PROUD POLISH RECORD

HON. EMILIO Q. DADDARIO

OF CONNECTICUT

IN THE HOUSE OF REPRESENTATIVES

Friday, August 14, 1970

Mr. DADDARIO. Mr. Speaker, 31 years ago on September 1, 1939, Nazi troops launched an unprovoked attack against Poland, signaling the first of Hitler's military drives to dominate the European continent. Unaided by any ally, Poland's small army was the first to offer any forceful resistance to the Nazi invasion.

Polish cavalry faced tanks, while the infantry stood up to the fearsome Nazi blitzkrieg, unintimidated by the awesome superiority of the most powerful army the world had ever seen. Though the Polish forces could hold off their invaders for only a few weeks, underground resistance to the occupation plagued the Nazis throughout the war. On August 1, 1944, 200,000 Poles gave their lives during a massive uprising in the capital city of Warsaw. Thousands of other, less dramatic instances of resistance bear witness to the tenacity of the Polish people in their struggle to regain their freedoms.

Elsewhere in Europe, Polish forces played a significant role in the Western war, fighting with allied troops in the battles of Britain and Narvick, and elsewhere in Italy, France, Belgium, and the Netherlands.

On September 1, we observe both an infamous aggression against a peaceful people, and the courageous efforts of those people to resist and overcome their invaders. Americans of Polish descent are justly proud of that record.

SENATE—*Tuesday, September 8, 1970*

The Senate met at 12 noon and was called to order by Hon. JAMES B. ALLEN, a Senator from the State of Alabama.

The Chaplain, the Reverend Edward L. R. Elson, D.D., offered the following prayer:

Almighty God, we thank Thee for Thy providence which has brought us to this hour, for Thy protection and guidance in work and in travel, and for the knowledge that underneath are The Everlasting Arms. We thank Thee for work completed and for the challenge of work yet to be undertaken.

Guide the Members of this body that the rule of Thy higher will may transcend all lesser wills. Make us worthy of these demanding days which try men's souls and cry aloud for wisdom and courage. Help us to lengthen our days by intensity of living, to fill the swift hours with mighty deeds and to lay up treasures where neither moth nor rust doth corrupt.

Be with all nations of the world. Draw them together in firm spiritual alliance. Lift all consultations for peace into the higher order of Thy kingdom and lead all men in paths of righteousness for Thy name's sake.

Through Jesus Christ our Lord. Amen.

DESIGNATION OF ACTING PRESIDENT PRO TEMPORE

The PRESIDING OFFICER. The clerk will please read a communication from the President pro tempore of the Senate (Mr. RUSSELL).

The assistant legislative clerk read the following letter:

U.S. SENATE,
PRESIDENT PRO TEMPORE,
Washington, D.C., September 8, 1970.

To the Senate:

Being temporarily absent from the Senate, I appoint Hon. JAMES B. ALLEN, a Senator from the State of Alabama, to perform the duties of the Chair during my absence.

RICHARD B. RUSSELL,
President pro tempore.

Mr. ALLEN thereupon took the chair as Acting President pro tempore.

MESSAGE FROM THE HOUSE RECEIVED DURING ADJOURNMENT—ENROLLED BILLS SIGNED

Under authority of the order of the Senate of September 2, 1970, the Secretary of the Senate, on September 2, 1970, received a message from the House of Representatives, which announced that the Speaker had affixed his signature to the following enrolled bills:

H.R. 13434. An act to provide for the disposition of judgment funds on deposit to the credit of the Hualapai Tribe of the Hualapai Reservation, Arizona, in Indian Claims Commission dockets Nos. 90 and 122, and for other purposes;

H.R. 13716. An act to improve and clarify certain laws affecting the Coast Guard Reserve;

H.R. 14097. An act to authorize the use of funds arising from a judgment in favor of the Citizen Band of Potawatomi Indians of Oklahoma in Indian Claims Commission docket No. 96, and for other purposes;

H.R. 14827. An act to provide for the disposition of funds to pay a judgment in favor of the Sac and Fox Tribes of Oklahoma in Indian Claims Commission docket No. 220, and for other purposes; and

H.R. 16416. An act to reimburse the Ute Tribe of the Uintah and Ouray Reservation for tribal funds that were used to construct, operate, and maintain the Uintah Indian irrigation project, Utah, and for other purposes.

REPORT OF A COMMITTEE SUBMITTED DURING ADJOURNMENT

Under authority of the order of the Senate of September 2, 1970, Mr. BIBLE, from the Committee on Interior and Insular Affairs, reported favorably, with an amendment, on September 4, 1970, the bill (S. 368) to authorize the Secretary of the Interior to make disposition of geothermal steam and associated geothermal resources, and for other purposes, and submitted a report (No. 91–1160) thereon, which was printed.

EXECUTIVE REPORT OF A COMMITTEE SUBMITTED DURING ADJOURNMENT

Under authority of the order of the Senate of September 1, 1970, Mr. FULBRIGHT, from the Committee on Foreign Relations, on September 4, 1970, reported favorably, without reservation, Executive F, 91st Congress, second session, the Supplementary Extradition Convention with France, signed at Paris on February 12, 1970, and submitted a report (Ex. Rept. No. 91–23) thereon, which was printed.

THE JOURNAL

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the reading of the Journal of the proceedings of Wednesday, September 2, 1970, be dispensed with.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

MESSAGES FROM THE PRESIDENT—APPROVAL OF BILLS

Messages in writing from the President of the United States were communicated to the Senate by Mr. Leonard, one of his secretaries, and he announced that the President had approved and signed the following acts:

On August 24, 1970:

S. 3102. An act to amend section 4 of the Fish and Wildlife Act of 1956, as amended, to extend the term during which the Secretary of the Interior can make fisheries loans under the act, and for other purposes.

On August 28, 1970:

S. 3547. An act to authorize the Secretary of the Interior to construct, operate, and maintain the Narrows unit, Missouri River Basin project, Colo., and for other purposes.

EXECUTIVE MESSAGE REFERRED

As in executive session, the Acting President pro tempore laid before the Senate a message from the President of the United States, submitting the nomination of Herman Nickerson, Jr., of Maine, to be Administrator of the National Credit Union Administration, which was referred to the Committee on Banking and Currency.

ORDER FOR ADJOURNMENT UNTIL 10 A.M. TOMORROW AND FOR THE REMAINDER OF THE WEEK

Mr. MANSFIELD. Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand in adjournment until 10 a.m. tomorrow, and for the rest of the week, up to and including Friday, September 11, 1970.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

PROGRAM FOR THE REMAINDER OF THE SESSION

Mr. MANSFIELD. Mr. President, I must say, in all candor, that I am some-

what disturbed at the reported lack of attendance today and express the hope that, with the concurrence of the leadership on the minority side, and the Senate, beginning tomorrow, it will be possible to operate on a two-shift basis, so that items on the calendar, which are being held and are debatable, can be brought up and considered. Whether this can be done will, of course, depend upon the consent of the Senate as a whole; but I would point out that we have much important legislation left, including six appropriation bills, and that we have some important legislation still coming out of the committees. There is also a certain number of important legislative items on the calendar.

I, therefore, believe that the Senate had better try to clear the calendar, so that an adjournment can be reached as soon as possible.

May I say that unless there is a great deal of cooperation and understanding on the part of every one of the 100 Senators, it will be well nigh an impossibility to adjourn sine die by the middle of next month. So, with those few words, I yield to the acting minority leader.

Mr. GRIFFIN. I thank the distinguished majority leader. I know I speak for the minority leader, the Senator from Pennsylvania (Mr. SCOTT), when I say that the leadership on this side wants to cooperate in every possible way with the majority leader in his efforts to complete the business of the Senate, if at all possible, before election day so we can adjourn sine die.

Even though it may appear, as a practical matter, that such a goal is impossible, we all know that sometimes the impossible is accomplished.

So far as the request of the majority leader that the Senate come in early each day and work late, on a two-shift basis, I want to indicate that the procedure certainly has the approval of the minority leadership. I wish to commend the distinguished majority leader for his approach and his attitude which points strongly in the direction of expediting the business of the Senate. And I wish to assure him that he will have every possible cooperation from the leadership on this side of the aisle.

Mr. MANSFIELD. I thank the distinguished acting minority leader.

Mr. WILLIAMS of Delaware. Mr. President, I am glad the majority leader is outlining a program by which we may be able to complete our business. I certainly want to cooperate with him. I am sure all Senators do.

I wonder whether it would not be a good policy, rather than have all committees meeting during a session of the Senate, which means that all we do in this Chamber is spin our wheels and do nothing while the committees are in session, that the leadership on both sides of the aisle get together to establish the priorities and decide which bills need most to be considered during this session, then give permission for those committees which have those bills in hand to meet and shut down the other committees.

As long as we keep grinding out the bills, even though they are referred to as minor bills or "cats and dogs," they are expensive cats and dogs. Bills that are passed in the last days of a session are ofttimes bills which should not pass. Therefore, it might be better to let them go over to next year, rather than to give blanket permission for all committees to meet, to keep grinding out the bills and holding hearings on legislation, which it is known will not be promoted or pushed until next year. Why not just stop committees from meeting during the session of the Senate except as they deal with legislation of high priority.

In that manner we could bring this session to an end and I am sure by so doing we would gain the thanks of the taxpayers.

Mr. MANSFIELD. The distinguished Senator from Delaware (Mr. WILLIAMS) has been reading my thoughts. I hope everyone can hear me. I have been out in Montana where the air is dry and invigorating, and I have returned to Washington with a touch of laryngitis. But I have instructed the Policy Committee to start compiling such a list, and I intend to discuss the matter with the Republican leadership, to see just what we jointly can consider as most important in the way of items to be taken up the remainder of this year.

I hope to have that ready for the regular luncheon of the Republican membership of the Senate, which I understand will be held tomorrow, rather than today.

I also want to discuss with the Republican leadership the possibility of an executive session, with only Members of the Senate present, both Republicans and Democrats, so that together we can discuss the program and see what we can do in the way of cooperating and considering bills in order to get them passed and wind up this session at some reasonable date.

But I want to say that the leadership cannot do it alone. It will take the cooperation and understanding and the pulling together of the entire membership—all 100 Members. The leadership can propose but the membership disposes.

Mr. GRIFFIN. If the Senator from Montana will permit me to correct an error, I indicated earlier that the Republican policy luncheon would be held on Wednesday of this week. I understand now that I was in error, and that the luncheon is virtually scheduled for Thursday of this week.

Mr. MANSFIELD. We will have the list for the Senator then.

Mr. BAYH. I would like to express a special word of appreciation to the distinguished majority leader for his willingness to make the electoral reform bill the pending business.

I realize that it was not an easy decision to make because the electoral reform proposal will, in all probability, create heated debate and discussion.

I believe the decision was right: that in the history of the country, this could be one of the most critical decisions the majority leader has made.

As one who is very anxious to see this matter debated and discussed, I should like to say now, at least from my standpoint, that I see no reason for prolonged debate. But I hope that the people of the country will not be denied the opportunity to have the Senate vote on the joint resolution, inasmuch as the House passed it by a 339-to-70 vote.

So far as the proponents are concerned, probably by the end of this week we could be persuaded to vote on the joint resolution, if the opponents are ready to vote. I hope that will happen, and in short order, so that we can get on with the other important items of business before the Senate, to which the majority leader has already referred.

Mr. MANSFIELD. Mr. President, I am in full accord with the remarks just made by the distinguished Senator from Indiana. I feel the same way about the equal rights amendment which, I hope, will be given expeditious consideration when it is laid before the Senate, as well as the President's proposal to reform the present welfare assistance in the name of what I think is referred to as the Family Assistance Act.

Personally, I have some grave questions in my own mind about that particular proposal. But I think that President Nixon's interest in this matter should be given every consideration and that the Senate should give the President the courtesy of having the bill reported out so that it can be discussed, debated, and disposed of and receive the same consideration as other important legislation which is coming to us in the shank of the evening, so to speak.

ORDER OF BUSINESS

Mr. MANSFIELD. Mr. President, I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

ORDER FOR A PERIOD FOR THE TRANSACTION OF ROUTINE MORNING BUSINESS

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that there be a period for the transaction of routine morning business with the statements therein limited to 3 minutes.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

ORDER FOR THE UNFINISHED BUSINESS TO BE LAID BEFORE THE SENATE

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that at the close of the period for the transaction of routine morning business, the unfinished business be laid before the Senate.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

ORDER OF BUSINESS

Mr. MANSFIELD. Mr. President, I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The assistant legislative clerk proceeded to call the role.

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

ORDER FOR ADJOURNMENT TO 10 A.M. ON WEDNESDAY, THURSDAY, AND FRIDAY THIS WEEK

Mr. MANSFIELD. Mr. President, I ask unanimous consent that the Senate adjourn tonight, Tuesday, Wednesday, Thursday, and that for the rest of this week, Friday included, the Senate convene at 10 a.m.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Is there further morning business?

ORDER OF BUSINESS

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. WILLIAMS of Delaware. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

ANNUAL FEDERAL EXPENDITURES FOR CIVILIAN PAYROLL IN THE EXECUTIVE BRANCH FOR FISCAL YEARS 1960–70

Mr. WILLIAMS of Delaware. Mr. President, the Joint Committee on Reduction of Federal Expenditures has just compiled a report summarizing the annual Federal expenditures for civilian payroll in the executive branch for the fiscal years 1960 through 1970.

This report shows that the average civilian employment for 1970 for civilian agencies was at an all-time high, totaling 1,694,157, or an increase of 374,125 over 1960, or an increase of 38,181 over 1969.

Civilian employment in the Defense Department for 1970 declined 41,457, but this was still 209,467 over 1960.

The annual cost of a civilian payroll in 1970 was $26,834,000,000, or more than double the $12,564,000,000, total cost in 1960.

The annual cost of the payroll in civilian agencies alone has climbed from $6,804,000,000 in 1960 to an all-time high of $15,621,000,000 in 1970 while the civilian employment payroll in the Defense Department has risen from $5,760,000,000 in 1960 to $11,213,000,000 in 1970.

I ask unanimous consent that this statistical report be printed in the RECORD.

There being no objection, the report was ordered to be printed in the RECORD, as follows:

ANNUAL FEDERAL EXPENDITURES [1] FOR CIVILIAN PAYROLL IN EXECUTIVE BRANCH—FISCAL YEARS 1960–70

Fiscal year	Civilian agencies	Defense Department [2] (civilian employment)	Total
1960	$6,804,000,000	$5,760,000,000	$12,564,000,000
1961	7,546,000,000	6,026,000,000	13,572,000,000
1962	7,898,000,000	6,318,000,000	14,216,000,000
1963	8,659,000,000	6,603,000,000	15,262,000,000
1964	9,297,000,000	6,818,000,000	16,115,000,000
1965	10,043,000,000	7,102,000,000	17,145,000,000
1966	10,875,000,000	7,732,000,000	18,607,000,000
1967	11,727,000,000	8,668,000,000	20,395,000,000
1968	12,919,000,000	9,395,000,000	22,314,000,000
1969	13,840,000,000	10,298,000,000	24,138,000,000
1970	15,621,000,000	11,213,000,000	26,834,000,000

[1] Dollars in rounded amounts.
[2] Excludes pay for foreign nationals not on regular rolls ($390,000,000 for fiscal year 1970).

Civilian employment in the Executive Branch during fiscal year 1970 averaged 2,958,364 as compared with 2,961,640 in fiscal year 1969. This decrease of 3,276 reflects inclusion in 1970 of an annual average of about 32,300 temporary 19th Decennial Census employees.

The average Executive Branch employment total of 2,958,364 for fiscal year 1970 includes an average of 2,592,549 full time employees in permanent positions; the total of 2,961,640 for fiscal year 1969 includes an average of 2,623,472 full time permanent employees. This was a decrease of 30,923 in average full time permanent employment.

The following tabulation shows average civilian employment for the Executive Branch broken between civilian military agencies for fiscal years 1960 through 1970.

AVERAGE CIVILIAN EMPLOYMENT BY FEDERAL AGENCIES IN EXECUTIVE BRANCH—FISCAL YEARS 1960–70

Fiscal year	Civilian agencies	Defense Department [1] (civilian employment)	Total
1960	1,320,032	1,054,740	2,374,772
1961	1,323,567	1,037,356	2,360,923
1962	1,373,485	1,058,676	2,432,161
1963	1,417,937	1,063,720	2,481,657
1964	1,434,104	1,042,552	2,476,656
1965	1,443,376	1,024,482	2,467,858
1966	1,500,349	1,074,080	2,574,429
1967	1,605,919	1,234,474	2,840,393
1968	1,654,973	1,280,853	2,935,826
1969	1,655,976	1,305,664	2,961,640
1970	1,694,157	1,264,207	2,958,364

[1] Excludes foreign nationals not on regular rolls (averaging 109,237 for fiscal year 1970).

