this a matter to be concerned about, and is not this one of the main reasons why we ought to pass some change in the electoral laws?

Dr. BURNS. I completely share your alarm, and would have emphasized this more if I had been in this country when this kind of thing was brewing.

I think this is of the utmost seriousness, and that is why I hope that if nothing else comes out of this, there would come the abrogation of the idea of—or the possibility of independent electors.

Senator DIRKSEN. Well, you do not invest that with any moral significance, do you?

If I go in my State and say to the people: I am a candidate for the presidential electorate and I am going to vote for the best man, is there any immoral, unmoral, amoral, any other kind of "moral" significance about it? I have freely presented the case.

Dr. BURNS. Senator Dirksen, I do not—

Senator DIRKSEN. You have some impact on party discipline and party structure, I grant you. I see no moral significance in it.

Dr. BURNS. I do not condemn people I disagree with as being immoral. I simply think this is a terrible way to run the Government.

And it can produce the kind of crisis that members of this subcommittee have often mentioned—crisis between the election date in November and the installation of a President.

Senator DIRKSEN. Well, I do not subscribe to it at all; I just do not want the record to show that there is any moral obloquy attached to a man submitting himself to the electorate, to become an elector, and telling them very freely that he is going to vote for the best man, whomever he thinks is the best man, when the time comes to cast his electoral vote.

Senator KEFAUVER. Well, as I understood Mr. Graham's reading the analysis of the laws that have been passed, these people are placed on the ballot under the party label; is that not correct?

Mr. GRAHAM. Yes, sir.

Senator KEFAUVER. But then, however, they may vote for whomever they want to.

Dr. BURNS. Of course.

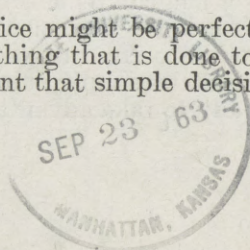
Senator KEFAUVER. This will mean that, assuming that the legislatures in Florida and Louisiana passed similar laws, the candidate being elected President would have to get more than a 53-vote majority, or else the election would be thrown into the House of Representatives; is that not the situation?

Dr. BURNS. Yes, sir.

But could I add to that, in answer to Senator Dirksen, Mr. Chairman, that, aside from the perilous aspect of this, I think we should recognize how difficult it is for the American voter to cope with the complexities of his electoral system.

I am sure you have counted, far more than I did in my one campaign, the number of people who simply do not understand who the candidates are and what is going on. They are simply baffled by the long ballot.

And even though some device might be perfectly proper from a legal standpoint, I think anything that is done to confuse the electorate along this line, to prevent that simple decisive understandable



choice between a Kennedy and a Nixon or Stevenson and Eisenhower—anything that confuses this is going to make for ineffective government, and it is going to make for a bewildered public.

I think your point about the public that is unaroused raises the question of whether the sheer complexity of our system helps keep people unaroused.

Senator DIRKSEN. Dr. Burns, in the Mundt bill there is a specific provision that the candidate for elector must declare who he is going to vote for at the time he petitions to get his name on the ballot. So that meets that proposition in the Mundt bill.

Then I was going to add one other thing.

You talk about a consolidated vote for the presidency. Well, the whole is equal to the sum of all its parts. And here is one district, there is another district, there is another district.

It would occur to me you get a pretty fair representative judgment of the country by doing it on a congressional district basis.

Dr. BURNS. I was making my point about the complexity in reference to these proposals in the Southern States that Senator Kefauver mentioned at the beginning of the hearings.

I am not sure that the whole does represent the sum of the parts in politics, unlike mathematics.

I think we get, from a national presidential campaign, the kind of confrontations as we did so supremely in the debate between Kennedy and Nixon, that we just do not get in—especially congressional—campaigns; that is, campaigns for the House of Representatives.

I think these campaigns suffer from the lack of effective television coverage, newspaper coverage; the voters often do not know who the candidates are. The candidates often obscure their position on issues.

All of which is terribly difficult to do on a national scale when the whole concerted press of the Nation is watching what the candidates are saying and checking up on their records and how they present their records.

Senator KEFAUVER. Mr. Graham, do you have any questions of Dr. Burns?

Mr. GRAHAM. Yes, Mr. Chairman.

Dr. Burns, Governor Wallace of Alabama, made a statement on a television show Sunday night that his efforts in 1964 would be devoted toward getting unpledged electors rather than a third party movement. And as we have seen, there are now three States whose laws would allow that, and two more who are considering a change—a total of 53 electoral votes. But 14 of those were unpledged in 1960.

Now, in your opinion, is this enough votes to really affect the outcome of the next election?

Dr. BURNS. I do not know whether it will affect the outcome of the next election. I am not that good a prophet.

I just have a feeling that in the long run history is not going to let us get away with this system. At some point it is going to trip us up. We have come close on several occasions.

I think there is a longrun tendency for presidential elections to be fairly close in this country as compared with earlier in the century. So that we are bound to run into trouble; and this concerted effort in several Southern States simply points up this problem and indicates that people are ready to take advantage of this weakness in order to

protect their own political interests and to advance their political aims.

So that I thoroughly agree that this development in the South makes the situation even more critical than it has been for some time.

Senator KEFAUVER. It is true, as Senator Dirksen has pointed out, that both the present district proposal and also the proportional one require in the first instance the electors to pledge to vote for the party of their choice, the candidate of the party. In the proportional plan, they, of course, automatically register. So that under either plan, what is taking place in certain Southern States will not be possible. The Mundt bill was amended in the last session to provide that.

Mr. Flynn, do you have any questions?

Mr. FLYNN. No, Mr. Chairman.

Senator KEFAUVER. Thank you very much, Dr. Burns, for your useful and illuminating statement.

Dr. BURNS. Thank you very much.

Senator KEFAUVER. It is of great assistance to this committee.

We are flattered that your students are reading the hearings of this committee. At least, we may be doing some good in that direction.

Dr. BURNS. Thank you.

Senator KEFAUVER. Our next witness will be Dr. Paul T. David, professor of political science at the University of Virginia, Charlottesville, Va.

Dr. David is an expert in the field of presidential elections.

He was formerly director of governmental research studies at Brookings Institution, and is coauthor of the book "The Politics of National Party Conventions," as well as a number of articles and lectures in this general field. In recent years, Professor David has done extensive work in the field of reapportionment, and is considered one of the leading authorities on its legal and political aspects.

We have had the privilege of having you before our committee on a previous occasion, Dr. David, and we are delighted to have you with us now.

#### STATEMENT OF PAUL T. DAVID, PROFESSOR OF POLITICAL SCIENCE, UNIVERSITY OF VIRGINIA, CHARLOTTESVILLE, VA.

Dr. DAVID. Thank you, Senator.

My name is Paul T. David, professor of political science at the University of Virginia. With Ralph Eisenberg, I have been the author of various recent publications on the subject of apportionment and State legislative redistricting.

It is a great pleasure to be here, and I am impressed by the presence of the press, which greatly exceeds my previous experience before this committee on two other occasions on this subject. I hope that this indicates that the subject is taking on the importance that it merits and that this is a sign that some degree of action may be just around the corner.

Senator KEFAUVER. Well, we join you in the appreciation of the fact that so many distinguished members of the press are present.

May I say in connection with your statement that you refer to reports and whatnot. If you need all of those, they will be printed as set forth in your statement.

Senator Dirksen?

Senator DIRKSEN. I was just going to ask: I notice you are author of a book "Devaluation of the Urban and Suburban Vote," is that right?

Dr. DAVID. That is correct.

Senator DIRKSEN. Devaluation?

Dr. DAVID. That is correct.

Senator DIRKSEN. Generally, what was the approach there? I would think it would be an evaluation of urban and suburban vote instead of devaluation. So would you clarify that?

Dr. DAVID. The two volumes are a very elaborate statistical study, sir.

Senator DIRKSEN. I am sure they are.

Dr. DAVID. Of the value statistically of the vote for the members of the legislatures computed in relationship to the average for each State on a statewide basis.

What it shows is that there has been a progressive decline in the voting power allocated to urban residents since 1910. We did this statistical work for 1910, 1930, 1950, and 1960.

These figures have been very widely quoted in the press all over the country. I will be glad to put them in the record, if you wish.

(The tabulation referred to is as follows:)

*Relative values of the right to vote for representation in State legislatures, National averages for all 50 States<sup>1</sup>*

Categories of counties by population size	1910	1930	1950	1960
Under 25,000.....	113	131	141	171
25,000 to 99,999.....	103	109	114	123
100,000 to 499,999.....	91	84	83	81
500,000 and over.....	81	74	78	76

<sup>1</sup> Reproduced from Paul T. David and Ralph Eisenberg, "Devaluation of the Urban and Suburban Vote" Bureau of Public Administration, University of Virginia, Charlottesville, 1961, p. 9.

Senator KEFAUVER. Dr. David, get your microphone closer to you, please, sir.

Dr. DAVID. Yes, sir.

I thought I might begin by commenting briefly on the importance of the present hearings, which seem to me to be very important indeed, especially in the context of the recent Supreme Court decision in the *Gray v. Sanders* case.

One aspect of that opinion that has not been widely noticed is the clear statement by the Court that the existing electoral college system by which the vote of each State for President is usually cast as a unit is a substantial denial of equality of voting power to the citizens who find themselves in the minority in any State.

This is true, of course, for the minority under any unit system of voting. It was so held in a Maryland case just recently decided.

It is equally true in the unit rule that has been used in the Democratic National Conventions by some States, and in the unit rule that would be followed if the election for President were thrown in the House of Representatives, where each State would have one vote and the members of the delegation who were opposed to the majority of the delegation in effect would lose their vote.

Senator KEFAUVER. If a State had one Democratic Congressman and one Republican Congressman, that State would have no votes.

Dr. DAVID. I believe that is correct, sir. At least it would cancel. As the Supreme Court said in *Gray v. Sanders*:

If a candidate won 6,000 of 10,000 votes in a particular county, he would get the entire vote, the 4,000 votes for a different candidate being worth nothing and being counted only for the purpose of being discarded.

This is from the opinion as printed at the time of the decision, note 12, page 12, majority opinion by Justice Douglas.

I believe that you will have another witness before you, sir, who will summarize some of what I was asked to testify on. The letter from Mr. Graham gave me a rather wide hunting license. He asked for my best analysis of the reapportionment situation today, the progress we can expect in reapportionment in the future, the effects of the type of judicial opinion reflected in *Gray v. Sanders*, the shifting political patterns in one-party areas and the effects of any or all of these factors on the election of Presidents and Vice Presidents.

On reapportionment, Mr. Pierce, I believe, will give a summary of the litigation which I assume will update the summaries that were previously published by Congressional Quarterly and which I have used myself quite extensively.

#### PRESENT STATUS OF REAPPORTIONMENT

There has been some redistricting that is actually now in effect and will be in effect unless further revised, in at least 10 States for both Houses. The 10 States I have in mind are Alabama, Colorado, Florida, Kentucky, Mississippi, Oklahoma, Tennessee, Utah, West Virginia, and Wyoming. That is a total of 20 houses of State legislatures. In addition, there has been some redistricting of one house only in Georgia, Vermont, and Maryland. So that I count a total of 23 legislative houses out of 99 in the United States—50 States, with Nebraska having only one.

So that in effect, we have had some change in about a quarter of the total situation. Speaking as a statistician, it is clear that, while this is an important change in some of the States affected, the total effect on the national situation is modest. In most of the States where a change has occurred, the amount of the change has been relatively small, and it has certainly fallen far short of giving full equality of representation to urban residents, at least so far.

So far as I can tell, the best record in this respect has been achieved in Kentucky in the legislation recently enacted at the end of February. There is still enough favoritism for rural areas in Kentucky under this recent law so that the people in the city of Louisville are intending to go into court to get a still better deal than they received. Nevertheless, it was good enough so that it now requires approximately 45 percent of the people of Kentucky to elect a majority of the lower house and about 47 percent to elect a majority of the upper house. These figures compare rather favorably with the 45 percent standard that Mr. Eisenberg and I advocated a year ago in our paper before the American Political Science Association.

The record in Utah also seems to have been fairly good. New legislation there in March changed the situation for the four big urban counties of Utah to the point where they were raised from 44 to 48 percent of upper house seats and 55 to 61 percent of lower house seats. They have 75 percent of the population, so that we can see

that the seats have not by any means caught up with the population even there.

On the other hand, Florida is, I suppose, the horrible example in all of these matters. It has had the most unrepresentative State legislature in the country for quite a number of years, and there has been a great deal of controversy within the legislature and between the legislature and the Federal courts in Florida ever since the decision of *Baker v. Carr*. The result of all of this controversy and effort has been to improve the situation to the point where it now takes as much as 14.5 percent of the population of the State to elect a majority of the upper house and 29 percent to elect a majority of the lower house. These are very small figures to control a whole State.

One of the most surprising aspects also, to me, was the fact that the three-judge Federal court handling the matter was prepared to approve a proposed constitutional amendment that means so little, and to approve it as being an adequate final plan. This, I thought, was most deplorable, and I could not understand the reasoning of the court.

In other States where similar steps have been taken—that is, a modest improvement but one put immediately into effect—the reasoning of the court, as in Alabama, for example, was that this is a way of breaking the deadlock in the legislature and getting enough new blood into the legislature so that then it may go on to do the further improvement that it ought to do for itself.

One does hope that as small increments of voting power are given to the urban elements in State after State, the continuing pressure of the courts will enable this process to go further, as I hope and believe it will. Nevertheless, it does not seem so far to have gone very far statistically.

In our research in Charlottesville, we hope to come back to this subject next spring and summer and recompute our figures for the summer of 1964 in order to obtain a statistical measure of just how much improvement will be in effect in the elections of 1964.

We have not yet had an opportunity to do that, and obviously the time is not yet here, but nevertheless simply reviewing these cases on a State-by-State basis, it becomes apparent that there has not as yet been much improvement in terms of national averages.

The lower courts have been floundering in terms of what to do. In many cases the courts have seemed to be unduly influenced by local opinion within the State itself.

This was evidently the case in Florida. And it was the case in Maryland to some extent, and it has been the case in State after State, where the court has seemed to feel that it has done wonders when it has produced a rather small improvement in a very bad situation.

Actually, some of the greatest improvements have occurred in States that were already in relatively good shape. That was true of Kentucky. Kentucky was not a very badly apportioned State in terms of averages, even before this recent law.

The Maryland case, which you all know about, is another case of very limited results. Maryland has to do a lot more to get up to where Virginia was 10 years ago. And yet Virginia still can stand a degree of improvement in its State legislative representation.

## EARLY PROSPECTS FOR FURTHER ACTION

The decision by the Supreme Court in *Gray v. Sanders*, which I was asked to comment on, does seem to me to be tremendous. It has been widely publicized and will, I think, have a constructive effect on the attitudes of the Federal courts in handling these other cases. Nevertheless, the Court went to some length to make it clear that it was not ruling on the State legislative problem in *Gray v. Sanders*. And this, of course, makes it impossible to predict how far the "one man, one vote" doctrine will be carried in the State legislative cases.

I think it is almost futile to predict or speculate on what the Court will do. I am not a lawyer, and I claim no special competence in that field. I can only express the hope that the Court, cognizant as it is of its responsibilities, will do something before it adjourns for the summer to clarify the probable calendar of further action.

I assume it will do something to set cases for argument next fall, and may perhaps even dispose of some cases immediately by some form of ruling in which they go back to the States for further action. Any action of that kind would give some guidance.

In any event, I would certainly hope that we would have substantial rulings by the Court no later than February or March of 1964, and that would in turn permit rapid action on these pending cases in the States. By that time I would imagine that at least 35 or 40 States will be in court with their situation unsettled and still awaiting further action by the Supreme Court.

If we do have such action by February or March of 1964, I would then think that a great deal of buttoning up would be done in time to affect the elections next year.

If it goes that way, the effects that are still to come in *Baker v. Carr* between now and November of 1964 could be far more important from those that have already been achieved. But this is obviously speculative and unpredictable.

## PROBABLE LIMITS OF FURTHER PROGRESS

I might next speak for a moment or two, if I may, on the probable limits of further progress.

First of all, I myself in my own writing have advocated the rule of equal voting rights in the election of representatives for both houses of State legislatures, and it is my hope that this is where the Court will eventually come out. But even if it goes all the way, I would call attention to some of the limitations of the situation that will then exist.

One limitation, important in partisan terms, arises simply by virtue of the fact that in so many Northern States, the statewide vote of the Democratic Party is concentrated in rather small geographic areas. This has the effect that under almost any plan of districting, and even if it is fair districting, there will continue to be a great wastage of Democratic votes by virtue of excessive majorities in the districts where they have them and a lack of majorities elsewhere.

Specifically, this could mean in Michigan, for example, that, even if we had absolutely fair districting in Michigan for both houses of the legislature, that State would continue to elect Republican majorities to at least one house, and perhaps both.

This is not confined to Michigan. I think it is general in most of the northern urban States from Massachusetts to Illinois and Wisconsin.

Another aspect of the problem, of course, is the fact that the status quo lingers on. Action never catches up. You go through successive generations of State legislatures that move as slowly and as little as possible while the courts look over their shoulders, and in the meantime populations keep on shifting. Also, so far the Governors have been apparently rather reluctant to take any serious leadership in most cases. Governor Combs in Kentucky, I think, was a notable exception, and that is one reason the Kentucky redistricting came out as well as it did.

So taking all these things into account, it would seem to me that it will not be until the redistricting after the 1970 census, coming into effect in the elections of 1972 and 1974, that we shall have the complete fulfillment of whatever is going to happen as the result of *Baker v. Carr*.

There are two or three other factors that would keep it from going even as far or as fast as I just suggested.

One is the rather technical problem of what Mr. Eisenberg and I have called the "offset principle." We have argued that generally some people get shortchanged under any districting plan, unless an "offset principle" is followed.

This is a result of the geographic features of the situation. Even with the best will in the world, I do not think anyone can go through the exercise of trying to lay out districts on a map without discovering that.

We have said these inequalities can be offset if in districting the second house the inequities of the first house districted are taken into account. The districting for the second house can be deliberately designed to offset the disadvantages that some residents always suffer under the districting in the first house, whichever is done first.

This, of course, as you know, Senator, is the principle that was in the Tennessee constitution and which provided that, as I recall the way the rule went, if a county had as much as two-thirds of a ratio, it was entitled to a representative in the lower house, and the Tennessee constitution provided that the representation thereby taken from the more populous counties should be made up in the representation accorded in the upper house.

So what did the Federal court do when it came to this problem after the case of *Baker v. Carr* came back? It paid absolutely no attention to the offset provision in the constitution of the State of Tennessee and, instead, laid down a rule to the effect that equal districting was required in only one house, although it said that the Tennessee Legislature so far had not provided it in either.

The second of these special problems is the case of what I would call invidious discrimination in situations where statistically it is not very great, but still has important practical effects. Even within a case where it requires as much as 40 or 45 percent of the population to elect a majority in each house, there can be discrimination that is systematic, persistent, and partisanly consequential.

New York is exactly a case of this sort of thing. It was New York that Al Smith said was constitutionally Republican, because of the provisions of the New York State constitution. They do not discriminate very much against New York City but they do discriminate

enough so that it is reasonably certain that the Democrats will not have a majority in the legislature.

Well, I would hope that the court would find means of dealing with this kind of a case; although the three-judge Federal court in New York has declined twice to do so, after having had it sent back the first time.

Finally, there is the possibility that the Supreme Court might go along with the doctrine that full equality is necessary in only one house. As I have said before, I hope this will not happen. As of now it seems to me that it is unlikely.

#### THE CHANGING PARTY SYSTEM

Turning from the effects of *Baker v. Carr* to the more general changes that are going on in the party system, I have written a great deal in recent years on the problems of competition in the party system. I believe that the party system is indeed becoming more competitive. And this, I think, is a very important development.

In this recently published book called "Continuing Crisis in American Politics," edited by Marian D. Irish, in which I have one of the chapters entitled "The Changing Political Parties," I summarized some of the aspects of the campaigns of 1960 that seemed to me to indicate the growing competition between the parties:

- (a) The scale, scope and nature of the national campaigns;
- (b) The number of States in which the election was fought hard with close outcomes in presidential, congressional and State elections;
- (c) The speed with which the professionals and the party organizations in each party turned to preparations for the 1962 campaigns;
- (d) The number of close votes in Congress on major items in the President's legislative program;
- (e) The evident disposition of the administration to sharpen issues in Congress in preparation for future election campaigns;
- (f) And, finally, the aggressive character of the leadership that has come to the top in each of the national parties.

Some of these signs are rather intangible, and none of them lend themselves well to specific quantitative measurement except the 50-State campaign.

(Excerpt from book entitled "Continuing Crisis in American Politics," is printed in the appendix as exhibit No. 7.)

Dr. DAVID. Mr. Nixon said he was going to campaign in all 50 States, and eventually he did; and Mr. Kennedy came very close to doing so, I believe.

This was a new thing, and it reflected the fact that politics has become more competitive, not only in the Nation at large but in almost every one of the 50 States.

We have had Republican gains in the South that have changed the historic position of the party in that part of the country. The gain in the Republican vote for Congress in the districts where the Republicans put up serious candidates has been very substantial. It has been great enough, it seems to me, that whenever the Republican Party again captures the Presidency, I would expect it to elect at least 30 to 40 Members in the House and Senate from the South. They are so near that line now that I would expect such gains to occur in conjunction with any future Republican presidential victory.

The Negro voting campaign in the South is well known and it seems to be making progress in terms of getting more Negroes registered and ready to vote.

Finally, there is one other aspect of party competition. It has been thought often that the Republican Party was gaining strength with the population movement to the suburbs in the Northern States. This certainly has been true in the past. But I believe I share the view of other political analysts that as this tendency has continued, more Democrats have been moving to the suburban areas, and more of the people in the suburbs are in occupations that lead them to favor the Democratic Party in their voting. So I anticipate in the future a more competitive relationship between the parties in the suburban areas.

Well, so much for the general competitive situation. It seems to me that all of this is intensified by the consequences of *Baker v. Carr*.

The urban areas are obviously the ones that are gaining additional representation. You probably have had the case brought before you of the new seats in Florida. As I recall it, about 40 new seats were created last spring and in the election the Republicans ran candidates for most of them and elected about a dozen new Republican members of the Florida Legislature. This kind of thing, not quite as dramatically but nevertheless to some extent, is going on all over the South.

The main effect of this is to bring new faces into politics, to bring new elements of the population more actively into politics, all of which seem to continue this intensification of party competition to which I have referred.

The consequences for presidential politics are a rising tension that I would expect to be reflected in the search for the strongest possible team of candidates in each party.

Of course, this has been going on for a long time. A major national political party, one assumes, has always tried to nominate the strongest political candidates they could get. But they certainly have been willing to temporize with this matter in some cases, and in many cases have nominated candidates that a great many people did not think were the strongest available. They have done so for a variety of reasons that were allowed to be influential because the parties were not feeling sufficiently competitive on those occasions.

There will be increasing pressure on the party loyalty problem at the coming national conventions, and it may lead to more strenuous campaigns all over the country in 1964.

#### THE ELECTORAL COLLEGE PROBLEM

In terms of the relation of all of this to the electoral college problem, I testified before on this same issue. My testimony is in the previous set of hearings, part 2, June 27, 28, and 29 of 1961, at page 424, where I favored the system of direct election of the President. I expressed myself to the effect that the direct election system was not nearly as hopeless as most people have thought, politically speaking, if it is submitted for ratification by the convention system in the States.

As you all know, prohibition repeal was achieved by the convention system of ratification, and it was the only amendment that has been ratified that way. It produced a yes-no vote in most of the States where it was put before the people, in the form of the election of one slate of statewide convention delegates running against another. This

is an easy system of ratification that can be set up in such a way that it can be conducted very quickly. It can easily become virtually a national referendum.

On that basis, I would think direct election had excellent prospects, and I would hope that eventually it would be considered on that basis.

Senator KEFAUVER. Dr. David—

Dr. DAVID. Yes, sir.

Senator KEFAUVER. Why would the direct election have a better chance with respect to the convention system in the States than if it were submitted to the legislatures?

Dr. DAVID. Well, as you know—in fact, as you were pointing out in this exchange we had a couple years ago—the small States with three electoral votes do have an arithmetical advantage in the electoral college. I had supposed that this might weigh rather heavily on some members of the State Legislatures in those States. I do not think it would weigh so heavily on the people themselves.

I think the popular view is that each man should have one vote; there is no special reason either the big or small States should be favored. And therefore, if put to the people, I think they would vote for direct election. I think they would vote for it in Nevada, New Mexico, Rhode Island, Alaska, just as they would in Ohio, New York, California, and Illinois.

Senator KEFAUVER. In other words, a legislator has to think of his political future?

Dr. DAVID. Yes, sir. The members of the conventions, however, I would hope, would be instructed and would follow their instructions. At any rate, the individual voter does not have to think about his political future in voting on a proposed amendment.

In terms of the immediate future, it does seem to me that there should be concern over the contemporary effort represented by Governor Wallace the other night and by other people to create an intensified States' rights situation in the South, in which the election next year might be thrown into the House of Representatives.

I share the concern that has been voiced here this morning about that situation, and it seems to me that it deserves urgent attention and prompt remedy.

The situation might well be compared to that in which Mr. Jefferson found himself toward the end of his first term when he undertook to avoid the situation he had been in on his first election. That produced the 12th amendment, which made it certain that the electors would not have the confusion of being required to vote for two different people in the electoral college for President; thus avoiding the tie that occurred in 1800 between Jefferson and Burr.

That amendment was a miracle of speed. In fact, for a long time it held the record for speed of enactment and submission to the States and ratification. This was not accidental.

In a similar way, it seems to me that if it became clear to leading political figures in this country that this States rights movement is a serious threat, then the proposal which Senator Kennedy introduced himself, when he was a Senator, could be put forward rather rapidly. I would think it could still be submitted and ratified before the election in 1964.

Senator KEFAUVER. The one you are referring to is the proposal to have the electoral votes automatically registered and also to have

the whole Congress, Senate as well as the House, in joint session decide election disputes where nobody had a majority?

Dr. DAVID. That is correct.

Senator KEFAUVER. That is the one to which you referred?

Dr. DAVID. Yes, sir. I have not looked at it for some years, so I am a little vague about the specific provisions.

As I recall it, there were some technical aspects perhaps needing some further study. But, in general, I thought it was a very commendable proposal and one that merits adoption.

Senator KEFAUVER. Dr. David, as I get it, then, from your statement—had you finished your statement?

Dr. DAVID. Yes, sir.

Senator KEFAUVER. We made some progress in reapportionment, but not a great deal; 23 of the 99 State legislative houses had made some changes?

Dr. DAVID. I would hope that by the election next year that number might be something like 60 or 70. I think it will be.

But again in terms of the amount of change that is needed the actual changes may be rather small.

Senator KEFAUVER. And the requirement for reapportionment needs to be further clarified by the Supreme Court; do you agree?

Dr. DAVID. That is correct.

Senator KEFAUVER. I know that you are not a lawyer, but you would have good ideas about this.

Do you think the rule about *Baker v. Carr* will be carried over to congressional districts, requiring equalization of the voting district in electoral and congressional districts? It has not been as of yet.

Dr. DAVID. To my knowledge, it has not been done so far.

I believe Mr. Peirce is prepared to testify on that.

The congressional cases as far as I have seen them have disappointed me in the reluctance of the courts to take action. But the more extreme cases of congressional inequality I believe have not yet been taken into court. This is another aspect of the problem in which people that are relatively well treated seem to be the ones that are most prepared to try to secure better treatment.

Senator KEFAUVER. My feeling is that, logically, the court would have to apply the same rule to congressional districts as they have to legislative districts.

Dr. DAVID. I believe this will come, sir.

Senator KEFAUVER. But it has not been done as yet.

Do you feel that the action by the three Southern States and the proposed action in two other States with reference to the electors not having any obligation to vote for the nominee of the party presents a real danger in connection with the election of the President sometime?

Dr. DAVID. Yes, sir, I do. I think it is a very real danger, although I have difficulty speculating on whether or not it is likely to throw the election into the House of Representatives next year.

I think we have to come closer to the election before one can speculate accurately on that. But the difficulty is, if you wait too long, it might then be too late for amending action, even with all the expedition that would be possible.

Senator KEFAUVER. Mr. Graham, do you have some questions?

Mr. GRAHAM. No, sir.

Senator KEFAUVER. Mr. Flynn?

Mr. FLYNN. No, sir.

Senator KEFAUVER. You mentioned the gain of the Republican Party in the South and the closeness of some districts, and you said you had a tabulation of those particular districts. I think it might be of interest to place this in the record.

Dr. DAVID. I do not have a tabulation with me that applies to particular districts, sir. But the statement I have here in this book—this is, again, "Continuing Crisis in American Politics," page 52, is substantially as follows:

"In the more than 40 districts where the Republican Party offered candidates in the South, it polled 26.5 percent of the vote in 1948, 27.4 in 1952, 38 in 1956, and 37.8 in 1960."

In other words, the vote in 1948 and 1952 was averaging around 25 to 30 percent to the Republican candidates, and in those same districts in 1956 and 1960 it was up to around 40 percent—a shift from about 25 to about 40 percent over a 12-year period.

The results of the election last year were further along the lines of that tendency, but it is difficult to make comparisons for the off years because of the extent to which candidates are running in many districts who are not serious.

Senator KEFAUVER. Dr. David, we certainly appreciate your coming, and being with us again.

Dr. DAVID. Thank you, sir. It is a privilege to be here.

(The tabulation by districts previously referred to has been supplied and is as follows:)

*Republican candidates and the Republican vote for Representatives in Congress, 11 former Confederate States, 1948-60 (presidential election years only) <sup>1</sup>*

11 FORMER CONFEDERATE STATES

Year	Congressional districts			Republican percentage of the 2-party vote		Total Republican vote, all districts	
	Total number	Number with Republican candidates	Number without Republican candidates	Districts with Republican candidates	Average of all districts, statewide	For Representative in Congress	For President
1948.....	105	54	51	26.49	16.20	715,034	1,361,742
1952.....	106	46	60	<sup>2</sup> 27.37	17.81	1,580,643	4,113,525
1956.....	106	48	58	<sup>2</sup> 38.04	19.52	1,673,842	4,218,468
1960.....	106	44	62	37.79	22.33	1,769,294	4,723,753

ALABAMA

1948.....	9	4	5	13.89	6.88	13,564	40,930
1952.....	9	2	7	19.97	5.45	18,673	149,231
1956.....	9	3	6	27.94	13.53	51,818	195,694
1960.....	9	2	7	28.12	10.99	48,117	237,981

ARKANSAS

1948.....	7	3	4	19.11	8.62	21,629	50,959
1952.....	6	2	4	33.64	14.38	51,889	177,155
1956.....	6	1	5	38.73	12.72	34,318	186,287
1960 <sup>3</sup> .....	6	1	5	17.30	( <sup>3</sup> )	12,054	184,508

FLORIDA

1948.....	6	4	2	21.80	15.81	55,803	194,280
1952.....	8	4	4	40.82	24.58	191,582	544,036
1956.....	8	6	2	42.14	37.39	352,149	643,849
1960.....	8	5	3	38.96	30.97	386,513	795,476

See footnotes at end of table.

*Republican candidates and the Republican vote for Representatives in Congress,  
11 former Confederate States, 1948-60—Continued*

## GEORGIA

Year	Congressional districts			Republican percentage of the 2-party vote		Total Republican vote, all districts	
	Total number	Number with Republican candidates	Number without Republican candidates	Districts with Republican candidates	Average of all districts, statewide	For Representative in Congress	For President
1948.....	10	0	10	0	0	0	76,691
1952.....	10	0	10	0	0	0	198,961
1956.....	10	7	3	13.20	10.22	59,423	222,778
1960.....	10	3	7	12.29	4.28	24,551	274,472

## LOUISIANA

1948.....	8	1	7	33.40	4.15	13,337	72,657
1952.....	8	1	7	33.60	8.68	36,161	306,925
1956.....	8	2	6	34.22	14.80	57,385	329,047
1960.....	8	5	3	19.07	15.00	77,938	230,980

## MISSISSIPPI

1948.....	7	1	6	1.63	.17	252	5,043
1952.....	6	2	4	8.62	2.50	6,024	112,966
1956.....	6	0	6	0	0	0	60,685
1960.....	6	2	4	6.71	1.95	5,036	73,561

## NORTH CAROLINA

1948.....	12	12	0	32.96	32.96	265,882	258,572
1952.....	12	11	1	33.25	31.98	358,863	558,107
1956.....	12	8	4	40.33	30.14	309,071	575,062
1960.....	12	12	0	39.57	39.57	515,488	655,420

## SOUTH CAROLINA

1948.....	6	6	0	4.91	4.91	6,905	5,386
1952.....	6	2	4	6.06	1.96	5,571	168,082
1956.....	6	2	4	11.66	4.69	12,278	75,700
1960.....	6	0	6	0	0	0	188,558

## TENNESSEE

1948.....	10	7	3	45.86	34.74	150,775	202,914
1952.....	9	4	5	52.94	29.82	203,766	446,147
1956.....	9	5	4	54.35	41.01	278,980	462,288
1960.....	9	2	7	85.68	31.53	202,711	556,577

## TEXAS

1948.....	21	9	12	11.47	6.23	65,410	282,240
1952.....	21	12	9	<sup>4</sup> 10.16	<sup>4</sup> 6.11	105,038	1,102,878
1956.....	22	5	17	<sup>4</sup> 37.15	<sup>4</sup> 14.01	238,760	1,080,619
1960.....	22	6	16	38.08	15.02	297,230	1,121,699

## VIRGINIA

1948.....	9	7	2	36.73	32.22	121,474	172,070
1952.....	10	5	5	44.77	31.73	138,604	349,037
1956.....	10	9	1	43.42	40.21	279,660	386,459
1960.....	10	6	4	44.77	32.69	199,656	404,521

<sup>1</sup> The following volumes of the Congressional Directory have been used in compiling the congressional voting data: 83d Cong., 1st sess. (March 1953); 86th Cong., 1st sess. (March 1959); 87th Cong., 1st sess. (April 1961).

<sup>2</sup> The vote for 1 Representative at Large in Texas in 1952 and 1956 is not taken into account.

<sup>3</sup> Vote not reported in districts in Arkansas in which candidates (all Democrats) ran unopposed and therefore not available.

<sup>4</sup> See footnote 2 above.

Source: Paul T. David, assisted by James J. Bolner, Denis Toothe, and Alexander Lacy (Oct. 10, 1962).

Senator KEFAUVER. Well, I think we will carry on a while now before lunch. We may have to have a session later this afternoon.

Our next witness is Mr. Neal R. Peirce. Mr. Peirce is political editor, Congressional Quarterly. In recent years, Mr. Peirce has specialized in gathering and analyzing data on reapportionment in the various State legislatures. He is a leading expert on the actual progress of reapportionment in the States.

We appreciate your work, Mr. Peirce, and we thank you very much for coming to testify today.

Mr. PEIRCE. Thank you, Mr. Chairman.

Senator KEFAUVER. Your statement will be printed in full, and an analysis from the Congressional Quarterly which you furnished us will be printed in the appendix to the record. This is the analysis of May 29, 1963.

(The analysis referred to is exhibit No. 8 in the appendix.)

Senator KEFAUVER. All right, sir; will you proceed?

#### STATEMENT OF NEAL R. PEIRCE, POLITICAL EDITOR, CONGRESSIONAL QUARTERLY, WASHINGTON, D.C.

Mr. PEIRCE. Mr. Chairman, Congressional Quarterly is pleased to make available to this committee some of its research findings which relate to the question of the electoral college and its possible reform. I would like to emphasize that while the statistical and factual data are official products of Congressional Quarterly service, any analysis or interpretation I may suggest are furnished solely by me for the purpose of aiding public debate. Congressional Quarterly takes no official position in favor of one electoral system or another.

As the chairman indicated in his opening remarks, a number of changes in the American political "solar system" appear to have taken place since 1961, when your committee last held hearings on the electoral college. Congressional Quarterly has been especially active in following developments concerning State legislative apportionment and congressional districting, and I would like to report briefly on our findings in those areas.

#### STATE REAPPORTIONMENT

In March 1962, the U.S. Supreme Court handed down its landmark decision in *Baker v. Carr*, the Tennessee reapportionment case, establishing the principle that voters may seek relief in the courts when they feel that a State legislature is so seriously malapportioned that they are deprived of their "equal protection of the laws" under the 14th amendment to the Constitution. Rarely in the history of the United States has a single Supreme Court decision had as immediate and far reaching an impact. Congressional Quarterly has maintained a boxscore on actions in the 50 States since *Baker v. Carr*. Here is our latest summary, based on developments of the last 14 months:

*Court cases filed in 37 States.*—(Cases were filed before Federal courts in 26 States, before State courts in 18 States, and before both Federal and State courts in 7 States.)

Court actions—preliminary or final—in 28 States: In 23 States courts found apportionment of one or both bodies of the legislature unconstitutional, or intimated that they would make such a finding

if reapportionment action were not taken in the near future: Alabama, Colorado, Delaware, Florida, Georgia, Indiana, Iowa, Kansas, Maryland, Massachusetts, Michigan, Mississippi, Nebraska, North Dakota, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, Washington, Wisconsin, and Wyoming.

Cases appealed to the Supreme Court from seven States—Alabama, Florida, Maryland, Michigan, New York, Oklahoma, and Virginia. Most of these cases—which will probably be considered in the Supreme Court term starting next October—relate to the questions left unresolved by the Court's decision in *Baker v. Carr*. These questions relate to the precise extent of malapportionment which constitutes denial of equal protection, whether a "little Federal system" is permissible, and whether the courts will condone an extent of malapportionment if it is approved by the voters of a State through initiative or referendum.

Reapportionment plans or State constitution amendments—all reducing current malapportionment to some extent—have been approved in 22 States—Alabama, Colorado, Delaware, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Mississippi, Nebraska, North Dakota, Oklahoma, Tennessee, Utah, Vermont, Virginia, West Virginia, and Wyoming. In Wisconsin the legislature passed a reapportionment which was vetoed by the Governor. In most of the States which did take some reapportionment action, urban forces did not consider the new plans satisfactory and are still pressing through the courts for immediate population-based redistricting. Among the "little Federal plans" to which urban spokesmen are taking serious exception are those in Wyoming, Iowa, Colorado, Maryland, Utah, and West Virginia. The only States in which reapportionment advocates appear to be satisfied with new plans, and are not pressing suits in the courts, are Georgia, Kansas, Kentucky, and Mississippi. The new Iowa plan will not go into effect unless approved in a December 3, 1963, referendum.

Another session of the Indiana Legislature must approve the reapportionment amendment to that State's constitution, and even then it would not go into effect until 1973. The Maryland and Vermont reapportionment plans were both stopgap measures for the 1962 elections only and must be improved on in new legislative action or the courts will step in before the 1964 legislative elections. The new plan approved in Delaware has already been declared unsatisfactory by a Federal court.

In addition to the above, reapportionment action before the 1964 elections is anticipated in at least six States—Illinois, North Carolina, Pennsylvania, Rhode Island, Vermont, and Washington.

The reapportionment picture is changing so rapidly in so many States that we find it difficult to make an assessment of the likely full impact before the 1964 elections. The important factor, however, seems to be the wide extent of pressure for reapportionment throughout the Nation, plus the fact that underrepresented areas are continuing to press for "one man, one vote" representation, even when the forces still in control of the State legislatures seek to offer them far less. Moreover, any increase in equal representation in a legislature tends to make it easier for the newly constituted body to move even further toward fair representation. The contrast to the situation before *Baker v. Carr*, when many legislatures had failed to reappor-

tion in decades and thought they might continue their intransigent attitude indefinitely, is striking indeed.

## CONGRESSIONAL DISTRICTING

Opponents of change in the current electoral college system frequently point to the alleged small State, rural overbalance in the Congress and maintain that the presidential electoral system must be weighted to the large States and urban areas as a counterbalance. Indeed, the rapid growth of U.S. metropolitan centers during the past half century has tended to leave rural and small city areas with more and more representation in the House than they would be entitled to on a pure population basis. It has often been suggested that a fair apportionment of the House would sharply reduce the rural influence and increase that of metropolitan centers.

Congressional Quarterly studies, however, have indicated that the growth of large suburban areas around cities has altered the simple country-versus-city fight for congressional representation. Moreover, it appears that the net shift of seats required to erase current urban-suburban-rural imbalances, particularly in the wake of 1961-62 reapportionment and redistricting, would be much less than many observers have led us to believe.

In an attempt to find an "ideal" apportionment balance between urban, suburban, and rural-small city areas, we have made a preliminary study of the inequalities remaining in each State following the 1961-62 redistricting that followed the 1960 census apportionment. This study has not been fully completed, but our preliminary findings suggest that a net national shift of less than 20 seats between urban, suburban, and rural areas would be necessary to achieve the "fairest" possible districting—the type of districting with the least possible malapportionment and gerrymandering in each State. With four existing at-large House seats eliminated by creating new districts in underrepresented areas, the overall preliminary results suggest:

Urban areas (cities with over 50,000 population) would gain 5 seats in States where they are now underrepresented but would lose 5 others in States where they are currently overrepresented for no net gain or loss.

Suburban areas (urban fringe areas) would gain a total of 16 seats.

Rural areas (small towns, cities up to 50,000 population) would lose 13 seats, gain 1 for a net loss of 12.

The Congressional Quarterly analysis indicated several other areas in which some amount of urban or suburban territory should be tacked onto existing rural districts in an "ideal" reapportionment. The urban or suburban areas would not yet dominate in such districts, however, although they might come to have more and more influence on the voting patterns of the incumbent Representatives.

Existing inequalities in congressional districts may be even further reduced if the U.S. Supreme Court should decide—probably within the coming year—that congressional districts, like State legislative districts, may be challenged in the Federal courts on the grounds that they deprive citizens of equal protection of the laws. Since *Baker v. Carr*, cases challenging U.S. House districts have been filed in five States—Georgia, New York, Wisconsin, Michigan, and Texas. Should

the court agree to hear such cases, suits in many other States would doubtless be filed. The leading case now on appeal to the Supreme Court, *Wesberry v. Sanders*, states the issue squarely in regard to Georgia's districts which were last revised in 1931 and now vary between 823,680 and 272,154 in population. Were the Court to enter this area and judge, for example, that variations of more than 20 percent from a State's average House district population violate the 14th amendment, the existing congressional districting of 28 States with a total of 306 Representatives would be affected. For your committee's files, I would like to offer a newly published Congressional Quarterly study on the precedents and prospects for Supreme Court action in this area.

In general, it appears that pressures for more equitable House districting are increasing in the country today. "One man, one vote" proponents are especially hopeful that the newly reapportioned State legislatures will be more likely to enact more equitable congressional districting laws.

#### SUPREME COURT OPINION

Unlike malapportionment and gerrymandering in legislative districts, the electoral college is specifically written into the Constitution so that the Supreme Court could not, by any stretch of the imagination, invalidate it because of its apparent gross inequalities. But the Supreme Court recently used the occasion of its decision in *Gray v. Sanders*, outlawing the county unit vote system in Georgia's congressional and statewide elections, to voice its opinion about the philosophy behind the electoral college. Justice Douglas said in the 8-to-1 majority opinion:

Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their home may be in that geographical unit \* \* \*. The concept of "we the people" under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications \* \* \*. The concept of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the 15th, 17th and 19th amendments<sup>1</sup> can mean only one thing—one person, one vote.

The Court's opinion sustained the lower court's action in invalidating the existing Georgia unit vote. It went further, however, by declaring unconstitutional any unit system of counting votes in a district or statewide election. The lower court had said that a unit vote system would be permissible "if the disparity against any county is not in excess of the disparity that exists against any State in the most recent electoral college allocation" or the disparity existing "under the equal proportions formula for representation of the several States in the Congress." The Supreme Court, however, said it thought "analogies to the electoral college, to districting and redistricting, and to other phases of the problems of representation in State or Federal legislatures or conventions" were not pertinent. The Court said the electoral college had been included in the Constitution "as the result of specific historical concerns," chiefly the desire to have politically knowledgeable men elect the President, rather than the people di-

<sup>1</sup> The 15th amendment prohibited States from barring Negroes from voting; the 17th amendment provided for the direct popular election of Senators; the 19th amendment guaranteed women the right to vote.

rectly, and that an "inherent numerical inequality" had been the price of the solution. "Passage of the 15th, 17th and 19th amendments," the Court said, "show that this conception of political equality belongs to a bygone day," and cannot justify use of a unit vote in statewide elections. The implications for the current electoral college system, based on a unit vote system with vast disparities in the effectiveness of various individuals' votes from State to State, would appear to be self-evident.

#### "NATIONALIZING" OF U.S. POLITICS

Much of previous years' debate concerning electoral college reform has centered on the "one party" areas of the Nation. All these arguments, however, seem to take on an air of unreality in view of what is actually happening in U.S. politics. In 1960, scarcely a State in the Union was considered definitely "safe" for one party or another. Running a Democrat, President Kennedy actually won his highest percentage of the vote in northern Rhode Island rather than any State of the so-called safe Democratic South.

The 1962 elections underlined the movement toward a stronger national two-party system. Oklahoma elected its first Republican Governor since statehood and Alabama came close to sending a Republican to the Senate. New Hampshire broke with tradition by electing a Democratic Governor and Senator, and Vermont did the unheard of by actually electing a Democratic Governor. In State after State, voters showed a willingness to cross party lines to vote for the man rather than the party. The drive for Negro voting rights in the South seems sure to increase total voter turnout in those States in the coming years. A continuation of such trends, combined with the direct personal judgment of presidential candidates the voters can make through the televised debates inaugurated in 1960, suggests to me that a presidential election system geared to the electorate as people—rather than States—may be most appropriate for modern-day America.

#### CONCLUSION

We frequently receive calls from our subscribers to Congressional Quarterly's political desk asking about the prospects for reform of the electoral college. In all candor, I feel obliged to tell them that the prospects for any thorough reform of the system—despite the work that your subcommittee has been doing—are quite dark until the day comes that the electoral college again elects a man who trailed in the popular vote.

I hope that I am overly pessimistic in that assessment, but it is the only one that I am able to offer at the present time.

We are also asked about the most likely form of reform, if a thorough one is ever undertaken. On this question, I think it is worth while considering that any amendment to the Constitution must obtain a wide consensus of national approval before it really has a chance for acceptance. Thus, any proposed electoral reform which has the clear intention of further "weighting" the way we elect our President to either the liberal or the conservative side is likely to run into so much resistance that it encounters defeat.

It seems to me that even the simple proposal for binding the electors will appear to be a further validation of the current system and will

run into opposition from those who feel the "winner take all" unit system gives undue weight to large, urbanized States.

On the other hand, the district system, even with a pretty effective mechanism for making equal districts, would run into the opposition from people who say: This is a conservative scheme to take over the Presidency.

The only type of reform really likely—and then only when a real sense of national concern has been aroused—will probably be one that can appeal, before all other things, to democratic ideals and the Nation's intrinsic desire for a fair, straightforward political system. The possible reforms which could meet this standard would appear to be the proportional system which Senator Kefauver and some others have favored, and the direct election system.

Since the proportional system carries the burden of still running the risk of electing the man who trails in popular votes, my personal preference would be for the direct election system.

Senator KEFAUVER. Well, thank you very much, Mr. Peirce.

What do you think the chances would be of getting approval of the so-called Kennedy proposal, which is in one of the resolutions that I have filed, whereby the electoral votes are automatically registered, and, in a contest, the decision is thrown into the whole Congress, not just into the House?

Mr. PEIRCE. Well, I am wondering whether it would go through without a great amount of publicity through your Northern States. Certainly I do not think your Southern States are going to want to go along with it while they are currently pressing for their independent electors.

Senator KEFAUVER. There are some Senators so committed to one of the other systems that they might feel this would take away the impulse for something better.

Mr. PEIRCE. This is a danger to that type of reform, I would think.

Senator KEFAUVER. Mr. Graham, do you wish to ask Mr. Peirce any questions?

Mr. GRAHAM. No, thank you.

Senator KEFAUVER. Mr. Flynn?

Mr. FLYNN. No, thank you, Mr. Chairman.

Senator KEFAUVER. Thank you very much for your fine statement. We appreciate it.

Mr. PEIRCE. Thank you.

Senator KEFAUVER. We will stand in recess until 2:15 this afternoon.

(Whereupon, at 12:40 p.m., the committee recessed, to reconvene at 2:15 p.m., the same day.)

#### AFTERNOON SESSION

Senator KEFAUVER (presiding). The committee will come to order.

Our next witness is Dr. Robert G. Dixon, Jr. Dr. Dixon has been before us previously. We appreciate his coming back. He is a distinguished former professor of political science at the University of Maryland. He is now professor of constitutional law at George Washington University.

On previous occasions he has testified upon the subject of the electoral college reform.

In recent years, Professor Dixon has also devoted much of his time to the analysis of the constitutional and political ramifications of reapportionment.

We appreciate your coming and being with us again, Dr. Dixon. We have your statement, so you proceed. The citations of cases you need not read. They will be printed.

**STATEMENT OF DR. ROBERT G. DIXON, JR., PROFESSOR OF LAW,  
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL AND GRADUATE  
SCHOOL OF PUBLIC LAW**

Mr. DIXON. Thank you, Mr. Chairman. It is an honor and a pleasure to be asked to testify before this subcommittee again concerning the process of election to an office which some consider to be the highest political office in the world—the Presidency of the United States. When I was here in 1955, and again in 1961, the hearings were focused to a large extent on the electoral college system and the three major proposals for revision: First, the proportional system of allocating the electoral vote; second, the district system of allocating the electoral vote; and, third, abolition of the electoral vote and substitution of direct popular election.

As I understand it, the purpose of today's hearing is threefold: First, to take account of dramatic recent developments in reapportionment of State legislatures stemming from *Baker v. Carr*, and less dramatic developments to date in congressional districting, and to relate these developments to the representation theory underlying our presidential election system; second, to take account of *Gray v. Sanders* last March in which the Supreme Court administered judicial euthanasia to Georgia's county unit system despite Georgia's attempt to analogize the unit system to the concededly valid electoral college system; third, to note the continuing but infrequent problem of presidential electors who occasionally fail to cast their vote for the candidate preferred by the people of their State.

Perhaps I should briefly state my background at the outset. I am a professor of constitutional law in the Law School of George Washington University and have been a member of the law school faculty since 1956. Prior to that time I was a member of the political science faculties of Syracuse University, American University, and the University of Maryland, and a Ford Foundation faculty fellow at Stanford University. Both in political science and in law, my teaching and research specialization has been in the field of public law, particularly constitutional law.

My comments today will be confined to the first two areas of interest to the subcommittee listed above; that is, the impact of legislative reapportionment on the presidential selection system, and the continued viability of the theory of representation underlying the electoral college system now that the courts have declared unconstitutional its junior version—the county unit system of electing a Governor and other statewide offices. These areas are interrelated and I will discuss them together.

We have become accustomed to occasional thunderclaps from the Supreme Court, as part of the exercise of the power of judicial review, but few decisions have evoked a greater storm of activity, and

are more pregnant with possibilities for the future, than the 1962 decision in the Tennessee State Legislature apportionment case, *Baker v. Carr*, 369 U.S. 186 (1962). The decision was 1 year old last March, and already has more children than can be accurately counted. By judicial order, or on other initiative, reapportionment was on the agenda of most of the 47 State legislatures holding sessions this year.

Some reapportionment, either final, or tentative and subject to judicial review or referendum, has occurred for at least one house of the legislature in at least 16 States. Some State legislatures have been declared unconstitutional in whole or in part, some have been sustained, and in many States the issue is in doubt. There is already a flood of comment in the law reviews and some other journals, to which I have made some contributions—see selected list in appendix, attached.

The only questions clearly settled by the Supreme Court in *Baker v. Carr* were that Federal courts have jurisdiction of suits challenging State legislative apportionment under the 14th amendment; that voters have "standing" to raise this question; and that the issue presented is justiciable. The Court thus reversed the line of cases which had dismissed the previous apportionment cases on the ground they presented "political questions." The case was then sent back to the Federal district court for further proceedings without giving any guidance on the critical question of what constitutes a "fair," or "equal," or "rational" apportionment under the 14th amendment, or on the question of appropriate remedies. Since then the lower courts, Federal and State, in a number of cases, have given varying and conflicting views on the standards to be applied to determine whether a given apportionment and districting system for a State legislature is constitutional. There also have been suits challenging the constitutionality of congressional districts in a handful of States, but so far none of these has been successful. I have analyzed these matters and detail elsewhere—see three items listed in the appendix—and will confine myself now to a few highlights, and then try to relate them to the electoral college system of choosing a President.

For a very helpful brief review of reapportionment activity and litigation see the summation in the Congressional Quarterly Weekly Report for March 18, 1963.

Contrary to some loose language that appeared in the press last March on the first anniversary of *Baker v. Carr*, the Supreme Court has not yet embraced the idea that the Constitution commands a one-man-one-vote principle as the basis for representation in both houses of the State legislature. In other words, it has not yet addressed itself to the question of how much vote weighting of the sort that results from disparities in the population of voting districts, may be constitutionally permissible. Of course, some vote weighting occurs in all systems of representation so the real question is not vote weighting or no, but the degree and character of vote weighting which is permissible, or desirable. I shall return to this point in a moment. Nor has the Supreme Court considered the constitutionality of the so-called Federal plan under which members of one house of the legislature are elected from districts of roughly equal population, and the other house is weighted strongly toward representation of counties or other political subdivisions of the State.

Nor has the Supreme Court considered the question whether courts should overrule apportionment systems which have been approved by the people in statewide popular referendums. This last question is a most delicate one. If the purpose of a representation system is to mirror the popular feeling in a State, the results of statewide popular referendums, where each voter counts as one, would seem to have much weight in determining what is a "democratic" representation system.

Some lower courts, however, have made some of these determinations. With one or two possible exceptions, courts have not held that the districts for both houses of a State legislature must be based on an equal population principle. But several courts have held that at least one house of a legislature should rest on an "equal population" principle, some others have added the thought that the other house must not deviate unduly from this principle, and one or two courts have deemed popular referendums irrelevant.

The even more difficult question of gerrymandering—that is, conscious inequity to particular groups of voters caused by the way in which district lines are drawn—has not yet played a major role in post-*Baker v. Carr* litigation, but that is the next step. This problem can be referred to technically as districting, although the word "apportionment" is sometimes used loosely to refer both to apportionment and districting. The Federal district court in New York has handled one case of this sort, *Wright v. Rockefeller, Powell, et al.*, 211 F. Supp. 460 (S.D.N.Y. 1962), and rejected allegations that congressional district lines in part of New York City were improperly drawn along racial lines. Negro leaders were on opposite sides of this case, and Congressman Adam Clayton Powell intervened as defendant to oppose the suit.

To summarize, if the present trend continues, we may soon see representation systems in a number of States under which popular majorities will be in a position to control affirmatively at least two-thirds of a State's government; that is, the executive branch including the Governor, and one house of the legislature. They may also be able to exercise substantial, if not dominant, influence in the other house.

Now, let us turn to the larger questions of politics, constitutional law, and representation theory, which are intertwined in the apportionment problem. It is the representation theory, particularly, which may throw light on our electoral college system and its relation to other parts of our political system.

The basic issue, in terms of representation theory, is between majoritarian democracy and consensus democracy. Those who argue unabashedly for a one-man-one-vote theory are in the camp of majoritarian democracy and have little fear or concern for a possible tyranny of the majority. Fifty-one percent shall rule. Those who would favor some formula other than one-man-one-vote for at least a part of our political system are in the camp of consensus democracy. And whether or not they have the future on their side, they do have the past and present on their side. The genius of our system, and perhaps one of the key to its durability, is that our political party system, our governmental structure, and our institutional habits have combined to give us a system in which major programs and major new directions cannot be undertaken unless supported by a fairly broad popular con-

sensus. This is normally far broader than 51 percent, although, of course, occasional exceptions can be found.

The components of this "consensus democracy" are several. They include our principle of federalism, our principle of separation of powers, the bicameral structure of legislatures, each house representing a somewhat different electorate and requiring in any event a double scrutiny of all measures, our committee system and seniority system inside legislatures, our State-based rather than Nation-based political party system, requirements for extraordinary majorities to enact certain kinds of measures, the executive veto power and the power to override it with an extraordinary majority, and numerous other formal arrangements and informal practices of political behavior. These arrangements and practices normally do not operate to give a popular minority power to rule. Where they do—as may have been the case in the Tennessee Legislature prior to *Baker v. Carr* and some other legislatures such as Florida—they should be corrected and are now in the process of being corrected. But they do give popular minorities some defensive power in regard to major policy issues against a bare numerical majority. A few years ago Dr. Ernest S. Griffith, formerly Director of the Legislative Reference Service of the Library of Congress and now dean of the school of international service at American University, compared British politics and political structure to American politics and political structure. He was impressed, and, as I recall, somewhat depressed, by the rigid majoritarianism of British operation in contrast to our much more complicated but more tolerant and satisfying consensus system.

When placed in this broad context, it should become apparent that the constitutional clause most often appealed to in apportionment litigation, i.e., the equal protection of the laws clause of the 14th amendment, is far too narrow to encompass the problem, at least as handled in the apportionment cases. It is far too narrow to provide a basis for thinking meaningfully about the problem, because it does not enable us to ask the right questions. The problem has been compounded in the apportionment litigation by misconstruing the clause as erecting something like a constitutional absolute of equality. It is true that in the field of race, which gave rise to the 14th amendment, we have erected a constitutional absolute, and properly so. Governmental action must be colorblind. But as applied to other fields, the clause has been interpreted as requiring only a rule of reasonableness. It thus has been handled in the past in the same fashion, roughly as the due process clause, and is a mandate against arbitrary or capricious governmental action, but not a mandate for exactness in classification or comparative treatment of different groups.

The important question to ask about apportionment is not whether each district is of equal population, but whether the end result of our complicated representation processes is to yield a system which is basically fair and reasonable and has broad popular acceptance. As Justice Frankfurter has so aptly put it, apportionment cases are really "republican form of government" clause cases, masquerading as equal protection cases. (*Baker v. Carr*, 369 U.S. 186, 297 (1962), dissenting opinion.)

Significantly, in some statewide popular referendums, where, of course, the one-man one-vote principle is in operation, the people have approved apportionment systems which give special weight to political

subdivisions such as counties in one house of the State legislature, and have rejected proposals to place both houses on an equal population principle. Events in Michigan, Colorado, Washington, and New York should be studied in this connection.

Neither apportionment nor the electoral college system can be studied adequately in the abstract, apart from the political realities of their operation. Unfortunately, we know far too little about the actual operation either of legislatures or of executive politics. Before we make a major overhaul of our system, we should have more grass-roots research. For example, it is true, and to what extent is it true, that urban-suburban popular majorities have been throttled in State legislature because of malapportionment, and that the House of Representatives is irresponsible to urban or "liberal" viewpoints? We lack exhaustive studies, and thus cannot give definite answers to these questions. But some of the small handful of studies which have been made have reached conclusions contrary to widely held impressions.