Mr. WILLIAMS of Delaware. Mr. President, I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

COMMUNICATIONS FROM EXECUTIVE DEPARTMENTS, ETC.

The ACTING PRESIDENT pro tempore (Mr. ALLEN) laid before the Senate the following letters, which were referred as indicated:

REPORTS OF THE COMPTROLLER GENERAL

A letter from the Acting Comptroller General of the United States, transmitting, pursuant to law, a report on the examination of financial statements of the Federal Home Loan Bank Board for the fiscal year ended December 31, 1969 (with an accompanying report); to the Committee on Government Operations.

A letter from the Acting Comptroller General of the United States, transmitting, pursuant to law, a report on the need for improved operation and maintenance of municipal waste treatment plants, Federal Water Quality Administration, Department of the Interior, dated September 1, 1970 (with an accompanying report); to the Committee on Government Operations.

REPORT COVERING PROPERTY DONATED TO PUBLIC HEALTH AND EDUCATIONAL INSTITUTIONS AND CIVIL DEFENSE ORGANIZATIONS

A letter from the Acting Secretary of Health, Education, and Welfare, transmitting, pursuant to law, a report covering personal property donated to public health and educational institutions and civil defense organizations and real property disposed of to public health and education institutions, for the period January 1 through June 30, 1970 (with an accompanying report); to the Committee on Government Operations.

REPORT ON RECLASSIFICATION OF LANDS WITHIN THE MIDVALE IRRIGATION DISTRICT OF THE RIVERTON PROJECT IN WYOMING

A letter from the Secretary of the Interior, reporting, pursuant to law, on the reclassification of lands within the boundary of the Midvale Irrigation District of the Riverton project in Wyoming; to the Committee on Interior and Insular Affairs.

THIRD PREFERENCE AND SIXTH PREFERENCE CLASSIFICATIONS FOR CERTAIN ALIENS

A letter from the Commissioner, Immigration and Naturalization Service, Department of Justice, transmitting, pursuant to law, reports relating to third preference and sixth preference classifications for certain aliens (with accompanying papers); to the Committee on the Judiciary.

ADMISSION INTO THE UNITED STATES OF CERTAIN DEFECTOR ALIENS

A letter from the Commissioner, Immigration and Naturalization Service, Department of Justice, transmitting, pursuant to law, copies of orders entered granting admission into the United States of certain defector aliens (with accompanying papers); to the Committee on the Judiciary.

SUSPENSION OF DEPORTATION OF CERTAIN ALIENS

Two letters from the Commissioner, Immigration and Naturalization Service, Department of Justice, transmitting, pursuant to law, copies of orders suspending deportation of certain aliens, together with a statement of the facts and pertinent provisions of law pertaining to each alien, and the reasons for ordering such suspension (with accompanying papers); to the Committee on the Judiciary.

REPORT OF THE LAW ENFORCEMENT ASSISTANCE ADMINISTRATION

A letter from the Associate Administrators, Law Enforcement Assistance Administration, U.S. Department of Justice, transmitting, pursuant to law, the second annual report of the Administration for fiscal year 1970 (with an accompanying report); to the Committee on the Judiciary.

TEMPORARY ADMISSION INTO THE UNITED STATES OF CERTAIN ALIENS

A letter from the Commissioner, Immigration and Naturalization Service, Department of Justice, transmitting, pursuant to

law, copies of orders entered, granting temporary admission into the United States of certain aliens (with accompanying papers); to the Committee on the Judiciary.

ENROLLED BILLS SIGNED

The ACTING PRESIDENT pro tempore (Mr. ALLEN) announced that on today, September 8, 1970, he signed the following enrolled bills, which had previously been signed by the Speaker of the House of Representatives:

H.R. 13434. An act to provide for the disposition of judgment funds on deposit to the credit of the Hualapai Tribe of the Hualapai Reservation, Ariz., in Indian Claims Commission dockets numbered 90 and 122, and for other purposes;

H.R. 13716. An act to improve and clarify laws affecting the Coast Guard Reserve;

H.R. 14097. An act to authorize the use of funds arising from a judgment in favor of the Citizen Band of Potawatomi Indians of Oklahoma in Indian Claims Commission Docket No. 96, and for other purposes;

H.R. 14827. An act to provide for the disposition of funds to pay a judgment in favor of the Sac and Fox Tribes of Oklahoma in Indiana Claims Commission docket numbered 220, and for other purposes; and

H.R. 16416. An act to reimburse the Ute Tribe of the Uintah and Ouray Reservation for tribal funds that were used to construct, operate, and maintain the Uintah Indian irrigation project. Utah, and for other purposes.

BILLS INTRODUCED

Bills were introduced, read the first time and, by unanimous consent, the second time, and referred as follows:

By Mr. MCCLELLAN:

S. 4322. A bill for the relief of Vincenzo Li Mandri; to the Committee on the Judiciary.

By Mr. YARBOROUGH (for himself, Mr. KENNEDY, Mr. COOPER, and Mr. SAXBE):

S. 4323. A bill to create a health security program; to the Committee on Labor and Public Welfare.

(The remarks of Mr. YARBOROUGH when he introduced the bill appear below under the appropriate heading.)

S. 4323—INTRODUCTION OF THE HEALTH SECURITY ACT

Mr. YARBOROUGH. Mr. President, today I introduce a bill along with Senator EDWARD KENNEDY of Massachusetts, Senator JOHN SHERMAN COOPER of Kentucky, and Senator WILLIAM SAXBE of Ohio, to create a national health security program, to be funded out of general revenue appropriations. While I jointly introduced S. 4297 along with Senator KENNEDY and 14 other Senators on Thursday, August 27, 1970, that bill was to be financed through the establishment of a Health Security Trust Fund and therefore was referred to the Senate Finance Committee. The bill I introduce today is financed out of general appropriations and therefore is to be referred to the Senate Labor and Public Welfare Committee.

I give notice that I intend to hold hearings on the national health security program on Wednesday, September 23, 1970, and Thursday, September 24, 1970. While this bill would normally be heard by the Health Subcommittee, of which I am chairman, I have had requests from members of the full committee to be able to participate in this hearing. Because of these requests and because of the significance of this bill and its relation to our national health problems, I will hold these hearings as chairman of the full Labor and Public Welfare Committee, rather than as chairman of the Health Subcommittee. In this manner, all the members of the full committee will be afforded an opportunity to participate. It is hoped that further hearings in addition to the 2 days in September will be held this year by me.

The need for improved health care is obvious and grows more persistent every day. The figures that used to shock us have now become common place: The United States ranks 13th in death of infants during the first year of life; seventh in the percentage of mothers who die in childbirth; no better than 18th in the life expectancy of males and 11th for females; and 16th in the death rate of males in their middle years.

This is the comparison of the United States with other industrial countries of the world, which are the countries that surpass us in their health programs. In all instances, the United States ranked better than 15 or 20 years ago. The fact is that the health of Americans is lagging behind our other national improvements and the national response to this fact is inadequate.

Not only are the facts becoming commonplace, but the rhetoric is also. At a press conference last year, President Richard Nixon said:

> We face a massive crisis in this area [health care] and unless action is taken both administratively and legislatively to meet that crisis within the next two or three years, we will have a breakdown in our medical care system which could have consequences affecting millions of people throughout the country.

Yet, the President's response to the crisis was to veto this year the two major bills that Congress put before him to improve health care.

It should be pointed out that Americans have not just sat idly by, but we have attempted within the framework of the present health system to secure adequate health care. In 1969, Americans spent $63 billion for health care—seven percent of the gross national product. This expenditure exceeded 1950 figures by over 500 percent. Since 1950 when health spending amounted to $12 billion the total health expenditures have risen at an average of 8.8 percent per year—an average of 12.2 percent in the past 3 years.

Furthermore, we have tried to cover the costs of health care through insurance, but the coverage has been inadequate. In 1968, health insurance was a giant $12 billion industry but benefit payments met only about one-third of the private costs of health care, leaving two-thirds to be paid from elsewhere by the recipients of the services. Twenty-four to 34 million Americans under age 65 have no private health insurance benefits at all.

That is a wide spread, Mr. President, but exact figures are impossible to obtain. We have searched this out, and we know that somewhere between those brackets is the accurate figure. The fact is that despite huge expenditures for health care and for medical insurance in this country, we still have not developed a system of adequate financing of health care for the people.

Even if we were to develop a better system of financing health care, however, there would still be an intense need to revamp the system to provide efficient care for all our citizens. That is, it is not simply a matter of more money to be spent on the present system, since experts maintain that $14 billion of the $63 billion we spend on health care is wasted and hospital overuse runs over 25 percent of the beds. With this great shortage in hospital beds, the medical people who have worked on the problem say there is 25 percent overuse, use of beds which is not needed.

The lessons of medicare and medicaid should teach us that the system needs to be changed so as to provide the motivation for better care at a more reasonable cost, not the motivation to provide more health care whether needed or not. Unfair advantage has been taken of the public health care programs of the past and the bill that I introduce today is designed to prevent that abuse.

Let me repeat, Mr. President, that health experts in this country think that, of this $63 billion, $14 billion is wasted, and that we could, with better planning, get health care to all the people for much less money.

Under the national health security program bill which I offer today, costs of necessary health care would be paid for in full. This includes physician services, psychiatric services, hospital and other institutional care, dental services, medicines, therapeutic devices, appliances, and equipment, as well as needed supporting services.

Furthermore, money will be provided to develop a more adequate supply and appropriate distribution of health professionals and supporting personnel. The program will actively encourage more efficient organization of existing health manpower, provide funds for special training of physicians, dentists, and other health workers needed for this program, and apply financial incentives to stimulate the movement of health manpower to medically deprived areas.

We have heard talk all during this Congress that there were "new" proposals forthcoming from the administration, that we should wait and see.

Mr. President, I have been urged for months to wait and see, that the administration will have a bill. And I have been waiting. But it is late in the session. The time for waiting is now past. We can no longer wait for a band-aid approach for our disintegrating health system that needs major surgery. While the bill I introduce today is not the complete answer, it is the best answer we have yet come up with.

Mr. President, I have been on the Health Subcommittee of the Senate for

nearly 13 years, up until last year under the great Lister Hill as chairman. I have listened to the evidence for 13 years. We have talked to the experts, and we have studied this question for years. Last January, when I became chairman of the subcommittee, I expressed a desire to introduce such a comprehensive health care bill. This, I repeat, is the best we have been able to come up with after hearing testimony from the people who have worked in this field over in the private structure of the economy, made a study of the problem, and come in with their recommendations.

I ask unanimous consent that the bill be printed in the RECORD.

The PRESIDING OFFICER (Mr. BELLMON). The bill will be received and appropriately referred; and, without objection, the bill will be printed in the RECORD in accordance with the Senator's request.

The bill (S. 4323) to create a health security program, introduced by Mr. YARBOROUGH (for himself, Mr. KENNEDY, Mr. COOPER, and Mr. SAXBE), was received, read twice by its title, and was referred to the Committee on Labor and Public Welfare.

ADDITIONAL COSPONSOR OF A BILL

S. 3220

At the request of the Senator from West Virginia (Mr. BYRD) the Senator from Nevada (Mr. CANNON) was added as a cosponsor of S. 3220, to protect a person's right of privacy by providing for the designation of obscene or offensive mail matter by the sender and for the return of such matter at the expense of the sender.

PROPOSED AMENDMENT TO THE CONSTITUTION RELATING TO DIRECT POPULAR ELECTION OF THE PRESIDENT AND VICE PRESIDENT—AMENDMENTS

AMENDMENT NO. 878

Mr. GRIFFIN submitted amendments, intended to be proposed by him, to the joint resolution (S.J. Res. 1) proposing an amendment to the Constitution to provide for the direct popular election of the President and Vice President of the United States, which were ordered to lie on the table and to be printed.

ANNOUNCEMENT OF HEARINGS: FEDERAL DATA BANKS AND THE BILL OF RIGHTS

Mr. ERVIN. Mr. President, in recent months, with the discovery of each new Federal data bank and data system, public concern has increased that some of the Federal Government's collection, storage, and use of information about citizens may raise serious questions of individual privacy and constitutional rights.

The Constitutional Rights Subcommittee has received countless letters and telegrams from Members of Congress and from interested persons all over the United States, urging that hearings be scheduled to consider the total impact of some of these data programs on preservation of individual rights.

I wish to announce that, in response to these demands, the subcommittee has scheduled a new series of hearings on "Federal data banks and systems and the bill of rights." The first stage of the hearings will be held October 6, 7, and 8.

The subcommittee has already undertaken a survey of Federal data banks and automated data systems to determine what statutory and administrative controls are governing their growth and what rights and remedies are provided for the citizen. The analysis of the executive branch replies to that subcommittee questionnaire, together with the hearings held in the last session on "privacy and Federal questionnaires," and the hearings which begin in October, will assist Congress in determining the need for a new independent agency to control Federal data banks on behalf of the privacy and due process rights of citizens. It has been my conviction that such an agency is needed, along with new remedies in the courts and other corrective actions. I detailed the reasons for my belief in a Senate speech in November 1969.

The purpose of the hearings is: First, to learn what Government data banks have been developed; second, how far they are already computerized or automated; third, what constitutional rights, if any, are affected by them; and, fourth, what overall legislative controls, if any, are required.

Witnesses familiar with the constitutional and legal issues, as well as the practical problems raised by some current and proposed data programs will document these for the record. The Secretary of the Army and other representatives of the Defense Department have already been invited to attend the October hearings to describe how and why the Army and other armed services have collected and stored information on civilians, and to what extent the records have been automated for easy access and retrieval.

Prof. Arthur R. Miller of the University of Michigan Law School, author of a forthcoming book, "The Dossier Society: Personal Privacy in the Computer Age," has been invited to describe the state of the law governing information flow in our society and its relationship to legal rights. Another witness will be Christopher Pyle, an attorney and former Army intelligence officer, who has investigated the Army's civil disturbance data programs, and has written widely on the subject.

In later hearings, other representatives of the executive departments and agencies will be invited to respond to the complaints and fears which have been expressed by the public. They will be afforded the opportunity to explain exactly what their data programs on people involve, and how, if at all, the privacy, confidentiality and due process rights of the individual are respected.

The subcommittee has received enthusiastic support from specialists in the computer sciences, in both the computer industry and in the academic community. We hope to receive the benefit of their expertise for our hearing record.

Mr. President, our Nation is predicated on the fundamental proposition that citizens have a right to express their views on the wisdom and course of governmental policies. This involves more than the currently popular notion of a so-called right to dissent. Our system cannot survive if citizen participation is limited merely to registering disagreement with official policy; the policies themselves must be the product of the people's views. The protection and encouragement of such participation is a principal purpose of the first amendment.

More than at any other time in our history, people are actively expressing themselves on public questions and seeking to participate more directly in the formulation of policy. Mass media have made it easy for large numbers of people to organize and express their views in written and oral fashion. Rapid means of transportation have aided our mobile population to move easily to sites of central and local authority for the purpose of expressing their views more publicly. The freedom of our form of government and the richness of our economy have made it possible for individuals to move about freely and to seek their best interests as they will in vocations and avocations of their choice, or indeed, to pursue none at all for a time, if that is what they wish. If modern technology has provided citizens with more efficient means for recording their dissent, or for registering their political, economic, or social views, it has also placed in the hands of executive branch officials new methods of taking note of that expression of views and that political activity. For these reasons, those individuals who work actively for public causes are more visible than ever before.

These new sciences have accorded those who control government increased power to discover and record immutably the activities, thoughts and philosophy of an individual at any given moment of his life. That picture of the person is recorded forever, no matter how the person may change as time goes on. Every person's past thus becomes an inescapable part of his present and future. The computer never forgets.

To be sure, recordkeeping is nothing new in the history of government; nor indeed, is the habit all governments and all societies have of surveillance, blacklisting and subtle reprisal for unpopular political or social views. Men have always had to contend with the memories of other men. In the United States, however, we are blessed with a Constitution which provides for due process of law. This applies to the arbitrary use of the recordkeeping and information power of government against the individual.

Despite these guarantees, the new technology has been quietly, but steadily, endowing officials with the unprecedented political power which accompanies computers and data banks and scientific techniques of managing information. It has given Government the power to take

note of anything, whether it be right or wrong, relevant to any purpose or not, and to retain it forever. Unfortunately, this revolution is coming about under outdated laws and executive orders governing the recordkeeping and the concepts of privacy and confidentiality relevant to an earlier time.

These developments are particularly significant in their effect on the first amendment to our Constitution.

No longer can a man march with a sign down Pennsylvania Avenue and then return to his hometown, his identity forgotten, if not his cause.

No longer does the memory of the authorship of a political article fade as the pages of his rhetoric yellow and crumble with time.

No longer are the flamboyant words exchanged in debate allowed to echo into the past and lose their relevance with the issue of the moment which prompted them.