In regard to Congress, for example, a study by Prof. Andrew Hacker of Cornell University, published in the magazine *Challenge*, February 1963, is addressed to the question whether liberals or conservatives benefit from the present arrangement of congressional districts. He tested the question by recomputing the votes on several Kennedy measures in the last session of Congress, weighing each Congressman's vote in proportion to the size of his district. On this basis he found that the conservative vote was "underrepresented" in every instance. On the urban affairs bill the administration received 11 more votes than it would have received if balloting had been based on district population; on education a bonus of 36 votes; on the farm bill a bonus of 29 votes. He infers from this that it is the conservatives, not the liberals, who suffer from whatever malapportionment may exist in Congress.

In regard to State legislatures, separate studies of the Illinois and Missouri Legislatures a few years ago by George D. Young and David R. Derge, indicated that:

The city's bitterest opponents in the legislatures are political enemies from within its own walls, and those camped in the adjoining suburban areas. (Derge, "Metropolitan and Outstate Alignments in Illinois and Missouri Legislative Delegations," 52 *Am. Pol. Sci. Rev.* 1065 (1958), incorporating findings of George D. Young, "The 1958 Special Session of the Missouri General Assembly," *Missouri Political Science Association Newsletter*, No. 3 (1958).)

A separate study by Steiner and Gove of the effects of the 1955 reapportionment on the Illinois Legislature concluded that there were "no profound changes," that Republican suburban politics had become more competitive. (Steiner and Gove, *Legislative Politics in Illinois* (1960), p. 132.) The story in Florida, however, is somewhat different. (See Harvard and Beth, "The Politics of Misrepresentation \* \* \* in the Florida Legislature" (1962).)

The recent case of *Gray v. Sanders*, 372 U.S. 368 (1963) invalidating Georgia's county unit system is a very special kind of case and should not have major bearing either on apportionment litigation nor on electoral college revision. The basic thing to note about *Gray v. Sanders* is that it is not a representation case. It involved the quite different issue of election of statewide officers from a single constituency; that is, the entire State. In 1963 it would be most difficult

to rationalize any other standard for a single constituency election than the one-man, one-vote principle. *Gray v. Sanders* did not raise the issue of representatively apportioning seats in a multi-membered body, and is therefore not relevant to the apportionment and districting problem.

The relevance of *Gray v. Sanders* to the electoral college system of choosing a President is less certain. In each instance one constituency is choosing an officeholder—the national constituency chooses a President; the State of Georgia constituency chooses a Governor and certain other statewide officers. The county-unit system was nullified in *Gray* despite its obvious parallel to the electoral vote system used in electing a President. It would be unthinkable, and also constitutionally unsound, for a number of reasons, to argue that *Gray* by implication challenges the constitutionality of our electoral college system. The electoral college system was a part of the historic compromises which were a condition of Union in 1887. It was reratified by the 12th amendment. It was reratified again by implication in the 20th and 22d amendments which dealt with the Presidency and assumed its continuance without change. No other amendments were enacted with the electoral college system in mind, or provide a reasonable basis for challenging it.

However, as a matter of policy rather than legality, some may find it anomalous to retain a unit-vote system for the Presidency after declaring it unconstitutional when used for a governorship. I would suggest, however, that an American State, and the United States, are generically different in so many ways that it would be reasonable, whether or not wise, to retain some provisions designed to diffuse geographically both political initiative and political control.

Let me try now to relate the developments above to electoral college revision, bearing in mind that the basic questions are these: What does representative democracy mean to us; what kind of balance do we wish to strike between majoritarianism and consensus? To be politically realistic we should look to the election system for Congress as well as to the electoral college system of electing a President. The theory and practice of representation used in one may condition our desires in regard to the other.

The Senate, we can assume, will continue on the present basis of equal representation of States. But this does not mean that it represents rural or agricultural interests, as distinct from urban interests. With the rise of urbanism, so that States like Texas are more urban than rural, the Senate is increasingly oriented toward urban-suburban problems, even though constituted nominally to represent "geography" or political subdivisions. The reason is that the urban-suburban vote, even in States thought of as major agricultural States, is too large to be ignored, and may have a balance-of-power position. Some observers feel that the Senate is more sympathetic to the problems of big cities and metropolitan areas than the lower House.

The House of Representatives, at least nominally, was designed to represent people rather than area, and although not constitutionally required, the Representatives apportioned to a State by Congress traditionally have been elected within districts fixed by the State legislatures rather than from the State at large. Population disparity among congressional districts has long been a source of concern and

has been challenged—so far without success—in some court suits since *Baker v. Carr*. See, for example, the suits in Federal district courts in Alabama, New York, Florida, Georgia, Washington, and Wisconsin, and in the State supreme court in Missouri. Such population imbalance detracts considerably from the national representative function of the House of Representatives, and from the capacity of a congressional delegation from any State to mirror the popular consensus in that State. Overly large congressional districts maximize the balance of power role of ethnic or activist minorities and can distort the true popular consensus of the State as a whole.

As a prelude to any detailed plans for electoral college revision I submit that we should first “shake out” our congressional district system and reduce population disparities among congressional districts within a single State to a maximum deviation of 25 percent. There can be no excuse for congressional districts which are half again as large, or 2, 3, or 4 times as large, as the smallest district in the same State. They make a mockery of the one-man-one-vote principle in the one place where the Constitution seemingly contemplates it—the House of Representatives. Neither in terms of popular expectancy nor in terms of constitutional theory can such population disparities be rationalized.

Population disparities among congressional districts also can have a detrimental effect on the vigor of our two-party system. According to the Republican National Committee, had Republican candidates gained as high a percentage of the seats as they did of the vote, there would be 209 Republicans in the House in the current 88th Congress, 33 more than elected. Population disparities of the sort being discussed were contributing causes to this inexactness in representation.

Turning now to presidential elections, what insights concerning possible revision of the electoral college system can be derived from these changes, and the changes yet to occur but foreseeable, in regard to State legislatures and congressional districts. The major alternatives—direct popular vote, the district system, or proportioning the electoral vote by party strength—have been exhaustively treated in previous hearings and this body of learning is incorporated by reference here.

Our present general ticket system of awarding a State's entire electoral vote to the candidate with a popular plurality in that State—winner-take-all system—operates roughly to give the President a constituency similar to that of the U.S. Senate. Within each State organized minorities, big city machines, and to lesser extent the disorganized suburbs, can play an important balance-of-power role and thus loom large in presidential and Senate politics. The House of Representatives, particularly if redistricted, exercises a counterweight by breaking up voting blocs within a State and isolating some of the balance-of-power factors.

In terms of representation theory, if we wish to pattern the Presidency and presidential politics more along the lines of the House of Representatives, the path to this end would be the district system, of electing the presidential electors from districts within a State. I am attracted to this proposal more now than 2 years ago, in part because *Baker v. Carr* now suggests that districting standards fixed by constitutional amendment or statute would present justiciable controversies and could be policed by the courts. The district system

rests on a diffusion of political control principle, and also avoids the winner-take-all result of our present system.

This morning Dr. David mentioned that the district system might hurt the Democratic Party in Michigan because Democratic majorities are concentrated in one rather small area of the State, small geographically. That might well be true. But, on the other hand, our present general ticket system, likewise, hurts the Republicans, because if they lose by a small statewide plurality, they lose all the electoral vote under the winner-take-all system.

So there are hazards in either direction.

I am not sanguine, however, on the capacity in practice of State legislatures to district fairly, or the capacity of courts to police Federal districting standards in timely fashion. The issues are still generically political despite the present disposition of the courts to try to litigate them. I would want to see a little more apportionment litigation unfold, before endorsing the district system, but I think the idea should be kept alive.

The other major proposal for revision which also would diffuse political control and avoid the winner-take-all result of our present system is the proportional system, known in earlier years as the Lodge-Gossett proposal. However, I still oppose this system for all the reasons given in my earlier testimony, and will continue to oppose it until the South truly becomes a two-party area at the State and local level, and not just an occasional maverick in presidential politics. Although conditions are changing, I think we are still years away from a true two-party South. With a one-party South, the proportional system, with occasional exceptions, could operate so that the Republican Party would be trading large blocs of Northern electoral votes for relatively small numbers of Southern electoral votes. Our two-party system is already too weak to warrant going in that direction. When the South ceases to be the South, however, the proportional system will have great appeal.

The direct popular vote system has so little chance of serious consideration that I will refrain from discussing it again except to say that its very simplicity and its guarantee against a minority President give it much appeal.

I have enjoyed being here, Mr. Chairman, and although I have no answers, I hope that my testimony will help us to ask the right questions concerning this vital aspect of representative government.

Thank you.

(The appendix referred to in Dr. Dixon's statement follows:)

#### APPENDIX

##### LEGISLATIVE APPORTIONMENT—SUBSTANTIVE ISSUES AFTER *BAKER v. CARR* (PARTIAL LIST)

*De Grazia, Apportionment and Representative Government* (1963).

Neal, "Baker v. Carr: Politics in Search of Law," *1962 Sup. Ct. Rev.* 252 (1962).

Israel, "On Charting a Course Through the Mathematical Quagmire: The Future of Baker v. Carr," *61 Mich. L. Rev.* 107 (1962)

—, "Apportionment Standards: Non-Population Factors," *28 Notre Dame Law.* (No. 4, 1963, in press).

Dixon, "Legislative Apportionment and the Federal Constitution," *27 Law & Contemp. Prob.* 329 (1962).

—, "States in the Federal System: Baker v. Carr," mimeo, (paper at Am. Soc. for Legal Hist. Conf., William & Mary, March 1963), available from George Washington University Law School.

- Dixon—Continued, "Apportionment Standards and Judicial Powers," 38 *Notre Dame Law* (No. 4, 1963, in press); typescript on reserve.
- Lucas, "Legislative Apportionment and Representative Government: The Meaning of *Baker v. Carr*," 61 *Mich. L. Rev.* 711 (1963).
- McKay, "Political Thickets and Crazy Quilts: Reapportionment and Equal Protection," 61 *Mich. L. Rev.* 645 (1963).
- , "The Federal Analogy and the Standard for State Apportionment," 38 *Notre Dame Law*. (No. 4, 1963, in press).
- , "Reapportionment and the Federal Analogy," Nat. Munic. League Pamphlet (1962).
- McCloskey, "The Reapportionment Case," 76 *Harv. L. Rev.* 54 (1962).
- Friedelbaum, "Baker v. Carr: The New Doctrine of Judicial Intervention and Its Implications for American Federalism," 29 *U. of Chic. L. Rev.* 673 (1962).
- Merrill, "Blazes for a Trail Through the Thicket of Reapportionment," 16 *Okla L. Rev.* 59 (1963).
- Symposium, *Baker v. Carr*. 72 *Yale L. Rev.* 7-106 (1962), short contributions by Bickel, Black, Emerson, Goldberg, O'Brien, Pollak, Schattschneider, Sandler.
- Silva, "Legislative Reappointment with Special Reference to New York," 27 *Law & Contemp. Prob.* 408 (1962).
- , "Apportionment in New York," 30 *Ford. L. Rev.* 581 (1962).
- Krastin, "The Implementation of Representative Government in a Democracy," 48 *Iowa L. Rev.* 549 (1963).
- Hagen, "The Bicameral Principle in State Legislatures," 11 *J. of Pub. Law* 310 (1962).
- Keefe, column, "Practicing Lawyer's Guide to the Current Law Magazines," 49 *A.B.A.J.* 508 (May 1963), column is devoted to apportionment, lists and discusses several articles including many of those listed above.
- Wright, "The Rights of Majorities and of Minorities in the 1961 Term of the Supreme Court," 57 *Am. Pol. Sci. Rev.* 98 (1963).
- David & Eisenberg, "State Legislative Redistricting: Major Issues in the Wake of Judicial Decision," Pub. Admin. Serv. Pamphlet (1962).
- , "Devaluation of the Urban and Suburban Vote," U. of Va. Bur. of Pub. Admin. Pamphlet (1961). Reworked and presented in somewhat more analytical fashion, "Urban-Suburban-Rural Representation, 20 *Cong. Quart. Weekly Rep.* 153-171 (1962).
- Hanson, "Courts in the Thicket: The Problem of Judicial Standards in Apportionment Cases," 12 *Am. U. L. Rev.* 51 (1963).
- Boyd, "Patterns of Apportionment," Nat. Munic. League Pamphlet, 1962.
- U.S. Advisory Commission on Intergovernmental Relations, *Apportionment of State Legislatures* (1962).
- Jewell, ed., *The Politics of Reapportionment* (1962)—collection of short state essays by several contributors.
- Harvard & Beth, *The Politics of Mis-Representations: Rural-Urban Conflict in the Florida Legislature* (1962).
- 52 *Nat. Civic Review* (April 1963), short Comments by Abram, Larson, McKay.

Senator KEFAUVER. Well, thank you very much, Dr. Dixon.

We appreciate the fact that you are continuing to study and consider and give these problems a great deal of thought. We are grateful to you for preparing this very fine statement for us.

Thank you very much for coming and being with us.

Mr. DIXON. Thank you.

Senator KEFAUVER. Mr. John P. Rogge of Houston, Tex., has come to Washington and wishes to testify in connection with this matter.

We are glad to give anyone an opportunity to testify.

#### STATEMENT OF JOHN P. ROGGE, ATTORNEY, HOUSTON, TEX.

Mr. ROGGE. Mr. Chairman, first I want to thank the committee for a chance to be here. I won't take too much time because I caught a laryngitis or something on my flight yesterday. I don't know whether I will get better or worse. But if I do not conclude—

Senator KEFAUVER. Mr. Rogge, your full statement will be printed in the record.

Mr. ROGGE. Thank you. May I make some comments as I go?

Senator KEFAUVER. Yes, you may. Your full statement will be printed. But try to limit yourself to 15 minutes, if you will.

Mr. ROGGE. I will.

Now, first off, it has been clear from not only the reports of the prior hearings, but from what I have overheard today, that there is a consensus of opinion among the folks who have appeared here that section 1 of article 2 must go, that the provision in the Constitution that says the State legislature shall direct and what men of the States electors of President and Vice President shall be appointed—that must go.

Personally, it is a good deal like in a football game, where one side temporarily loses the ball, the other players fumble over it, and cannot get possession of it, and the rightful player, we might say, gets possession of the ball. And it is to be hoped that before these differences, these fortunate differences, I would say, for the preservation of the rights of the States—before they are resolved between the various conflicting proposals, it could very well be that the State legislatures will take the ball, and if they do, the faults that have been leveled here at the convention system, either directly or indirectly, they will all be corrected by the intervention of quite an ancient but nevertheless a very effective method by which the State legislature acts as the agent.

In all of these proposals that are before the subcommittee—I suppose it would be proper to say the direct election and primary election provisions, with those exceptions—all of them contemplate somewhere in the machinery for the electing of a President, the intervention of an agent. Every one of them does.

Now, to that extent they do agree with the framers of the Constitution. They said there ought to be an agent—but there is no such thing as a direct election of the President, and that ought not to be taken as a reflection on the intellect of the people—it has nothing to do with it.

You just naturally cannot get 180 million around a ballot box, you cannot do it. And most important of all, in every one of these proposals, they have overlooked, with the exception of the direct primary, the necessity of in some way getting us a candidate to vote for.

Now, we find a lot of fault with the unpledged elector—they say they are going to take away from the people the right to vote. The people do not now have the right to vote. The best the people have now is the right to choose between A and B—A and B being the nominees of the national conventions.

I am glad to note—if the Chair will permit me one brief quote—this is in the hearings in 1961, part 2, on page 386, where the Chair took, I think, clearly the proper position in evaluating the national convention.

The other thing is that at the present time very often the political party makes its nomination without ever knowing what the nominee really stands for. He is drafted to run and has never been out and exposed himself and talked about what his national program or international program may be.

I think that is thoroughly correct.

Now, if that is a fact, why, then, should we continue to support the nominees of the national convention? And they do not purport to reflect the thinking of the people. They are party serving to the extreme degree.

Now, here we have quite recently in the papers—this appears in the *Houston Chronicle* of May 26. I haven't found too much satisfaction in quoting the *Houston Chronicle*—I do not know who owns it any more. But in the *Houston Chronicle* they carry an article reporting the recent statement by James Farley. I have confirmed this in James Farley's "Story of James Farley."

In this recent statement, less than a month ago, he recounts how one of his—his most difficult decision was on breaking with President Roosevelt over the third term in 1940. It says:

Farley blames the third and fourth terms of the late President for many of the ills which beset the world today. Those terms, he said, brought a great mind, but one worn by the care of years and weight of state, to the conferences of Teheran and Yalta.

I read also in the story of Farley where he goes into more detail than that. He says:

I can remember in the 1944 convention the question of nominating Roosevelt for a fourth term came up, and many of us were bitterly opposed to it, because we knew that his physical condition and even his mental condition did not enable him to carry on the tremendous responsibilities of leading in the war and the peace that would follow.

But then he gives the punch line.

He says:

But when Senator Barkley demurred at making the nominating speech, we prevailed on him to go ahead like a good soldier and do it for the good of the party.

Now, that is a convention we are talking about. And that the convention is going to be served by every one of these proposals before this committee with the possible exception—well, I would say the certain exception of the proposal for direct election with direct nationwide primaries, which I think would on analysis before the State legislatures and the people fall for half a dozen very basic reasons.

Now, then, before my time runs out, I want to say something more appropriate, I think, in the way of offering cures.

As I said in my statement, the cure is to go back to the constitutional method that was practiced in the early days, and there provide by simple act of the legislature of the State that State electors will be appointed in the November election date by the direct action of the State legislature.

I believe the fact that the legislature has not done that, that they have been slow in correcting the mistakes that appear since, I would say, the surrender of the two-thirds rule—we must remember the two-thirds rule was surrendered voluntarily by the Democratic convention in 1936. And since that time, the Democratic convention has ceased to be a deliberative body in the sense that it was for 100 years.

Now, we have got to see now that the State legislature was in the beginning responsible for permitting the name of the nominee of the national convention to dominate the State ballot. They can take that off now, just as well as their predecessors put it on.

We ought not, I believe, to complain that the present legislatures are derelict in their duties. They do not know, literally do not know that they have under section 1 of article 2 a tremendous power. I dare say a poll would show that not one citizen out of a hundred thousand would know. It is the strangest political secret of the century.

Now, the State legislatures are beginning to hear about it. The next thing is what will they do about it.

We have had in the State of Texas quite a wholesome development. We have a Farm Bureau of something like 100,000 families, a very dynamic group, dedicated citizens for the most part. They adopted in their last State convention a resolution calling on the State legislature to themselves provide for appointment of electors in 1963.

Now, it is true that the bill did not pass. It is true that a similar bill in 1959 did not pass in Texas. We have some peculiar situations in Texas that might not apply everywhere.

But at the same time the important thing is, more important than the fact that they did not pass, is the fact that they reflect the thinking of a very considerable and, I would say, a representative cross section of the people.

Now, the proposition is if the State legislatures are alerted to this question, I believe they will meet the situation.

It has been confessed on all sides that any amendment that is agreed on here will be a long time in coming about. The suggestion is while it is coming about, if it appears to be eventually acceptable either to the people or to the legislatures—while it is coming about, there ought to be, then, a resolution of this complaint against the national convention, and it ought to be resolved in a manner that the State legislatures, by direct election, appoint the agent. Don't let the delegates to the national conventions be that agent, because they do not represent the people. They are a very small reflection of the sentiments of the people.

Senator KEFAUVER. Mr. Rogge, let's see if I understand what you are talking about. Now, you mean to have the legislators of each State appoint the electors, who will elect the President?

Mr. ROGGE. That's right; yes, sir, Mr. Chairman. I have something I would like to introduce here that I think is perhaps the most important thing that has been said in this entire hearing. That is no reflection on anybody that has been here before.

I have taken this matter up with Mr. Ed Gossett. Mr. Ed Gossett is well known in these hearings. He is thoroughly acquainted with this question. And Mr. Ed Gossett, in reply to a letter that I wrote to him, which had reference to his support of the bill that was introduced in the Texas Legislature in 1959, he comes back with a rather brief letter.

If I might, I would like to read this. May I do so?

Senator KEFAUVER. All right. Do you have a copy of the letter?

Mr. ROGGE. Yes, sir; I have.

Senator KEFAUVER. Do you have a copy of the letter you wrote him?

Mr. ROGGE. Yes, sir; I have that, too, I believe. Well, I will not read that letter unless you care to have it, Mr. Chairman. I will read his reply. But I will give a copy of my letter to him. Is that agreeable?

Senator KEFAUVER. Leave a copy of your letter to him with us.

Mr. ROGGE. Yes, I will.

(The letters referred to follow :)

MAY 29, 1963.

Mr. ED GOSSETT,  
General Attorney for Texas Legal Department,  
Southwestern Bell Telephone Co., Dallas, Tex.

DEAR MR. GOSSETT: I have in my file a blind copy which you sent me of your letter of April 13, 1959, addressed to Hon. Reagan Huffman and Hon. Jerry Sadler, then members of the house of representatives in Austin, Tex. This letter referred to house bill 792, which had been introduced in the house of representatives shortly before by Representatives Huffman and Sadler. As you will recall, house bill 792 had to do with the 1960 presidential election; it would have provided for the State legislature by its own direct action to appoint Texas electors of President and Vice President in 1960, thereby bypassing the national convention of both principal parties, the purposes being, of course, to provide Texas with electors not pledged to the nominees of either of the conventions.

In your letter you seem to express a preference for electors with some degree of independence, and you observe that the Founding Fathers in writing the Constitution intended for electors to be independent, and you observe that under house bill 792, or some similar legislation, Texas would have everything to gain and nothing to lose.

The purpose of this letter is to inquire if the above represents your present thinking on the subject, and to ask you if it is agreeable with you if your statement in reply is made public. It is possible that I would want to make use of it in connection with a statement that I may be making before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, and so I would especially appreciate a reply at your earliest convenience.

Very truly yours,

JOHN P. ROGGE.

---

SOUTHWESTERN BELL TELEPHONE CO.,  
LEGAL DEPARTMENT,  
Dallas, Tex., May 31, 1963.

Mr. JOHN P. ROGGE,  
Houston, Tex.

DEAR MR. ROGGE: I have your good letter of May 29 expressing an interest in the choice of independent electors.

As everybody ought to know, the Founding Fathers in writing the Constitution intended that electors should be free and independent agents in the choosing of a President. The system they intended has been confounded, confused, and corrupted to a ridiculous degree not anticipated by anybody. While I strongly favor an amendment to the Federal Constitution changing the electoral college system, I would also favor, in the meantime, a return to the free elector system. The States, of course, have this authority and in their own interest should certainly resort to the choice of such free electors. I would even greatly prefer that State legislators themselves select electors in preference to the present system.

As you doubtless know, numerous electoral reform amendments have been introduced in both Houses of the Congress at every session for the last 20 years. Nothing has been done largely because there has not been a sufficient grassroots demand for action.

Until the Congress has acted the States should take the initiative in this matter and in their own interest should provide for a choice of independent electors. Any initiative and assertion of independence by the States would be for the general welfare, in my opinion.

Let me commend you for your patriotic concern with this whole problem.

Yours very truly,

ED GOSSETT.

Mr. ROGGE. The importance of this is, I would say, a challenge to all of the various proposals that have been offered here by the other Senators. It is a challenge to them. Will they go equally? They say, "Well, it is going to take us years to do this thing"—and while we are doing it, let's bypass these national conventions and by direct appointment by the State legislature let us solve this problem as to who shall appoint the agents.

First, who shall be the agent—and you all agree there must be one. Then, second, who shall appoint him? Then, third, shall he be controlled. And by logic, you will have to say no, because then you have to find the agent that is going to control him. So you get back to the question.

Shall the elector be the agent as he was in the first 40 years in this country, and who then shall appoint him?

Thank you very much, Mr. Chairman.

Senator KEFAUVER. All right, Mr. Rogge.

(The prepared statement submitted by Mr. Rogge is as follows:)

Mr. Chairman, this statement is offered in opposition to the proposals for electoral reform through constitutional amendments now before this subcommittee. At the same time, it is recognized that the present machinery for the election of the President and Vice President is in need of improvement. It is not intended to analyze any of the proposals now before this subcommittee; instead, it is intended to call attention to complaints most commonly heard against the electoral system at present in use and to suggest means to remedy the ills complained of.

A discussion of electoral reform must necessarily involve section 1 of article II of the Constitution of the United States where it is provided as follows:

Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the States may be entitled in the Congress \* \* \*.

It is thought that this provision gives to the State legislatures the greatest single grant of power found anywhere in the Constitution; it is believed, too, that if this power is properly exercised by enough of the State legislatures, there will be no need for electoral reform such as is now under consideration by this subcommittee.

In considering the shortcomings in the present electoral system, the purpose of such a system ought to be kept in mind; it is thought that the purpose is or should be to provide for the election of a President who will perform his duties under the Constitution and in conformity with the preferences of the people. This is not intended as an accurate definition, but may be sufficient for the present.

Proponents and opponents of electoral reform seem agreed on the premise that at some stage in the election process the people must act through an agent; to this extent, they agree with the framers of the Constitution. There is difference of opinion, though, as to who should be such agent, as to who should appoint him and as to the limit of his agency. The framers of the Constitution provided for "electors" to act as such agent, and provided further that they should be appointed in such manner as the legislature may direct. This authorized the legislatures to appoint the electors, and for the first 40 years after the Republic was founded, and while the founders were active in public affairs, it was the practice for the legislatures to appoint the electors. It was also intended by the framers of the Constitution that the electors should be free of any control in considering whom they would support for President.

With the appearance of the national nominating conventions, the freedom of the elector to vote his convictions was limited and in due time he has become an agent of the national conventions, rather than of the people. Until recent times, probably within the last 30 years, the performance of the national conventions was acceptable to the party followers generally, so that the authority of the conventions was not questioned. It is now generally recognized that the conventions no longer enjoy the confidence or respect of the people. The causes for this are common, more or less, to both parties with each party coming in sometime for special criticism. Thus, in 1936, the Democratic convention took away the two-thirds rule, and substituted rule by simple majority. The smaller States, including the Southern States, thereby lost the voice they had enjoyed for a hundred years, and control of the convention passed to the bigger States, principally to New York. This has contributed toward the Democratic convention's loss of popularity, and the third and fourth nominations of Franklin Roosevelt contributed to it further. The Republican conventions have likewise lost in public favor because of their refusal to respect the preferences of the people. Without enlarging on the shortcomings of the conventions, the case against them can be based on popular opinion, and it is generally recognized

that they are now at an all-time low in the estimation of the people. Beside the charge that they do not reflect or respect the preferences of their party followers, the accusation is heard that each of the conventions is dominated by a mysterious, but very real, few, who are able to compel nominations in both parties suitable to their own designs, which are at variance with the best interests of the country.

So much reference has been made to the conventions because the electoral system at present leaves the conventions in control of the election machinery. This is brought about by the acts of the legislatures, which put the name of convention nominees on the official State ballot, requiring the voter not to vote for the elector, but apparently to vote directly for the President. In this way, two false impressions are left, one that the voter actually votes for the President, and the other that the elector is in some way bound to vote for the convention nominees of his party.

As stated above, it seems agreed that there must be an agent to act for the people in the election process. The question seems to be only, should it be the national conventions, or should it be the elector provided for in the Constitution; and if it should be the latter, should he be a free agent to exercise his best judgment in seeking out for President a man he considers most suitable for the position? Or, should the elector be pledged in some way to act as the agent of the national convention? It is contended here that the electoral system should contemplate an elector as the agent of the people, and that he should be a free agent in voting for the President and Vice President, and that he should be directly appointed by the legislature. This conclusion is predicated partly on the fact that the national conventions have proved faithless to the people and to the Nation, while, on the other hand, free electors for a considerable time served them well, and can and would do so again.

The soundness of the case for electors is testified to by the specious arguments to which some of the opponents have found it necessary to resort, the most evident being the charge that the entire electoral system should be abolished because it belongs to the "horse and buggy" age. But this charge can also be made against the national nominating conventions. And if antiquity is to be the yardstick for appraising institutions and concepts, the Sermon on the Mount would now be unacceptable, and also the Ten Commandments and the Golden Rule.

One desirable result of free electors would be that although they could vote for one of the two convention nominees, they would not be limited to that choice. In this connection, it will be remembered that charges against the independent electors express the fear that they will prevent the people from electing the President, leaving the impression that under the present system, the people do elect the President. The fact, however, is that under the present system, the voter is permitted to vote for one of two candidates for President, though he is without any voice in the nomination of that candidate, thus suggesting the system in Russia, where the citizen may vote for but one candidate, or none, and he having no voice in the nomination of that one. In other words, our system is semitotalitarian. It will be remembered that in his testimony before the subcommittee, Mr. Nicholas Katzenbach found fault with the electoral system because, he said, he has found it hard to explain in his travels aboard; it is hoped that at least he defended it enough to draw a favorable comparison to the Communist so-called election—at least he could have said that our system is twice as good, or else only half as bad as the totalitarian system in that, under the convention system grafted onto the elector system, we permit the citizen to vote for either of two handpicked candidates, while the Communists permit their citizens to vote for one or none.

It would be better to have the elector as the agent of the people and to have him appointed by the legislature, for in that way any defection on the part of the elector would be chargeable against the legislators when they come up for reelection. This would encourage the faithful performance of their duties of both the legislator and the elector, which is much in contrast to the present situation when the people have no adequate recourse against the national conventions or their delegates for any breach of faith. This observation is at variance with contentions of some of the proponents for electoral reform who fear that unpledged electors might be inclined to bargain for their own advantage, a charge which more properly should be directed to the conventions. It is believed that some of the proposals for amendments to change the machinery for electing the President are being urged only because the State legislatures have

delayed in taking any action against the national conventions by taking the names of the convention nominees off the State ballot. In other words, it is believed that by properly exercising its powers under section 1, article II, the State legislature can provide for its own appointment of free electors, and that by so doing, it will cure the evils inherent in the national conventions, unresponsive as they are to the wishes of the people in the election of the President.