No longer can a man be assured of his enjoyment of the harvest of wisdom and maturity which comes with age, when the indiscretions of youth, if noticed at all, are spread about in forgotten file cabinets in basement archives.

Instead, today, his activities are recorded in computers or data banks, or if not, they may well be a part of a great investigative index.

Some examples come readily to mind from the subcommittee survey.

The Civil Service Commission maintains a "security file" in electrically powered rotary cabinets containing 2,120,000 index cards. These bear lead information relating to possible questions of suitability involving loyalty and subversive activity. The lead information contained in these files has been developed from published hearings of congressional committees, State legislative committees, public investigative bodies, reports of investigation, publications of subversive organizations, and various other newspapers and periodicals. This file is not new, but has been growing since World War II. The Commission has found it a reasonable, economical and invaluable tool in meeting its investigative responsibilities. It is useful to all Federal agencies as an important source of information.

The Commission chairman reports:

> Investigative and intelligence officials of the various departments and agencies of the Federal Government make extensive official use of the file through their requests for searches relating to investigations they are conducting.

In its "security investigations index," the Commission maintains 10,250,000 index cards filed alphabetically covering personnel investigations made by the Civil Service Commission and other agencies since 1939. Records in this index relate to incumbents of Federal positions, former employees, and applicants on whom investigations were made or are in process of being made.

The Commission's "investigative file" consists of approximately 625,000 file folders containing reports of investigation on cases investigated by the Commission. In addition, about 2,100,000 earlier investigative files are maintained at the Washington National Records Center in security storage. These are kept to avoid duplication of investigations or for updating previous investigations.

For authorization for these data banks, the Commission cites Executive Order 10450, an order promulgated in 1953.

Another department, the Housing and Urban Development Department, is considering automation of a departmental procedure. According to the report made to the subcommittee:

> The data base would integrate records now included in FHA's Sponsor Identification File, Department of Justice's Organized Crime and Rackets File, and HUD's Adverse Information File. A data bank consisting of approximately 325,000 3x5 index cards has been prepared covering any individual or firm which was the subject of, or mentioned prominently in any investigations dating from 1954 to the present. This includes all FBI investigations of housing matters as well. In addition, HUD maintains an index file on all Department employees which reflects dates and types of personnel security investigations conducted under the provisions of Executive Order 10450.

In the interest of preparing for possible civil disturbances and for protecting the armed services from subversion, the Department of the Army and other military departments have been collecting information about civilians who have no dealing with the military services.

The Secret Service has created a computerized data bank in the pursuit of its programs to protect high Government officials from harm and Federal buildings from damage. Their guidelines for inclusion of citizens in this data bank refer to "information on professional gate crashers; information regarding civil disturbances; information regarding anti-American or anti-U.S. Government demonstrations in the United States or overseas; information on persons who insist upon personally contacting high Government officials for the purpose of redress of imaginary grievances, and so forth."

In the area of law enforcement, the Bureau of Customs has installed a central automated data processing intelligence network which is a comprehensive data bank of suspect information available on a 24-hour-a-day basis to Customs. The initial data base, according to the Secretary of the Treasury, is a "modest" one comprising some 3,000 suspect records: He states:

> These records include current information from our informer, fugitive and suspect lists that have been maintained throughout the Bureau's history as an enforcement tool and which have been available at all major ports of entry, though in much less accessible and usable form. With the coordinated efforts of the Agency Service's intelligence activities, steady growth of the suspect files is expected.

This data bank, which is used by the Bureau to identify suspect persons and vehicles entering the United States, is an "essential tool" in performance of Customs officers' search and seizure authority, Secretary Kennedy has stated.

The Department of Justice is establishing comprehensive law enforcement data systems in cooperation with State governments, and is funding State data programs for law enforcement, civil disturbance and other surveillance purposes.

The National Science Foundation has created a data bank of scientists.

The Department of Health, Education, and Welfare has established a data bank on migrant children to facilitate the transfer of school records.

During our subcommittee hearings last year, case after case was documented of the vast programs to coerce citizens into supplying personal information for statistical data banks in the Census Bureau and throughout other Federal agencies.

These are only a few of the data programs which have raised due process of law questions from Congress and the public.

How do these things come about? It would be unfair, perhaps, to attribute suspicious political motives, or lack of ethics to those responsible for any one program or for any group of programs for collecting and storing personal information about citizens. Frequently, they just grow over the years. Sometimes, executive department data banks are either merely good faith efforts at fulfillment of specific mandates from Congress; or they are based on what some officials think to be implied mandates to acquire information necessary for Congress to legislate. If so, then Congress has no one to blame but itself when such programs unnecessarily threaten privacy or other rights. But it then has an even greater responsibility for acting, once its own negligence is discovered.

Perhaps the most such officials can be charged with is overzealousness in doing their job within narrow confines, to the exclusion of all other considerations.

Sometimes the issue of threats to individual rights is presented only after a data system has developed, and only after practical problems are raised which were not envisioned on paper.

At times, due process may be threatened by the failure of the computer specialists to consider only the information on a person absolutely essential for their programing.

There are political reasons also. One is the failure of heads of executive departments and agencies to mind their own stores and stay out of the business of other agencies. Each department does not need to seize the total man when it administers a program; only those portions of him necessary for the job. Another reason is the tendency of executive branch officials in the interest of political expediency and shortcuts to law and order goals, to seize upon the techniques of data banks, intelligence gathering, and surveillance activities as a substitute for hard-hitting, practical law enforcement work by the proper agencies, and for creative administration of the laws.

All of these excuses will not help the law-abiding citizen who, at the whim of some official, is put into an intelligence-type data bank which is part of a network of inquiry for all manner of governmental purposes.

No one would deny that the Government of such a populous and farflung country should not avail itself of the efficiency offered by computers and scientific data management techniques. Clearly, Government agencies must, as Congress has charged them, acquire, store, and process economically the information it obtains from citizens for administrative purposes. There is an ever increasing need for information of all kinds to enable the Congress to legislate effectively and the executive branch to administer the laws properly.

Furthermore, there is an obvious need in such a complex mobile society for recording and documenting amply the official relationship between the individual and his government.

More and more frequently, misguided individuals are resorting to violence and violation of the law. Communities are faced with rising crime rates. Local, State, and Federal Government have a right and a duty to know when a person has a legal record of violation of the law which, under the law, would deny him certain rights or benefits. They should be able to ascertain these matters quickly.

There are always some problems of accuracy and confidentiality with such records, especially when automated. It is not the carefully designed individual law enforcement data banks which concern the public. Rather, the subcommittee study is revealing that data programs which have aroused the most apprehension recently are those—

Which bear on the quality of first amendment freedoms by prying into those protected areas of an individual's personality, life, habits, beliefs, and legal activities which should be none of the business of Government even in good causes;

Which are unauthorized, or unwarranted for the legitimate purpose of the agency;

Which keep the information they acquire too long, and which by the very retention of unknown data may intimidate the individual subject;

Which are part of a network of data systems;

Which make little, if any provision for assuring due process for the individual in terms of accuracy, fairness, review, and proper use of data, and thereby may operate to deny the individual rights, benefits, privileges, reputation, which are within the power of Government to influence, grant or deny.

There is growing concern that the zeal of computer technicians, of the systems planners, and of the political administrators in charge of the data systems threatens to curtail the forces of society which have operated throughout our history to cool political passions and to make our form of government viable by allowing a free exchange in the marketplace of ideas.

The new technology has made it literally impossible for a man to start again in our society. It has removed the quality of mercy from our institutions by making it impossible to forget, to forgive, to understand, to tolerate. When it is used to intimidate and to inhibit the individual in his freedom of movement, associations, or expression of ideas within the law, the new technology provides the means for the worst sort of tyranny. Those who so misuse it to augment their own power break faith with those founders of our Constitution who, like Thomas Jefferson, swore upon the altar of God eternal hostility against every form of tyranny over the mind of man.

Mr. President, it has become dangerously clear in recent times that unless new controls are enacted, new legal remedies are provided, and unless Federal officials can be persuaded to exercise more political self-control, this country will not reap the blessings of man's creative spirit which is reflected in computed technology. Rather, if the surveillance it encourages is allowed to continue without strict controls and safeguards, we stand to lose the spiritual and intellectual liberty of the individual which have been so carefully nourished and so valianty defended, and which our Founding Fathers so meticulously enshrined in the Constitution.

I say this out of my conviction that the undisputed and unlimited possession of the resources to build and operate data banks on individuals, and to make decisions about people with the aid of computers and electronic data systems, is fast securing to executive branch officials a political power which the authors of the Constitution never meant any one group of men to have over all others. It threatens to unsettle forever the balance of power established by our Federal Constitution.

Our form of government is the fruition of an ideal of political, economic, and spiritual freedom which is firmly rooted in our historical experience. Basic to its fulfillment has always been the monumental truth that such freedom is truly secure only when power is divided, limited, and called to account by the people. For this reason the central Government was divided into three separate and equal branches.

For this reason, the bill of rights was added to secure certain areas of liberty against incursion by Government and the exercise of Federal power was limited to certain purposes.

For this reason, we cherish and protect the legal freedom of each citizen to develop his mind and personality and to express them free of unwarranted governmental control.

I differ with those who say that there are no existing checks on this developing power of computer technology, for I believe they already exist in our form of Government. The guarantees are established in our Constitution.

The forthcoming hearings will help Congress determine how these guarantees may best be implemented to meet the demands of the computer age.

In the interest of responding to the many inquiries from scholars, reporters and members of the public who are working on this subject, I should like to refer to other sources of materials which provide useful background information.

The subject of how Government manages its information systems, and its paperwork, how and when it uses computers and automation to assist in this effort, has been a continuing subject of concern by a number of congressional committees and their efforts should interest those working on this subject.

The Senate Administrative Practice and Procedures Subcommittee has contributed valuable hearings, reports and studies on the subject of computers, privacy, and Government dossiers. Particularly informative is their 1967 report "Government Dossier: Survey of Information on Individuals Contained in Government Files."

The Senate Government Operations Committee has, in other years, conducted comprehensive hearings and issued reports on Government information systems and management uses of computers.

In the House of Representatives, the Committee on Science and Astronautics has held a provocative and stimulating series of hearings and panel discussions on the impact of technology, especially on the management of Government information.

The House Government Activities Subcommittee of the Government Operations Committee, chaired by Representative JACK BROOKS, has produced valuable hearings, reports, and legislation on "Data Processing Management in the Federal Government."

More than anyone else, Representative CORNELIUS GALLAGHER has continually pointed out the dangers to individual rights and privacy of the establishment of a national data center, and his Special Subcommittee on Invasion of Privacy, after stimulating hearings, produced a classic and concise report entitled, "The Data Bank Concept." The record of his hearings contains testimony from many expert witnesses on the philosophy of privacy and computer technology.

The Census and Statistics Subcommittee of the House Post Office and Civil Service Committee produced a thought-provoking and influential report in the 89th Congress entitled "The Federal Paperwork Jungle." Scholars will find most informative that subcommittee's hearings and reports dealing with the paperwork requirements placed upon business, industry, and the public by the Federal departments.

I commend the publications of all of these committees and the thoughtful speeches of the chairmen and the members of these committees to persons interested in this subject.

It is my hope that the hearings and study by the Constitutional Rights Subcommittee will add a unique and valuable dimension to the public and congressional dialog on the role of data banks, information systems, and computers in our constitutional form of government.

Ben A. Franklin, in an excellent article in the New York Times on June 28, 1970, has described some of the current data banks and computers in the Federal Government and their possible effect on individual rights and privacy. I ask unanimous consent that his most perceptive article be printed in the RECORD at this point, together with the following

thoughtful articles and editorials. These are only a few of the excellent editorials and articles on this subject which have come to my attention, and they suggest a nationwide interest.

Editorials from the Greensboro, N.C., Daily News, July 1, 1970; Asheville, N.C., Times, June 18, 1970; Omaha, Nebr., World Herald, January 15, 1970; Sioux Falls, S. Dak., Argus, January 16, 1970; New York Post, June 30, 1970; Washington, D.C., Post, April 24, 1970; Asheville, N.C., Citizen, July 2, 1970; New York Times, July 4, 1970; Computerworld, March 4, 1970, and August 27, 1969; Huntsville, Ala., Times, July 12, 1970; Washington, D.C., Evening Star, March 16, 1970; and Houston, Tex., Post, March 16, 1970.

An article by Tom Wicker, entitled "In the Nation: A Right Not To Be Data-Banked?" from the New York Times, July 7, 1970, and an article from the Boston, Mass., Herald Traveler by John S. Lang, entitled "Big Brother, U.S., Is Watching You," April 19, 1970, an article from the Morning Call, Allentown, Pa., entitled "Guardian of Freedom," June 30, 1970, "Mitchell Defends Justice Department's 'Big Brother' Role," by Jared Stout, Staten Island, N.Y., Advance, July 19, 1970, and "Justice Department Keeps Files on Activists," by Morton Kondracke, Roanoke, Va., World News, March 11, 1970.

There being no objection, the editorials and articles were ordered to be printed in the RECORD, as follows:

[From the New York Times, June 28, 1970]

FEDERAL COMPUTERS AMASS FILES ON SUSPECT CITIZENS—MANY AMONG HUNDREDS OF THOUSANDS LISTED HAVE NO CRIMINAL RECORDS—CRITICS SEE INVASION OF PRIVACY

(By Ben A. Franklin)

WASHINGTON, June 27.—The police, security and military intelligence agencies of the Federal Government are quietly compiling a mass of computerized and microfilmed files here on hundreds of thousands of law abiding yet suspect Americans.

With the justification that a revolutionary age of assassination, violent political dissent and civil disorder requires it. The Government is building an army of instantly retrievable information on "persons of interest."

The phrase is an agent's term for those citizens, many with no criminal records, whom the Government wants to keep track of in an effort to avert subversion, rioting and violence or harm to the nation's leaders.

Critics of this surveillance, so far few in number, believe that the collection and dissemination of such information on noncriminals—for whatever purpose—is unauthorized by law and raises the most serious constitutional questions.

The foremost among them, Senator Sam J. Ervin, Jr., Democrat of North Carolina, has said that computerized files already in existence here are leading the country toward a "police state."

Discussions with officials, an examination of some known data files and information supplied by the Senator show that the files often contain seemingly localized and mundane information, reflecting events that today are virtually commonplace.

The leader of a Negro protest against welfare regulations in St. Louis, for example, is the subject of a teletyped "spot report" to Washington shared by as many as half a dozen Government intelligence gathering groups.

The name of a college professor who finds himself unwittingly, even innocently, arrested for disorderly conduct in a police roundup at a peace rally in San Francisco goes into the data file.

A student fight in an Alabama high school is recorded—if it is interracial.

Government officials insist that the information is needed and is handled discreetly to protect the innocent, the minor offender and the repentant.

The critics—including the Washington chapter of the American Civil Liberties Union and Representative Cornelius E. Gallagher, Democrat of New Jersey—charge that the system is an invasion of privacy and a potential infringement of First Amendment rights of free speech and assembly.

MASS SURVEILLANCE SYSTEMS

Senator Ervin, a conservative, a student of the Constitution, a former judge of the North Carolina Superior Court, and the chairman of the Senate Subcommittee on Constitutional Rights, says that the advent of computer technology in Government file keeping is pushing the country toward "a mass surveillance system unprecedented in American history."

In a recent series of Senate speeches, Mr. Ervin said that the danger was being masked by a failure of Americans to understand "the computer mystique" and by the undoubted sincerity and desire for "efficiency" of the data bank operations and planners.

The Government is gathering information on its citizens at the following places:

A Secret Service computer, one of the newest and most sophisticated in Government. In its memory the names and dossiers of activists, "malcontents," persistent seekers of redress, and those who would "embarrass" the President or other Government leaders are filed with those of potential assassins and persons convicted of "threats against the President."

A data bank compiled by the Justice Department's civil disturbance group. It produces a weekly printout of national tension points on racial, class and political issues and the individuals and groups involved in them. Intelligence on peace rallies, welfare protests and the like provide the "data base" against which the computer measures the mood of the nation and the militancy of its citizens. Judgments are made; subjects are listed as "radical" or "moderate."

A huge file of microfilmed intelligence reports, clippings and other materials on civilian activity maintained by the Army's Counterintelligence Analysis Division in Alexandria, Va. Its purpose is to help prepare deployment estimates for troop commands on alert to response to civil disturbances in 25 American cities. Army intelligence was ordered earlier this year to destroy a larger data bank and to stop assigning agents to "penetrate" peace groups and civil rights organizations. But complaints persist that both are being continued. Civilian officials of the Army say they "assume" they are not.

Computer files intended to catch criminal suspects—the oldest and most advanced type with the longest success record—maintained by the Federal Bureau of Investigation's National Crime Information Center and recently installed by the Customs Bureau. The crime information center's computer provides 40,000 instant, automatic teletype printouts each day on wanted persons and stolen property to 49 states and Canada and it also "talks" to 24 other computers operated by state and local police departments for themselves and a total of 2,500 police jurisdictions. The center says its information is all "from the public record," based on local and Federal warrants and complaints, but the sum product is available only to the police.

A growing number of data banks on other kinds of human behavior, including, for example, a cumulative computer file on 300,000 children of migrant farm workers kept by the Department of Health, Education, and Welfare. The object is to speed the distribution of their scholastic records, including such teacher judgments as "negative attitude," to school districts with large itinerant student enrollments. There is no statutory control over distribution of the data by its local recipients—to prospective employers, for example.

WARNING BY ERVIN

Senator Ervin has warned: "Regardless of the purpose, regardless of the confidentiality, regardless of the harm to any one individual [that might occur if there were no computer files], the very existence of Government files on how people exercise First Amendment rights, how they think, speak, assemble and act in lawful pursuits, is a form of official psychological coercion to keep silent and to refrain from acting."

But despite his sounding of such alarms, Senator Ervin has noted that there is "unusual public and Congressional complacency." When he speaks on the Senate floor of "techniques for monitoring our opinions" and of "grave threats to our freedoms," the chamber is more often than not nearly empty. He has gained little Congressional support and scant attention outside the Congress.

Meanwhile, various official and high-level pressures on Government agencies to acquire computers and to advance their surveillance are producing results.

The pressures include a stern recommendation for the broadest possible surveillance of "malcontents" and potential assassins by the Warren Commission, which investigated the assassination of President Kennedy. The commission's mandate is widely cited in the Government as the authority for citizen surveillance.

The commission, headed by former Chief Justice Earl Warren, disapproved as too narrow, the criteria for persons to be bought under "protective" surveillance proposed in 1964 by the Secret Service. The guidelines were "unduly restrictive," the commission declared, because they required evidence of "some manifestation of animus" by disgruntled and activist citizens before those persons could be brought under Secret Service surveillance as poential "threats to the President."

EVERY AVAILABLE RESOURCE

"It will require every available resource of the Government to devise a practical system which has any reasonable possibility of revealing such malcontents," the commission said.

The guideline was broadened. A computer was installed by the Secret Service last January. The commission's edict became a surveillance bench mark.

For surveillance of persons who may be involved in civil disturbances, the riots of 1967 and 1968 served the same purpose.

"The Warren Commission and the riots legitimized procedures which, I grant you, would have been unthinkable and, frankly, unattainable from Congress in a different climate," one official said. "There are obvious questions and dangers in what we are doing but I think events have shown it is legitimate," the official declined to be quoted by name.

Senator Ervin contends that in the "total recall," the permanence, the speed and the interconnection of Government data files there "rests a potential for control and intimidation that is alien to our form of Government and foreign to a society of free

men." The integration of data banks, mixing criminal with noncriminal files, is already underway, according to his subcommittee.

INTEGRATION OF FILES

The subcommittee has been advised by the Department of Housing and Urban Development, for example, that its data systems planners have proposed to integrate on computer tape files concerning the following: the identities of 325,000 Federal Housing Administration loan applicants; the agency's own "adverse information file," the Justice Department's organized crime and rackets file, and F.B.I. computer data on "investigations of housing matters." The object, the Department said, is a unified data bank listing persons who may be ineligible to do business with H.U.D.

As another example of how computer data proliferates, the subcommittee cites a report it received from the Internal Revenue Service.

The I.R.S., with millions of tax returns to process, was one of the earliest agencies to computerize. It has also had a reputation as a bastion of discretion. The privacy of individual tax returns has been widely regarded as inviolate, to be overcome only by order of the President.

But the subcommittee has been told that the I.R.S. has "for many years" been selling to state tax departments—for $75 a reel—copies of magnetic tapes containing encoded personal income tax information. It is used to catch non-filers and evaders of state taxes.

The District of Columbia and 30 states bought copies of the I.R.S. computer/covering returns from their jurisdictions in 1969, the service has told the subcommittee. Each local jurisdiction was merely "requested" to alert its employees that the unauthorized disclosure of Federal tax data was punishable by a $1,000 fine.

FIREARMS DATA FOR SALE

The I.R.S. also sells at cost—apparently to anyone who asks—the copies of its data files of registrants under the various Federal firearms laws it enforces.

The Secret Service computer file is capable of instant, highly sophisticated sorting and retrieval of individuals by name, alias, locale, method of operation, affiliation, and even by physical appearance.

The agency's Honeywell 2200, with random access capability, makes it possible to detect, investigate and detain in advance "persons of interest" who might intend—or officials concede "they might not but we don't take chances"—to harass, harm or "embarrass" officials under its protection.

Unknown to most Americans, the names, movements, organizations and "characteristics" of tens of thousands of them—criminals and noncriminals—are being encoded in the Secret Service data center here.

The names of other thousands have been inserted in less specialized computers operated by the Justice Department and the F.B.I. Although the agencies insist that they do not, the computers can—and Senator Ervin stresses that no law says they may not—"talk" to each other, trading and comparing in seconds data that may then spread further across the nation.

The Secret Service can now query its computer and quickly be forewarned that, say, three of the 100 invited guests at a Presidential gathering in the White House Rose Garden are "persons of protective interest."

Under current Secret Service criteria, they may have been regarded by someone as the authors of reportedly angry or threatening or "embarrassing" statements about the President or the Government. The action taken by the Secret Service may range from special observation during "proximity to the President" to withdrawal of the invitation.

What constitutes a computer-worthy "threat" thus becomes important. The Secret Service asserts that it applies relatively easy-going and "sophisticated" standards in deciding who is to be encoded. But the critics point out that the vast capacity of a computer for names and dossiers—unlike that of a paper filing system, which has self-limiting ceiling based on the ability to retrieve—is an encouragement to growth.

The information or "data base" for a Secret Service computer name check flows into the protective intelligence division from many sources—abusive or threatening letters or telephone calls received at the White House, F.B.I. reports, military intelligence, the Central Intelligence Agency, local police departments, the Internal Revenue Service, Federal building guards, individual informants.

Much of it that may be "of interest" to the Federal monitors of civil disturbance data is screened out, Secret Service spokesmen say, or is merely name-indexed by the computer with a reference to data reproducible elsewhere.

According to guidelines distributed by the Secret Service last August, the types of information solicited for insertion in the computer—broadened at the insistence of the Warren Commission—included items about:

Those who would "physically harm or embarrass" the President or other high Government officials.

Anyone who "insists upon personally contacting high Government officials for the purpose of redress of imaginary grievances, etc."

Those who may qualify as "professional gate crashers."

Participants in "anti-American or anti-U.S. Government demonstrations in the United States or overseas."

In an interview, Thomas J. Kelley, assistant director of the Secret Service for protective intelligence, said the computer name insertions already totaled more than 50,000. The Secret Service is extremely careful, he said, both in evaluating the encoded subjects and in checking to determine that those who receive a printout are entitled to it.

But there apparently is no formal guideline or list of criteria for dissemination, as there is for insertion. And direct, automatic, teletype access to the computer from distant Secret Service bureaus—the system used by the airlines and the National Crime Information Center—may be the next step, Mr. Kelley said.

Nothing demonstrates how remote access multiplies the output of a computer better than the crime information center's system, staged by the F.B.I. in 1966.

With direct-access teletype terminals in 21 state capitals and large cities, the information center computer here can be queried directly by local police departments on the names, aliases, Social Security numbers, license tag numbers and a broad array of stolen goods (including boats) that come hourly before the police.

An officer in a patrol car tailing a suspicious car can radio his dispatcher, ask for a check of a license number, and be told by teletype and radio in less than a minute that the automobile is stolen and that its occupants may be "armed and dangerous."

With one of the newest and most sophisticated random access computers in Federal service the Secret Service data center can also perform some wizardry that no other equipment here can master. It can be ordered, for example, to print out a list of all potential trouble makers—"persons of protective interest"—at the site of a forthcoming Presidential visit. The random access scanning can be geographical.

Photographs and descriptions can be assembled for the traveling White House detail. Investigations, even detentions, can be arranged at the site.

"You take a waiter in a hotel dining room where the boss is going to speak," a Secret Service spokesman explained. "Let's say the computer turns up his name and we investigate and decide it would be better for him to be assigned to some other duties. No one has a constitutional right to wait on the President, you know. That's how it works."

Cued by another more elegant electronic program, the same computer can also produce all the information it contains on the "characteristics" of subjects encoded on its tapes—all the short, fat, long-haired, young white campus activists in Knoxville, Tenn., for example. Only the Secret Service computer can do that.

The American Civil Liberties Union office here protested last October that the Constitution protects such acts as an effort merely to "embarrass" a Government official, the persistence of citizens in seeking redress even of "imaginary" grievances, and their participation in "anti-U.S. Government demonstrations." The Secret Service, however, has declined to withdrew or amend its intelligence reporting guidelines.

"They seem satisfactory to us," Mr. Kelley said. "If we weren't getting the information we want, we'd change them."

Under the heading, "Protective Information," the guidelines read as follows:

"A. Information pertaining to a threat, plan or attempt by an individual, a group, or an organization to physically harm or embarrass the persons protected by the U.S. Secret Service, or any other high U.S. Government official at home or abroad.

"B. Information pertaining to individuals, groups, or organizations who have plotted, attempted, or carried out assassinations of senior officials of domestic or foreign governments.

"C. Information concerning the use of bodily harm or assassination as a political weapon. This should include training and techniques used to carry out the act.

"D. Information on persons who insist upon personally contacting high Government officials for the purpose of redress of imaginary grievances, etc.

"E. Information on any person who makes oral or written statements about high Government officials in the following categories: (1) threatening statements; (2) irrational statements, and (3) abusive statements.

"F. Information on professional gate crashers.

"G. Information pertaining to 'terrorist' bombings.

"H. Information pertaining to the ownership or concealment by individuals or groups of caches of firearms, explosives, or other implements of war.

"I. Information regarding anti-American or anti-U.S. Government demonstrations in the United States or overseas.

"J. Information regarding civil disturbances."

Senator Ervin, who is noted for a piquant sense of humor, said in a speech a few months ago: "Although I am not a 'professional gate crasher,' I am a 'malcontent' on many issues.

"I have written the Persident and other high officials complaining of grievances that some may consider 'imaginary.' And on occasion I may also have 'embarrassed' high Government officials."

Based on the guidelines, the Senator asserted, he himself is qualified for the computer.

[From the Greensboro (N.C.) Daily News, July 1, 1970]

PERSONS OF INTEREST

Are you a "person of interest" to the United States government? You may be whether you know it or not, and regardless of whether you have a criminal record or even an arrest record.

You are if you:

Are a "professional" gate crasher.

Have attempted or plan to attempt, either individually or as a member of a group or organization, to "physically harm or *embarrass* the persons protected by the U.S. Secret Service, or any other high U.S. government official at home or abroad."

Have made any oral or written statements about high government officials that might be interpreted as "threatening," "irrational," or "abusive."

Occasionally or regularly "insist upon personally contacting high government officials for the purpose of redress of imaginary grievances, etc."

These are some of the guidelines certain federal agencies are using as they quietly build up information (some of it almost certainly false information based on rumors) dossiers on hundreds of thousands of law-abiding, but for one reason or another suspect, American citizens.

Among the federal agencies engaged in this sort of information gathering are the Secret Service, The Federal Bureau of Investigation, Justice Department, Internal Revenue Service and the Army's Counterintelligence Analysis Division. These agencies swap information freely and make their files available to certain other federal agencies.

The agencies involved cite as the source of their authority the recommendations of the Warren Commission. The commission recommended the broadest possible surveillance of "malcontents" and potential assassins. Although the commission's recommendations have not been enacted into law, the federal agencies now in the surveillance business are going far beyond them. Participation in an anti-war demonstration is enough to get on the list.

This is taking place apparently with the tacit consent of a majority of American citizens, possibly because most of them are unaware of the extent of the information gathering and its implications.

The broad language of the guidelines the agencies use is dangerous in itself. So is the practice of integrating the files on criminals with the files on law-abiding citizens. Together with certain provisions of the Nixon administration's omnibus crime bill, such as the preventive detention and "no-knock" search clauses, they lay the ground work for a police state of a sort Americans have never known except by hearsay.

Few public critics of this developing surveillance system have emerged. The only two in Congress are Senator Sam J. Ervin Jr. of North Carolina and Rep. Cornelius Gallagher of New Jersey. Mr. Ervin charges that the system is a threat to the right of privacy and a potential infringement of the First Amendment rights of free speech and assembly.

Senator Ervin, chairman of the Senate Subcommittee on Constitutional Rights, takes the view that the government's information gathering about the lives and habits of its citizens is pushing the country toward a mass surveillance system "unprecedented in American history." The federal gumshoes are getting by with it because Americans fail to understand the computer mystique and its implications, Mr. Ervin says.

Briefly, the computer mystique is the doctrine that the computer is foolproof, 100 per cent objective, and naturally superior to the human brain that created it. Emotion clearly does not enter into a computer's decisions. And a computer can perform a routine task much faster than a man. But thousands of Americans on computer billing lists know the computer can make the same errors that men make.

The difference is that when a computer makes a mistake it is almost impossible to get it to correct itself without the intervention of the humans who guide it. But it is not in the self-interest of those who program and operate the computer to catch it in too many mistakes. That would tend to undermine the computer mystique upon which their jobs and power depend.

Senator Ervin contends, and we agree, that within the government data files there exists "a potential for control and intimidation that is alien to our form of government and foreign to a society of free men." Based on the guidelines, the Senator told reporters, he is himself qualified for the computer files.

"I have written the President and other high officials complaining of grievances that some may consider 'imaginary.' And on occasion may also have 'embarrassed' high government officials," he said.

How do you break up the snoopers' playhouse in Foggy Bottom? The quickest way is to let your congressman and senators know you don't like it. Congress can put the national data bank out of business. Congress will put it out of business when the public demands it, but not before.

[From the Asheville (N.C.) Times, June 18, 1970]

BIG BROTHER WINS ANOTHER ONE

Overruling a lower court, the New Jersey Supreme Court has decreed that police agencies in that state may indeed compile exhaustive dossiers on persons who take part in demonstrations—whether or not the demonstrations involved disorder and whether or not the person investigated committed any illegal act.

The range of this Big Brotherism is dangerously wide. It permits the compiling of information on the individual's family, employment, finances, personal habits and past activities. The danger is that it makes people who may have been only innocent bystanders subject to the most intensive kind of official prying. The mere gathering of the information, which involves police questioning of friends, employers and others, can all too often arouse unjustified suspicion among acquaintances.

This prying trend is by no means confined to New Jersey. It has been revealed recently that Army Intelligence has dossiers on millions of Americans with the only excuse that such persons *might* some day be investigated for sensitive posts in the military establishment. Just recently the White House instigated a check into the personal backgrounds of 250 State Department employees who protested the Cambodian invasion. The FBI of course has voluminous files.

It would seem that the point is right here at which to draw the line on this ever-increasing snooping into the private lives of presently uninvolved citizens. The line should be at the point where an individual has actually applied for a sensitive position, or has actually been involved in illegal disorders. Mere participation in an orderly demonstration should be no authorization to open a file.

North Carolina's Senator Sam J. Ervin has been the leader in Congress in defending federal employees from the often outrageous lengths to which security checks go. He could well lift his sights and take in the whole range of official prying into private lives.

Enforcement agencies have the right and duty to learn all they can about individuals who seek sensitive posts or who are suspected of committing illegal acts. Investigation before the act is indefensible.

Hopefully, the New Jersey ruling will be taken into the federal courts and there overturned. Big Brother has too much power already.

[From the Omaha World-Herald, Jan. 15, 1970]

ERVIN ON GUARD

The trouble with letting government agencies have all those data processing machines is that it helps create a demand for more data to be processed.

This can lead to the government's having much more information than it needs or than is good for it or the country, especially when the information consists of files on individual citizens.

Sen. Sam. J. Ervin, D-N.C., chairman of a subcommittee on constitutional rights, thinks he detects an instance in which the government is trying to collect too much about too many people, and for insufficient reason.

Ervin has questioned the Secret Service's attempt to enlist other government agencies in the compiling of computer dossiers on persons who make threatening, irrational or abusive statements about high government officials; professional gate crashers; persons who insist on personally contacting high government officials for the purpose of redress of grievances, or people who take part in demonstrations.

This sort of information gathering Ervin characterized as "conducive to a mass surveillance unprecedented in American history." He wrote a concerned letter about it to Treasury Secretary David M. Kennedy, whose department includes the Secret Service.

Kennedy replied that the Secret Service limited such activities to its mission of protecting the President and others for whose safety it is responsible.

He said the information Ervin referred to was being sought only from law enforcement agencies, not from "run of the mill" government workers. He also said that the information relating to people who had taken part in demonstrations was required only in connection with the safety of the President while traveling.