It is believed that there is nothing lacking in the Constitution's provisions for the election of the President, but that the popular dissatisfaction with the election machinery is attributable to the manner in which the legislatures have performed their duties under the Constitution. It is noted also that there is an awakening among the people to the possibilities when the legislatures take the initiative as suggested above.

There is plenty of evidence that such interest is developing; in Texas the 1962 Farm Bureau convention called on the Texas Legislature to return to the earlier constitutional method by appointing Texas' 25 electors next year. A bill for that purpose was introduced with the support of the Farm Bureau and other organizations. A similar bill was introduced in the 1959 session. The fact that these bills have not passed is not as important as is the concern which their sponsorship and the public interest indicates. At the same time, the general concern over the moral collapse of the national conventions and rediscovery of the legislature's powers to deal with it are providing new hope and developing ever wider interest.

With all the ramifications of this subject, it could not be adequately dealt with in a few pages. It is hoped that the pledged elector has been identified as the defect in the present elector system, and that the remedy indicated lies with an alerted legislature directly appointing unpledged electors. It is thought that while this movement is developing, the subcommittee should proceed with great deliberation in proposing an amendment which, at best, must be recognized as experimental and which, once adopted, cannot be so easily repealed—the surrender of the two-thirds rule being a lesson in point.

It is also to be hoped that the proponents of electoral reform by constitutional amendment will not read too much encouragement into the ease with which the 23d amendment was recently ratified. Instead, it can be expected that a reaction will militate against any further amendments which would in any way impair or water down the voice of the State in the Federal Government. It is believed, too, that the recent flood of proposals for other amendments in that general direction have served further to bolster resistance on the part of the people and of the legislatures. With this background, it can be expected that any proposed amendment toward electoral reform will be met with popular disapproval as will the recently proposed amendment to give the District of Columbia two Senators and proportional seats in the House, and another to give Puerto Rico three electoral votes, and another to give each ex-President a Senate seat for life—and still others which would in some way strike at principles upon which the Republic is founded.

On all sides there is increasing evidence that the people want less of this sort of congressional action rather than more, that they would welcome as a wholesome and propitious sign the personal resolve by the Members of the Congress to be content merely to serve under the Constitution, rather than try to remake it into a blueprint for further centralization in government. The flood of amendments in that general direction now being urged in and by the Congress is therefore meeting formidable opposition among the people, the more so because they see in it the attack on the foundation of government which Daniel Webster so vividly foretold, and they are determined that any such attack shall fail, that the dismal prospect imagined by Webster will be spared us; that, as he hoped, the majestic columns of constitutional government will not be toppled into the dust of the valley.

More to the point, for the first time the people are beginning to turn to their legislatures for help in holding the line in Washington by the exercise of their long-overlooked powers under section 1, of article II, of the Constitution of the United States, and it is believed that the legislatures' response will make it unnecessary and inadvisable to submit to them any amendments to take from them their powers under that provision.

Senator KEFAUVER. You are a lawyer in Houston, are you?

Mr. ROGGE. Yes, sir; I practice law in Houston. I happen to be a native of Illinois, had my schooling at the University of Chicago, and

my law work there, too. I have been practicing law in Texas for about 30 years.

I have had also some personal acquaintance in the elector matter. I was an elector nominated in 1952 on the Republican slate in Texas. At that time I was active in the affairs in Harris County, in the Republican Party. Part time I was chairman, part time I was secretary of the executive committee.

I was named at the first convention as a candidate for elector. After the transactions in the Chicago convention, I was even yet offered the position to remain on the slate if I would promise that if elected I would cast my vote for Dwight Eisenhower. I refused to bind myself, thinking then in 1952 that it was inconsistent for an agent who is supposed to be free to bind himself to a national convention that has no authority under the Constitution. And I take that view still.

Senator KEFAUVER. So you refused to act as an elector?

Mr. ROGGE. I refused to act. Well, I refused to stand on the ballot. I was not continued on the ballot.

Senator KEFAUVER. Thank you, sir.

That will conclude this series of hearings. We will leave the record open for 10 days for any other statements that might be sent in, or for any of the witnesses to amplify upon their testimony.

The committee is now in recess.

(Whereupon, at 3 p.m., the committee adjourned, subject to call of the Chair.)

and the fact that I had been the leading law in Texas about

that time. I had also been the leading law in Texas about that time. I had also been the leading law in Texas about that time. I had also been the leading law in Texas about that time.

I had also been the leading law in Texas about that time. I had also been the leading law in Texas about that time. I had also been the leading law in Texas about that time. I had also been the leading law in Texas about that time.

I had also been the leading law in Texas about that time. I had also been the leading law in Texas about that time. I had also been the leading law in Texas about that time.

I had also been the leading law in Texas about that time. I had also been the leading law in Texas about that time. I had also been the leading law in Texas about that time. I had also been the leading law in Texas about that time.

I had also been the leading law in Texas about that time. I had also been the leading law in Texas about that time. I had also been the leading law in Texas about that time. I had also been the leading law in Texas about that time.

---

---

APPENDIX

---

---

---

APPENDIX

---

SUPREME COURT OF THE UNITED STATES

No. 112.—OCTOBER TERM, 1962.

James H. Gray et al.,  
Appellants,  
v.  
James O'Hear Sanders. } On Appeal From the United  
States District Court for the  
Northern District of Georgia.

[March 18, 1963.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

I.

This suit was instituted by appellee, who is qualified to vote in primary and general elections in Fulton County, Georgia, to restrain appellants from using Georgia's county unit system as a basis for counting votes in a Democratic primary for the nomination of a United States Senator and statewide officers, and for declaratory relief. Appellants are the Chairman and Secretary of the Georgia State Democratic Executive Committee, and the Secretary of State of Georgia. Appellee alleges that the use of the county unit system in counting, tabulating, consolidating, and certifying votes cast in primary elections for statewide offices violates the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment and the Seventeenth Amendment. As the constitutionality of a state statute was involved and the question was a substantial one, a three-judge court was properly convened. See 28 U. S. C. § 2281; *United States v. Georgia Public Service Comm'n*, decided January 14, 1963.

Appellants moved to dismiss; and they also filed an answer denying that the county unit system was unconstitutional and alleging that it was designed "to

achieve a reasonable balance as between urban and rural electoral power.”

Under Georgia law each county is given a specified number of representatives in the lower House of the General Assembly.<sup>1</sup> This county unit system at the time this suit was filed was employed as follows in statewide primaries:<sup>2</sup> (1) Candidates for nominations who received the highest number of popular votes in a county were considered to have carried the county and to be entitled to two votes for each representative to which the county is entitled in the lower House of the General Assembly; (2) the majority of the county unit vote nominated a United States Senator and Governor; the plurality of the county unit vote nominated the others.

Appellee asserted that the total population of Georgia in 1960 was 3,943,116; that the population of Fulton County, where he resides, was 556,326; that the residents of Fulton County comprised 14.11% of Georgia's total population; but that, under the county unit system, the six unit votes of Fulton County constituted 1.46% of the total of 410 unit votes, or one-tenth of Fulton County's percentage of statewide population. The complaint further alleged that Echols County, the least populous county in Georgia, had a population in 1960 of 1,876, or .05% of the State's population, but the unit vote of Echols County was .48% of the total unit vote of all counties in Georgia, or 10 times Echols County's statewide percentage of population. One unit vote in Echols County represented 938 residents, whereas one unit vote in Fulton County repre-

<sup>1</sup> Ga. Const., 1945, Art. III, § III, ¶ 1:

“The House of Representatives shall consist of representatives apportioned among the several counties of the State as follows: To the eight counties having the largest population, three representatives each; to the thirty counties having the next largest population, two representatives each; and to the remaining counties, one representative each.”

<sup>2</sup> Ga. Code Ann., §§ 34-3212, 34-3213 (1936).

sented 92,721 residents. Thus, one resident in Echols County had an influence in the nomination of candidates equivalent to 99 residents of Fulton County.

On the same day as the hearing in the District Court, Georgia amended the statutes challenged in the complaint. This amendment<sup>3</sup> modified the county unit system by allocating units to counties in accordance with a "bracket system" instead of doubling the number of representatives of each county in the lower House of the Georgia Assembly. Counties with from 0 to 15,000 people were allotted two units; an additional one unit was allotted for the next 5,000 persons; an additional unit for the next 10,000 persons; another unit for each of the next two brackets of 15,000 persons; and, thereafter, two more units for each increase of 30,000 persons. Under the amended Act, all candidates for statewide office (not merely for Senator and Governor as under the earlier Act) are required to receive a majority of the county unit votes to be entitled to nomination in the first primary. In addition, in order to be nominated in the first primary, a candidate has to receive a majority of the popular votes unless there are only two candidates for the nomination and each receives an equal number of unit votes, in which event the candidate with the popular majority wins. If no candidate receives both a majority of the unit votes and a majority of the popular votes, a second run-off primary is required between the candidate receiving the highest number of unit votes and the candidate receiving the highest number of popular votes. In the second primary, the candidate receiving the highest number of unit votes is to prevail. But again, if there is a tie in unit votes the candidate with the popular majority wins.

Appellee was allowed to amend his complaint so as to challenge the amended Act. The District Court held

---

<sup>3</sup> Ga. Laws 1962, Ex. Sess., p. 1217; Ga. Code Ann. §§ 34-3212, 34-3213 (1962).

that the amended Act had some of the vices of the prior Act. It stated that under the amended Act "the vote of each citizen counts for less and less as the population of the county of his residence increases." 203 F. Supp. 158, 170, n. 10. It went on to say:

"There are 97 two-unit counties, totalling 194 unit votes, and 22 counties totalling 66 unit votes, altogether 260 unit votes, within 14 of a majority; but no county in the above has as much as 20,000 population. The remaining 40 counties range in population from 20,481 to 556,326, but they control altogether only 287 county unit votes. Combination of the units from the counties having the smallest population gives counties having population of one-third of the total in the state a clear majority of county units." *Ibid.*

The District Court held that as a result of *Baker v. Carr*, 369 U. S. 186, it had jurisdiction, that a justiciable case was stated, that appellee had standing, and that the Democratic primary in Georgia is "state" action within the meaning of the Fourteenth Amendment. It held that the county unit system as applied violates the Equal Protection Clause, and it issued an injunction,<sup>4</sup> not against conducting any party primary election under the county unit system, but against conducting such an election under a county unit system that does not meet the requirements specified by the court.<sup>5</sup> 203 F. Supp.

<sup>4</sup> The order, dated April 28, 1962, was not restricted to the party primary of September 12, 1962; nor was the relief asked so restricted.

<sup>5</sup> The District Court in its order defined the type of county unit system which violated the Equal Protection Clause as follows:

"A county unit system for use in a party primary is invidiously discriminatory if any unit has less than its share to the nearest whole number proportionate to population, or to the whole of the vote in a recent party gubernatorial primary, or to the vote for electors of the party in the most recent presidential election; pro-

158. In other words, the District Court did not proceed on the basis that in a statewide election every qualified person was entitled to one vote and that all weighted voting was outlawed. Rather, it allowed a county unit system to be used in weighting the votes if the system showed no greater disparity against a county than exists against any State in the conduct of national elections.<sup>6</sup> Thereafter the Democratic Committee voted to hold the 1962 primary election for the statewide offices mentioned on a popular vote basis. We noted probable jurisdiction. 370 U. S. 921.

## II.

We agree with the District Court that the action of this party in the conduct of its primary constitutes state action within the meaning of the Fourteenth Amendment. Judge Sibley, writing for the court in *Chapman v. King*, 154 F. 2d 460, showed with meticulous detail the manner in which Georgia regulates the conduct of party primaries (*id.*, pp. 463-464) and he concluded:

“We think these provisions show that the State, through the managers it requires, collaborates in the conduct of the primary, and puts its power behind the rules of the party. It adopts the primary as a part of the public election machinery. The exclusions of voters made by the party by the primary rules become exclusions enforced by the State.” *Id.*, p. 464.

---

vided, no discrimination is deemed to be invidious under such system if the disparity against any county is not in excess of the disparity that exists as against any state in the most recent electoral college allocation, or under the equal proportions formula for representation of the several states in the Congress of the United States, and, provided provision is made for allocations to be adjusted to accord with changes in the basis at least once each ten years.”

<sup>6</sup> See note 5, *supra*.

We agree with that result and conclude that state regulation of this preliminary phase of the election process makes it state action. See *United States v. Classic*, 313 U. S. 299; *Smith v. Allwright*, 321 U. S. 649.

We also agree that appellee, like any person whose right to vote is impaired (*Smith v. Allwright, supra*; *Baker v. Carr, supra*, pp. 204-208) has standing to sue.<sup>7</sup>

---

<sup>7</sup> Chief Justice Holt stated over 250 years ago:

"A right that a man has to give his vote at the election of a person to represent him in parliament, there to concur to the making of laws, which are to bind his liberty and property, is a most transcendent thing, and of a high nature . . . . [I]t is a great injury to deprive . . . [him] of it. . . .

"It would look very strange, when the commons of *England* are so fond of their right of sending representatives to parliament, that it should be in the power of a sheriff, or other officer, to deprive them of that right, and yet that they should have no remedy . . . . This right of voting is a right in the plaintiff by the common law, and consequently he shall maintain an action for the obstruction of it. . . .

"But in the principle case my brother says, we cannot judge of this matter, because it is a parliamentary thing. O! by all means be very tender of that. Besides it is intricate, and there may be contrariety of opinions. . . . To allow this action will make publick officers more careful to observe the constitution of cities and boroughs, and not to be so partial as they commonly are in all elections, which is indeed a great and growing mischief, and tends to the prejudice of the peace of the nation. But they say, that this is a matter out of our jurisdiction, and we ought not to enlarge it. I agree we ought not to inroach or enlarge our jurisdiction; . . . but sure we may determine on a charter granted by the king, or on a matter of custom or prescription, when it comes before us without inroaching on the parliament. And if it be a matter within our jurisdiction, we are bound by our oaths to judge of it. This is a matter of property determinable before us. Was ever such a petition heard of in parliament, as that a man was hindered of giving his vote, and praying them to give him a remedy? The parliament undoubtedly would say, take your remedy at law. It is not like the case of determining the right of election between the candidates." *Ashby v. White*, 2 *Ld. Raym.* 938, 953, 954, 956 (1702).

Moreover, we think the case is not moot by reason of the fact that the Democratic Committee voted to hold the 1962 primary on a popular vote basis. But for the injunction issued below, the 1962 Act remains in force; and if the complaint were dismissed it would govern future elections. In addition the voluntary abandonment of a practice does not relieve a court of adjudicating its legality, particularly where the practice is deeply rooted and long-standing. For if the case were dismissed as moot appellants would "be free to return to . . . [their] old ways." *United States v. W. T. Grant Co.*, 345 U. S. 629, 632.

### III.

On the merits we take a different view of the nature of the problem than did the District Court.

This case, unlike *Baker v. Carr*, *supra*, does not involve a question of the degree to which the Equal Protection Clause of the Fourteenth Amendment limits the authority of a State Legislature in designing the geographical districts from which representatives are chosen either for the State Legislature or for the Federal House of Representatives. Nor does it include the related problems of *Gomillion v. Lightfoot*, 364 U. S. 339, where "gerrymandering" was used to exclude a minority group from participation in municipal affairs. Nor does it present the question, inherent in the bicameral form of our Federal Government, whether a State may have one house chosen without regard to population. The District Court, however, analogized Georgia's use of the county unit system in determining the results of a statewide election to phases of our federal system. It pointed out that under the electoral college,<sup>8</sup> required by Art. II, § 1 of the Con-

---

<sup>8</sup> The electoral college was designed by men who did not want the election of the President to be left to the people. See S. Doc. No. 97, Survey of the Electoral College in the Political System of the United

stitution and the Twelfth Amendment in the election of the President voting strength "is not in exact proportion to population . . . . Recognizing that the electoral college was set up as a compromise to enable the formation of the Union among the several sovereign states, it still could hardly be said that such a system used in a state among its counties, assuming rationality and absence of arbitrariness in end result, could be termed invidious." 203 F. Supp. 169.

---

States, 79th Cong., 1st Sess. "George Washington was elected to the office of Chief Magistrate of the Nation, by 69 votes—the total number cast by the electors. At that time, three States did not vote. New York had not yet passed an electoral law, and North Carolina and Rhode Island had not yet ratified the Constitution. Therefore, of an estimated population of 4,000,000 people, a President was chosen by 69 voters, who had not been selected by the people, but appointed by State legislatures, save in the instances of Maryland and Virginia." *Id.*, p. 4.

Hamilton expressed the philosophy behind the electoral college in The Federalist No. 68. "This process of election affords a moral certainty, that the office of president, will seldom 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. It will not be too strong to say, that there will be a constant probability of seeing the station filled by characters pre-eminent for ability and virtue. And this will be thought no inconsiderable recommendation of the constitution, by those, who are able to estimate the share, which the executive in every government must necessarily have in its good or ill administration."

Passage of the Fifteenth, Seventeenth, and Nineteenth Amendments shows that this conception of political equality belongs to a bygone day, and should not be considered in determining what the Equal Protection Clause of the Fourteenth Amendment requires in statewide elections.

Accordingly the District Court as already noted<sup>9</sup> held that use of the county unit system in counting the votes in a statewide election was permissible "if the disparity against any county is not in excess of the disparity that exists against the state in the most recent electoral college allocation." 203 F. Supp. 170. Moreover the District Court held that use of the county unit system in counting the votes in a statewide election was permissible "if the disparity against any county is not in excess of the disparity that exists . . . under the equal proportions formula for representation of the several States in the Congress." *Ibid.* The assumption implicit in these conclusions is that since equality is not inherent in the electoral college and since precise equality among blocs of votes in one State or in the several States when it comes to the election of members of the House of Representatives is never possible, precise equality is not necessary in statewide elections.

We think the analogies to the electoral college, to districting and redistricting, and to other phases of the problems of representation in state or federal legislatures or conventions<sup>10</sup> are inapposite. The inclusion of the electoral college in the Constitution as the result of specific historical concerns,<sup>11</sup> validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of an analogous system by a state in a statewide election. No such specific accommodation of the latter was ever undertaken, and therefore no validation of its numerical inequality ensued. Nor does the question here have anything to do with the composition of the state or federal legislature. And we intimate

---

<sup>9</sup> See note 5, *supra*.

<sup>10</sup> We do not reach here the questions that would be presented were the convention system used for nominating candidates in lieu of the primary system.

<sup>11</sup> See note 8, *supra*.

no opinion on the constitutional phases of that problem beyond what we said in *Baker v. Carr*, *supra*. The present case is only a voting case. Cf. *Nixon v. Herndon*, 273 U. S. 536; *Nixon v. Condon*, 286 U. S. 73; *Smith v. Allwright*, *supra*. Georgia gives every qualified voter one vote in a statewide election; but in counting those votes she employs the county unit system which in end result weights the rural vote more heavily than the urban vote and weights some small rural counties heavier than other larger rural counties.

States can within limits specify the qualifications of voters both in state and federal elections; the Constitution indeed makes voters' qualifications rest on state law even in federal elections. Art. I, § 2. As we held in *Lassiter v. Northampton Election Board*, 360 U. S. 45, a State may if it chooses require voters to pass literacy tests, provided of course that literacy is not used as a cloak to discriminate against one class or group. But we need not determine all the limitations that are placed on this power of a State to determine the qualifications of voters, for appellee is a qualified voter.

The Fifteenth Amendment prohibits a State from denying or abridging a Negro's right to vote. The Nineteenth Amendment does the same for women. If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable. See *Terry v. Adams*, 345 U. S. 461. How then can one person be given twice or ten times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their

income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of "we the people" under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.

The Court has consistently recognized that all qualified voters have a constitutionally protected right "to cast their ballots and have them counted at Congressional elections." *United States v. Classic*, 313 U. S. 299, 315; see *Ex parte Yarbrough*, 110 U. S. 651; *Wiley v. Sinkler*, 179 U. S. 58; *Swafford v. Templeton*, 185 U. S. 487. Every voter's vote is entitled to be counted once. It must be correctly counted and reported. As stated in *United States v. Mosley*, 238 U. S. 383, 386, "the right to have one's vote counted" has the same dignity as "the right to put a ballot in a box." It can be protected from the diluting effect of illegal ballots. *Ex parte Siebold*, 100 U. S. 371; *United States v. Saylor*, 322 U. S. 385. And these rights must be recognized in any preliminary election that in fact determines the true weight a vote will have. See *United States v. Classic*, *supra*; *Smith v. Allwright*, *supra*. The concept of political equality in the voting booth contained in the Fifteenth Amendment extends to all phases of state elections, see *Terry v. Adams*, *supra*; and, as previously noted, there is no indication in the Constitution that homesite or occupation affords a permissible basis for distinguishing between qualified voters within the State.

The only weighting of votes sanctioned by the Constitution concerns matters of representation, such as the allocation of Senators irrespective of population and the use of the electoral college in the choice of a President.

Yet when Senators are chosen, the Seventeenth Amendment states the choice must be made "by the people." Minors, felons, and other classes may be excluded. See *Lassiter v. Northampton Election Board*, *supra*, p. 51. But once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded. As we stated in *Gomillion v. Lightfoot*, *supra*, p. 347:

"When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right."

The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.

While we agree with the District Court on most phases of the case and think it was right in enjoining the use of the county unit system<sup>12</sup> in tabulating the votes, we vacate its judgment and remand the case so that a decree in conformity with our opinion may be entered.

*It is so ordered.*

---

<sup>12</sup> The county unit system, even in its amended form (see note 3, *supra*) would allow the candidate winning the popular vote in the county to have the entire unit vote of that county. Hence the weighting of votes would continue, even if unit votes were allocated strictly in proportion to population. Thus if a candidate won 6,000 of 10,000 votes in a particular county, he would get the entire unit vote, the 4,000 other votes for a different candidate being worth nothing and being counted only for the purpose of being discarded.

## EXHIBIT No. 2

## MISSISSIPPI LEGISLATURE

FIRST EXTRAORDINARY SESSION, 1963

SENATE BILL No. 1522

(As approved by the Governor March 2, 1963)

AN ACT To amend chapter 391, Laws of 1952, appearing as section 3107, Mississippi Code of 1942, Recompiled, to provide that the electors for President and Vice President of the United States of political parties in this State be nominated by popular vote of the people composing said political parties; and to repeal chapter 312, Laws of 1948, appearing as section 3107.5, Mississippi Code of 1942, Recompiled

*Be it enacted by the Legislature of the State of Mississippi:*

SECTION 1. The provisions of this Act shall be applicable to all political parties registered pursuant to Section 3107-01, Mississippi Code of 1942, as amended.

SECTION 2. \* \* \*

3107. \* \* \* A state convention shall be held by each political party in the state, in the year 1964, and every four (4) years thereafter, at the time and place to be designated by the state executive committee in the year in which candidates for president and vice president of the United States are elected, appropriate notice of which shall be given by said committee, to appoint delegates to the national convention, at the discretion of said State Convention, to select a state executive committee, to select one or more slates of presidential electors to be nominated as hereinafter provided, to nominate a candidate for president and vice president of the United States, adopt a platform, promulgate principles, and take such further action deemed proper by the convention. \* \* \* It is expressly provided that the state convention shall not in anywise be limited in the nomination of candidates for president and vice president by any nomination made by any other convention.

\* \* \* \* \*

SECTION 3. At said state convention, upon motion supported by ten percent (10%) of the membership of said state convention, a slate of electors composed of the number of electors allotted to this state, which said electors announced a clearly expressed design and purpose to support the candidates for president and vice president of the national political party with which the said party of this state has had an affiliation and identity of purpose heretofore, shall be designated and selected for a place upon the primary election ballot to be held as herein provided.

Also upon motion supported by ten percent (10%) of the membership of the state convention, a group of electors equal to the number of electors to which this state is entitled, which said electors announce a clearly expressed design and purpose not to support the candidates of the political party to which the said party of this state has had an affiliation and identity of purpose heretofore, or to be freed from any obligation to so do, shall be designated and selected for a place upon the ballot for the primary election to be held as herein provided.

SECTION 4. A primary election shall be held the first Tuesday in September in the year of the general election for president and vice president, and the group of electors receiving the most votes at said election shall be placed upon the ballot in said general election as the electors of the said political party in this state, and no other group of electors shall be placed upon the said ballot as such electors of the said political party in this state.

Unless the electors last above mentioned certify in writing to the Secretary of State at least thirty (30) days before the primary election herein provided for the names of persons for president and vice president for whom they have the intent and purpose of supporting with their ballot if elected, then said electors shall be placed on the primary election ballot and designated "Unpledged." If no selection of persons is made before the primary provided for in this Act, or by notifying the Secretary of State thirty (30) days before the general election of such selection, then the said electors shall go on the general election ballot as "Unpledged."

SECTION 5. Nothing in this Act shall be construed to deny or prescribe the right of any qualified person to run for the office of elector in this state, provided he or she qualifies in the manner herein provided or in any other manner provided for by law. Furthermore, any elector or group of electors so qualifying may

have it signified upon the general election ballot as to whom they intend to vote for, or are pledged to vote for in the election for president and vice president.

SECTION 6. Nothing in this Act shall be construed to place any mandatory or inhibitory restrictions upon the office of elector for president or vice president contrary to the provisions of the Constitution of the United States. Nor shall anything in this Act change or alter the provisions of Section 3129, Mississippi Code of 1942, Recompiled, and Chapter 309, Laws of 1948, in reference to the rights of any citizen of this state casting his ballot for electors for president and vice president as he may choose and see fit without in anywise affecting his party affiliations.

---

### EXHIBIT No. 3

#### GEORGIA LAWS 1962 SESSION

##### ELECTIONS—PROCEDURE TO PLACE NAMES ON GENERAL ELECTION BALLOTS

*Be is enacted by the General Assembly of Georgia:*

SECTION 1. Code section 34-1904, relating to ballots in elections other than primary elections, as amended, particularly by an Act approved October 2, 1948 (Ga. L. 1948, Ex. Sess., p. 3), is hereby amended by striking said section in its entirety and inserting in lieu thereof a new section 34-1904 to read as follows:

"34-1904. (a) In all elections other than primary elections held under the auspices of a political party, it shall be the duty of the ordinary to provide and furnish at the expense of the county, and in case of purely municipal elections, it shall be the duty of the proper municipal election official to provide and furnish at the expense of the municipality, official ballots for all such elections, having printed thereon, in separate columns, the names of the candidates of each political party, designating the names of the political parties to which they belong, and also the names of any other candidates for the offices to be filled at said election. In case of election for President and Vice President of the United States, the names of the candidates for such offices may be added with the Electors and party designation.

EXHIBIT NO. 4

April 24, 1963

## SENATE BILL NO. 525

### TO BE ENTITLED

AN ACT providing for the selection, election and appointment of electors to cast ballots on behalf of the State of Florida for the election of president and vice-president of the United States.

*Be It Enacted by the Legislature of the State of Florida:*

Section 1. The State of Florida shall appoint in the manner herein provided a number of electors equal to the whole number of senators and representatives to which the State may be entitled in the Congress, who shall vote by ballot for president and vice-president of the United States in accordance with the Twelfth Amendment to the Constitution of the United States.

Section 2. No candidate for president or vice-president shall have his name as such placed upon any general election ballot or voting machine. The voters shall elect presidential electors who shall, in turn, cast their ballots for president and vice-president.

Section 3. Each political party which, on January 1, 1964, and each fourth year thereafter, has registered to vote as members thereof more than five per cent of the total registered electors of the State shall have the names of a number of its registered members equal to the number of presidential electors to be appointed appear upon the general election ballots and upon all voting machines employed in the general election held in that year. Other political parties may nominate candidates for presidential electors as provided in subsection (3) of Section 103.021, Florida Statutes. The ballots and voting machines shall be so prepared that the voter may vote for the group of electors of any single political party as a whole and not for individual electors except that he may vote for write-in candidates as provided in Section 8 hereof.

Section 4. Not later than noon on the 1st day of February in the year 1964 and each fourth year thereafter, the State Executive Committee of each political party which on January 1 of that year has registered to vote as members thereof more than five per cent of the total registered electors of the State shall certify to the Secretary of State as candidates for presidential electors the names of a number of its members equal to the number of electors to be cho-

sen, together with a written oath or affirmation by each party member so named that he will, if nominated and elected, cast his ballot for president and for vice-president of the United States for the candidates for president and vice-president respectively nominated for such offices by the national convention of the political party of which he is a member.

Section 5.

(a) Not later than the 1st day of January in the year 1964, and each fourth year thereafter, the President of the Senate of Florida and the last elected Speaker of the House of Representatives of Florida (whether still in office or not) shall select and certify to the Secretary of State of Florida the name of a registered voter of Florida to serve with them, as a committee of three, to designate the members of a Nominating Commission for each political party which has registered to vote as members more than five per cent of the total registered electors of the State. Should either the President of the Senate or the last elected Speaker of the House of Representatives be unable to act, the Secretary of State shall act in his stead. Should the President of the Senate and the Speaker of the House of Representatives be unable to agree upon the third member of the committee of three, then the Secretary of State shall become the third member of the committee of three.

(b) After January 1, but not later than noon on January 15 in the year 1964 and each four years thereafter, the committee provided for in the preceding paragraph shall by majority vote certify to the Secretary of State of Florida the names of five members of each political party which has registered to vote as members more than five per cent of the total registered electors of the State; who shall be chosen upon the basis of their ability, experience, sound judgment and familiarity with the basic political philosophies of the members of the party in the State of Florida, and such five persons shall constitute a Nominating Commission of the political party.