Ervin also questioned whether the information the Secret Service was gathering would be in safe hands. He said he was concerned over who would have access to the files.

Kennedy replied that all computer personnel have top secret clearances and that no other persons or agencies had direct access to the files.

That, perhaps, is the key to maintaining continued freedom from mass surveillance by the government. If the information on individuals obtained by one branch or department is kept in its own files and used only for its own necessary purposes, the likelihood of untoward government surveillance is reduced.

However, if all the agencies of government started comparing notes and collecting individual files into master dossiers, Washington could end up with a frightening array of weapons that could be used, at the whim of a bureaucrat, for any number of unsanctified purposes.

Sen. Ervin has suggested several approaches to computer control and legislative safeguards, including prohibitions on transfer or use of data collected for one purpose only.

Perhaps, in the case of the Secret Service, nothing particularly ominous is involved in the gathering of information. At least Secretary Kennedy's reassurances to Sen. Ervin sound convincing.

But this assuredly will not be the last time when the government's use of information gathering and storing techniques will be called into question. The best way to keep 1984 from getting here before it is due on the calendar is to be alert to the dangers, and we hope Sen. Ervin and others will continue to be.

[From the Sioux Falls (S. Dak.) Argus Leader, Jan. 16, 1970]

A HINT OF BIG BROTHER

Sen. Sam J. Ervin of North Carolina, chairman of a Senate subcommittee on constitutional rights, has expressed concern about what he sees as a new threat to First Amendment freedoms.

The threat, he fears, is embodied in new Secret Service guidelines for gathering and storing information about many citizens. Ervin has performed a valuable public service by calling attention to this matter.

It is the old story: Little exception could be taken to what the Secret Service is doing if there were firm guarantees against misuse of the data, but there are no guarantees.

Congress had better get busy and provide for some. Ervin thinks "the criteria for filing information about individuals are questionable from a due process standpoint, are impractical and are conducive to a mass surveillance unprecedented in American history." That is something to worry about.

[From the New York Post, June 30, 1970]

BIG BROTHER'S NEW TOYS

There has been little response on Capitol Hill to disclosures about the government's growing industry in recording the names and activities of "malcontents" on its computerized and milcrofilmed tapes. But the Senate's leading lecturer on Constitutional law, Sam Ervin (D-N.C.), has suggested that under the government's criteria, he could well be suspect.

According to Secret Service guidelines, among the dissidents the computer should know about are:

—Those who would "physically harm or embarrass" the President or other high officials.

—Those who seek personal contact with high officials "for the purpose of redress of imaginary grievances."

Obviously there's room there for more than just one Senator.

Consider the phrase "imaginary grievance." To whom is a grievance imaginary—the lawmaker who brings it or the official who rejects it? The answer, of course, is the official; he's also the guy with the computer.

That section, then, nets all of Sen. Ervin's colleagues in Congress. The only remaining Capitol Hill figure unaccounted for is the president of the Senate, Vice President Agnew, and he could fit the composite for section one.

That he feels to embarrass the President has been adequately proven. That he might physically harm him would seem implausible. But it should be noted that he has had to look elsewhere than the White House for his golfing companions and tennis partners.

[From the Washington Post, Apr. 24, 1970]

IN THE NAME OF SECURITY

A fear of unorthodoxy is the first symptom of insecurity. It marks national administrations that have no clear sense of purpose or direction. Such administrations quite naturally, like a stream seeking its own level, tend to seek in their personnel mediocrity, conformity, conventionality. Innovation frightens them; dissent dismays them. And so they bar from employment anyone who has ever displayed any signs of eccentricity or independence. It is all the more disquieting that such a system of selection is always undertaken in the name of national security. It operates, manifestly, to diminish security rather than enhance it.

Sen. Sam J. Ervin Jr., chairman of the Senate's Constitutional Rights Subcommittee wrote to the chairman of the U.S. Civil Service Commission last week to inquire about report "new rules governing qualifications for federal employment which would exclude persons who have engaged in demonstrations and protests." The CSC says that no new rules have been adopted; the old rules are simply being applied with a bit more stringency. In this connection it is alarming indeed—although by no means surprising—to learn that the Civil Service Commission maintains a blacklist containing the names of at least 1.5 million Americans who might, at some time, have been involved in "subversive activity." The blacklist is largely compiled, without any fixed standards, from references to individuals in the publications of so-called radical student movements.

Shades of Titus Oates and Joe McCarthy! These scraps of information squirreled away in the files of the CSC are like so many pellets of deadly poison. Although they are not supposed to be taken in themselves as proof of subversive activity or intent, they operate inevitably, nonetheless, as flags disqualifying their subjects for federal employment. The injustice of this system to the individuals damaged by it is the least of the problem. The worst of it is the impact on the public service. As Senator Ervin observed, it is essential to assure that any denial of a security clearance or of a federal job is rendered on equitable, just and timely standards of social behavior. Otherwise we face dangerous conformity in our national life and a bleak future of mediocrity in the federal service.

[From the Asheville (N.C.) Citizen, July 2, 1970]

YOU CAN BE A PERSON OF INTEREST

Despite the fact that a few voices are raised in opposition—notably that of Senator Sam J. Ervin—intelligence agencies of the Federal government are still quietly compiling informational files on hundreds of thousands of law-abiding—though presumably suspect—Americans.

Declaring that violent political dissent and civil disorder require the policy, the government is building a mass of computerized information on "persons of interest."

The phrase is a term for those citizens, many with no criminal records, whom the government wants to keep track of, just in case trouble breaks out.

The files often contain seemingly unimportant data, which can be shared—almost instantaneously—by half-a-dozen intelligence gathering groups.

The operation does not disturb us particularly, though it is unauthorized by law and raises serious constitutional questions.

Critics claim the computerized "who's who" is leading the country toward a police state.

Possibly so, and much of the action seems senseless. But think what a convenient tool the files would be if the country—God forbid—ever drifts toward dictatorship.

[From the New York Times, July 4, 1970]

OUR ALIENATED RIGHTS

One hundred and ninety-four years ago the Founding Fathers asserted their independence with a ringing Declaration of man's "unalienable rights."

Today, as too often before, those rights are once more threatened. They are threatened not by some tyrannical foreign monarch, but by domestic governmental agencies whose actions and proposed actions against crime and dissent endanger constitutional guarantees designed to safeguard the rights of Americans to "life, liberty and the pursuit of happiness."

Typical of these new dangers is the spreading web of Federal prying into the private lives of citizens. Utilizing modern computer technology, Federal police, security, military intelligence and other agencies are accumulating vast stores of data on the activities of hundreds of thousands of unsuspecting "suspect" Americans.

There is nothing wrong with the use of the computer to help make more efficient and effective the legitimate work of law-enforcement and other agencies. A modern society must use modern techniques to help enforce and administer its laws and to protect itself from those who would do violence to its leaders and institutions.

But a subcommittee headed by the highly respected Senator Sam J. Ervin Jr., Democrat of North Carolina, has unearthed alarming evidence that Federal agencies have been employing the new technology to amass data that has little or no direct relation to criminal or other activities of legitimate Federal concern. Particularly disturbing are persistent reports that the Army's Counterintelligence Analysis Division is disregarding orders to stop collecting information on peace and civil rights organizations. Furthermore, the subcommittee reports that restrictions on the dissemination of "intelligence" accumulated by some agencies is woefully inadequate.

Among the "persons of interest" on whom the Secret Service collects data are individuals who have merely threatened to "embarrass" a high Government official, who "insist upon personally contacting high Government officials for the purpose of redress of imaginary grievances, etc.," and who participate in anti-American or anti-United States Government demonstrations.

Senator Ervin, a conservative and a student of the Constitution, has observed: "I am a 'malcontent' on many issues. I have written the President and other high officials complaining of grievances that some may consider 'imaginary' and on occasion I may also have 'embarrassed' high Government officials."

Senator Ervin is obviously a "person of interest" by Secret Service definition and therefore grist for a Federal computer. Indeed, any American today who vociferously articulates unpopular or unorthodox views is in danger of being digested by a Federal computer, along with common criminals, and of being exposed to potential harassment and humiliation.

If Americans still cherish the Declaration of Independence and the rights we celebrate today, they will insist that their representatives in Congress support Senator Ervin's efforts to place strict legal limits on Federal collection and dissemination of information on the activities of private citizens.

[From Computerworld, Aug. 27, 1969]

PRIVACY LOST?

The bill to implement President Nixon's national computerized job bank program does give the secretary of labor the power to prescribe "rules and regulations to assure the confidentiality of information submitted in confidence" to one of the banks.

But nowhere is there any mention of the key point made by President Nixon during his election campaign. At that time, he stressed that only jobs would be stored. Applicants would not have to input their names, he said, only their qualifications. This would assure privacy and eliminate any possibility that additional personal records would be gathered and stored.

While the absence of this precaution from the bill does not mean this safeguard will not be included in the final program, we would be much happier if it were spelled out in the bill.

POLITICAL PRESSURE NEEDED

At present, the individual has no protection against the use or misuse of personal information in data banks, and it now appears that it will be several years before adequate protective legislation can be formulated.

But the most important data banks are being set up now, and there is a need for immediate protection. Several congressmen have suggested that a person or group be named as a data bank ombudsman, with the power and responsibility to protect the individual against the misuse of information in data banks.

Such an ombudsman provides an immediate solution to an immediate problem. And he would also help to find a long-term solution, because he would be able to use his experience to help formulate laws regulating data banks.

Ombudsmen should be appointed on both the state and federal level. But the appointment of such ombudsmen will occur only if pressure is brought on legislators now. This is an election year and consumer protection is an important issue—congressmen and state legislators will be more responsive this year than at any other time.

We propose that individuals and local chapters of professional societies immediately begin a campaign for data bank ombudsmen. Such a campaign should be primarily educational at first: informing local newspapers, state legislators, and congressmen of the dangers posed by computerized data banks and proposing the appointment of ombudsmen as an immediate solution. And we must keep the pressure on.

Data bank ombudsmen offer the only hope of protecting the rights of the individual in the near future. Concerted action by computer professionals could make such protection a reality.

[From the Washington Evening Star, Mar. 16, 1970]

PRIVACY AND THE COMPUTER

The cliche about people having skeletons in their closets is woefully out of date. These days, the skeletons are in computerized data banks. What's worse, the figurative skeletons may be mislabeled with the wrong owners' names, or they may be the figment of a computer's imagination.

The dangers of the mysterious, hard-to-refute data banks have been much discussed in the last few years. The discussion is about to accelerate again, and it's a good thing, because eventually something may be done about the problem.

The National Academy of Sciences has a $149,500 Russell Sage Foundation grant to conduct a broad study of how to preserve privacy and civil liberties against the onslaught of the computer age. The study will be conducted by Columbia Professor Alan Westin, an expert on the subject, and will focus on how to protect the rights of persons (meaning everybody) on whom information is collected and stored for a variety of uses. Westin will be backed by a panel including Ralph Nader, James Farmer, former Attorney General Katzenbach and Representative Cornelius Gallagher of New York, who heads the House subcommittee on invasion of privacy.

On another front, House committee hearings are to start tomorrow on the proposed Fair Credit Reporting Act, which already has Senate approval. The bill aims at giving consumers a way to counter erroneous or malicious information on file against them in credit data banks. Included in the bill's provisions are rules to limit disclosure of information, to let the consumer know what's in his own file and to give him the right to dispute the information.

Still dormant is the 5-year-old proposal for a National Data Bank, a menacing centralization of the information collected by federal agencies. The plan raised congressional howls in 1966 and was quickly put down as an Orwellian step toward Big Brotherism. But don't count it out—it makes too much computer-type sense to have one big control panel able to spill the beans on all our lives.

Future studies are likely to add to the growing pile of horror stories about people whose lives were marred because a computer dredged up some embarrassing fact from the sooner-forgotten past—or from nowhere. It's too bad the comprehensive National Academy of Science investigation, which could lead to important reforms, is scheduled to take 2½ years. Because that will bring us 2½ years closer to 1984.

[From the Houston (Tex.) Post, Mar. 16, 1970]

DATA BANK IDEA ALIVE

The proposal advanced a few years ago to establish a national "data bank" in which information collected by federal agencies would be stored and made available at the push of a computer button appears to be far from dead.

It is being talked up again, at least sufficiently for Sen. Sam J. Ervin of North Carolina, chairman of the Senate's subcommittee on constitutional rights, to say that he will reopen the hearings this year.

Despite assurances that there would be all kinds of safeguards to protect the privacy of individual citizens, the mere thought of the pooling of all the information gathered by government agencies was enough to arouse in the minds of a great many people Orwellian nightmares of a "Big Brother" watching their every move constantly.

Even though it was promised that the stored information would be impersonal and not linked with any individual, being of the general type collected by the Census Bureau, there were fears that, once the information bank should be established, this could be changed. It would be a relatively simple matter to compile and file away a fairly complete dossier on every citizen, containing all kinds of highly personal information. This information might or might not be accurate.

The great fear was that any concentration of data could be abused and the information misused, perhaps not immediately but at some time in the future. The instinctive reaction of most people that it would be much safer, so far as the privacy and perhaps the freedom of the individual citizen is concerned, not to permit the proposed "bank" to be created.

Potentially, there could be a great concentration of power in the hands of whoever assembled and controlled the information, and it is elementary that the diffusion of power is the best protection against tyrannical government.

Federal agencies now collect a great deal of information about a great many people in the course of their normal operations, but the data collected by one in most cases is not available to the others. For the "data bank" idea to be acceptable to most people, it would be necessary that there be strong restrictions upon the information that is pooled, on how it is to be used and to whom it is to be made available. It remains for advocates of the idea to prove that adequate, foolproof safeguards against misuse and abuse are possible.

Although efforts to establish a national "data bank" have been blocked thus far, vast quantities of highly personal information already are stored in computers about practically every American citizen, and if the data ever should be brought together, it would make fairly complete dossier on him and all of his personal affairs.

The tremendous expansion of this country's credit system has made necessary the compilation of information about everybody who buys anything on credit. It is necessary for those who extend credit to know a great many facts, much of it very personal, about those seeking credit to determine how good credit risks they are. This has given rise to many private agencies that collect this information. Many of these co-operate and exchange information.

It is estimated that one credit agency alone has data on millions of Americans on file in its computers. Every time a citizen draws a paycheck or answers a census question, the information is recorded on somebody's computer somewhere.

There is relatively little reason for alarm in this because the information is fragmentary and widely scattered. What arouses concern are continuing efforts to bring all these bits and pieces of information together in one vast computer bank, with the possibility that the data might fall into the wrong hands and/or be misused.

[From the New York Times, July 7, 1970]

IN THE NATION: A RIGHT NOT TO BE DATA-BANKED?

(By Tom Wicker)

WASHINGTON.—Do you have a right not to be stored in a computer, where you can be called up for instant investigation by any bureaucrat or law officer who considers you a "person of interest" or who may want to provide someone else—maybe your employer—with "facts" about you? If you haven't thought about that, it's high time you did.

Ben A. Franklin detailed in The New York Times of June 28, for example, how Government "data banks" are mushrooming out of computer wizardry. Literally hundreds of thousands of individual dossiers now are being stored on tape by various agencies. The tape can be fed to computers with instant recall; and the computers and tapes can be interconnected from one agency or region to another in an ominous national network. Numerous state agencies have easy access to the material in this computer network, and are under little or no pressure to keep it confidential.

At the very least, therefore, some guidelines on the compilation of these banks and some safeguards on disseminating the material appear in order. An interesting case pending in Federal court here (*Menard v. Mitchell and Hoover*) may help provide them.

A Maryland man was arrested in California in 1965 on suspicion of burglary, held for two days, then released when police found no basis for charging him with a crime. Subsequently, a brief record of the detention, together with the Maryland man's fingerprints, appeared in F.B.I. criminal files.

Maintaining that the record is misleading and incomplete and that it is not properly a "criminal record," the Maryland man moved in Federal District Court here to have it purged from the F.B.I. files.

COURT CONCERN INDICATED

The Court denied this motion, and the man appealed. On June 19, the Court of Appeals for the District of Columbia, while finding no fault with the district court's ruling on the motion, ordered the case remanded for trial and "more complete factual development." The supporting opinion, although limited to the case, suggests the circuit court's concern about what ought to go into Government files, under what rules, and whether proper safeguards surround its dissemination.

The judges (Bazelon, McGowan and Robinson) pointed out that the fact that the police had been "unable to connect" the Maryland man with a crime did not necessarily acquit him of having committed one, and they conceded that certain arrests not followed by a charge or a conviction might be a proper part of someone's criminal record. But, they asked, did the mere fact that a man had been picked up and held for two days justify the F.B.I. in retaining the record in its criminal identification files?

An arrest record (the distinction between a "detention" and an "arrest" is considerably less than a difference) can be terribly damaging to one's opportunities for schooling, employment, advancement, professional licensing; it may lead to subsequent arrests on suspicion, damage the credibility of witnesses and defendants, or be used by judges in determining how severely to sentence. Moreover, thousands of arrests are made every year without any further action against the arrested person, usually for lack of evidence.

DISSEMINATION ISSUE

Thus, the court asked, if a person is arrested, even properly, but no probable cause for charging him is developed, should he "be subject to continuing punishment by adverse use of his 'criminal' record"?

This has particular point because of the lack of established safeguards on dissemination. The Maryland man's record, for instance, could be made available by statutory authority to "authorized officials of the Federal Government, the states, cities, and penal and other institutions" and also, by an Attorney General's regulation, to government agencies in general, most banks, insurance companies, and railroad police.

When New York recently passed a law requiring employes of securities firms to be fingerprinted, several hundred were dismissed for "criminal records," but about half of them had only arrests, not convictions, on their records. The Appeals Court, noting this, reasoned that F.B.I. records had been passed directly to the securities firms involved.

As data banks proliferate, so will the indiscriminate use of the material they contain. And that raises the question whether an American citizen has a constitutional or legal right not to be data-banked, computerized, stored exchanged and possibly damaged—materially or in reputation—by the process.

[From the Huntsville (Ala.) Times, July 12, 1970]

"MAFIA MACHINE" GOES TO WORK

(By Jared Stout)

WASHINGTON.—A computer nicknamed the Mafia Machine has gone to work in the Justice Department, giving organized crime fighters their most powerful weapon to date. But it may be a mixed blessing.

While the machine is enabling heretofore impossible analysis of the activities of organized criminals, it is also raising new questions about computers in law enforcement and invasion of individual privacy.

Within the computer's memory, the department is storing histories of the major and minor figures in confederated crime, how and where they travel, even details on their eating habits.

But the department is also computerizing the names of those legitimate individuals with whom the Mafiosi often deal, persons against whom no charges have been brought or proved.

Thus while members of the Organized Crime and Racketeering section are highly pleased with the workings of their still embryonic system, they are deeply troubled by the privacy issue.

"I feel like I'm walking around with a bomb in my hands," said one official who has worked on the project and who declined to be quoted by name. "Some of this information is really dynamite."

"The fact is the privacy issue is one of paramount importance and we haven't yet figured out a way to balance the law enforcement needs with the constitutional safeguards for privacy," the official said.

For the moment, however, the privacy question is being put to one side as the department fine-tunes the computer and explores its use in analysis of what's going on within the organized crime community.

Individuals now included within its memory against whom there may be no more than a suspicion—a person who, for example, is frequently seen in the company of a known hoodlum—are protected by tight security.

According to the department, only law enforcement, agencies with a need to know are given information drawn from the computer, and they insist that individuals listed because of unverified suspicions are made known to none outside the federal investigative family.

The basic data for the computer has come from reports given the organized crime section by 26 other federal agencies, principally the FBI, the Internal Revenue Service and others that regularly join the section in cooperative investigations.

The information is, however, keyed into portions of the 400,000 file cards containing 250,000 names of Mafia or Mafia-related individuals.

Until six weeks ago, the file cards were the major source of section information, a system that prevented recall of the data they contained without spending days, perhaps weeks, of manual sorting.

The computer makes possible high-speed searches of the records the section has incorporated within its memory, yielding up in minutes, for example, a list of all those Mafia figures nicknamed "Sonny."

Such information becomes useful because the operators of big crime often speak of one another only in nickname references.

Gerald Shur, the man-in-charge of the computer program, said in a recent interview "the kinds of questions we can ask are limited only by the data we can feed into the computer."

Shur said ultimately the department hopes to store enough information to enable predictions about the impact of investigations or develop economic theories to estimate what kinds of business situations organized crime may be heading toward.

[From the Boston Herald Traveler]

BIG BROTHER (U.S.) IS WATCHING YOU

(By John S. Lang)

(NOTE.—The government knows far more about you than you may suspect. And if you've ever taken part in protest marches or the like, even the military services probably have been keeping tabs on you. Some agents have seized garbage in hunting incriminating evidence.)

WASHINGTON.—Behind the closed door of Room 2439, a handful of government clerks search through radical newspapers, methodically snipping out names. They are hunting Americans favorably mentioned by the publications of dissent.

Found, snipped, checked, reviewed, the names are conveyed down a wide clean corridor to be fed into a "subversive activities" data bank already bulging with names of 1.5 million citizens.

The name-hunters in Room 2439 are low-level servants of the Civil Service Commission, the agency set up to oversee federal employment.

The commission's security dossier—not to be confused with its separate files on the 10 million persons who have sought federal jobs since 1939—are indicative of the watch the government keeps on Americans in this age of dissent and social turmoil.

An Associated Press study showed:

Military intelligence agents have spied on civilian political activities and kept secret computerized files on thousands of individuals and organizations although Pentagon counsel cannot cite any law authorizing this surveillance.

The Army has kept a so-called blacklist which included the names, descriptions and pictures of civilians "who might be involved in civil disturbance situations."

A second list has been circulated by the Pentagon's counter-Intelligence Analysis Division as a two-volume, yellow covered, loose-leaf publication entitled "Organizations and Cities of Interest and Individuals of Interest"—according to a court suit.

The FBI, with the most extensive security files and 194 million sets of fingerprints, has infiltrated the leadership of virtually every radical organization in the United States.

Agents of the FBI, Naval Intelligence and local police have seized citizens' garbage in hunts for incriminating evidence. In one case Navy agents examined garbage from an entire apartment house to find information about one tenant.

The Secret Service has set up a computer with 100,000 names and 50,000 investigative dossiers on persons who it says could be dangerous to top government officials.

A Senate subcommittee found that federal investigators have access to 264 million police records, 323 million medical histories and 279 million psychiatric dossiers. In each category, that's more numbers than there are people in the United States.

And the massive files of investigative and intelligence agencies contain but a small portion of the information the government collects on its citizens.

Millions of scraps of information go into federal files routinely when citizens pay their taxes, answer the census, contribute for Social Security, serve in the military, or apply for a passport.

In fact, a Senate subcommittee calculated that the names of U.S. citizens appear 2.8 billion times in federal records. This means, the panel said, that the statistical odds are that a dozen different agencies have files on the typical law-abiding citizen.

Much of this data is held in strictest confidence. Census questionnaires, for example, can be inspected only by Census Bureau employes—and they're sworn to secrecy.

Federal income tax returns also are considered confidential by the IRS. But they may be seen by the heads of federal agencies, some congressional committees, the governors of every state and by a special counsel to President Nixon.

A proposal three years ago to gather files of all agencies into a National Data Bank and use them for statistical purposes kicked up such a furor in Congress that, according to one official, "now that issue is dead as a dodo."

But the AP study showed that investigative and intelligence agencies can—and do—share the information they gather.

For example, investigative agencies of the executive branch have access to the "subversive activities" data bank in the Civil Service Commission's downtown Washington headquarters.

According to an official commission publication, the data bank "at present . . . contains approximately 2.5 million index cards containing information relating to Communist and other subversive activities."

The document adds: "No information is added to this file until it has been determined after careful review by a responsible official who is experienced in this field that an actual question of subversive activity is involved. . ."

A quick thumbing through the file discloses names like:

Charles Garry a white San Francisco attorney who represents the Black Panthers.

Robert Shelton, a leader of the Ku Klux Klan.

Staughton Lynd, a professor and radical writer.

Robert DePugh, head of the Minutemen.

The files are kept as index cards in mechanized rotary cabinets. There are thick bundles of cards for some individuals, only one

card for others. The cards do not state anything about a person; they are more like a bibliography, citing publications which mention him. Until evaluated, the clippings are considered "raw data" and are kept in other filing cabinets.

One name in the raw data is that of William Kunstler, civil rights attorney who represented the defendants in the "Chicago 7" conspiracy trial and who faces a jail term for contempt of court.

Kimball Johnson, director of the commission's Bureau of Personnel Investigations, says the security file is kept up to date by 17 clerks, "experts in the field," who read Communist publications, the Black Panther newspaper, the free presses, underground papers and other publications such as The Guardian, Workers World, The Militant and Liberation News Service.

"We read these and clip the names of people supported by them," Johnson says. "It's all in the public domain. It's simply that unless you clip it and title it there's no one mind that can comprehend it."

Section Chief Pierce waves a hand toward a stack of publications on a table in his office and says: "That's what we check. It's full of subversive material. Note the Commie art, Picasso and others all tied in to Communism."

Asked to cite a statute or regulation authorizing the security file, Johnson replied there is no specific law. But, he added:

"The file is an essential tool to the commission's legal function of investigating the fitness of people for federal employment for security positions. And there is Public Law 298 which shifted responsibility for making personnel investigations from the FBI to the Civil Service Commission."

The commission says its security file aids in personnel investigation which give "the reasonable assurance that all persons privileged to be employed in . . . government are reliable, trustworthy, of good conduct and character, and of complete and unswerving loyalty to the United States."

It also says that when any subversive information from the security file is identified with a person under investigation the case is referred to the FBI for a full field loyalty probe.

The FBI has overall responsibility and broad powers—based on presidential directives dating back to 1939—for investigating matters relating to espionage, sabotage and violations of neutrality laws.

FBI Director J. Edgar Hoover told Congress last year his agency had placed informants and sources "at all levels including the top echelon" of such groups as the Student Nonviolent Coordinating Committee, the Ku Klux Klan, the Black Panther Party, the Republic of New Africa, the Nation of Islam, the Revolutionary Action Movement, the Minutemen and the Third National Conference on Black Power.

Hoover also gave a hint of the scope of FBI security files when he outlined how agents keep tabs on sympathizers *who contribute money for radical causes.*

"Included among these," he testified, "are a Cleveland industrialist who has long been a Soviet apologist, the wife of an attorney in Chicago who is a millionaire, an heiress in the New England area who is married to an individual prominent in the academic community who has been active in New Left activities, and a wealthy New York lecturer and writer who for years had been linked to more than a score of Communist-front organizations and has contributed liberally to many of them.

"These individuals alone have contributed more than $100,000 in support of New Left activities."

Hoover also said agents have identified most of the writers of antiwar newspapers—which he termed "the work of the dedicated revolutionaries who are against ROTC and against our war effort in Vietnam"—and had referred that information to the Justice Department for possible prosecution.

Don Edwards, a member of the subcommittee which oversees FBI budget requests, complains that Congress does not exert proper authority over the FBI. He believes one reason for this is fear stemming from long standing rumors that the FBI, among its many dossiers, has files on each member of Congress.

"There are lots of congressmen who think that probably they do have files," Edwards told an interviewer.

But the rumors have never been proven and there have been few complaints from congressmen.

There was, however, much alarm expressed in Congress with the recent disclosure that, for the past several years, military intelligence agents have conducted surveillance of civilian political activists and have fed information on individuals and organizations into data books.

In response to 50 congressional inquiries, the Army admitted that it:

Kept a so-called blacklist which included the names and descriptions and pictures of civilians "who might be involved in civil disturbance situations."

Operated a computer data bank for storage and retrieval of civil disturbance information.

Used its intelligence agents in some instances for direct observation and infiltration of civilian organizations and political meetings.

But in making these admissions, the Army said that during the past year it has sharply curtailed such activities after realizing they weren't needed to prepare for any civil disturbances.

The Army said the blacklist—a term to which it objected—had been ordered withdrawn and destroyed. It said the computer data bank had been discontinued and that its agents have conducted no overt operations in the civilian area during the past year.

Extensive details of the military's domestic intelligence activities were disclosed in January in an article written by a former intelligence officer, Christopher H. Pyle of New York, for the Magazine Washington Monthly.

Pyle wrote that the Army's Intelligence Command, headquartered at Ft. Holabird, Md., was in a position to develop one of the largest domestic intelligence operations outside the Communist world.

A few weeks later, the Pentagon announced that Ft. Holabird would be closed in an economy move and the Army Intelligence School there would be moved to Arizona.

An Army spokesman said the domestic surveillance operations were expanded in 1967 after the outbreak of serious civil disorders.

"There was a feeling we had to be in a position to predict when federal troops would be used again. We need more information to inform tactical commanders on the streets and to guide them. This led to widespread collection efforts," he said.

The information gathered by the military was funneled into Ft. Holabird, summarized and sent out on the Army's Teletype system.

One weekly summary, marked "Pass to DIA Elements," was distributed to Army commands throughout the world. It contained this dispatch:

"The Philadelphia chapter of the Women's Strike for Peace sponsored an anti-draft meeting at the First Unitarian Church which attracted an audience of about 200 persons. Conrad Lynn, an author of draft evasion literature, replaced Yale chaplain William Sloan Coffin as the principal speaker at the meeting."

Lynn, the Women's Strike for Peace and a dozen other individuals and groups identified in the summary have filed suit through the American Civil Liberties Union, claiming the Army has violated their constitutional rights of free speech and association.

The suit, filed in U.S. District Court in Washington, contends that in addition to the surveillance and computer operations the Army admits conducting, it is concealing from Congress the existence of:

A large microfilm data bank on civilian political activity indexed by computer and maintained by the Counterintelligence Analysis Division.

A second computerized domestic intelligence data bank maintained by the Continental Army Command at Ft. Monroe, Va., as well as extensive regional files at other locations.

The "two volume, yellow-covered, looseleaf publication entitled Counterintelligence Research Projects Organizations and Cities of Interest and Individuals of Interest, which describes numerous individuals and organizations unassociated with either the Armed Forces or with domestic disturbances."

The Army said it would not comment on the lawsuit's charges.

But, in an interview, a spokesman for the office of the Army's chief counsel could cite no legal basis for surveillance of civilian activities.

"In the civilian sphere the FBI has jurisdiction," the spokesman said. "We must get approval for what we do from the FBI. There is no specific law on domestic intelligence as such applying to the Army."

To determine the range of domestic military surveillance, The Associated Press submitted a list of 20 questions to each branch of the service. Army spokesmen declined to answer the questions specifically, preferring to speak generally about the program. The Air Force said it does not have any domestic program. The Navy never responded.

But Navy intelligence operations slipped into public view last August when the ACLU complained that agents were sifting through garbage from the apartment house of Seaman Roger Lee Priest accused by the Navy of soliciting members of military forces to desert in an underground newspaper he published.

A spokesman for the District of Columbia government acknowledged garbage from all apartments in the building where Priest lived was searched because it couldn't be separated from the seaman's prior to collection.

"We ended up with an ONI agent posing as a sanitation worker and picking up trash and bagging the garbage," he said.

"Then the Civil Liberties union got in, raising hell."

Searching citizen's garbage apparently is not uncommon for government security agencies. Last summer a D.C. Sanitation Department official disclosed that the city, on request of investigators, makes up to a dozen special garbage collections yearly "in the interests of law and order."

Besides garbage, private mail also is often watched by government law enforcement agents.

The most commonly used means is the "mail cover," recording from a letter the name and address of the sender, the place and date of postmarking and the class of mail.

The Post Office declines to say how many mail covers are in effect. A Senate committee asked for a list of several years ago, but the agency objected.

"The list you have requested would contain the names of about 24,000 persons, a large percentage of whom are innocent of any crimes," a postal official said.

More recently, the Post Office confirmed a new regulation allows federal agents to open

all mail coming into this country frim virtually every nation in the world.

"However," a spokesman said, "it's not intended to be used on personal mail."

When threatening letters are received by the President or other high government officials, the Secret Service moves into action.

Operating under guidelines adopted after President John F. Kennedy's assassination, the agency collects "protective information" which is fed into its computers.

One of the 1963 guidelines asked other federal agencies to relay information on citizens who make abusive statements or attempt to "harm or embarrass" high government officials.

Civil libertarians objected that this guideline means that any citizen who writes a strongly worded letter of complaint to a government official might come under the agency's scrutiny.

A Secret Service spokesman responded: "At the time the guidelines were passed emotions were high. Everyone was saying, 'Let's protect the President.' Now people are apparently forgetting the tragedy of that year . . ."

Several years ago when Congress was considering proposals to establish a National Data Bank to gather files from all agencies and use them for statistical purposes, author and sociologist Vance Packard raised the spectre of Big Brother, the symbolic totalitarian government in George Orwell's book "1984."

Noting that the year 1984 would come in the next decade, Packard told a congressional committee:

"My own hunch is that Big Brother, if he ever comes to the United States, may turn out to be not a greedy seeker, but rather a relentless bureaucrat obsessed with efficiency."

[From the Morning Call, (Pa.) June 30, 1970]

GUARDIAN OF FREEDOM

Sen. Sam J. Ervin Jr. is a conservative Democrat from North Carolina. But he is also a guardian of constitutionlly guaranteed freedoms.

Sen. Ervin is currently worried about the massive record-keeping which has come into vogue in government agencies. And press reports concerning the type of records being kept give substance to his fears.