(c) The Nominating Commission of each political party so appointed shall, not later than noon on February 1, prior to the holding of the first primary election in the year of their appointment, certify to the Secretary of State of Florida the names of a number of registered members of their party equal to the number of presidential electors to be chosen, who shall be selected because of outstanding ability, integrity, sound judgment and familiarity with the political philosophies of the members of the party in Florida, as can-

didates for selection as presidential electors, together with a written oath or affirmation by each such nominee that he is not committed to cast his ballot for any candidate for president or vice-president and that he will not pledge himself to support any candidate for president or vice-president until after the succeeding general election.

Section 6. Upon the ballots and voting machines used in conducting the primary election in the year 1964 and each fourth year thereafter, the names of the nominees for election as presidential electors designated by the Executive Committee of the party as provided in Section 4 shall be listed under the heading "PLEDGED: Candidates for presidential electors PLEDGED to support the nominee of the National Convention of the \_\_\_\_\_ party", and the names of nominees as presidential electors certified by the Nominating Commission of the party in accordance with Section 5 shall appear under the heading "UNPLEDGED: Candidates for presidential electors NOT PLEDGED to support nominees of the National Convention of the \_\_\_\_\_ party." The ballots and machines used in conducting such primary election shall be so arranged that each voter may vote for either group of candidates as a group, but only as a group and may not vote for members of more than one group.

Section 7. Persons certified to go on a party ballot as a candidate for nomination for presidential elector shall be regarded as candidates from the time their names are certified to the Secretary of State by the Executive Committee or the Nominating Commission of the party but shall not be required to file any other qualifying papers, name campaign treasurers, or make any report of receipts and disbursements of campaign funds in connection with the primary election.

Section 8. In the general election in the year 1964 and each fourth year thereafter there shall appear upon the general election ballot and voting machines as the nominees of each political party holding a primary election in that year the names of that group of candidates for presidential electors which received the largest number of votes in the first primary election of that party held in that year, and the candidates of minor political parties selected as provided in subsection (3) of Section 103.021, Florida Statutes, and the ballots and machines used in conducting such general election shall be so arranged that each voter may vote for one group, but

only for one group of candidates for presidential elector, which may be that group nominated by any political party furnishing candidates as herein provided or an equal number of persons whose names the elector shall have written in as is otherwise provided for voting for write-in candidates.

Section 9. That group of candidates receiving the largest number of votes in the general election for presidential electors shall cast their ballots for president and vice-president of the United States as is provided by law and the Constitution, being unbound by party affiliation.

Section 10.

(a) Should any member of the Nominating Commission of a political party be unable to function, or there be a vacancy in the Commission, the remaining members of such Nominating Commission shall appoint a qualified person to serve in his stead on such Nominating Commission and certify such appointment to the Secretary of State.

(b) Should any person selected by the State Executive Committee of a political party to be a candidate for nomination as a presidential elector die or resign before the primary election, the State Executive Committee of that political party shall fill such vacancy by appointment of a qualified person and certify his name to the Secretary of State.

(c) Should any person selected by the Nominating Commission of a political party to be a candidate for nomination as a presidential elector die or resign before the primary election, the Nominating Commission of that political party shall fill such vacancy by appointment of a qualified person and certify his name to the Secretary of State.

(d) Should one of a group of persons nominated as candidates of a political party for election as presidential electors die or resign before the general election, the remaining members of his group by a majority vote shall nominate a successor and certify his name to the Secretary of State.

(e) Should one of a group of persons elected as presidential electors die or resign before casting his vote for president and vice-president, his place shall be filled by a majority vote of the remaining presidential electors who shall certify his name to the Secretary of State and the Governor.

Section 11. It is found, determined and declared by the Legislature of Florida that:

(a) In performing the duties imposed upon it by Article II, Section I of the Constitution of the United States to provide the manner of appointment of presidential electors, the Legislature of Florida is acting pursuant to authority of that Constitution and its powers are not restricted by Section 15 of Article XVI of the Constitution of Florida;

(b) The qualifications of persons to serve as electors pursuant to Article II, Section I of the Constitution of the United States are fixed by that Constitution, and Section 15 of Article XVI of the Constitution of Florida is not applicable to such electors.

(c) No person shall be disqualified from being chosen as a presidential elector pursuant to Section I, Article II of the Constitution of the United States by reason of holding any state office, nor shall any state officer by being chosen as or by performing the duties of a presidential elector abandon or relinquish his state office. Members of the Nominating Commission of a political party may be nominated and elected as presidential electors.

Section 12. All laws and parts of laws in conflict herewith are hereby repealed.

Section 13. This act shall take effect July 1, 1963.

## EXHIBIT No. 5

## "CONCURRENT RESOLUTION ———

"Concurrent resolution petitioning the Congress of the United States to call a convention for proposing an amendment to the Constitution of the United States, unless Congress shall sooner have submitted such an amendment, to provide for the election of the President and Vice President in a manner fair and just to the people of the United States

"Whereas under the Constitution of the United States, presidential and vice presidential electors in the several States are now elected on a statewide basis, each State being entitled to as many electors as it has Senators and Representatives in Congress; and

"Whereas the presidential and vice presidential electors who receive the plurality of the popular vote in a particular State become entitled to cast the total number of electoral votes allocated to that State irrespective of how many votes may have been cast for other elector candidates; and

"Whereas this method of electing the President and Vice President is unfair and unjust in that it does not reflect the minority votes cast; and

"Whereas the need for a change has been recognized by Members of Congress on numerous occasions through the introduction of various proposals for amending the Constitution: Now, therefore, be it

"Resolved by the Senate of the state of ———, the House of Representatives concurring therein, That application is hereby made to Congress under article V of the Constitution of the United States for the calling of a Convention to propose an article or amendment to the Constitution providing for a fair and just division of the electoral votes within the States in the election of the President and Vice President; and be it further

"Resolved, That if and when Congress shall have proposed such an article or amendment this application for a convention shall be deemed withdrawn and shall be no longer of any force and effect; and be it further

"Resolved, That the secretary of state is hereby directed to transmit copies of this application to the Senate and House of Representatives of the United States, and to the several Members of said bodies representing this State therein: also to transmit copies hereof to the legislatures of all other States of the United States."

## EXHIBIT No. 6

U.S. DEPARTMENT OF JUSTICE,  
OFFICE OF THE DEPUTY ATTORNEY GENERAL,  
Washington, D.C., June 4, 1963.

HON. ESTES KEFAUVER,

*Chairman, Subcommittee on Constitutional Amendments, Committee on the Judiciary, U.S. Senate, Washington, D.C.*

DEAR SENATOR: Thank you for having had Fred Graham advise me of the one-day hearing to be conducted by the Subcommittee on June 4 on electoral college legislation.

As you will recall, I testified before the Subcommittee on June 28, 1961, on proposals identical or substantially similar to the proposals presently before the Subcommittee. (See Hearings on S.J. Res. 1, et al., before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, 87th Congress, 1st Session, Part 2, pages 363 et seq., entitled "Nomination and election of President and Vice President and Qualifications for Voting.")

The only proposal among those introduced in this Congress which was not specifically cited in my prior testimony is S.J. Res. 8, identical to S.J. Res. 26 in the 87th Congress. In general, S.J. Res. 8 embodies the substance of S.J. Res. 132 introduced in the 85th Congress by President, then Senator, Kennedy. As you will note from my prior testimony, the Department endorsed a proposal such as S.J. Res. 132 providing for the election of President and Vice President. The Department continues to prefer S.J. Res. 132 over similar proposals such as S.J. Res. 8 chiefly because the provisions of S.J. Res. 132 are set forth with greater clarity.

In view of the foregoing, with the permission of the Subcommittee, I should like to make my prior testimony a part of the record of the June 4 hearing.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's Program.

Sincerely yours,

NICHOLAS DEB. KATZENBACH,  
Deputy Attorney General.

### EXHIBIT No. 7

(The following is reprinted from "Continuing Crisis in American Politics," by Marian D. Irish, Ed., © 1963, Prentice-Hall, Inc., Englewood Cliffs, N.J., pp. 48-53:)

#### A MORE COMPETITIVE PARTY SYSTEM?

In a review of contemporary politics in 1961, it was my conclusion that "the party system as a whole now occupies what is probably the most highly competitive position it has ever reached in national politics."<sup>2</sup> This conclusion was based on such factors as the following:

- the scale, scope, and nature of the national campaigns of 1960;
- the number of states in which the election was fought hard to a close outcome in presidential, congressional, and state elections;
- the speed with which the professionals and the party organizations in each party turned to preparations for the 1962 campaigns;
- the number of close votes in Congress on major items in the President's legislative program;
- the evident disposition of the administration to sharpen issues in Congress in preparation for future election campaigns;
- the aggressive character of the leadership that has come to the top in each of the national parties.

These signs, however, may be more persuasive than probative; and the future remains uncertain. We would like to know whether the 1960 elections were merely the highest point of a competitive tension that will recede until 1964 or 1968; and also whether the long-term drift toward a more competitive situation that has been evident for a generation will continue, despite the fluctuations that may be related to the circumstances of particular election years.

On the short-term side, there were indications early in 1962 that the Republican Party might do poorly in the 1962 elections, contrary to the historical experience in which the party out of power has usually gained seats in Congress in midterm elections.<sup>3</sup> The Republican Party also has been engaged in an unusual amount of soul-searching over its internal problems; but the kind of ferment that is in process suggests that the Party will eventually recover strongly even if its competitive fortunes become worse before they become better.<sup>4</sup>

The longer term aspect of the problem of interparty competition is obviously the more important for students of the party system; and an opinion that projects past trends into the future needs to be supported by some long-term interpretation of party history. Such a view could begin by noting the political events of 1896, when a Republican sweep elected William McKinley president.

The election of 1896 is generally credited with a restructuring of political affiliations that endured for more than a generation. The South became the solidly Democratic South. It is all too often forgotten that twenty northern

<sup>2</sup> Paul T. David et al., *The Presidential Election and Transition 1960-61* (Washington, D.C.: The Brookings Institution, 1961), p. 339.

<sup>3</sup> The most specific evidence came from the Gallup Poll, which from April 1961 to March 1962 was reporting that voter preferences for the Democratic party were at a level indicating Democratic gains in the 1962 elections. In March 1962, the apparent split in the two-party vote for Congress was placed at Democratic, 61 percent; Republican, 39. George Gallup, "GOP Lag in Congress Races Indicated," *Washington Post and Times-Herald*, Mar. 25, 1962.

On February 24, 1962, Republican Chairman Miller told a closed meeting of Republicans that "continued stress" on adverse public opinion polls would "undermine the enthusiasm of the rank-and-file," and that the party should not "succumb to the psychological warfare of the Democrats." *Congressional Quarterly Weekly Report*, XX, Mar. 2, 1962, p. 361.

<sup>4</sup> Robert C. Albright, "Republicans Fretting Over Future of Party," *Washington Post and Times-Herald*, Mar. 4, 1962; "Self-Analysis by GOP Brings Gleams of Hope," *ibid.*, Mar. 5, 1962.

states became so solidly Republican that they could reasonably have been called the "solid North." The period was the high point of a sectional political alignment, and the low point in the effectiveness of the competitive relationship between the Democratic and Republican parties, both nationally and in most states.

These relationships were changed by the realignments that occurred in 1928, 1932, and 1936. The Democratic Party replaced the Republican as the party with a majority following; and whereas the former Republican majority had been sectional, the Democratic majority was national. By 1940, the Republican Party had begun to recover, but a new cleavage line had been established between the parties. Though the South was still solid and still Democratic, in most of the nation, and especially in the central urban and industrial areas from Massachusetts to California, the parties were again competitive in statewide elections. The cleavage line within the electorate, moreover, essentially followed social and economic divisions in the states where the parties were competitive.<sup>5</sup>

The broad effect of these changes is apparent in the election returns when they are arranged to show the relative amounts of one-party voting by states, taking first the period from 1896 to 1927 and second the period from 1928 to 1956. This has been done in a tabulation of the voting in presidential and gubernatorial elections, giving each state its percentage weight in the electoral college as follows:

[In percent]

Categories of States <sup>1</sup>	Period of 1896 to 1927		Period of 1928 to 1956	
	President	Governor <sup>2</sup>	President	Governor
One-party Republican.....	50.0	35.1	1.5	7.5
Two-party Leaning Republican.....	10.7	10.5	23.1	18.4
Two-party Uncertain.....	10.3	16.4	23.4	33.0
One-party Leaning Democratic.....	4.9	12.3	40.2	14.0
One-party Democratic.....	24.1	25.7	11.8	27.1
	100.0	100.0	100.0	100.0

<sup>1</sup> States were classified in the 1-party category when the party concerned was victorious in 80 percent or more of the elections during the period; as leaning to 1 party when the party was victorious in 60 to 79.9 percent of the elections; and as uncertain when neither party won more than 60 percent of the time. These tabulations were originally made by Richard C. Bain for a paper by Paul T. David, "Intensity of Inter-Party Competition and the Problem of Party Realignment," presented at the annual meeting of the American Political Science Association, September 1957.

<sup>2</sup> Based on the period 1901-27.

In presidential voting, as these figures show, most of the states were solidly for one party or the other in the earlier period, while in the recent period, the solidly Republican states had almost disappeared and there had been major inroads in the solidly Democratic states, coupled with a great increase in the number of states leaning toward the Democratic Party. In gubernatorial elections, the shifts were somewhat different. The shrinkage in Republican areas was reflected mainly in an increase in the competitive areas; and the solid South was still solid in electing Democratic governors.

In recent years, the partisan attachments of the electorate have been remarkably stable in most parts of the country. Throughout the Eisenhower period, apparently about 60 percent of the voters continued to consider themselves Democrats. In a "normal" election, however, it has been computed that the Democratic share would be no more than 54 percent, because many Democrats are habitual nonvoters. This relatively narrow Democratic vote, moreover, consists of a lopsided majority in the South, and a 49 percent *minority* outside the South.<sup>6</sup>

It would be easier to predict that the two national parties will continue to become more competitive if some increase could be predicted in the Republican Party's share in the southern vote. On this, the Party's shortage of effective candidates is one of its most serious problems. As recently as 1960, it offered no

<sup>5</sup> For a fuller statement, see Paul T. David, Ralph M. Goldman, and Richard C. Bain, *The Politics of National Party Conventions* (Washington, D.C.: The Brookings Institution, 1960), chap. 3; paperback ed., chap. 2.

<sup>6</sup> Philip E. Converse, Angus Campbell, Warren E. Miller, Donald E. Stokes, "Stability and Change in 1960: A Reinstating Election," *American Political Science Review*, LV, June 1961, pp. 269-280; Donald E. Stokes, "1960 and the Problem of Deviating Elections," paper presented at annual meeting of the American Political Science Association, September 1961.

candidate for Congress in 62 of the 106 congressional districts in the eleven one-time Confederate states. But in the more than forty districts where it offered candidates, it polled 26.5 percent of the vote in 1948, 27.4 in 1952, 38.0 in 1956, and 37.8 in 1960. In recent years, seven of these districts sent Republican members to Congress. The Republican vote in many of the other districts is high enough to fall within striking range of a majority whenever the Party is again in a favorable position nationally in a presidential election.

Republican prospects in the South—and the prospects for a two-party system in the southern region—were substantially improved by the Supreme Court's decision of March 26, 1962, in the Tennessee reapportionment case, *Baker v. Carr*. The new Republicans of the South have been concentrated in the most underrepresented urban and suburban areas. If given fair representation, they seem certain to expand their beachheads in southern state legislatures and in Congress. Attractive candidates developed through these opportunities could in turn do much to expand the Party's following throughout the South. On the other hand, liberal Democrats of the southern cities, also underrepresented in previous districting arrangements, will be able to increase their weight in southern Democratic Party affairs. Where this happens on a sufficient scale, conservative southern Democrats may find their inclination to shift to the Republican Party somewhat increased.

By a coincidence that is not entirely accidental, the effects of the Tennessee case are coming at the same time that major efforts to increase Negro registration and voting in the South are reaching fruition. If the increased Negro vote materializes, the new Negro voters may help to maintain Democratic Party majorities in presidential elections, while engaging in split-ticket voting locally on the basis of the characteristics of the candidates locally available. Obviously these are complex processes, but they seem more likely to increase competition between the parties in the end than to reduce it; and in time they will certainly change the nature of the Democratic Party in the South and in Congress.<sup>7</sup>

In other parts of the country, substantial revisions of the political map are also in prospect as a result of the redistricting activity impelled by judicial action. The rapidly growing suburban areas and smaller cities will be the major beneficiaries. The Republican Party will lose representation in some northern rural areas, but may achieve offsetting gains in big city suburbs. More important, however, opportunities for new political leadership may emerge in both parties from the new political units where population growth and economic activity are greatest.

In most of the states, neither party can any longer anticipate a permanent monopoly in the statewide elections for governor, for senator, and for President. In these states, the long-term outlook continues to point toward a rising level of competitive tension. The readjustments resulting from *Baker v. Carr* and from other contemporary changes are likely to enhance the tension rather than to lessen it.

---

#### EXHIBIT No. 8

(The following article submitted by Neal R. Peirce is from the advance release of the Congressional Quarterly Fact Sheet of May 29, 1963:)

##### CONGRESSIONAL DISTRICTING ISSUE TO CONFRONT HIGH COURT

Within the next year the U.S. Supreme Court is expected to rule on one of the thorniest questions ever brought before it: May Congressional districts be challenged under the 14th Amendment in the same way that state legislative districts have been open to challenge since the Court's historic 1962 decision in *Baker v. Carr*, the Tennessee legislative apportionment case?

If the Court were to decide that inequality in Congressional district populations deprives citizens of their 14th Amendment guarantees of equal protection of the laws, the Congressional apportionments of more than half the states of the Union could easily come into question. Many of the nation's top Congressional leaders could find their districts radically altered. The membership of the House of Representatives might change rapidly as a result of such decisions. Supreme Court decisions leading in this direction might plunge the Court into

---

<sup>7</sup> Louis E. Lomax, "The Kennedys Move In On Dixie," *Harper's*, May 1962, pp. 27-33.

a bitter clash with the House of Representatives. One of the classic power struggles between the branches of the Federal Government could ensue.

Reviewed on page 6 are the two Congressional district cases currently on appeal to the Supreme Court—*Wesberry v. Sanders*, a Georgia case, and *Wright v. Rockefeller*, a New York case. Both of these cases were filed after the Supreme Court decision in *Baker v. Carr*. Both were dismissed by U.S. District Courts and then appealed to the Supreme Court.

Also awaiting hearing and decision by the Supreme Court in its term starting next October are a number of cases relating to state legislative apportionment. The picture regarding Congressional districts is clouded because the Court still has not set out any type of standards for the lower courts to use in deciding what constitutes "invidious discrimination" in state legislative apportionment. *Baker v. Carr* established only the principle that citizens might bring suits in the federal courts if they felt that state legislative apportionment was depriving them of their equal rights under the 14th Amendment. It is still unknown whether the Court will insist on strict population-based apportionment or permit factors of geography, economics or other special interest to be taken into account as well. Or if population is the only standard, no one knows how much variation the Court will consider constitutional. The answers to those questions in state legislative apportionment will give clues to possible directions of the Court's thinking on Congressional districts. But even if the state cases are decided first, major questions will remain on the Congressional district level.

#### HISTORICAL BACKGROUND

The Constitution provides that "Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state" (14th Amendment modification of Art. I, Sec. 3), that population censuses shall take place every 10 years (Art. I, Sec. 3) and that "the times, places and manner of holding elections for Senators and Representatives shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations" (Art. I, Sec. 4) with "each house \* \* \* the judge of the elections, returns and qualifications of its own Members." (Art. I, Sec. 5).

Although the Constitution did not require that the states choose their Representatives by single member districts, researchers believe the Founding Fathers intended it and the practice has usually been followed in U.S. history. The first Congressional requirement of individual districts was incorporated in an 1842 law, prompted by seven states' decisions to elect their Congressmen at large. But in 1843, after four states still refused to establish districts, the House decided to seat the disputed delegations. The requirement of separate districts was dropped from the statute books in 1852 but reinstated in 1862. In 1872, a requirement was added that districts be as equal in population as practicable; in 1901, a requirement of compactness was added. The 1911 Reapportionment Act provided that Representatives "be elected by districts composed of a contiguous and compact territory containing as nearly as practicable an equal number of inhabitants. But gross malapportionment and gerrymandering continued in many states. In 1901 and again in 1910 the House discussed but declined to take action to prevent seating of Members from districts which clearly violated the standards on the statute books. Among the reasons given for inaction were assertions that voters in the affected districts would be left without any representation for two years, that the enforcement of the equality requirement would rest in the hands of the transitory House majority, that Members would be prey to constant uncertainty, not knowing when their seats might become pawns in some power struggle in the House, and that to enforce equality "spasmodically" by occasional challenges to seating would be unfair and ineffective.

Congressional reapportionments have generally followed the decennial censuses. Congress, however, took no action to reapportion on the basis of the 1920 Census. By the end of the following decade malapportionment was at an exceptionally high level and Congressional leaders saw the need of enacting an automatic reapportionment act that would avert reapportionment delays in the future. The Reapportionment Act of 1929 did set up regular reapportionment machinery—which has been used every decade since—but in order to win passage of the bill, the 1911 Act's sections requiring separate, compact and contiguous districts of equal population were not included in the 1929 Act bill as finally approved. However, they were not specifically repealed.

## 1932 CASES

In 1932 the Supreme Court decided several important cases on Congressional redistricting. In each, petitioners claimed the state legislatures had not complied with the 1911 Act's requirements that districts be separate, compact, contiguous and equally populated. The question was whether those requirements, not repealed in the 1929 Act, were still in effect. In *Smiley v. Holm*, a Minnesota case, the petitioner also attacked the redistricting statute passed by the Legislature on the ground that the Governor's veto should apply to districting legislation and that the statute had not been repassed over his veto. The Supreme Court chose to ignore the question of the 1911 Act and ruled merely on the issue of the gubernatorial veto, stating that the federal Constitution did not exempt districting statutes from a Governor's veto. Two other 1932 Congressional districting cases—*Koenig v. Flynn*, from the New York Court of Appeals, and *Carroll v. Becker*, from the Missouri Supreme Court, were decided by the Supreme Court on similar questions regarding gubernatorial vetoes.

The question of the 1911 Act's applicability was reached, however, in *Wood v. Broom*, a 1932 case challenging the constitutionality of a new Mississippi redistricting law. Speaking for the Court, Justice Hughes ruled that the 1911 Act had, in effect, expired with the approval of the 1929 Apportionment Act and that the standards of the 1911 Act were therefore no longer applicable. The Court reversed the decision of a lower federal court which had permanently enjoined elections under the new Mississippi redistricting act because it violated the standards of the 1911 Act. Later the same year the Court made a similar ruling in *Mahan v. Hume*, a Kentucky Congressional districting case.

Four members of the Supreme Court—Justices Brandeis, Stone, Roberts, and Cardoza—also said in the *Wood* case that they would have dismissed the suit for "want of equity." The "want of equity" phrase in this context suggests a policy of judicial self-limitation related to the entire question of judicial involvement in essentially "political" issues.

## COLGROVE V. GREEN—1946

Not until 1946, in *Colgrove v. Green*, did the Supreme Court again rule in a significant case dealing with Congressional redistricting. The Colgrove case was brought by a political science professor at Northwestern University who alleged that Illinois' Congressional districts—varying between 112,116 and 914,053 in population—were so unequal that they violated 14th Amendment guarantees of equal protection of the laws. A seven-man Supreme Court dismissed the suit, 4-3, but the opinions were split 3-3-1.

Justice Frankfurter gave the plurality opinion of the Court, speaking for himself and Justices Reed and Burton. Frankfurter's opinion cited *Wood v. Broom* to indicate that Congress had deliberately removed the standards in the 1911 Act. "We also agree," he said, "with the four Justices (Brandeis, Stone, Roberts and Cardoza) who were of the opinion that the bill in *Wood v. Broom* should be 'dismissed for want of equity.'" The issue, Frankfurter said, was "of a peculiarly political nature and therefore not meet for judicial interpretation \* \* \*". The short of it is that the Constitution has conferred upon Congress exclusive authority to secure fair representation by the states in the popular House and has left to that House determination whether states have fulfilled their responsibility. If Congress failed in exercising its powers, whereby standards of fairness are offended, the remedy lies ultimately with the people \* \* \*. To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure state legislatures that will apportion properly, or to invoke the ample powers of Congress." In addition, Frankfurter said that the Court could not affirmatively re-map Congressional districts and that elections-at-large would be politically undesirable.

Justice Black, dissenting in an opinion joined by Justices Douglas and Murphy, opined that the District Court had jurisdiction under a section of the U.S. Code giving district courts the right to redress deprivations of constitutional rights occurring through action of the states. Black's opinion also rested on a previous case in which the Court had indicated that federal constitutional questions, unless "frivolous," fall under jurisdiction of the federal courts. Black found that the appellants had standing to sue, that the population disparities did violate the equal protection clause of the 14th Amendment, and that relief should be granted. Black specifically rejected the view that *Smiley v. Holm* had set a

precedent of non-justiciability. *Smiley v. Holm*, Black said, merely decided that the 1911 Act was no longer applicable. Only a minority of the Court, he said, had thought the case should be dismissed for "want of equity."

With the Court split 3-3 on whether the Judiciary had and should exercise jurisdiction in *Colegrove v. Green*, the deciding opinion was made by the seventh participant, Justice Rutledge. On the question of justiciability, Rutledge agreed with Black, Douglas and Murphy that the issue could be considered by the federal courts. "But for the ruling in *Smiley v. Holm*," Rutledge said, he would have thought that the Constitution specifically reserved the regulation of Congressional elections to the states and Congress. But Rutledge found that *Smiley* "rules squarely to the contrary." Thus a majority of the Court participating in the *Colegrove* case felt that Congressional redistricting cases were justiciable. (The 1962 Supreme Court later relied heavily on this point in its opinion in *Baker v. Carr*.)

On the question of granting relief in the specific case, however, Rutledge agreed with Frankfurter, Reed and Burton that the case should be dismissed. He pointed out that four of the nine justices in *Wood v. Broom* had felt that dismissal should be for want of equity. Rutledge saw a "want of equity" situation in *Colegrove* as well. "I think the gravity of the constitutional questions raised so great, together with the possibility of collision (with the political departments of the Government), that the admonition (against avoidable constitutional decision) is appropriate to be followed here," Rutledge said. Jurisdiction, he thought, should be exercised "only in the most compelling circumstances." He thought that "the shortness of time remaining (before the forthcoming election) makes it doubtful whether action could, or would, be taken in time to secure for petitioners the effective relief they seek." Rutledge warned that Congressional elections at large would deprive citizens of representation by districts "which the prevailing policy of Congress demands." In the case of at-large elections, he warned, "the cure sought may be worse than the disease." For all these reasons he concluded that the case was "one in which the Court may properly, and should, decline to exercise its jurisdiction."

#### BAKER V. CARR—1962

Although it centered on the question of state legislature apportionment, the 1962 decision of the Supreme Court in *Baker v. Carr* raised the question of justiciability of Congressional districting cases. It was the first Supreme Court decision since *Colegrove* to touch directly on this subject. (For full review of *Baker v. Carr*, see 1962 Almanac p. 1054.)

In his majority opinion, concurred in by Chief Justice Warren and Justices Black, Clark, Douglas and Stewart, Justice Brennan ruled that *Colegrove*, and other cases dealing with state districting action, established the right of petitioners—in this case, Tennessee urban residents denied fair representation in their state legislature—to appeal to the federal courts for relief under 14th Amendment guarantees of equal protection of the laws. Salient points of the majority opinion:

**Jurisdiction:** On the question of jurisdiction (whether the case properly "arises under" the Federal Constitution, laws or treaties), Brennan said "an unbroken line of precedents sustains the federal courts' jurisdiction of the subject matter." The cases cited all related to congressional redistricting—*Ohio ex. rel. Davis v. Hildebrandt*, a 1916 decision affirming, on the merits, an Ohio Supreme Court decision upholding the right of citizens to subject the state's Congressional districting law to a referendum against a claim that such a referendum usurped Congress' right to regulate elections; *Smiley v. Holm*; *Wood v. Broom*; *Mahan v. Hume*; *Colegrove v. Green*. In regard to *Colegrove*, Brennan said that "two of the opinions expressing the views of four of the justices, a majority, flatly held that there was jurisdiction of the subject matter."

**Justiciability:** Even if a case is one over which the courts have jurisdiction, they might consider a case "nonjusticiable" because it deals with primarily "political" questions that it would not be appropriate for the courts to decide. Brennan, however, found that neither state legislative or congressional districting cases are nonjusticiable. "The mere fact that the suit seeks protection of a political right does not mean that it is a political question," he said. "The non-justiciability of a political question is primarily a function of the separation of powers. \* \* \* Deciding whether a matter has in any measure been committed by the Constitution to another branch of government \* \* \* is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as the ultimate interpreter of the Constitution."

In the matter of state legislative apportionment, Brennan said there was clearly no "political question" throwing a cloud on justiciability. "The question here," he said, "is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of the government coequal with this Court. \* \* \* Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the 14th Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." (One of the chief problems of lower courts since *Baker v. Carr* has been to determine how to apply the "well developed and familiar \* \* \* judicial standards under the Equal Protection Clause." The definition of "arbitrary and capricious" in the opinions of the various lower courts has varied widely, so that many cases have been sent to the Supreme Court on appeal.)

Brennan also stated that "*Smiley, Koenig and Carroll* (see page 938) settled the issue in favor of justiciability of questions of Congressional redistricting." This statement would appear to nullify the chance that the Court would sidestep decision on Congressional districting cases merely because they deal with the Congress, a "coequal" branch of the Government.