It is all very well for the FBI to utilize computers to process information on criminals and persons sought in connection with crimes. This type of service has been credited with speeding the apprehension of suspects.

But it is a different matter when the Justice Department, the government's prosecutor, maintains dossiers on participants in peace rallies and welfare protests. Moreover, Justice takes it upon itself to categorize such persons as "radical" or "moderate" although it is unclear upon what criteria it bases this distinction.

The Secret Service, which says it is trying to spot potential assassins, also has recourse to the computers: It keeps files on miscontents, persistent seekers of redress and those who would "embarrass" the President or other high-ranking government officials.

These are just a few of the agencies which maintain voluminous files on the activities of citizens in a wide variety of fields. The reasoning behind this extensive bookkeeping is valid. Agencies believe that to be forewarned is to be forearmed. In brief, it is a continuing hunt for potential troublemakers.

But when the government gets into the business of gathering intelligence about its own citizens, it can easily go too far. And there is evidence that it has already done so.

For what reason should an agency keep notes on persons who are doing nothing more than exercising their right to freedom of speech, assembly and petition? Since when has it become a crime to persistently seek redress of grievances?

When it gets into these areas, government is dangerously close to trampling on constitutional freedoms and on the individual's right to privacy. It is easy to see how Sen. Ervin reached the conclusion that such methods have "the potential for control and intimidation that is alien to our form of government and foreign to a society of free men."

[From the Advance, July 19, 1970]

MITCHELL DEFENDS JUSTICE DEPT.'S "BIG BROTHER" ROLE

(By Jared Stout)

WASHINGTON.—The Justice Department has asserted a virtually unchecked right—not subject to the Constitution—to keep records on persons who are "violence prone" in their protests of government policies.

The right, Atty. Gen. John N. Mitchell said through a spokesman, arises from the inherent powers of the federal government "to protect the internal security of the nation. We feel that's our job."

It was the first time Mitchell had outlined the legal basis for the collection and computerization of dossiers on protesters within the department's special Civil Disturbance Unit.

The assertion matches in breadth the claim made June 13, 1969 when the government said it had unlimited powers to eavesdrop on those the Justice Department thinks are seeking to "attack and subvert the government by unlawful means."

The eavesdropping claim was made in defense of electronic eavesdropping against some defendants in Chicago Seven riot conspiracy trial.

The extension of this doctrine to the department's domestic intelligence operation came in response to questions arising from Mitchell's news conference last Tuesday.

Mitchell declined to give the legal foundation for the intelligence operation last Tuesday. He said only "there are no court decisions that would restrain us from compiling this type of information."

Later, however, he acknowledged through the department's spokesman that the legal argument used to justify the Chicago Seven eavesdropping also applied to the intelligence operation.

In the Chicago case, the department said nothing in the Constitution's ban on unreasonable searches and seizures limits the powers of the President—and the Attorney General—to eavesdrop, and now keep records on, those who try to "foment violent disorders."

This position has been sharply attacked by critics including Sen. Sam Ervin Jr. (D-N.C.) as a step toward "a police state" and a potential violation of First Amendment rights to free speech and association.

Earlier this past week, it was disclosed that Treasury Department agents had been seeking the names of those who had checked out books on bombs and explosives from public libraries in Atlanta and other cities.

Ervin attacked this step as he has other intelligence efforts, including those of the Secret Service which lists in computer files all those who may pose a threat to the President.

Throughout his opposition to such activities, Ervin has stressed the lack of standards in deciding who shall be listed within such files, and how once a person is catalogued, he may learn of the step and question his inclusion.

The Justice Department spokesman said the definition of "violence prone" persons for its purposes included those who either acted violently, counselled violence or appeared in the ranks of violent confrontations.

He said the dossiers were not kept on "as broad a range as those compiled by the Army," a reference to the watch military intelligence agents have kept on civilian protesters. No notice is given to those whose names have been recorded.

According to the spokesman, this means those individuals listed in department records at least had to be present or in the leadership of violent events. Army records included, for example, those who subscribed to New Left publications.

It was learned, however, that the justice intelligence unit still has access to the records compiled by the Army, which said in February it had discontinued its record-keeping but has hung on to those it made in four years from 1966.

[From the World News, Roanoke, Va., Mar. 11, 1970]

JUSTICE DEPARTMENT KEEPS FILES ON ACTIVISTS

(Note.—In the last few weeks members of Congress have responded with cries of outrage to a magazine article that reported on how the Army was maintaining a computerized data bank on persons it considered politically dangerous. As a result, the Army announced it was closing down the data bank and that it only began it because the Justice Department, which is responsible for political intelligence functions, was unable to handle them. Now the Justice Deparmtent says it is ready to take over. Morton Kondracke, who reported the government's political intelligence activities in this article.)

(By Morton Kondracke)

WASHINGTON.—While the Army has closed down its political computer, the Justice Department maintains an even bigger one in its "war room" containing data on thousands of individuals, including many whose activities are entirely nonviolent.

Political computers were part of the federal government's response to the problem of controlling ghetto riots. Now that the riots have subsided, the government is more and more devoted to gathering intelligence on campus disorder, antiwar activity and militant left and right-wing groups.

The government's justification for such surveillance is its need to be aware of potential violence, but thousands of persons are drawn in whose activities are peaceful and lawful.

For example, the Army continues to maintain a microfilm file that reportedly contains information on such persons as Mrs. Martin Luther King Jr., Georgia State Rep. Julian Bond and retired Adm. Arnold E. True, a critic of the Vietnam war.

The Army file is primarily, made up of FBI reports, and FBI reports are also the chief source of data feeding the Justice Department's computer. The FBI makes it a point to keep its information in "raw" form—unevaluated as to truth or falsity.

Those who process the FBI data at Justice say it is impossible to tell whether or not any of it comes from wiretaps. Atty. Gen. John Mitchell has declared that taps may be used without court permission on domestic organizations believed seeking to "attack and subvert the government."

Besides input from the FBI, Justice's computer contains information supplied by 93 U.S. attorneys around the country and by other government agencies, such as the Treasury department's Alcohol and Tobacco Tax Division, which enforces federal firearms laws.

Some information comes also from the Secret Service, which has lately begun assembling a data bank of its own. The service's primary concern is with threats to the

President, but its data bank will also contain information on demonstrations, "abusive statements" and plans to embarrass government officials.

Each week, the Justice Department computer disgorges its intelligence onto printout paper. The product is four books, each about two inches thick and enclosed in brown cardboard covers.

Each book refers to a region of the country. It contains a city-by-city assessment of the potential for civil disorder, indicating what marches, rallies or meetings are occurring, the organizations and individuals sponsoring them and the city's disturbance history.

The books are combed by officials of the department's interdivisional information unit, which sends pertinent data to the attorney general and the various divisions of the department.

The community relations service gets information, for example, on potential racial problems for it to try to conciliate. The civil rights division gets reports on possible violations of the laws it enforces. The criminal division gets data on such violations as interstate movement to incite riots.

Besides city print-outs, the computer can produce a run-down on a specific upcoming major event, listing all stored information on the individuals and organizations who are planning it.

This was done, for example, prior to the Nov. 15 antiwar march on Washington organized by the New Mobilization Committee to End the War in Vietnam and the Vietnam Moratorium Committee.

Special print-out reports have also been done on at least one organization, the Black Panther Party.

Whether special reports have been prepared on individuals is not known, although interdivisional information unit director James T. Devine said it could be done if needed.

Devine, also chief of the department's civil disturbance group, declined to identify any individual whose name is on computer tape.

He said, however, that it is "impossible not to have information on nonviolent individuals." He added, "I think it's realistic to expect that what would normally be in the files of the Justice department would reflect itself in the computer. You can make your own assumptions (about who is listed). It should not be difficult."

Another Justice department official said that a specific unput report on an individual might tell "he made a speech on such-and-such a night at such-and-such a place. This is what he said. This was the result."

Government officials differ on whether computerized storage of political information is dangerous to the civil liberties of Americans.

Devine contended that it is not. He said it is "a ghost" to see danger.

"The information is here anyway, in the records of the department. Putting it on a computer is just a matter of systematizing it and making it more retrievable," he said.

He added: "Having your name on a computer does not involve the question of guilt or innocence."

This is not the attitude of the two chief congressional defenders of the right to privacy, Sen. Sam Ervin, (D-N.C.) and Rep. Cornelius Gallagher, D-N.J.

The two were responsible, along with 13 other congressmen who wrote letters, for forcing the Army to abandon its political computer at Fort Holabird in Baltimore. Ervin and Gallagher are continuing inquiries into other Army political files.

Neither has commented about the Justice Department computer. It is not known whether they are even aware of its existence, for no specific authorization was sought from Congress to set it up. Justice does not believe legislation was necessary to computerize files already maintained in the department.

ADDITIONAL STATEMENTS OF SENATORS

PRISONERS OF WAR STILL A MATTER OF PRIORITY

Mr. BAKER. Mr. President, as we return to do the work of the people after the Labor Day recess I would call attention once again to one of the great unsolved problems of the year—the plight of the Americans held prisoner by the North Vietnamese.

The Communist regime remains adamant against abiding by the Geneva Convention on Prisoners to which it is a signatory power. Those agreements provide the bare minimum of guarantees for the captured men. They are entitled to health care, an adequate diet, proper shelter, and at least minimal communications with their families. In addition the government is required to notify our Government of their capture, listing their names and condition when captured.

The North Vietnamese have abided by none of these agreements.

It must remain a matter of top priority with the Government of the United States to ease the lot of these men and to continue every possible avenue of negotiation for their safe return to their waiting families.

EVERY DAY THE STAKES GROW HIGHER FOR HUMAN RIGHTS: THE LEGACY OF ROBERT F. KENNEDY

Mr. PROXMIRE. Mr. President, the past few days have been frought with senseless violence and bloodshed, both here and abroad. The tragic bombing at the University of Wisconsin and the terrorism so prevalent in the Middle East made me think back to a speech of the late Senator Kennedy that is memorable in its insight and compassion. In his speech at Fordham University and also to students in South Africa in 1967, Senator Kennedy spoke poignantly of what must come close to being his personal philosophy:

Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope, and crossing each other from a million different centers of energy and daring, those ripples build a current that can sweep down the mightiest walls of oppression and resistance.

Mr. President, a little more than 3 years ago, Robert Kennedy spoke of political courage in the quest for human rights. It was his firm conviction, both in his words and his acts, that "only those who dare to fail greatly can ever achieve greatly."

I ask unanimous consent that this stirring and provocative statement by one of the most gifted leaders of our time be printed in the RECORD.

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

THE WORK OF OUR HANDS

If you fly in a plane over Europe, toward Africa or Asia, in a few hours you will cross over oceans and countries that have been a crucible of human history. In minutes you will trace the migration of men over thousands of years; seconds, the briefest glimpse, and you will pass battlefields on which millions of men once struggled and died. You will see no national boundaries, no vast gulfs or high walls dividing people from people; only nature and the works of man—homes and factories and farms—everywhere reflecting man's common effort to enrich his life. Everywhere new technology and communications bring men and nations closer together, the concerns of one more and more becoming the concerns of all. And our new closeness is stripping away the false masks, the illusion of difference that is at the root of injustice and hate and war. Only earthbound man still clings to the dark and poisoning superstition that his world is bounded by the nearest hill, his universe ended at river shore, his common humanity enclosed in the tight circle of those who share his town and views and the color of his skin.

Each nation has different obstacles and different goals, shaped by the vagaries of history and experience. Yet as I talk to young people around the world I am impressed not by the diversity but by the closeness of their goals, their desires and concerns and hope for the future. There is discrimination in New York, apartheid in South Africa and serfdom in the mountains of Peru. People starve in the streets of India; intellectuals go to jail in Russia; thousands are slaughtered in Indonesia; wealth is lavished on armaments everywhere. There are differing evils, but they are the common works of man. They reflect the imperfection of human justice, the inadequacy of human compassion, the defectiveness of our sensibility toward the sufferings of our fellows; they mark the limit of our ability to use knowledge for the well-being of others. And therefore, they call upon common qualities of conscience and of indignation, a shared determination to wipe away the unnecessary sufferings of our fellow human beings at home and around the world.

TO RELY ON YOUTH

Our answer is the world's hope; it is to rely on youth—not a time of life but a state of mind, a temper of the will, a quality of the imagination, a predominance of courage over timidity, of the appetite for adventure over the love of ease. The cruelties and obstacles of this swiftly changing planet will not yield to obsolete dogmas and outworn slogans. It cannot be moved by those who cling to a present that is already dying, who prefer the illusion of security to the excitement and danger that come with even the most peaceful progress. It is a revolutionary world we live in; and this generation, at home and around the world, has had thrust upon it a greater burden of responsibility than any nation that has ever lived.

"There is," said an Italian philosopher, "nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success than to take the lead in the introduction of a new order of things." Yet this is the measure of the task of this generation, and the road is strewn with many dangers.

First is the danger of futility, the belief that there is nothing one man or one woman can do against the enormous array of the world's ills—against misery and ignorance, injustice and violence. Yet many of the world's great movements, of thought and action, have flowed from the work of a single man. A young monk began the Protestant Reformation, a young general extended an empire from Macedonia to the borders of the earth, and a young woman reclaimed the territory of France. It was a young Italian ex-

plorer who discovered the New World, and the thirty-two-year-old Thomas Jefferson who proclaimed that all men are created equal. "Give me a place to stand," said Archimedes, "and I will move the world."

These men moved the world, and so can we all. Few will have the greatness to bend history itself, but each of us can work to change a small portion of events, and in the total of all those acts will be written the history of this generation. Thousands of Peace Corps volunteers are making a difference in isolated villages and city slums in dozens of countries. Thousands of unknown men and women in Europe resisted the occupation of the Nazis and many died, but all added to the ultimate strength and freedom of their countries. It is from numberless diverse acts of courage and belief that human history is shaped. Each time a man stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope, and crossing each other from a million different centers of energy and daring, those ripples build a current that can sweep down the mightiest walls of oppression and resistance.

"If Athens shall appear great to you," said Pericles, "consider then that her glories were purchased by valiant men, and by men who learned their duty." That is the source of all greatness in all societies, and it is the key to progress in our time.

The second danger is that of expediency, of those who say that hopes and beliefs must bend before immediate necessities. Of course, if we would act effectively we must deal with the world as it is. We must get things done. But if there was one thing President Kennedy stood for that touched the most profound feelings of people across the world, it was the belief that idealism, high aspirations, and deep convictions are not incompatible with the most practical and efficient of programs—that there is no basic inconsistency between ideals and realistic possibilities, no separation between the deepest desires of heart and mind and the rational application of human effort to human problems. It is not realistic or hardheaded to solve problems and take action unguided by ultimate moral aims and values. It is thoughtless folly. For it ignores the realities of human faith and passion and belief, forces ultimately more powerful than all the calculations of economists and generals. Of course, to adhere to standards, to idealism, to vision in the face of immediate dangers, takes great courage and self-confidence. But we also know that only those who dare to fail greatly can ever achieve greatly.

It is this new idealism that is also, I believe, the common heritage of a generation that has learned that while efficiency can lead to the camps of Auschwitz or the streets of Budapest, only the ideals of humanity and love can climb the hill to the Acropolis.

A RARER COMMODITY

A third danger is timidity. Few men are willing to brave the disapproval of their fellows, the censure of their colleagues, the wrath of their society. Moral courage is a rarer commodity than bravery in battle or great intelligence. Yet it is the one essential, vital quality for those who seek to change a world that yields most painfully to change. Aristotle tells us that "at the Olympic games it is not the finest and the strongest men who are crowned, but they who enter the lists. . . . So too in the life of the honorable and the good it is they who act rightly who win the prize." I believe that in this generation those with the courage to enter the moral conflict will find themselves with companions in every corner of the world.

For the fortunate among us, the fourth danger is comfort, the temptation to follow the easy and familiar paths of personal ambition and financial success so grandly spread before those who enjoy the privilege of education. But that is not the road history has marked out for us. There is a Chinese curse that says, "May he live in interesting times." Like it or not, we live in interesting times. They are times of danger and uncertainty, but they are also more open to the creative energy of men than any other time in history. And all of us will ultimately be judged, and as the years pass we will surely judge ourselves, on the effort we have contributed to building a new world society and the extent to which our ideals and goals have shaped that effort.

Our future may lie beyond our vision, but it is not completely beyond our control. It is the shaping impulse of America that neither fate nor nature nor the irresistible tides of history, but the work of our own hands, matched to reason and principle, will determine our destiny. There is pride in that, even arrogance, but there is also experience and truth. In any event, it is the only way we can live.

CONCLUSION OF MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Is there further morning business? If not, morning business is closed.

COMMITTEE MEETINGS DURING SENATE SESSION

Mr. BAYH. Mr. President, I ask unanimous consent that all committees be authorized to meet during the session of the Senate today.