But Brennan immediately proceeds into a detailed consideration of *Colegrove v. Green*, especially Rutledge's opinion. The entire Brennan opinion indicates a desire to preserve *Colegrove* as a valid precedent in the field. And in a footnote Brennan says: "No constitutional questions, including the question of whether voters have a judicially enforceable constitutional right to vote at elections of Congressmen from districts of equal population, were decided in *Colegrove*." Brennan then quotes Rutledge's reasons for finding "want of equity"—that "the gravity of the constitutional question is so great, together with the possibility of collision" with the political departments of the Government, that "the admonition (against avoidable constitutional decision) is appropriate to be followed here."

Thus a possibility exists, if the Court maintains the line of reasoning expressed in Brennan's majority opinion in *Baker v. Carr*, that the Court would find the issue of Congressional districting one in which it has jurisdiction and one that is justiciable, but that the Court would nevertheless refrain from exercising its jurisdiction as Rutledge chose to do in *Colegrove*, basing its decision on grounds akin to the want of equity which Rutledge detected.

#### GROUND FOR JUDICIAL RETICENCE

Three principal grounds might be used by the Supreme Court if it were to refrain from adjudicating Congressional district cases for grounds related to "want of equity":

1. Standards. How much population inequality, or how much gerrymandering, is permissible before citizens are entitled to relief under the 14th Amendment? Or in other words, what type of districting amounts to "arbitrary and capricious" state action? Will a mathematical formula of permissible district population deviations—possibly a limit of two to one, as suggested in a 1962 Michigan Supreme Court decision—or 15 or 20 percent, as recommended by many political scientists—be adopted? What then of special geographical considerations creating districts of especially low populations, such as a district embracing the Eastern Shore of Maryland or one incorporating the Upper Peninsula of Michigan? Or may districting recognize diversified interests other than population? In staying a Michigan Supreme Court ruling ordering statewide elections of the state Senate because of inequitable districting, Supreme Court Justice Potter Stewart July 27, 1962 suggested that a state might well wish to give a small mining economy, its farming interests, its traditional communities, or other socio-economic interests special recognition in legislative districts. One problem facing the Court will be that existing disparities in Congressional district populations rarely approach the most criticized ones on the state legislative level. The grossest disparity in Tennessee was 19 to 1; the grossest disparity in Congressional districts is currently less than 5 to 1 and will probably be close to 3 to 1 following anticipated 1963 redistricting in Michigan and Texas. No current Congressional districting laws involve disparities as great as those in dispute in *Colegrove v. Green*. (For a discussion of malapportionment and "gerrymandering," see p. 912.)

2. Enforcement. What penalties will the Court choose to impose on a state which refuses to redistrict despite a Court declaration that its districts are unconstitutional? Unlike the Executive and Legislative Branches, the Court has no physical means of imposing its will. It depends on public respect for the rule of law to see that its decisions are carried out. By the injunctive process the Court may prevent the holding of elections within malapportioned districts, but scarcely anyone believes the Courts will actually begin to draw new district lines themselves. (A federal court in Alabama actually drew new state legislative lines in 1962, but it used lines which the Legislature itself had adopted as alternative plans.)

The ultimate weapon of the courts in forcing redistricting may be to order elections at large until a state complies. An at-large election, however, may result in election of representatives only from the most populated areas of the state or from the majority party, truly depriving minority parties and geographic areas of a voice in government and raising serious new questions of deprivation of equal protection of the laws. As Rutledge warned in *Colegrove*, "the cure sought may be worse than the disease." Justice Stewart expressed a similar view in 1962 in granting a stay in the Michigan Senate apportionment case.

3. Collision with Congress. A Supreme Court decision to judge Congressional districts could thrust the Judiciary into a full-scale conflict with Congress. If Court decisions disturbed many districts, a strong reaction could be expected from Capitol Hill. The reaction could take the form of Congress reestablishing standards for Congressional districting and setting up its own machinery to obtain enforcement—as the Constitution authorizes it to do—a reaction the Court would probably welcome. But it could also take the form of retribution in new laws limiting the Judiciary or trimming appropriations for the courts. The Justices do read the newspapers, and they could hardly ignore the danger of such a reaction.

Examples of the impact of judicially-imposed standards:

A Supreme Court decision establishing 2 to 1 as the greatest permissible variance in a state's Congressional districts would bring into question districts in 14 states: Arizona, Colorado, Florida, Georgia, Indiana, Maryland, Michigan, Mississippi, New Jersey, Ohio, Oklahoma, South Dakota, Tennessee and Texas. These states have a total of 151 Representatives.

And should the Court, for example, establish a 20-percent variation from the average district as the greatest permissible variation, the current districting in 28 states with a total of 306 Representatives would be affected:

State	Maximum variation	State	Maximum variation
Arizona	-54.3	Michigan	+84.8
Arkansas	+28.8	Mississippi	+39.7
California	+42.4	New Jersey	+44.8
Colorado	-55.4	North Carolina	-32.9
Connecticut	+36.0	Ohio	+72.1
Florida	+60.3	Oklahoma	+42.5
Georgia	+108.9	Oregon	-40.0
Idaho	+22.9	Pennsylvania	+31.9
Illinois	-33.6	South Dakota	-46.3
Indiana	+64.6	Tennessee	+58.2
Kansas	+23.9	Texas	+118.5
Kentucky	+40.8	Utah	+28.6
Louisiana	-35.2	Virginia	+36.0
Maryland	+60.5	Washington	+25.2

If the Supreme Court were also to judge whether gerrymandering is involved in Congressional districts—apart from the problem of mathematical malapportionment—far more difficult problems would arise and most state's Congressional districting laws would probably be subject to protracted court challenges.

#### OUTLOOK

Few Court observers are willing to make flat predictions of how the Court may decide on the Congressional districting cases now pending before it (see box). The line of reasoning in *Baker v. Carr* surely leads in the direction of direct judicial involvement in Congressional districting. But the difficulties of standards and enforcement and the danger of direct conflict with Congress are formidable. The Court might choose to leave the question of Congressional redistricting,

at least temporarily, to the state legislatures which themselves are becoming more and more "representative" through the effects of *Baker v. Carr* and thus might be expected to be more friendly to equitable Congressional districting. Also, as pointed out by the Justice Department in its *amicus curiae* brief in *Baker v. Carr*, the decennial Census apportionments cause frequent changes in state Congressional districting laws, thus avoiding the situation in state legislature apportionment where there is no spur to periodic redistricting action and therefore a steady increase in inequalities.

Were the Supreme Court first to hear arguments and announce opinions in the state legislature cases pending before it—cases from Maryland, Virginia, Oklahoma, Florida, New York and Michigan<sup>1</sup>—direct clues to an opinion on Congressional districts might appear. There is a strong possibility, however, that the Court might hear the Congressional cases concurrently with those dealing with state legislative districts and announce opinion on the two types of cases simultaneously. The Court is expected to begin hearing arguments on the apportionment cases soon after it reconvenes for its fall term in October 1963.

Since the decision in *Baker v. Carr*, Justice Frankfurter (who wrote a strong dissent in that case) and Justice Whittaker (who did not participate) have retired. They have been replaced by Justices Goldberg and White. Goldberg is considered a likely backer of judicial standards in the field of legislative apportionment. Some observers believe White may take a more middle-of-the-road stand, though he recently refused to grant a stay in the Oklahoma apportionment case (Weekly Report, p. 429).

Justice Stewart, who wrote a separate concurring opinion in *Baker v. Carr*, indicated in his stay of the Michigan case that he had serious reservations about court imposition of pure population standards for districting. Justice Clark, in his concurring opinion in *Baker*, said: "I would not consider intervention by this Court into so delicate a field if there were any other relief (such as referendum or initiative) available to the people of Tennessee." Justice Harlan has consistently opposed judicial intervention in districting matters. Thus there is a good chance that Stewart, Clark, and Harlan would oppose judicial imposition of stiff standards on Congressional districting. The question would be whether two or more of the remaining Justices would join them. Justices Black, Douglas, and probably Goldberg would be the least likely to do so. The "swing vote" might be cast by the group consisting of Chief Justice Warren and Justices Brennan and White.

#### HOUSE DISTRICTING CASES

##### *Currently on appeal to U.S. Supreme Court*

*Georgia.—Wesberry v. Sanders.* Dismissed June 20, 1962, by a three-judge federal court in Atlanta, Ga.

Two plaintiffs had asked the court either to force redrawing of the boundaries of Georgia's 10 Congressional districts before the Sept. 12 Democratic primary or else require all 10 Congressmen to be elected at large in the whole state. The plaintiffs, both residents of Atlanta, claimed that the composition of the current districts, which range in population from 823,680 in the 5th District (Atlanta) to 272,154 in the rural 9th District (Northeast), deprived them of the "equal protection" of the law under the 14th Amendment to the U.S. Constitution. They urged the court to require new Congressional districts no more than 15 percent above or below the average district for the state, which is 394,312.

The court's majority opinion dismissing the case, written by Federal Circuit Judge Griffin B. Bell and concurred in by Federal District Judge Lewis R. Morgan, gave four major considerations for the court's decision: (1) that the case presented "a political question involving a coordinate branch of the Federal Government"; (2) the case involved a "political question posing a delicate problem difficult of solution without depriving others of the right to vote by district, unless we are to redistrict for the state"; (3) "relief may be forthcoming" from the State Legislature after it has been reapportioned; (4) "relief may be afforded by the U.S. Congress."

The majority opinion emphasized that the Supreme Court in the *Baker vs. Carr* case "was at pains to distinguish" that case from the 1946 decision in *Colegrove vs. Green*, when the Court refused to rule on the composition of Illinois Congressional districts. The majority opinion went on to say that "the rationale of the (*Baker vs. Carr*) decision goes no further than to open to doors of the

<sup>1</sup> The Michigan case may have become moot through adoption of the New Michigan Constitution. See Weekly Report, p. 531.

courts for the purpose of adjudicating consistency of state action with the Federal Constitution where no question is concerned involving a coequal political branch of government."

In an opinion concurring in part and dissenting in part, Federal Circuit Judge Elbert P. Tuttle said he agreed "that this Court should deny the injunction at this time" but disagreed "with the conclusion that the injunction should be dismissed." He said the Court "should retain jurisdiction of the cause in order to give the State Legislature an opportunity to remedy what this court has unanimously found to constitute a gross inequity."

Judge Tuttle said that "the point of difference between my views and those of my colleagues is that I am not convinced that if the Georgia Legislature persists in the future in maintaining Congressional districts as grossly disproportionate as they are today, the federal courts would have no power to take cognizance of such a situation and declare the state apportionment laws unconstitutional."

*New York.—Wright vs. Rockefeller.* Dismissed Nov. 26, 1962 by a three-judge federal court in New York City.

The plaintiffs, New York City Negro and Puerto Rican residents, asked to have the part of the 1961 New York redistricting law establishing the four Manhattan districts declared invalid under the 14th Amendment because, they alleged, it established "irrational, discriminatory and unequal Congressional districts (which) segregate eligible voters by race and place of origin." The plaintiffs alleged that the Republican 17th District (East Side) was "contrived" to exclude "non-white citizens and citizens of Puerto Rican origin" and that the Democratic 18th, 19th and 20th Districts "have been drawn so as to include the overwhelming number" of Negro and Puerto Rican citizens. As relief they asked the court to order an at-large election of Manhattan's four seat or appoint a special master to redefine the boundaries.

The plaintiffs received a jolt when Rep. Adam C. Powell (D 18th District) and five other Harlem Democratic leaders intervened in behalf of Gov. Nelson A. Rockefeller (R) and the other state officials who were listed as defendants. The Powell group charged that the Republican-controlled Legislature drew the new district lines "along partisan political lines rather than racial lines" to "cut out as many Democrats as they possibly could" and that the judgment sought by the plaintiffs would place in jeopardy the current Negro-Puerto Rican representation in Congress by causing a county-wide election in which the chances of a Negro or Puerto Rican candidate would be substantially less.

Circuit Court Judge Leonard P. Moore wrote the majority opinion in which he was joined by District Judge Wilfred Feinberg. They decided the case entirely on its merits, not questioning justiciability or the question of a possible want of equity. Moore said that "no proof was offered by any party that the specific boundaries were drawn on racial lines." He said that plaintiffs, "to inject a racial angle," had cited *Gomillion v. Lightfoot*, a 1960 case in which the Supreme Court ruled unconstitutional the action of the State of Alabama in altering the boundaries of the city of Tuskegee in such a manner as to exclude and thus disenfranchise in city elections all but a few of the city's 5,400 Negroes. Moore said the *Gomillion* case had "no application whatsoever" in the New York districting dispute. Moore said that the New York districts were reasonably equal in population and that "no citizen of Manhattan \* \* \* has been deprived of his right to vote for the duly nominated candidates of the party of his choice and in the area in which he resides \* \* \*. To create districts based upon equal proportions of the various races inhabiting metropolitan areas would indeed be to indulge in practices verging on the unconstitutional," Moore concluded.

District Judge Thomas F. Murphy dissented, saying that despite "a total absence of any direct proof" that the districts had been drawn along racial lines, the 1960 Census figures showing white, non-white, and Puerto Rican population in the area proved a prima facie case of "a legislative intent to draw Congressional district lines in the 17th and 18th Districts on the basis of race and national origin," thereby violating the "equal protection" clause of the 14th Amendment to the Constitution.

#### *Congressional cases not appealed*

*Wisconsin.—State of Wisconsin v. Zimmerman.* A three-judge Federal court in Milwaukee, Aug. 14, 1962, dismissed without prejudice a case asking the Court to order immediate reapportionment of the state's Congressional and state Legislature districts. Circuit Court Judge F. Ryan Duffy, speaking for the court, did not question the justiciability of the matter, but concurred in the judgment of a

special master appointed by the court that the "equities are not with the plaintiffs." Duffy also said that "as a practical matter" it was too late to alter the rules of the 1962 elections. The court ordered the suit be dismissed without prejudice to any similar suit after Aug. 1, 1963, if the Legislature had not reapportioned by that time.

The Legislature passed and the Governor May 20, 1963 signed into law a new Congressional redistricting bill with disparities of no more than 3.4 percent from the average district population figure (Weekly Report, p. 815).

*Michigan.—Calkins v. Hare.* A panel of three federal judges at Port Huron, Mich., July 10, 1962 refused to order the election of all 19 Michigan Congressmen at large. Two Dearborn teachers had asked the at-large elections pending Legislature redistricting to relieve gross malapportionment violating the 14th Amendment. The Court said: "This, under the circumstances, is a request for an extraordinary remedy and one which this court is unwilling to indulge upon such short notice and without full study, consideration and reflection." No further action was taken on the case.

*Washington.—Thigpen v. Meyers.* This was a taxpayers' suit, backed by the League of Women Voters, challenging both the Congressional and state legislative districts of Washington. A panel of three federal judges in Seattle Dec. 13, 1962 dismissed the part of the complaint relating to Congressional districts. The Court said that the question of Congressional districting was clearly justiciable, citing *Baker v. Carr*, but found that "the Constitution and existing laws of the United States do not require Congressional apportionment on the basis of population." The Court said that gross population discrepancies could amount to invidious discrimination in Congressional districts, but that Washington's districts (ranging between 342,540 and 510,512) were "not so invidiously discriminatory as to amount to a denial of equal protection."

---

#### EXHIBIT No. 9

(Telegram dated June 5, 1963, addressed to Hon. Estes Kefauver from Clarence Mitchell, director, Washington Bureau, NAACP, follows:)

WASHINGTON, D. C., June 5, 1963.

HON. ESTES KEFAUVER,  
U.S. Senate, Washington, D.C.

Wish to register support for proposal offered by Senator Keating that presidential elections be determined by a majority of the voters rather than through the votes of State electors. Plan to eliminate electors but continue giving all electoral votes of a State to the winning candidate is also desirable. We are unalterably opposed to any plan which could divide each State's votes among candidates because such a plan would undoubtedly strengthen the bastions of segregation and discrimination by shifting the balance of power from liberal and progressive areas of the country to those sections which continually seek to turn back the clock in the area of human rights. Regret that brief hearing has made it impossible for us to be heard in person.

However, in lieu of appearance we ask that this telegram be inserted in the hearing record.

CLARENCE MITCHELL,  
Director, Washington Bureau, NAACP.

## EXHIBIT No. 10

(The following is a report of the Law Reform Committee, New York Chamber of Commerce, with letter dated May 7, 1963, from Chester D. Pugsley, Counselor at Law, New York, to John T. Gwynne, Secretary, New York Chamber of Commerce, New York, N.Y.):



## ELECTORAL COLLEGE REFORM

The electoral college begins to function on the first Tuesday after the first Monday in November of every fourth year when qualified voters of the several States choose the Presidential electors; it continues on the first Monday after the second Wednesday in December when the electors meet in their respective States to cast their votes for President and Vice President; and it ends on January 6, when the electoral votes are counted in the presence of the two Houses of Congress and the results are announced.

Efforts have been made for more than fifty years to change the electoral college procedures for electing the President and Vice President. After each succeeding national election a flurry of activity brings forth large numbers of bills to amend the electoral process, but aside from the changes wrought by the 12th, 20th, 22nd and 23rd Amendments to the Constitution, and these made little change in the actual procedures, there has been little success. The movement for reformation of the electoral process intensifies when there is a close election or when the election results in the selection of a President by less than a majority of the popular vote.

The continuing efforts to alter or eliminate the electoral college arise from the conviction held by many that there are great inequities in the present system. With few exceptions, however—notably those in 1800, 1824 and 1876—the system has successfully elected a President, although on three occasions the man elected was a “minority” President, having received a smaller popular vote than his opponents, and on fourteen occasions the man elected held only a plurality of the popular vote.

Those who favor a change in the electoral college system argue that it is inequitable because it does not permit a division of the electoral

vote of a State between the candidates, but rather provides for a unit-rule or "winner-take-all" procedure which results in the disenfranchisement of great numbers of voters whose votes, in fact, are cast in favor of the opposing candidate. They contend that the present system places exaggerated importance on the larger and pivotal States to the extent that the major parties not only concentrate their campaigning in these areas but also generally choose the candidates from these few most populous States. Moreover, there is criticism of the philosophy and procedure of the contingent election in the House of Representatives where all the States are granted one vote in the choice for President. Finally, there is some feeling that the electoral college itself has become an archaic institution and should be abolished.

Those who are opposed to any change in the present system insist that it has withstood the test of time for almost two centuries and has produced only three "minority" presidents; that on only two occasions has it been necessary to invoke the contingent election procedure; that the present system gives proper and adequate representation to the small and sparsely populated States; that any change in the block vote might produce "splinter" parties. Further, they reason that the method currently in use is time-tested and that any new innovation would be experimental. Finally, they contend that the proponents of electoral reform have failed to rally behind a single method they think is better than the present system, but rather offer a number of alternative methods upon which they cannot agree.

### How the Present System Evolved

Article II of the Constitution provides that:

Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which a State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

In the early days of the republic, the electors were chosen in a variety of manners; they were selected by the State Legislatures, they were elected by the people in the districts, or they were elected on a State-wide general ticket. The electors, thus chosen, were directed to cast ballots for two persons. The one receiving the highest number, if a

majority, would be President; the second highest, the Vice President. In the event of a tie or the lack of a majority, the choice would be made by the House of Representatives.

In 1800, a tie between Jefferson and Burr, running for President and Vice President, respectively, on the Republican-Democrat party ticket, threw the election into the House where, after the 36th ballot, Jefferson was chosen. This dispute stimulated the consideration of reform—and the 12th Amendment to the Constitution, ratified in 1804, resulted therefrom.

The 12th Amendment eliminated any question as to the designees for the specific offices by providing that:

The electors shall meet in their respective states and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the persons voted for as President, and in distinct ballots the persons voted for as Vice President. . . .

The amendment also detailed the manner in which the votes would be tallied in the Congress. Amendment XII further provided that the House of Representatives would make the selection of the winning Presidential candidate (if none received a majority of the electoral votes) by a ballot, with each State having one vote. A similar procedure was established for the Senate, for the selection of the Vice President.

The next change in the electoral process was made nearly 130 years later with the ratification of the 20th Amendment in 1933. This Amendment, known as the "lame duck" Amendment, set the time for the assumption of office by the President and Vice President on the 20th day of January and set the opening meeting of Congress for the 3rd of January. This eliminated the possibility of the choice of President and Vice President in a contingent election by a Congress which would remain in office only a few more weeks, rather than by the newly elected body. The amendment provided also that in the event the President-elect dies before he is inaugurated, the Vice President shall become President.

The 22nd Amendment limiting to two the number of terms that a President may serve, and the 23rd Amendment enfranchising the eligible

voters of the District of Columbia, are the most recent adjustments in the national election procedure, and like the preceding ones, make no fundamental alteration in the procedure of actually selecting a President and Vice President through the electoral college.

Statutory changes affecting the electoral process have been made by Congress, but these have dealt with the line of succession to office and measures establishing the time of elections, the time and place that electors will meet, and the procedures to be followed in Congress in tabulating the electoral votes.

### How the Electors Are Chosen

A great deal of the prerogative in determining electoral policy is delegated to the States in Article II of the Constitution which provides that the States shall appoint, in the manner directed by the Legislature, a number of electors equal to the State's representation in Congress. Each State is permitted to determine for itself the manner in which such electors are chosen. At present it happens that electors in all the States are chosen on a general ticket at the election held in November of Presidential years. This method has been followed by all States, with a few exceptions, since 1836.

However, the States differ considerably in the manner in which the electors are nominated, in the manner they are presented on the ballot, and, most significantly, in the extent to which they are committed to cast their ballots for the candidates of the parties the electors presumably represent. In most States, the Presidential electors are nominated by the State party conventions or the State committees, and in some they are nominated in a primary. In Florida, however, they are chosen by the Governor and in Pennsylvania by the Presidential nominees of each party.

The pledge by the elector to cast his vote for a party's candidate is sometimes associated with the manner of nomination, or it is determined by the manner of presentation on the ballot. Where the so-called "Presidential short-ballot" (a ballot on which the names of the candidates for President and Vice President appear in lieu of the names of the electors) is used, there is an implication that the electors are expected to vote for these candidates. In the 33 States where this system has been adopted, State law contains a provision that a vote cast for the candidate is deemed

to be a vote cast for the electors of the party whose names may not even appear on the ballot. In another group of States, an inference of a pledge may be made from the ballot on which the names of the electors are listed under the party insignia and names of the candidates. Provisions for the names of unpledged electors are made on the ballots in Alabama, Arkansas and Georgia.

Many of the deficiencies and alleged inequities of the present system may be attributed to the adoption, by the States, of the general ticket method of selecting electors. By the simple act of electing the entire slate of electors of the party receiving a plurality of the votes, there is an automatic assignment of all the State's electoral votes to one candidate. While it is possible in some States to vote for individual electors, the trend in most States, now, is to vote for the Presidential candidate in lieu of individual electors. The expanded use of voting machines is accelerating this process.

It is possible, therefore, to change the electoral procedure by having every State Legislature reject the use of the general ticket method. In doing so a Legislature could select another method, and it is entirely conceivable that a majority in a Legislature, anticipating an unfavorable outcome in the next election, might attempt to fortify itself against such an eventuality by again changing the mode of appointing electors.

The result could be an instability in the manner of choosing electors. The alternative would be the determination of a mode of choosing the President that would be given the fixedness and permanence of a Constitutional rule, and one that would seriously reduce the Constitutional prerogative of the States to appoint the electors "in the manner directed by the Legislatures."

### The Electoral Process in Operation

The President and Vice President are chosen by the electoral college, an assemblage of electors which meets in each State to cast their ballots for the President and Vice President. While voters going to the polls usually think of themselves as voting for the President and Vice President, actually they vote only for the electors even though they may seldom know who the electors are.

The electors vote for the President and Vice President on separate ballots, and the lists are delivered to the President of the Senate on a

date set by law. The President of the Senate acts as the presiding officer at a joint meeting of the Senate and House of Representatives on the 6th of January for the purpose of tabulating the electoral votes. If one candidate polls a majority of the electoral vote, the President of the Senate announces the vote; and that announcement is deemed a declaration of the persons elected President and Vice President.

In the event that no candidate receives a majority of the electoral vote, the Constitution requires that the House of Representatives immediately choose a President; and that the Senate choose a Vice President. The contingent method provides for the selection of a President by ballot in the House from among the candidates (not more than three) who received the highest number of electoral votes. Further, the Constitution provides that in choosing the President, the votes in the House shall be taken by States, with each State entitled to one vote. The candidate for whom the vote of a State will be cast is determined by a polling of the State's representatives. The one receiving the greatest number of votes will receive the one vote of the State, while a tie vote means the loss of the State's one vote. The choice of a Vice President is made in the Senate from the two candidates receiving the highest votes, by a method similar to that prescribed for the selection of the President. In the House the quorum required for this purpose is representation from two-thirds of the States, and in the Senate the quorum consists of two-thirds of the whole number of Senators. In both bodies, the candidate receiving the majority is the winner.

### Proposals to Reform the Electoral System

Of the hundreds of bills submitted in Congress from time to time in efforts to revise the electoral college system, few have progressed beyond committee consideration. One of the more recent proposals, the "Lodge-Gossett" plan, was passed by the Senate in 1950, but could not muster the required two-thirds vote in the House of Representatives. Many of the proposals are restatements of recommended changes which date from as early as 1826.

Since 1947, more than one hundred proposals have been introduced to amend the Constitution with respect to the electoral process. They have centered on three basic methods of electing the President and Vice President—the direct election by popular vote plan; the Dis-

trict Plan or "Mundt-Coudert" program; the Proportional Plan, as embodied in the "Lodge-Gossett" proposal. A fourth proposal which has been advanced was the combination plan or "Daniel Substitute" plan which combines the District and Proportional Plans.

In addition, there have been a number of variations on the present system and on the above proposals that have been submitted for consideration. Prominent among these is the proposal that would incorporate in the Constitution the present practice of awarding all of a State's electoral votes to the candidate receiving the largest number of popular votes, but which would eliminate the electors. This has been called the direct election by the States method, because it provides that the people vote directly for candidates and cast their votes by State units of electoral votes.

#### *The Direct Election Plan*

This proposal calls for the amendment of the Constitution to provide that the selection of the President and Vice President would be decided by a national direct vote of the people. The electoral college would be totally abolished.

The advocates of this proposal argue that this method of electing the President and Vice President would give a more accurate picture of relative party strength; that it would be simpler for the voter to understand; and that it would give the voter the actual choice, rather than merely an expression of preference which is now transmitted to someone else making the choice. They contend that this method would eliminate the "weighting" that occurs with the use of electoral votes and the resulting concentration by the candidates upon the winning of large "key" States, and that it would make every vote equal. Finally, the direct election method would eliminate the need for a contingent election procedure and thus prevent the election of a President who receives a minority of the popular vote.

Those who oppose the direct election plan hold that it would encourage the growth of minor parties and otherwise affect the two party system; that it would remove a slight advantage given to voters in small States; that it would reduce the role of the States in the electoral process and permit the nationalization of election procedures; and finally, that it would be the most drastic method of eliminating whatever weaknesses may now exist in the electoral process.

*The District Plan*

Popularly termed the Mundt-Coudert proposal, the District Plan would preserve the electoral college, but would change the present procedure of giving the entire electoral vote to the winning candidate in the State. Instead, the electors would be chosen in each Congressional district, with two electors chosen from the State at large. A State's electoral vote, therefore, would reflect the voter preferences in each Congressional district, plus the State at large. Under this proposal the Presidential candidate receiving the highest number of electoral votes would be chosen, provided he had a majority. Failing a majority, the Senate and House, meeting jointly, would elect a President from the top three candidates.

One variation of the Mundt-Coudert proposal was introduced by former Representative Coudert. This proposal would abolish the electoral college while retaining the other provisions of the District plan. The candidate receiving the plurality of votes cast in each district would be credited with one electoral vote and the State winner would receive the at-large votes. This proposal would follow the District Plan in all other respects.

Those who favor the District Plan contend that it has the advantage of providing a more accurate reflection of the popular vote than is now obtainable from the present system; that it is more favorable toward the establishment and maintenance of the two-party system; and that it would not create an unwanted precedent for a method of election by proportional representation for Congress. Further, the District Plan, it is felt, would provide a harmony of expression between the vote for President and the vote for representative in the same district; it would reduce the power of the large, "doubtful" States; and it would encourage greater voting participation in single-party States.

Those opposed to the District Plan claim that it would not reflect the popular vote more accurately than the present system but rather would permit a candidate, by winning his districts by small majorities or pluralities while his opponent won his districts by resounding numbers, to get more electoral votes in a State while having only a minority of the State's total popular vote. They also believe that this plan would encourage excessive gerrymandering; would overweight the political power of

rural areas; and that it would impair rather than strengthen the two-party system because it would permit minor parties to win Congressional districts and thereby gain some electoral votes.

### *The Proportional Plan*

The most popular among the recent proposals for amendment of the electoral process has been the Lodge-Gossett Plan, or Proportional Plan. This plan would abolish the electoral college but would retain the electoral vote, which would be apportioned in each State among the Presidential candidates in accordance with the number of popular votes they receive. The candidate with the greatest number of mathematically computed electoral votes would be the winner. In the numerous variations on this plan there have been requirements that the winner have a majority of the electoral vote; while in the 1950 version of the Lodge-Gossett plan which passed the Senate, and in the Original Daniel Plan submitted in 1955, the winner was required to poll at least 40% of the total electoral vote. The Lodge-Gossett Plan sets forth a contingent election procedure which specifies that the President would be chosen from the two candidates having the highest numbers of electoral votes by Congress, in joint session if no candidate polls the required percentage of the total electoral vote.

The supporters of the Proportional Plan claim that it would tend more accurately to reflect the popular vote, particularly in so-called "one-party" States; that it would be less likely to produce a minority President; and that it would give the voters a more direct voice in the choice of the President. Moreover, those favoring this method believe that it would act to strengthen the two-party system and eliminate the current tendency of the parties to concentrate election efforts in the so-called "pivotal" States.

Those advocating other plans or a maintenance of the present system believe that the Proportional Plan would enable minority parties to get electoral votes and thereby weaken the two-party system; that the vote would still be weighted in favor of small States and give undue importance to areas with less population; that the States would have less importance as units in the electoral process. In addition, they argue that the Proportional Plan might bring pressure for proportional representation in Congress and, possibly, Federal control over voting standards.

### *The Daniel Substitute Plan*

In 1955, Senator Daniel and 19 others introduced Senate Joint Resolution 31 which was similar to the Lodge-Gossett Plan. In the following year, those who favored the District Plan and those who favored the Proportional Plan joined forces and offered a substitute to S. J. Res. 31 which was known as the Daniel Substitute Plan. It was sponsored by 54 Senators. The amendment would permit each State to adopt either the District Plan or the Proportional Plan. Under this substitute plan, a State could distribute its electoral votes among the three top candidates according to the popular vote; or a State Legislature could decide that the electors would be chosen by Congressional districts with two additional Statewide votes.

### **The Numbers Game**

To some extent the advocacy or opposition to a particular method of choosing the President and Vice President has been motivated by partisan consideration of the chances of a political party gaining top position in the Nation. Extensive analysis of voting patterns over numbers of years has probably influenced the choice of those who believe that a revised electoral system would improve their chances of winning, and would not result in a reversal in what they currently consider "safe" States.

The adoption of a different method of electing the President than currently in effect would not likely affect the outcome of elections in which there is a clear majority in favor of one candidate, except to reduce the margin of victory in the electoral count. But in a close election, as in the Kennedy-Nixon race in 1960, the outcome may well be determined by the method of selection used. For example, if the electoral votes in 1960 had been cast under the District Plan, Mr. Nixon, the Republican party candidate, would have emerged the victor.

DATA ON ELECTORAL VOTE IN THE  
1952, 1956 and 1960 ELECTIONS

<i>Popular Vote</i>	1952	1956	1960
Republican	33,927,549	35,590,472	34,108,546
Democrat	27,311,316	26,022,752	34,227,096
Other	308,996	413,684	503,337
Total	61,547,861	62,026,908	68,838,979
<i>Percentage of Popular Vote</i>			
Republican	55.1	57.4	49.5
Democrat	44.4	42.0	49.7
Other	.5	.6	.8
Total	100.0	100.0	100.0
<i>Electoral Vote Present System</i>			
Republican	442	457	219
Democrat	89	74	303
Other			15 (Byrd)
Total	531	531	537
<i>Electoral Vote District Plan</i>			
Republican	375	413	280
Democrat	156	116	254
Other		2	3
Total	531	531	537
<i>Electoral Vote Proportional Plan</i>			
Republican	288.5	296.683	263.662
Democrat	239.8	227.224	266.136
Other	2.7	7.093	7.202
Total	531.0	531.000	537.000

A State-by-State view of the count under the different systems reveals a considerable disparity in the possible distribution of the electoral vote.

RESULT OF THE STATE ELECTORAL VOTE CAST IN 1960

State	<i>Present System</i>		<i>District Plan</i>		<i>Proportional Plan</i>	
	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.
Alabama	0	11	1	10	4.598	6.259
Alaska	3	0	3	0	1.527	1.473
Arizona	4	0	4	0	2.220	1.776
Arkansas	0	8	1	7	3.448	4.016
California	32	0	19	13	16.032	15.872
Colorado	6	0	5	1	3.276	2.694
Connecticut	0	8	1	7	3.704	4.296
Delaware	0	3	0	3	1.470	1.518
Florida	10	0	6	4	5.150	4.850
Georgia	0	12	0	12	4.488	7.512
Hawaii	0	3	0	3	1.500	1.500
Idaho	4	0	3	1	2.152	1.848
Illinois	0	27	15	12	13.446	13.500
Indiana	13	0	12	1	7.150	5.798
Iowa	10	0	10	0	5.670	4.320
Kansas	8	0	8	0	4.832	3.128
Kentucky	10	0	8	2	5.360	4.640
Louisiana	0	10	2	8	2.860	5.040
Maine	5	0	5	0	2.850	2.150
Maryland	0	9	3	6	4.176	4.824
Massachusetts	0	16	0	16	6.336	9.632
Michigan	0	20	10	10	9.760	10.180
Minnesota	0	11	4	7	5.412	5.566
Mississippi*	0	5	0	5	1.976	2.904
Missouri	0	13	7	6	6.461	6.539
Montana	4	0	3	1	2.044	1.944
Nebraska	6	0	6	0	3.726	2.274
Nevada	0	3	0	3	1.464	1.536
New Hampshire	4	0	4	0	2.136	1.856
New Jersey	0	16	6	10	7.872	8.000
New Mexico	0	4	0	4	1.976	2.008
New York	0	45	20	25	21.285	23.625
North Carolina	0	14	7	7	6.706	7.294

State	<i>Present System</i>		<i>District Plan</i>		<i>Proportional Plan</i>	
	Rep.	Dem.	Rep.	Dem.	Rep.	Dem.
North Dakota	4	0	4	0	2.216	1.780
Ohio	25	0	20	5	13.325	11.675
Oklahoma	8	0	7	1	4.720	3.280
Oregon	6	0	6	0	3.156	2.844
Pennsylvania	0	32	15	17	15.584	16.352
Rhode Island	0	4	0	4	1.456	2.544
South Carolina	0	8	2	6	3.904	4.096
South Dakota	4	0	4	0	2.328	1.672
Tennessee	11	0	7	4	5.819	5.038
Texas	0	24	7	17	11.640	12.120
Utah	4	0	4	0	2.192	1.808
Vermont	3	0	3	0	1.758	1.242
Virginia	12	0	9	3	6.288	5.640
Washington	9	0	5	4	4.563	4.347
West Virginia	0	8	2	6	3.784	4.216
Wisconsin	12	0	9	3	6.216	5.760
Wyoming	3	0	3	0	1.650	1.350
Total	220	314	280	254	263.662	266.136

\* Mississippi had three unpledged electoral votes which were cast for Senator Harry Byrd, and these are not tallied in the total.

The total in the Proportional Plan excludes 7.202 electoral votes cast for other than major candidates.

It is evident from the record that the present system fails to reflect the fact that, in 1960, both Presidential candidates polled less than a majority of the total national popular vote, or that the winner polled only 116,550 votes more than the loser out of a total of 68,838,979 votes. Furthermore, as indicated by a tabulation of the votes in the State of Illinois, the use of a different method of apportioning the electoral vote might have provided another result. Under the District Plan, for example, Mr. Nixon would have received more electoral votes (15 to 12); and under the Proportional Plan Mr. Kennedy would have received 13.500 votes to Mr. Nixon's 13.446 electoral votes:—either of which would have been a more accurate expression of voter preference than the granting of 27 electoral votes to one candidate on the basis of a .2% margin in the popular vote.

The need for amendment of the electoral process, however, carries beyond the actual political advantage that might be derived from the use of one method or the other. It should initially be based on the need to provide a more realistic reflection of voter preference than is now available through present electoral procedures.

In recent years a number of polls conducted by Mr. Gallup of the American Institute of Public Opinion have projected that a significant portion of the American public favored changing the method of electing the President. In 1950, the poll indicated that 57% of the American public favored changing the method of electing the President. In 1950, the poll indicated that 57% of the people favored the Lodge-Gossett amendment while 22% opposed it and the remainder had no opinion. Ten years later another Gallup poll showed 50% of the public supporting reform of the electoral college system, 28% opposed and 22% expressing no preference.

Inasmuch as the reform of the electoral college would require an amendment to the Constitution it is evident that such an effort must arouse greater interest across the Nation and a marshalling of support behind one of the proposed plans. In making a realistic appraisal of the possibility of gaining electoral reform it is clear that there is little public interest in such an effort and that is manifested almost exclusively at election time every four years; that there is a lack of general knowledge about the electoral process; that there is little organized effort to educate the public and to gain their support for electoral reform.

Clearly there is a need for informed comment on this subject as well as widespread discussion of the means of improving the electoral process. Perhaps this is a matter to which the associations of the bar across the Nation might address themselves as they did on the problem of Presidential inability, and thus provide the influential and knowledgeable leadership that would be required to change and improve our electoral procedures.

Committee on Law Reform  
New York Chamber of Commerce

CHESTER D. PUGSLEY

Counselor at Law  
120 Broadway, New York 5  
WOrth 4-4040

May 7, 1963

Mr. John T. Gwynne,  
Secretary, New York Chamber of Commerce,  
65 Liberty Street,  
New York 5, New York.

Dear Mr. Gwynne:

In view of the long agenda of Committee Reports and the Annual Election of Officers and Committees today I did not want to take the time of the meeting to mention some addenda that might be of interest to the membership in connection with the very comprehensive report for information only of the Law Reform Committee on Electoral College Reform.

I, therefore, now ask you instead, as you suggested, to add at the end of the Committee Report in the *Monthly Bulletin* this letter. In two Presidential Elections the Electoral College was not able to elect a President. In 1800 there was a tie vote between Burr and Jefferson and the election was thrown into the House of Representatives, which elected Jefferson, and again in 1824 there were four candidates for President voted for in the Electoral College none of whom had a majority, Adams, Clay, Crawford and Jackson, and the election was again determined by the House of Representatives for Adams.

In 1876 and 1888 there were Presidents Hayes and Harrison elected without the popular vote in their favor. In 1876 the Electoral College failed to elect due to duplicate returns from three states, and an Electoral Commission had to be set up by Congress to determine the election which awarded it to Hayes. There was also an instance of where the United States Senate had to elect a Vice President alone in R. M. Johnson in 1836. I personally favor the abrogation of the Electoral College and election by popular vote, which I have advocated since my article in 1920 in the *New York American*, and the former *Independent Magazine* about that period.

Very truly yours,

CHESTER D. PUGSLEY

S/ Chester D. Pugsley

## EXHIBIT No. 11

(The following article by Professor Joseph E. Kallenbach, the University of Michigan, Ann Arbor, Michigan, is reprinted from the *Midwest Journal of Political Science*, Vol. IV, May 1960:)

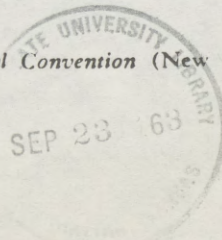
## *Our Electoral College Gerrymander\**

ANALYSTS OF THE ancient but questionable art of the political gerrymander as practiced in the United States most commonly direct their attention to its more striking manifestations in the mapping of districts for the choosing of congressional, state legislative and other classes of local governmental representatives. The unique system by which voters in the United States effect their choice of a President through the mechanism of the electoral college is not usually thought of as a species of the gerrymander. One does not ordinarily associate gerrymandering with the choice of a single officer, such as the President; and besides, presidential election results as determined through the electoral vote device have usually been in accord with the national majority will as revealed by the popular vote, considering the nation as one great constituency. Nevertheless there are elements in the present system of choosing the President which cause it to distort the values of individual popular votes in much the same way that legislative district gerrymanders do. Because of the elector system, individual voters do not have an equal voice in designating the person who shall occupy the highest office within the power of the people to fill

The idea that the President should be chosen by the people has become firmly embedded in our extra-constitutional practice and thinking. The philosophy expressed in George Mason's observation in the Constitutional Convention of 1787 that to entrust the choice of the President to the people would make no more sense than "to refer a trial of colours to a blind man"<sup>1</sup> was repudiated by political developments early in the nation's history. Popular election is the foundation upon which the modern Presidency rests. Much of current constitutional theory and practice relative to the powers, functions, and relationships of the President to his party, to Congress, and to the outside world springs from the proposition

\* With the assistance of Mr. Paul E. Mott.

<sup>1</sup>Max Farrand, *The Records of the Federal Convention* (New Haven: Yale University Press, 1911), II, 31.



that he has a mandate from the people of the nation through popular election.

Two elements of bias against the principle of according to voters in the nation an equal voice in choosing the President are evident in the electoral vote system as it now functions. One is that a voter who happens to have the good fortune to reside in one of the populous "pivotal" states has a far greater opportunity to influence the outcome of a presidential election than one who resides elsewhere in the nation. Another aspect of inequality in individual voting power is that, given a fairly normal voting pattern in the nation in terms of major party division of the popular vote, a Democratic party candidate for President will have to obtain a greater percentage of the total national popular vote than a Republican party candidate must secure to produce an electoral majority.

These peculiar features of the electoral vote system as a means of recording and reflecting the will of the people in the nation at large are understood by everyone reasonably familiar with its operation. They arise from the nature of the constitutionally imposed electoral vote distribution formula for weighting state power in choosing the President; from the use of the state-wide general ticket device by the states for electing their respective slates of presidential electors; and from the tendency of the several state electorates to follow a more or less persistent voting behavior pattern in a partisan sense from election to election. It is the purpose here to analyze these operative aspects of the electoral college system in some detail to demonstrate statistically the dimensions of these two inequities inherent in it, viewed as a national popular election device; and to point out their bearing upon the failure of recent constitutional reform movements in this area. Favored state, sectional, and partisan interests under the present system can be expected to, and do, resist efforts to eliminate or minimize its inequitable features for the same kinds of reasons that vested interests under state and local forms of the gerrymander have always resisted efforts to terminate the special advantages they enjoy under them. One does not expect a favored interest under a gerrymander, solely on grounds of political equity and justice, to surrender willingly and gladly the advantage it enjoys. One is entitled, however, to view with

some skepticism the array of arguments and justifications advanced by the beneficiaries of the current inequitable arrangement in support of its retention and by way of criticism of suggested alternatives to it.

#### STATE INTERESTS

Resolution of conflict between the interests of the larger, more populous states and those of the smaller, less populous ones was probably the most difficult aspect of the problem of devising an acceptable plan for choosing the President faced by the Philadelphia Convention. The issue was essentially the same as that involved in determining the basis of representation in Congress. It is quite probable that the delegates would have provided for a system of legislative election of the President—a principle which was endorsed by a majority of the state delegations on several different occasions—had there not been the difficulty of having to reach a decision on whether the voting by Congress should be on a state unit basis or by a joint vote system of the two Houses under which the more populous states would enjoy a voting power commensurate with their greater population and wealth, as reflected by their larger numbers of Representatives.

This issue was finally resolved by establishing a selective process expected, normally, to involve two steps. At the first stage—action by the presidential electors—the more populous states were expected to exert a preponderant influence by reason of their greater number of electors. At the second step—action by the House of Representatives—all states without regard to their respective populations were to have equal voting power. The formula for allocating electors to the states on the basis of their total congressional representation, an adaptation of the "Connecticut Compromise" principle to the problem of presidential selection, made a small concession to the smaller states, to be sure, by reflecting their equal representation in the Senate; but the elector arrangement was considered on the whole to have been a concession favoring the larger, more populous states. It was expected by most of the delegates that the electoral votes (after Washington's selection as the first President) would ordinarily be so widely distributed among the various candidates that no majority choice would emerge from

the electors' votes.<sup>2</sup> Accordingly, the House of Representatives would then have to effect the final choice as a matter of normal course. The more populous states would thus have an ascendancy in the preliminary electoral vote stage, which would amount to a kind of nominating process; while the smaller states would have equality with the larger ones in the final election when the President would be chosen from the panel of five presented by the electors.

The entrance of political parties into the presidential selective process, the development of partisan nominating procedures for naming presidential candidates and slates of electors pledged in advance to them, and the establishment of the principle, by state action, of popular election of electors, soon converted the original plan into what for all practical purposes is a national popular elective system. The electoral vote stage became determinative in most cases in the election of the President. This being the case, it is apparent that the more populous states have emerged as the gainers over the less populous ones so far as the "electoral college compromise" of the Convention is concerned. That part of the process in which it was conceded that the principle of relative numbers of people rather than state equality would be given effect has become, normally, the final step in the selective process. To this extent, making the electoral vote stage determinative in the choice of the President was a long step in the direction of according equal voting power to voters in the nation without regard to their state of residence. It went a long way toward converting the presidential election process from a *federal act* into a *national* one.

Political inequities in the system for electing the President persist because it retains the outward form of a federal act, while in essence he is chosen by the voters of the nation acting as one great

<sup>2</sup> George Mason, of Virginia, for example, predicted that "nineteen times in twenty" the ultimate choice of a President would have to be made by action of the states in Congress. Farrand, *op. cit.*, II, 500. The provision that electors might not cast both their votes for residents of their own states was inserted by the Convention in the belief that electors would tend to favor "local figures" with both their votes if not prevented from doing so. Requiring them to cast at least one vote for a candidate from a state other than their own, it was thought, would tend to insure the setting up of a panel of nationally known persons from which the House of Representatives would make the final choice.

constituency. Disparities in the relative influence individual voters have on the final outcome appear under it because the popular election principle governs the result only at the state level, not at the national level. Some critics of the elector system have made much of the point that it is inherently defective as a popular election device because under it, popular votes cast for losing candidates are cancelled out, or in effect, counted for the winning candidate at the state level, thus distorting the national result. The basic fault of the present system as a democratic device, however, is that the power of the individual voter to influence the final result depends upon conditions which vary from state to state. Less partisanly-attached voters in some states have an exaggerated influence upon the outcome nationally at the expense of similarly independently inclined voters in other states. It is because the present system violates, in a national sense, the principle of "one man, one vote" that it is vulnerable to criticism. It imposes upon the country a species of gigantic gerrymander.

The true dimensions of this gerrymander can be measured by taking into account the factors responsible for the varying weights of individual popular votes in their effect on the choice of the President, depending upon the states wherein they are cast. These variable factors include (1) the electoral vote allocation formula; (2) the relative extent of popular participation in a presidential election in the several states; (3) the number of electors a voter may participate in choosing; and (4) the relative closeness of the popular vote for President in the several states.

The electoral vote distribution formula, considered independently of all the other factors, tends, of course, to enhance the value of an individual popular vote in the less populous states. This element in the variability pattern reflects the rule that electors shall be awarded to states on the basis of Senate seats as well as seats in the House of Representatives. Its effect on the value of an individual popular vote is modified materially, however, by the second variable factor—the extent of popular participation in balloting for presidential electors. Differences among the states in such matters as suffrage and registration requirements, the intensity and effectiveness of partisan campaign activity, and the level of political

awareness and interest among those who are potential voters produce variations in the extent of popular participation in elections from state to state. Given a fixed state quota of electoral votes based primarily on population, an individual voter's ballot will count for more or less in its power to influence the result depending on whether a relatively small or relatively large proportion of the potential voters in his state actually vote. In other words, the number of *actual* voters represented by an electoral vote varies considerably from state to state. For the 1956 presidential election the extremes were seen in Illinois, where each electoral vote represented 163,235 actual voters, and Mississippi, where each electoral vote represented 31,018 actual voters.

This does not represent a final measure of the relative value of popular votes, state by state, however, because it does not take into account the impact of the third and fourth variable factors mentioned above. The third variable factor—the number of electors a voter may actually have an influence in choosing—results from the practice of electing the entire slate of electors in each state through a state-wide vote in which the plurality rule governs the result.<sup>9</sup> This obviously works to the advantage of voters who live in the more populous states, for they participate in the disposition of many more electoral votes than do the voters in the less populous ones. The extremes are seen in the cases of New York voters, who in 1960 will participate in the election of 45 electors; and those of Delaware, Nevada, Wyoming, Vermont, Alaska and Hawaii, who in each instance will participate in the choice of only three. A New York voter will be able to assist in determining the disposition of approximately 17 percent of the electoral votes necessary to an electoral vote majority; but each voter in one of these least populous states will participate in the allocation of only about one per cent of an electoral vote majority.

The final factor affecting the intrinsic value of an individual popular vote in a given state is its degree of marginality; that is,

<sup>9</sup> In Georgia presidential electors must receive a majority of the popular votes to be elected. If a majority of the electors are so chosen, they appoint others to the remaining seats; if a majority of them are not chosen by action of the voters, the state legislature fills out the slate by appointment. *Ga. Code Ann.*, sec. 34-2503 (1935).

its potentially decisive effect upon the outcome of the contest in that state. If the competition is very keen and only a relatively small number of popular votes represent the difference between defeat and victory for one candidate's slate of electors, the critical value of each individual popular vote in relation to the total number of votes cast is enhanced. As the winner's popular plurality tends to be numerically larger, the critical importance of any individual popular vote making up the margin of victory decreases; as the winner's plurality tends to be smaller, it increases. The critical importance of a marginal vote is, however, a function of the total number of votes of which it is a part. As the total number of votes out of which a given winning plurality may be constructed is greater, the critical value of any individual vote increases; and conversely, as the total number of votes from which the same plurality may be secured is smaller, the critical value of each individual vote is lessened. In other words, the *percentage* of the total popular vote represented by the margin of plurality is the essential measure of the critical value of an individual popular vote in a given state.

An illustration of the influence of this factor can be seen in a comparison of the popular vote results in the 1952 presidential election in Tennessee and Minnesota. Since the number of electoral votes at stake in these two states was the same, *viz.*, eleven, that factor can be ignored in comparing the strategic values of individual popular votes in these states for that election. In Tennessee, Eisenhower's popular vote exceeded that of Stevenson by a margin of only 2437 out of a total of 892,553 for all candidates. In that same year in Minnesota Eisenhower received a popular plurality of 154,753 over Stevenson out of a total popular vote of 1,379,483. Even though the total number of voters from which a winning plurality could be developed was greater in Minnesota than in Tennessee and the strategic value of any individual popular vote in Minnesota was thereby enhanced in comparison with a Tennessee vote, the overall strategic importance of an individual popular vote in Minnesota was less than that of an individual Tennessee popular vote because of the much smaller winning plurality in the latter state. The comparative strategic values of individual popular votes resulting from the relative closeness factor

in these two states is indicated by the two ratios of 892,553 to 2437 and of 1,379,483 to 154,753. That is to say, the strategic value of a Tennessee popular vote was approximately 41 times as great as that of a Minnesota popular vote in that election, taking the relative closeness and total vote factors into account. Had Eisenhower's popular plurality been the same in Minnesota as in Tennessee, *i. e.*, 2437, but with the same popular vote totals, the strategic value of a Minnesota popular vote would have been about one and one-half times greater than that of a Tennessee popular vote because the larger vote total in Minnesota would have provided a better opportunity for accumulating that much of a margin of victory.

It will be observed that the influences of the factors mentioned above on the relative values of popular votes in presidential elections tend to offset and cancel out one another in some degree. They also vary in their impact from election to election. The relative closeness factor, in particular, tends to swing rather widely in any given state from election to election. For any given election an accurate measure of the relative value of presidential popular votes, state by state, taking into account all these variable factors, can be obtained by a simple mathematical computation involving popular vote totals, popular pluralities, and electoral votes at stake. A formula which takes into account the combined effect of all the factors noted above is  $\frac{t}{p} \times e$  equals  $s$ , wherein "t" is the total popular vote for all candidates, "p" is the plurality of the winning candidate, "e" is the number of electoral votes at stake and "s" is the resultant state norm. In order to make state by state comparisons for a particular election and to compare state rankings in different elections, the values of "s" computed by the formula just described can be standardized by dividing each of them by the expression  $\frac{\sum s}{n}$ , where  $\sum s$  is the sum of all of the values of "s" for all states for a particular election and "n" is the number of states. Since  $\frac{\sum s}{n}$  equals  $\frac{T}{P} \times E$ , where "T" is the average total vote per state, "P" is the average state plurality, and "E" is the average number of electoral votes per state, the right side of the equation

becomes a simple computational form for  $\frac{\sum s}{n}$ . Thus in the 1952 presidential election the *average* total popular vote per state was 1,282,333; the *average* state plurality was 163,298; and the *average* number of electoral votes at stake per state was 11.146. Substitution of these figures in the formula  $\frac{T}{P} \times E$  equals N, where "N" is the national norm, produces an expression with a numerical equivalent of 87.518. The "s" computed for each state can now be standardized by dividing it by the national norm for a given election. The resulting number gives a measure of the degree of deviation of each state about the national norm where this norm has a value of 1. For example, the vote value gross figure for Michigan in the 1952 election was  $\frac{2,798,592}{320,872} \times 20$ , or 174.440. This figure represents 199.3 per cent of the national norm of 87.518 for that election. Hence the relative value of a Michigan vote as compared with popular votes cast generally that year was 1.993.<sup>4</sup>

Application of this measurement device to presidential election results for each of the last eight elections reveals a considerable variation in the relative value of a popular vote in a given state from election to election; but it also shows that certain states regularly have a very high popular vote value rating in comparison with the national norm, while others quite as consistently have relatively low popular vote value ratings. In terms of 1 as the national average for a popular vote in each election, the relative value of a popular vote in Illinois, for example, in the last eight elections ranged from a low of 2.227 in 1956 to a high of 19.436 in 1948; in New York, from a low of 3.187 in 1956 to a high of

It should be noted that in the formula  $\frac{T}{P} \times E$  equals N, the expression  $\frac{T}{P}$  might well have been expressed in the form of its reciprocal. To have used the reciprocal form, however, would have resulted in working with large numbers to the left of the decimal point rather than to the right of it. In order to avoid the loss of several significant digits the factor "E" would have to be expressed in its less realistic form also. The problems of making computations involving several significant digits to the right of the decimal were avoided by the form of the formula used. Since in either case the values of "s" would be standardized by dividing it by the national norm "N," the resulting values from either computational procedure are identical.

32.272 in 1948; and in Arizona, from a low of .106 in 1940 to a high of .325 in 1928. The greatest range for any state was shown by Kentucky, which had a low of .422 in 1948 and a high of 149.477 in 1952. The latter figure reflected the fact that in the 1952 election a plurality of only 700 popular votes in a total vote of 933,148 was the margin by which the 10 electoral votes of that state were given to Stevenson.<sup>5</sup>

Table I, which follows, is arranged to show the ranking of the states in terms of the relative "weights" of individual popular votes therein for the last eight elections as measured against a national norm of 1 for each election. The states are listed by groups alphabetically as determined by the number of times their popular vote values have exceeded or fallen below the national vote value norm. Group I includes those 12 states whose vote value ratings have exceeded the national norm in at least six of the last eight elections; Group II includes eight states whose vote value ratings have been above the national norm about as often as below it; while Group III includes the remaining 28 states whose vote value ratings have been below the national norm in most or all of the last eight elections.

As will be noted from the table, the four states of Illinois, New York, Ohio and Pennsylvania have never fallen below the national norm in terms of the value of their individual popular votes in any of the last eight elections, and close behind them are California, Massachusetts, Michigan and New Jersey, which have exceeded the national norm in all but one of the last eight elections in this respect. At the other extreme are 13 states, one of which is in the New England area, two in the South, and the remainder in the West, which have never in any of the last eight elections enjoyed a vote value rating above the national norm.

Another way of viewing these vote value statistics is to note the number of times a state has rated among the top quartile or the lowest quartile in the relative value of its popular votes in a presi-

<sup>5</sup> Other extraordinary "highs" were the popular vote values of 80.484 for Missouri in 1956; 60.483 for Ohio in 1948 and 53.544 in 1940; 50.525 for California in 1948; and 42.446 for Tennessee in 1952. Lowest vote value ratings were Mississippi's .068 in 1948; Vermont's .071 in 1948 and .073 in 1952; and South Carolina's .075 in 1944.

TABLE I  
GROUP I—HIGH VALUE VOTE STATES

States	High	Low	No. of Elections over National Norm	No. of Elections below National Norm	Present No. of Electoral Votes
Illinois	19.436	2.227	8	0	27
New York	32.273	3.187	8	0	45
Ohio	60.483	1.311	8	0	25
Pennsylvania	10.810	2.104	8	0	32
California	50.525	.709	7	1	32
Massachusetts	27.451	.833	7	1	16
Michigan	55.544	.601	7	1	20
New Jersey	13.950	.834	7	1	16
Connecticut	11.591	.462	6	2	8
Indiana	9.537	.800	6	2	13
Iowa	2.423	.374	6	2	10
Missouri	80.484	.529	6	2	13
Total electoral votes:					257

GROUP II—MEDIUM VALUE VOTE STATES

States	High	Low	No. of Elections over National Norm	No. of Elections below National Norm	Present No. of Electoral Votes
Minnesota	2.788	.373	5	3	11
Kentucky	149.477	.422	4	4	10
Wisconsin	6.391	.568	4	4	12
North Carolina	16.744	.262	3	5	14
Rhode Island	6.729	.142	3	5	4
Tennessee	42.446	.306	3	5	11
Texas	9.061	.330	3	5	24
West Virginia	2.191	.311	3	5	8
Total electoral votes:					94

## GROUP III—LOW VALUE STATES

States	High	Low	No. of Elections over National Norm	No. of Elections below National Norm	Present No. of Electoral Votes
Alabama	7.020	.106	2	6	11
Delaware	2.036	.164	2	6	3
Florida	1.048	.141	2	6	10
Kansas	2.506	.220	2	6	8
Louisiana	1.803	.128	2	6	10
Maryland	3.371	.446	2	6	9
New Hampshire	4.940	.193	2	6	4
Virginia	2.489	.292	2	6	12
Arkansas	1.913	.129	1	7	8
Colorado	2.280	.297	1	7	6
Maine	2.084	.163	1	7	5
Oklahoma	1.238	.230	1	7	8
Oregon	1.037	.277	1	7	6
South Carolina	5.841	.075	1	7	8
Washington	1.688	.325	1	7	9
Arizona	.325	.106	0	8	4
Georgia	.806	.145	0	8	12
Idaho	.898	.136	0	8	4
Mississippi	.404	.068	0	8	4
Montana	.445	.206	0	8	4
Nebraska	.912	.165	0	8	6
Nevada	.564	.128	0	8	3
New Mexico	.445	.173	0	8	4
North Dakota	.804	.099	0	8	4
South Dakota	.746	.109	0	8	4
Utah	.861	.149	0	8	4
Vermont	.490	.071	0	8	3
Wyoming	.950	.123	0	8	3
Total electoral votes:					180

dential election. Over the last eight elections, 28 different states have had vote value ratings which placed them among the top 12 for at least one election; but the first quartile vote value positions have been largely a monopoly of the following 12 states, which have taken 69 of the available 96 upper quartile positions for the last eight elections:

TABLE II  
TOP QUARTILE VOTE VALUE RATINGS\*

	Number of Times in Upper Quartile	Present Number of Electoral Votes
Illinois	8	27
New York	8	45
Pennsylvania	8	32
Michigan	6	20
Missouri	5	13
Ohio	6	25
Indiana	5	13
Massachusetts	5	16
New Jersey	5	16
California	4	32
Iowa	4	10
Wisconsin	4	12
Totals	69	261

\* Other states which have rated in the top quartile for at least one election are Tennessee and Texas (3 times each), Connecticut, Kentucky, Maryland, Minnesota, New Hampshire, North Carolina and Rhode Island (twice each), and Alabama, Arkansas, Delaware, Kansas, South Carolina, West Virginia, and Virginia (once each).

On the other hand 27 different states have had popular vote value ratings which have placed them in the lowest quartile for one or more elections. Again, certain states in this group have tended to monopolize these positions at the bottom of the scale, but only Arizona has the distinction of having ranked in the lowest quartile for every one of the last eight elections. Altogether, 18 states have rated in the lowest quartile in four or more of these elections. These 18 states have taken 86 of the 97 possible lowest quartile ratings for these eight elections. Four states—New Hampshire, Rhode Island, Delaware, and Kansas—have the distinction of having rated at least once in the top quartile and at least once in the lowest quartile for different elections.

TABLE III  
 LOWEST QUARTILE VOTE VALUE RATINGS \*

	Number of Times in Lowest Quartile	Present Number of Electoral Votes
Arizona	8	4
Mississippi	7	8
South Carolina	6	8
Louisiana	5	10
New Mexico	5	4
Nevada	5	3
Utah	5	4
Vermont	5	3
Alabama	4	11
Arkansas	4	8
Florida	4	10
Georgia	4	12
Idaho	4	4
Maine	4	5
Montana	4	4
North Dakota	4	4
South Dakota	4	4
Wyoming	4	3
Totals	86	109

\* Other states which have rated in the lowest quartile at least once are Nebraska and Rhode Island (twice each) and Colorado, Delaware, Kansas, New Hampshire, Oklahoma, Oregon and Washington (once each). Washington was tied with Arizona for inclusion in the lowest quartile group in the 1928 election, which accounts for the total of 97 possible places over eight elections.

The conclusion to be drawn from these statistics is obvious. They demonstrate in statistical terms the generally understood proposition that the outcome of presidential elections regularly depends upon the attitudes of voters in a number of states in the Northeastern and North Central parts of the country, plus California, even though these states have only about half of the total number of electors. They demonstrate further that so far as the individual voter is concerned the closeness factor, along with the larger blocs of electoral votes at stake in the popular voting in these states, overrides any relative advantage voters in the less populous or light voting states may have because of the awarding of electoral votes for senatorial seats or because of relatively low

voter participation, both of which tend to enhance the power of the individual voter by lowering the ratio of popular votes per elector. The balance of electoral power in the choice of the President rests with the "swing" voters in the high value vote states, not with the "swing" voters in the remaining parts of the country. Popular votes cast in any of the 18 lowest value vote states are very unlikely to have a significant influence on the national result. Whether they vote as regular partisans or shift their allegiance from election to election, voters in these areas merely go along for the ride; they never actually determine the direction of the trip.

Primarily because of its "winner-take-all" principle of awarding a state's electoral votes, the current electoral vote system thus is seen to operate as a kind of nation-wide gerrymander. It discriminates against certain elements of the national electorate on the basis of their state of residence. A system of voting which gives more potential weight to the opinions and attitudes of a voter who happens to live in one of the "strategic twelve" states than to one who resides elsewhere in the nation is difficult to justify from the standpoint of political equity and justice, if it be conceded that the choice of the President should be, and is in essence, a *national* act. Why should not ambivalent voters who constitute the balance of political power between the two major parties *nationally* have equal opportunity to influence the choice between the candidates of the two major parties, regardless of the one-sidedness of the partisan vote in the state in which they happen to reside? Why should the vote of a partisanly ambivalent factory worker in Boston, or of a "white collar" man in New York City, or of a truck farmer who lives in California have a greater potential influence over the outcome of a presidential election than that of a similarly less partisanly attached factory worker in Alabama, of a school teacher in Utah, of a wheat farmer in North Dakota? The accident of place of residence should have no relevance in the choice of the one officer who has the whole nation as his constituency and whose attitudes and actions affect so profoundly the conduct of national affairs in which all are equally concerned.

Voices have been raised in various places in defense of this aspect of the current system. Some spokesmen for the favored state

interests under the present system advance frankly the argument of self-interest and make no further effort to defend their position. Others, taking refuge in the point that the election of a President is still, in the formal sense at least, a *federal* act rather than a nationwide popular plebiscite, simply dismiss these inequitable aspects of the current system as being irrelevant or inconsequential. A few spokesmen for the states and interests favored by the current electoral plan have attempted, however, to formulate a more sophisticated argument in support of their stand against change. Facing up to this issue, Senator Paul Douglas, of Illinois, in the most recent Senate debate on the question of electoral college reform, defended the existing arrangement on the ground that the advantage presently enjoyed by the marginal voters in the dozen or so "strategic" states is merely an appropriate compensation for the under-representation of these more populous, urbanized states in the Senate. Furthermore, he argued, the general ticket system of choosing electors serves as a kind of corrective for under-representation of urban areas in the House growing out of state gerrymanders of the congressional districts in the heavily urbanized states. The electoral vote system on the whole, he maintained, has the commendable effect of giving a relatively stronger voice to the more progressively inclined urban elements in the choice of the President, thereby providing a proper balance for the over-representation of more conservatively minded rural elements through both Houses of Congress.<sup>9</sup>

There are several flaws in this line of argument, however. In the first place, the relative value of individual popular votes in electing a President, while tending to be greater in the more populous states than in the less populous ones, does not coincide exactly with the degree of under-representation of states in the Senate, population-wise. Some of the more populous states are quite regularly found in the low value vote categories, as are a good many medium-sized states; while some medium-sized states are found regularly among

<sup>9</sup> See particularly his remarks in the Senate debate on the Daniel-Mundt-Thurmond Amendment proposal, 102 *Cong. Rec.* 5535 ff. (1956). Similar views were expressed by Senator Kennedy, of Massachusetts, and Senator Case, of New Jersey, in that debate. It will be noted, of course, that each of the Senators mentioned represents a "high value" vote state.

the most "strategic" states. This is true because it is the number of electoral votes at stake, *modified by the closeness factor*, and not merely relative state populations, which mainly determines the relative value of popular votes. Moreover, since Senators are elected from the same constituencies which determine the disposition of the various blocs of electoral votes—that is, from state-wide constituencies—it may be assumed that the same voting elements in "strategic" states which have a critical importance in the presidential voting also have a similar special influence in the choosing of Senators from these states. Why should they have a double influence in shaping national policy through both the Senate and the Presidency?

In the second place, not all the important urban areas of the country are found in the regularly "high value" vote states—Baltimore, Houston, Minneapolis, New Orleans and Seattle being notable examples. The point that the general ticket system of choosing electors is a counter-balance for the gerrymandering of congressional districts is a valid one so far as it goes. But it should be pointed out that a more direct and appropriate line of action to deal with this inequity would be for Congress to enact remedial legislation setting limits upon permissible deviations from the population norm per district in every state.<sup>7</sup> To perpetuate the *status quo* in the matter of electing the President has the unfortunate effect of providing an additional excuse where none is needed for continuing present inequitable arrangements at the state level in the lay-out of congressional districts.

The assumption behind Senator Douglas's line of argument is that "liberal" or "progressive" elements now hold the balance of power between the two major parties in the "strategic" states, and by compelling both the major parties to bid for their support

<sup>7</sup> During the past several Congresses Representative Celler, of New York, who is Chairman of the House Judiciary Committee, has sponsored bills designed to require all states having two or more Representatives to elect them by districts and setting maximum limits on deviation from the population ratio per congressional seat in each state. In the current Congress hearings were held on a bill of this nature introduced by Representative Celler (H. R. 73) which would limit deviations from the district population norm in any state to 20 per cent, and on a similar bill (H. R. 575) introduced by Representative Multer, of New York, proposing a 10 per cent deviation limit.

they tend to insure the nomination of Presidential candidates favorable to their point of view. In more specific terms, this means that the candidates of both major parties will be individuals who will assume a more internationalist viewpoint on foreign affairs, a stronger pro-civil rights and pro-labor attitude, and a more sympathetic approach on policy matters looking toward relieving economic distress in urban areas, than would otherwise be the case.

Granting that these assumptions appear well-founded in the light of current political attitudes in the states and in the nation as a whole, one may nevertheless question their validity as a basis for a stand in opposition to reform of the presidential elective process. There is no assurance that the political elements whose position of influence induces candidates to take a "liberal" or "progressive" stand on issues will always be in a balance of power situation in these states, so that the President chosen will always be one more sensitive to their wishes than will the Congress as a whole. A presidential electoral mechanism maintained deliberately because it now tends to exaggerate the influence of certain urban, "progressive" elements in the electorate can conceivably boomerang and become a device for exaggerating the influence of some other kind of element in the future. It now tends to induce both major parties to bid for critical votes in the "strategic" state by taking a slightly left of center position of moderate progressivism on most major issues in order to counter the threat of an ultra-liberal "third-party." But who can say that a well-organized, articulate ultra-conservative element, setting itself up as a potential "third" party or as a cohesive interest group, may not come to be a balance of power influence in the politics of these states? The very same factors inherent in the present system of electing the President which cause both party candidates to make a special appeal for support from the ambivalent ultra-progressive elements could conceivably come to operate in reverse fashion and induce them to become more sensitive than their party is nationally to the demands of new balance of power elements in the "strategic" states. In that kind of situation would not the "liberal" or "progressive" cause come to be more closely associated with elements in other states not in a position to influence the outcome of presidential

elections so readily because of the unbalanced system of popular voting? A generation or so ago the political forces demanding "progressive" reforms in such matters as national currency and banking legislation, control of business monopolies, corrupt practices legislation, public power, conservation of natural resources, and agricultural relief had their main sources of strength in states of the West and South. The inability of these areas to bring sufficient pressure to bear in the choice of the President and through him upon the policies espoused by the national government during the 1920's caused a damming up of political demands which were not released until the landslide election of 1932 and the subsequent flood of "New Deal" economic and social reform.

A presidential election system which would force the rival major parties and candidates to appeal for support throughout the nation for those elements of the voting population who constitute the balance of power *nationally* between the two major parties will contribute in the long run to more stable, representative government insofar as the Presidency is concerned. By providing him with an electoral constituency that fairly mirrors the national state of mind, it will tend to improve the President's relations with Congress and with the party he represents before the nation. The nation is better served by relying upon the Congress in its varied membership, rather than upon the President, to give expression to the more extreme political views of the "right" or of the "left" or to policies associated with particular sections of the country. To maintain deliberately an electoral mechanism for choosing the President which distorts the national popular vote on the ground that it is a necessary element in a scheme of "balanced" powers as between the executive and legislative branches can lead to dangerous consequences. A House of Representatives representing substantially equal geographical blocs of people, a Senate representing the people as organized into states, and a President representing the people of the nation considered as one great constituency would appear to be as fairly and properly balanced a series of organs for guiding the nation's destinies as can be devised.

## PARTISAN INTERESTS

Viewed from the standpoint of its serving as a means of effectuating the national popular will, the present electoral college system exhibits another characteristic feature of a gerrymander. The current system has been given its present shape and form, within the limits imposed by the rules of the written Constitution, by major partisan interests operating at the state level. The statewide plurality vote rule governing the choice of presidential electors in the states has been adopted by state legislative bodies dominated by one major party or the other in the expectation that it will promote the interests of the dominant party in the respective states.

This is not to say, however, that both of the major parties as presently constituted as national organizations have an equal stake in maintaining unimpaired all features of the present system. By reason of the nature of the normal pattern of distribution of major party strength, state by state, the Republican party enjoys an advantage over its rival in the nation at large. In a "normal" two-party contest the Republican candidate can expect to amass a majority of the electoral votes with a nation-wide popular vote of considerably less magnitude than his Democratic opponent must receive to obtain an electoral majority. The likelihood of a Republican candidate's winning an electoral majority without obtaining a majority of the popular votes is considerably greater than that the Democratic party's candidate might so win; likewise, there is a greater likelihood that the Republican candidate may receive an electoral majority without even receiving a popular plurality in the nation.

A superficial view of the partisan advantage aspect of the present electoral vote system seems to lend support to the opposite conclusion. Proceeding on the assumption that the eleven states of the so-called "Solid South" can ordinarily be counted upon to deliver their electoral votes, at present totalling 128, to the Democratic party's candidate, regardless of his identity or of the issues, the position of the Democratic party under the current electoral vote system appears at first view to be a more advantageous one. The remaining states, with the exception of perhaps Maine and Vermont with a present total of eight electoral votes, so the as-

sumption goes, are the real battleground of the election. With 128 electoral votes "in the bag" the Democratic candidate's problem is conceived to be the comparatively easy one of capturing a minimum of 138 more electoral votes in the "battleground" area where a total of 395 electoral votes are at stake.<sup>8</sup> On the other hand a Republican candidate, it is thought, must capture approximately two-thirds of these 395 electoral votes to achieve a national electoral vote majority.

This estimate of the situation confronting the rival parties and their candidates, however accurately it may have reflected conditions which prevailed prior to 1920, does not have validity when examined in the light of actual voting performances of the states in the ten most recent presidential elections. It is founded on a conception of a "Solid South" in presidential elections which results of the past 40 years have shown to be something of a myth. It discounts the existence of an increasing number of nominal Democrats in that area who are "presidential Republicans," as well as the ever-present threat, carried into execution in 1948, of a "bolt" to a third party by a considerable segment of Southern Democratic party regulars. It also discounts the fact that there is another group of states which, on the basis of their electoral performance over the past 40 years, a Republican candidate can regard as safe for him to about the same degree that his Democratic opponent can count upon the "Solid South" bloc of states for himself.

A party regularity record of seven times or more out of the last ten presidential elections may be assumed to be a fairly reliable indicator of a state's present partisan voting tendency. It is only with this degree of assurance that Democratic party strategists can count upon their candidate's receiving the electoral votes of the "Solid South" states of Virginia, Florida, and Texas. One "Solid South" state, Tennessee, having been carried by the Republican

<sup>8</sup> With the addition of Alaska and Hawaii to the union of states, the total number of electoral votes for the 1960 election will rise to 537, with 269 constituting a majority and the "battleground" area including 401 electoral votes. Following the 1960 census and the subsequent Congressional reapportionment, the total number of electoral votes and the number representing a national majority will presumably revert to the pre-1960 figures.

candidate in four of the last ten elections, cannot be counted upon even with this degree of assurance by a Democratic candidate. This is offset by the fact that Kentucky has given its electoral votes to the Democratic candidate with a degree of consistency to justify its classification among the eleven fairly certain Democratic states, with a total strength of 127 electoral votes.

When this same standard of party regularity is applied to the other states, a total of fourteen of them, with 126 electoral votes, are found to be in the fairly certain Republican column. The electoral vote handicap which a Republican candidate carries into the "battleground" area because of the pro-Democratic fixation of a large proportion of Southern voters is offset by his opponent's having a similar handicap because of the pro-Republican fixation of large numbers of voters in certain other states. The rival major party candidates may, in fact, assume with nearly equal degrees of confidence that they will enter the actual "battleground area" each with a fairly secure block of something over 100 electoral votes gained elsewhere, if the various state electorates continue to maintain the pattern of political behavior revealed by the ten most recent elections. (See Table IV).

It is when viewed as a competition for popular support in the nation at large, however, that the presidential candidate of the Republican party, under the present electoral system, is seen to be in a position of distinct advantage over his Democratic opponent. Given a fairly normal pattern of distribution of popular support between the two major parties, the Republican candidate can expect to assemble a national electoral vote majority by receiving a somewhat smaller total national popular vote than that received by his Democratic rival. The advantage of the Republican candidate in this sense has averaged 1.427 per cent in the last eleven elections, and in four instances it has exceeded three per cent. With a national total major party popular vote now approaching 65,000,000 this means that a Republican candidate can quite reasonably expect to defeat his opponent in a close election, even though receiving upwards of 1,000,000 fewer popular votes in the nation at large. This results, of course, from the fact that a Republican candidate will ordinarily have a smaller percentage of his

TABLE IV

	All Elections	All but one election	All but two elections	All but three elections
States most frequently Democratic since 1920	Arkansas 8 Georgia 12	Alabama* 8 Mississippi* 14 North Carolina 8 South Carolina* 8	Louisiana* 11	Florida 10 Kentucky 10 Texas 24 Virginia 12
Current electoral vote totals	20	41	10	56
Grand total of normally "safe" Democratic votes				127
States most frequently Republican since 1920	Maine 5 Vermont 3		South Dakota 4 Indiana 13 Kansas 8 Nebraska 6 North Dakota 4	Colorado 6 Connecticut 8 Delaware 3 Iowa 10 Michigan 20 New Hampshire 4 Pennsylvania 32
Current electoral vote totals	8		35	83
Grand total of normally "safe" Republican votes				126

\* Carried by States Rights Democratic candidate in 1948.

popular vote represented in "wasted" state-wide pluralities than will be the case with a successful Democratic candidate.

The relative one-sidedness of most of the presidential contests from 1920 onward, both in terms of the popular vote results and the electoral vote, has tended to obscure this aspect of the functioning of the electoral vote system. It has been frequently noted, however, that in 1916 a shift of support by some 1500 voters to Hughes in California would have reversed the national result of that election; while in 1948, a shift of support by a total of some 30,000 voters in the key states of Ohio, Illinois, and California from Truman to Dewey would have given the latter an electoral vote majority. But it is hardly ever pointed out that had the 1916 electoral vote result been favorable to Hughes by the margin indicated, he would have won even though receiving a national popular vote short of a plurality by some 500,000 votes; while a majority electoral vote for Dewey on the basis of the potential vote shift indicated would have left him with some 2,000,000 fewer popular votes than Truman.

An analysis of the popular vote results in the eleven most recent presidential elections demonstrates that the pattern of relationship between national popular vote strength and electoral vote strength of the major parties evident in the 1916 and 1948 elections has been the general rule. In all but two of these eleven elections (1928 and 1956), the popular vote distribution was such that the Democratic candidate would have had to have a larger percentage of the national popular vote to acquire an electoral majority than the Republican candidate would have needed. This can be demonstrated by calculating the effect of a uniform, nation-wide shift of popular votes percentage-wise, from the winning candidate to the loser, up to that point where a reversal of the outcome, in terms of an electoral majority, would occur.

An analysis of the presidential vote for each of the last eleven elections in this manner is presented in Table V. It will be noted that in each case the potential "pivotal" state (*i. e.*, the state whose electoral votes were found to be ultimately marginal in reversing the result) was one of the "high value" popular vote states disclosed by Table I above. This is only another way of demonstrat-

ing the point made earlier that it is the marginal voters in the "high value" vote states who are in a position to decide a presidential election, and not the marginal voters in the other states.

TABLE V

Election	Republican per cent of total popular vote	Republican electoral vote	Democratic per cent of total popular vote	Democratic electoral vote	Per cent of popular vote shift necessary to reverse result	Potential "pivot" state	Per cent partisan advantage in pop. vote distribution pattern
1916	46.081	254	49.272	277	.191	California	2.809 Rep.
1920	60.360	404	34.183	127	14.929	Connecticut	3.681 Rep.
1924	54.056	382	28.829	136	13.347	New York	1.467 Rep.
1928	58.110	444	40.793	87	7.326	Illinois	2.665 Dem.
1932	39.653	59	57.437	472	8.854	Iowa	.476 Rep.
1936	36.540	8	60.194	523	10.282	Ohio	3.190 Rep.
1940	44.770	82	54.685	449	3.447	Pennsylvania	3.022 Rep.
1944	45.869	99	53.365	432	2.906	Massachusetts	1.684 Rep.
1948	45.122	189	49.510	303*	.422	Illinois	3.524 Rep.
1952	55.122	442	44.374	89	5.734	Michigan	.720 Rep.
1956	57.356	457	41.955	73*	6.593	Pennsylvania	2.215 Dem.
Average partisan advantage for all elections							1.427 Rep.

\* One Democratic elector failed to vote for regular party nominee.

So far as partisan attitudes toward electoral reform are concerned, the conclusion to be drawn from these figures is clear. The current system is such that any change in the direction of equating more closely the electoral vote results and the popular vote on a national basis will tend to diminish relatively the Republican party's chances of winning a presidential contest, assuming no partisan realignments would be induced by the change. Abandonment of the elector system entirely in favor of a nation-wide direct popular vote system would obviously have that effect. Substantially the same result would be produced by adoption of the Goldman-Humphrey plan of retaining the electoral vote idea, with a candidate receiving only two electoral votes for each state in which he obtains a popular plurality and the remaining 435 electoral votes being awarded to the candidates on the basis of the total national

popular vote each receives.<sup>9</sup> Retention of the electoral vote distribution formula for weighting state power and breaking up state blocs of electoral votes by application of the proportional distribution rule, as proposed in the Lodge-Gossett plan, or electing the electors in the same manner as Senators and Representatives are chosen, as currently advocated by a plan sponsored by Senator Mundt, of South Dakota, might even serve to put the shoe on the other foot by forcing the Republican candidate rather than his Democratic opponent as a present to the necessity of normally having to poll a larger proportion of the popular votes in the nation in order to win.<sup>10</sup>

Recent debates in Congress on electoral reform proposals have not centered heavily upon this element of national partisan bias in the present system as a reason for abandoning it in favor of an alternative method of electing the President. For Democratic members of Congress to emphasize the partisan imbalance of the present system in a national sense as a reason for change would, no doubt, only serve to stimulate Republican opposition to any proposal calculated to correct or minimize this imbalance. Republican members of Congress, on the other hand, have preferred for the most part to base their opposition to various reform proposals on grounds other than naked partisan self-interest in perpetuating the present system. However, the belief that adoption of the Lodge-Gossett proposal in 1950 would place Republican candidates at a disadvantage in terms of the national popular vote they might have to

<sup>9</sup> For an explanation and defense of this plan see Ralph M. Goldman, "Hubert Humphrey's S. J. 152: A New Proposal for Electoral College Reform," *Midwest Journal of Political Science*, II (February, 1958), 89-96.

<sup>10</sup> This is the conclusion reached by Ruth Silva in "The Lodge-Gossett Resolution: A Critical Analysis," *American Political Science Review*, XLIV (March, 1950), 86-99, wherein the results of past presidential elections are analyzed from the point of view of the effects if the distributive electoral vote principle of that plan had governed the outcome. After a similar study of past voting results, the same writer has concluded that the Mundt-Coudert plan for choosing electors in the same manner as members of Congress would also probably work to the relative advantage of the Democratic party's candidates if no major political realignments in the direction of greater Republican strength in the South took place. See "Reform of the Electoral System," *The Review of Politics*, 14 (July, 1952), 394-407 and *Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. J. Res. 3 et c.*, 84th Cong., 1st Sess. (1955), 333-345.

obtain under it in order to win undoubtedly was a major factor in causing Republican members of Congress to register majorities against it in each House.<sup>11</sup> The debate on this point did not go so far as to produce a theory justifying maintenance of the present system on the ground that it is in the national interest to require a larger number of voters in the country at large to install a Democratic candidate in the Presidency than is required to elect a Republican to this post. Such a theory might conceivably be advanced on the ground that Republican votes generally tend to represent a higher *per capita* wealth or property interest than Democratic votes; or that there is a large "submerged" Republican vote in certain Southern states because of the enforcement of suffrage requirements in a partisanly biased manner there.

#### CONCLUSION

For well over a hundred years there have been spasmodic efforts in Congress to formulate and submit to the states a revisory constitutional amendment on the election of the President. The object of most of these efforts has been to bring the electoral process into closer harmony with the popularly accepted principle that the choice of the President should be effected by the votes of the people of the nation. James Wilson, reporting to the Pennsylvania ratifying convention on the problems confronting the Convention of 1787, declared that the framers had been "perplexed with no part of this plan of a Constitution so much as the mode of choosing the President of the United States."<sup>12</sup> Most of the basic issues on this question that troubled the framers have since disappeared; in fact, the stone rejected by the builders—that the President should come into office through the suffrage of the people—has become the

<sup>11</sup> When the Lodge-Gossett Resolution was passed by the Senate in 1950 but was rejected in the House, Republican Senators voted against it by a margin of 23 to 18, while in the House, Republican Representatives opposed it 93 to 47. Both Republican floor leaders, Senator Taft, of Ohio, and Representative Martin, of Massachusetts, urged their colleagues to vote against it. *Cf.* 96 *Cong. Rec.* 1269, 10425 (1950).

<sup>12</sup> Farrand, *op. cit.*, III, 166. A similar estimate was made by Madison in discussing this feature of the new constitution in the Virginia ratifying convention. *Ibid.*, 329.

cornerstone of the modern structure of the Presidency. The problem of devising a revisory amendment to clear away the out-moded electoral college machinery is today no less a "perplexing" one; but it is "perplexing" in much the same sense that getting a gerrymandered state legislature to agree upon submission of a plan for putting an end to its unrepresentative character is perplexing. A set of vested interests has evolved under the present system. Their spokesmen in Congress can block the submission of any reform proposal not to their liking. Experience has shown that it will be most difficult to induce them to relinquish the political advantages they enjoy, or mistakenly think they enjoy, under the present system.

Much zeal and ingenuity has been displayed in Congress in recent years in attempts to devise a plan upon which agreement by a sufficient number might be reached to submit it to the states for ratification; but the conflicting interests have so far proved irreconcilable. It is not the purpose here to propose any new formula for resolving the *impasse*, or to analyze at length the various proposals that have been advanced recently by way of solution. It suffices to say that the only plan which will assure to the citizens of each state complete equality of voting power with those of others in the choice of the President is a direct national vote system, as advocated in recent Congresses by the late Senator Langer of North Dakota, former Senator Lehman of New York, and several others. Such a system would seem to imply as a corollary a nationally uniform definition of suffrage standards; but even without this feature, it would be preferable from the standpoint of political equity to the present unbalanced one. Under a national popular vote system, even without a nationally uniform set of suffrage requirements, it would be highly improbable that states, given present national constitutional restrictions in the matter of defining suffrage standards, would move in the direction of limiting the suffrage more than they do at present; or conversely, that they would commit political *hari-kari*, as some observers predict they would, by lowering suffrage standards to an absurd degree for the sake of increasing their electoral weight in presidential contests.<sup>13</sup>

<sup>13</sup> For example, Edward S. Corwin has observed: "Obviously, under this direct

The pressure of its own interests might well tend, however, to push every state in the direction of permitting and encouraging all its adult citizens to exercise the franchise—a not altogether undesirable result.

The main stumbling block to presidential electoral reform is the provision, embedded in the concrete of constitutional phraseology, guaranteeing to each state electoral voting power in accordance with the total number of its Senators and Representatives. This principle is regarded by many observers—particularly by most members of Congress—as giving a substantial advantage to the less populous or light-voting states.<sup>14</sup> Consequently members of Congress from such states tend to set up as a *sine qua non* of constitutional reform retention of the electoral vote formula for weighting state power. In the light of the political realities of the current system, as shown above, the real political interest and advantage of the citizens of these states may suffer by continued insistence on this point. If the price of retaining the electoral vote system is, as recent votes in Congress seem to indicate, maintenance of its accompanying feature of the general ticket device for choosing state slates of electors, it is a dear one for the citizens of the less

national vote plan it would be to the self-interest of each state to throw as many voters into the fray as possible. It is conceivable that the country might wind up with a twelve-year-old electorate and that nonvoting would become a new form of juvenile delinquency." *The President: Office and Powers* (4th ed.; New York: New York University Press, 1957), p. 52. Criticisms in this vein overlook the point that if states are required to apply the same suffrage standards to presidential elections as apply to elections of members of the most numerous branch of their own legislatures, as current proposals of this character commonly stipulate, there would be little likelihood that they would adopt unreasonably low standards for voting merely for the sake of increasing their relative influence in choosing the President.

<sup>14</sup> For an example of this kind of misinterpretation regarding the actual impact of the present system upon the relative influence of voters in the less populous and the more populous states in choosing the President see Sidney Hyman, *The American President* (New York: Harper and Bros., 1954), p. 153. Clinton Rossiter in his *The American Presidency* (New York: Harcourt, Brace and Co., 1956) takes the realistic view that "the present electoral system is gerrymandered in favor of the urban vote" of the large, politically doubtful states. For this as well as other reasons he favors retention of the present "humpty-dumpty system that works" rather than trying to secure "a neat one that may blow up in our faces." *Ibid.*, pp. 144, 145.

populous and light-voting states; for it means they will continue to be denied the right to exercise a significant influence in the election of the President. It means that the choice of the President will continue to be dictated by the partisanly ambivalent "balance of power" voters in the populous, politically doubtful states. When this point is more fully appreciated, perhaps the way will be opened for the formation of a coalition of interests in Congress that will be sufficiently great to bring about submission of a reform amendment based upon outright acceptance of the nationwide direct popular vote idea, or upon something on the order of the Goldman-Humphrey modification of it which would retain only that part of the electoral vote formula reflecting the equal representation of the states in the Senate.