The ACTING PRESIDENT pro tempore. Is there objection to the request of the Senator from Indiana? The Chair hears none, and it is so ordered.

DIRECT POPULAR ELECTION OF THE PRESIDENT AND VICE PRESIDENT

The ACTING PRESIDENT pro tempore (Mr. ALLEN). In accordance with the previous order, the Chair lays before the Senate the unfinished business, which will be stated.

The assistant legislative clerk read as follows:

A joint resolution (S.J. Res. 1) proposing an amendment to the Constitution to provide for the direct election of the President and Vice President of the United States.

The Senate proceeded to consider the joint resolution.

Mr. BYRD of West Virginia. Mr. President, I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BYRD of West Virginia. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. BAYH. Mr. President, today the Senate begins an historic debate on one of the most pressing issues facing this Nation—determining the best method of electing the President and Vice President. Nothing short of the very best method will suffice.

I am sure, because of the gravity of this question, that the debate will be active, enthusiastic, and perhaps at times heated, but I hope that by the time we are through we will have provided a major change which will correct some of the shortcomings of the present system.

Mr. President, I ask unanimous consent that there be printed in the RECORD immediately following my remarks a copy of Senate Joint Resolution 1 as reported from the Committee on the Judiciary, together with a section-by-section summary and analysis.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered. (See exhibit 1.)

Mr. BAYH. Mr. President, I want to emphasize the point I made a moment ago as strongly as I know how. I have said before, and I say once again, Mr. President, that as long as man is frail and as long as an occasional human being, either within Government or without, will yield to the temptation not to walk the straight and narrow, any system for choosing our President could have shortcomings. In short, no system devised by man can be perfect, and prevent an unscrupulous individual from trying to distort it to give him more advantage than he should have under the system.

So, Mr. President, at the start of this debate, I hope we will lay aside the effort to find a perfect system. As one who has studied this matter for 4 or 5 years, I do not know of any perfect system, but rather, I think what we are striving for in this debate today, is to find the best system, that which has the fewest shortcomings and the fewest possibilities of malfunctioning. Because, Mr. President, nothing short of the very best method for choosing our President will suffice. I believe that the measure now pending before this body, Senate Joint Resolution 1, is the very best method for selecting the President. It is the only system that is truly democratic, truly equitable, and truly responsive to the will of the people.

Having already been fortunate enough to be a principal in the successful effort to secure passage of the 25th amendment, Mr. President, I know that amending the Constitution is an awesome responsibility. It is a responsibility that I do not take lightly.

I think our Founding Fathers were correct in requiring two-thirds of both Houses and three-fourths of the State legislatures to join in concurrence before a major change could be made in the bedrock constitutional law of this land. Because of this responsibility, I say to the Senate at the outset that today, after 4½ years of exhaustive committee study not only in the Halls of Congress, but by many organizations throughout the country, I urge the Senate to approve a constitutional amendment providing for direct popular election of the President.

The burden in this debate will be on those of us who support direct popular election—as it rightly should. Certainly, Congress should approve constitutional amendments only when there has been exhaustive study and the need for constitutional change has been clearly demonstrated. In the case of our antiquated electoral college system, where

the prospect of electing a man who is not the popular choice of the voters is an ever-present danger, I believe the need for change is clear. But more than change, the archaic and dangerous method by which we elect our Presidents and Vice Presidents requires substantial reform. Mr. President, I have not taken a poll of the Members of this august body, but I would hazard a guess that if we were to poll the 100 Senators, more than 90 of them would suggest some change that they think should be made in our present system.

So, as we embark upon our discussion and our study on the floor of the Senate, I think we should emphasize, while trying to achieve the best change we possibly can, that change alone is not enough. We need a basic reform that will minimize the inequities and the malfunctioning of the present system; and it is in this respect that I suggest that the direct election of the President would be a change of the type that is necessary.

There has developed, over the past few years, a strong amount of support for this type of change. It is, I think we can accurately say, an idea whose time has come.

In view of the national consensus on the need to replace the electoral college system with direct popular election, I am hopeful that two-thirds of the Senate will agree with the more than 40 of us who already have joined in sponsoring Senate Joint Resolution 1: that now is the best time to reform—and that direct popular election is the best reform available to us.

"The road to reform in the method of choosing the Presidents and Vice Presidents of the United States," Arthur Krock wryly commented more than 20 years ago, "is littered with the wrecks of previous attempts." The first attempt, I might point out, was as long ago as 1816, almost before the ink on the original Constitution itself had dried.

For more than a century and a half, Mr. President, we have recognized the perils of a system that leaves the choice of President to a group of independent electors—electors whose freedom to disregard the will of the people is presently guaranteed by the Constitution. We have recognized the inequities in a scheme that allocates all of a State's electoral votes to the candidate who wins a popular vote plurality in that State, regardless of whether that plurality is 1 vote or 1 million votes—a scheme, I should add, that is nowhere to be found in the Constitution itself. We have recognized the grave risks that the popular will of the people can easily be thwarted, either by the strange arithmetic of the electoral system or by the mischievous deeds of a handful of power brokers.

Having long recognized these obvious inadequacies, we have yet to correct them. Why? Because repeatedly in the past we have failed to achieve agreement as to the most desirable route to reform. As I said a moment ago, I am fully convinced that 90 percent of the Members of this body want some type of change.

For that matter, there has always been near unanimous agreement as to the need for reform, but never before has there been a national consensus as to what specific type of reform was needed.

Today we have that elusive national consensus. That is why now is the best time to reform.

Mr. CURTIS. Mr. President, would the distinguished Senator from Indiana care to yield at this point?

Mr. BAYH. I am glad to yield to my distinguished colleague from Nebraska.

Mr. CURTIS. I should like to ask the distinguished author of this resolution to explain lines 23 to 26 on page 4 of the resolution, also including the word "except" in the previous line: "except that for electors of President and Vice President, the legislature of any State may prescribe less restrictive residence qualifications and for electors of President and Vice President the Congress may establish uniform residence qualifications."

What does the Senator mean by that?

Mr. BAYH. I shall be glad to answer the question, but does the Senator from Nebraska have a series of questions to which he would like to address himself? If so, I would feel better if the RECORD could show my entire opening statement first.

Mr. CURTIS. Very well. I withhold further questions.

Mr. BAYH. I think the Senator's question is very pertinent, but I should like to have continuity in my opening remarks. After I have concluded them, I shall be glad to answer any questions the Senator from Nebraska cares to ask.

Mr. CURTIS. I withdraw my question.

Mr. BAYH. I was saying that I feel now is the best time for reform, Mr. President.

I feel that at the outset of this debate, perhaps a bit of study as to what has gone on before the debate would be helpful to the Senate in its consideration.

In February 1966, Mr. President, the American Bar Association established a Special Commission on Electoral Reform. As some Members of this body will recall, the American Bar Association, with a similar commission, was very helpful to us in preparing the ground work for the consideration of the 25th amendment, and I thought it would be helpful, and indeed it has proved to be very helpful, for the Bar Association to appoint another such commission to help us with this different constitutional problem.

The commission was composed of distinguished political scientists, lawyers, legal scholars, public officials, and other leaders from every section of the country and reflecting various political views. It studied the present electoral system and considered all of the various proposals for reform. After an extensive 10-month study, the commission concluded that the existing electoral system is: "Archaic, undemocratic, complex, ambiguous, indirect, and dangerous."

The Bar Association's blue-ribbon commission further concluded that:

> While there may be no perfect method of electing a President, we believe that direct, nationwide popular vote is the best of all possible methods. It offers the most direct and democratic way of electing a President and would more accurately reflect the will of the people than any other system.

In urging the abolition of the present electoral system and replacing it with direct popular elections, the commission foreshadowed an emerging national consensus on the question of electoral reform.

The Harris and Gallup polls have shown, for example, that 78 percent and 81 percent of the American people, respectively, favor direct popular election. The extent of this feeling, it is important to note, is nationwide—and fairly evenly distributed throughout the country. To quote excerpts from one of Mr. Gallup's polls, the figures reveal that 82 percent of the people in the East, 81 percent in the Midwest, 76 percent in the South, and 81 percent in the West think direct popular election is both desirable and necessary.

Despite some speculation to the contrary, this debate should not result in a sectional type dispute, because the people themselves, when they are asked, "Do you think you should have a right to vote for your President? Do you think direct popular election is today the best way to choose our President?" by an overwhelming majority, as the figures show, respond in the affirmative.

In addition, Senate Joint Resolution 1 has been publicly endorsed by a unique and formidable array of national organizations, among them the American Bar Association, the Chamber of Commerce, the AFL–CIO, the United Auto Workers, the National Federation of Independent Business, the National Small Business Association, and the League of Women Voters—indeed a rather prestigious group of organizations representing broad philosophical and nationwide support.

For years, one of the arguments often raised against direct popular election was that it could not be ratified by the legislatures of three-fourths of the States. In fact, even a few direct popular supporters, including the late Senator Estes Kefauver and Senator Henry Cabot Lodge, were deterred from pushing it because of their doubts as to whether direct election could be ratified.

In 1966, the distinguished Senator from North Dakota (Mr. BURDICK) dramatically refuted this argument by polling 8,000 State legislators and finding that of the 2,500 who responded. nearly 60 percent favored direct election. The results, once again, revealed very little variation from State to State. More recently, Senator GRIFFIN polled 4,000 legislators from the 27 States thought most likely to oppose direct election—and 64 percent of those responding endorsed direct election.

If I might make a brief detour, it would seem to me, as an ex-State legislator, that the average State legislator is probably not too far from the thinking of his average constituent. And as the polls of Harris and Gallup show, and the polls of the various State legislators show, there is strong grassroots support throughout the country for this major constitutional change.

In September 1969 the House of Representatives reflected this national consensus by approving a constitutional amendment for direct election by an overwhelming 339 to 70 vote. Now it is the Senate's turn to act. The people of the United States will not put up with the electoral roulette of the present system. They want reform. They want direct popular election of the President. Now is the time for reform. Now is the time for direct popular election.

There is another equally compelling reason for acting now, Mr. President—before it is too late. Why not eliminate, once and for all, the ominous prospect of elevating to the Presidency a man who is not the choice of the American voters? Why not take an ounce of prevention now, before the antiquated electoral college backfires, and it is too late for the proverbial pound of cure?

Mr. BAKER. Mr. President, will the Senator yield?

Mr. BAYH. I yield.

Mr. BAKER. Mr. President, I am in thorough accord with the statement just made by the distinguished Senator from Indiana. Not only am I a cosponsor of this joint resolution, but also, I have long advocated the abolition of any system that dilutes the full effectiveness of one man's vote in relation to any other man's vote in the selection of our chief magistrate and the Vice President.

But may I say at this point that I believe it is urgent and essential, as the Senator from Indiana points out, to take action on this matter now, and to take affirmative action. In 1968, this country witnessed one of the several significant third-party efforts in our history, in the form of the American Independent Party, supporting the candidacy of Governor Wallace; and I believe that most Members of this body would agree that the principal strength claimed by former Governor Wallace, and his principal claim to support in that campaign in 1968, was not that he would receive a majority of the votes but, rather, that he would receive enough electoral votes to deny a candidate a major and therefore to create for himself a bargaining position.

If we are to avoid that again—and all the forces and factors present in 1968 are still there and will be, I suppose, in 1972—if we are to avoid that in 1972, we have to get about the business of changing the machinery now. It is the machinery, it is the mechanism, that creates the opportunity for the third party effort to create a bargaining position.

I believe, as I think the Senator from Indiana believes, that our President and the Vice President ought to be chosen on some basis other than a bargaining position, and they ought to be chosen by the clear expression of the sentiment of the people themselves, not by some three-cornered set of forces and powers which throw the election to the House of Representatives.

At this point and without undue interruption, I hope, of the Senator's excellent statement on this subject, may I say that I want to underscore the imperative nature of early and affirmative action, so that we can prepare ourselves for the 1972 election without again subjecting ourselves to the risk of a bargaining election.

Mr. BAYH. I appreciate the comments of the Senator from Tennessee. His cosponsorship and his active support of this measure provide not only comfort but also assurance, in my judgment, that the measure has an excellent chance of being accepted by the Senate.

As this debate proceeds, I am sure that some of our colleagues—the distinguished Senator from Nebraska, I am sure, will be one—not only will express reservations with respect to certain sections dealing with technicalities and how the mechanics of this proposal is to operate, but also will express broad philosophical disagreement with the right of the people to vote directly on a one-man, one-vote basis for the President. I think there is room for difference of opinion in this body. But I think the Senator from Tennessee touched the keystone of our argument. Today, perhaps more than ever before in the history of our country—at least, since the great War Between the States—the ability of our system to respond and to be a viable system of governing 200 million people is being tested. Some very critical questions are being asked now that were not asked 20 years ago. Hopefully, they will not be asked 20 years from now. But they are being asked today.

I think that one of the major reasons why we need to prevent an occurrence such as that described by the Senator from Tennessee, which almost happened in 1968, is the recognition of the fact that it would be extremely difficult, if not impossible, today for the President of the United States to govern if he were chosen in the manner mentioned by the Senator from Tennessee.

Mr. BAKER. If the Senator will yield further, I agree entirely with that observation. As ominous as it is, I am afraid it is entirely accurate; and I think it underscores another important point in support of the basic necessity for electoral reform of this type.

At the time of the creation of the electoral college, this was a great, sprawling nation, even though smaller in geographical size than it is today. Now it is a homogeneous nation. It is for the first time, I suppose, a nation-state. The United States is no longer an aggregation of dissimilar States but a federation of 50 States in which the people are more nearly alike. By and large they think the same things, they are concerned about the same problems, they are moved along by the same impulses, they respond to the same stimuli, and they dislike the same things. We live in an era of instantaneous communication by reason, primarily, of the electronic media, and of almost instantaneous transportation because of the advent of the jet airplane and other swift means of transportation.

The point is that as the electoral college may once have served a useful purpose for an undereducated or poorly educated populace in a federation of colonies or States with respect to the nomination of candidates capable of serving as President, or to be selected by the House of Representatives, which after all was the rationale, no longer is that condition applicable to a nation-state such as we have today, but is positively destructive of the ability of this Republic to resonate fully to the range of desires, demands, and dissents of 200 million Americans.

Thus, I suggest most respectfully, especially in view of the high esteem in which I hold Senators who disagree with this statement, that not only is it necessary to accommodate every one of those items now, but we are incurring great and grave risks by jeopardizing our ability to govern efficiently and effectively in these trying times, if we are to do our best to fine-tune the democratic system so that every citizen is a fully participating citizen; so that every person regardless of the State in which he lives or the congressional district in which he resides, no matter how heavily Republican or how overwhelmingly Democratic that State or that congressional district may be, can have his vote counted.

I have only this additional comment to make, with apologies once more to the Senator from Indiana for this lengthy interruption. I remember, as I was growing up in my native State of Tennessee, that the National Democratic Party paid very little attention to us because they assumed the State would vote Democratic, and the National Republican Party paid no attention to us because they assumed that they could not carry the State. Yet, Tennessee always has had 35 percent, 40 percent, 45 percent Republican voters—until recently, mostly in the eastern third of the State—but they were ignored. In fact, they were disfranchised because the Democratic Party—and the Republican Party, as well—paid no attention under the winner-take-all theory, which is what the electoral college process amounts to, and it did not make that much difference whether one campaigned for the Republican candidates or not.

Only by the direct popular election of a President and a Vice President can that minority of 40 percent or 45 percent, as it was in Tennessee for many years, or 1 percent, as it is in some States, regional, ethnic, or otherwise, be fully counted with the same vitality, strength, and energy that the vote in every other State is counted.

I believe that it is not unseemly for me to say, in this time of much talk about a southern strategy, and the Senator from Indiana, who is not of my party, will not be offended by my saying that I hope that there is a southern strategy by both parties; that never again will either party take the South for granted or ignore it, but, rather, that both parties will compete for the support and dedication of the South and the Southeast, just as they compete for every other State in every other area.

I believe, and I say on my own experience, that one-partyism in the United States is a unique, direct product of the defective design of the electoral college

system in modern times, and that it will never again exist with all of its attendant evils if we resort to the direct popular election of a President and a Vice President.

Mr. BAYH. I certainly appreciate the thoughts of the distinguished Senator from Tennessee and hope, during debate and discussion of this issue, that we can drive home that point.

Coming from Indiana, I have seen the national political strategy work the opposite way, in that in most elections in this century the Democratic Party voters have been ignored because it looked as though the Republicans would carry, and the Republicans on the other hand thought they had such a big majority they did not need to pay much attention to the State, either. As a result, this is not conducive to strong, two-party activity. I think this is one of the items that strongly recommends our proposal.

Mr. President, what I should like to do now, if I may, is to touch on and briefly review some of the obvious defects and deficiencies of the electoral college that make it such a clear and ever-present danger.

DEFICITS AND DEFICIENCIES IN THE ELECTORAL COLLEGE

There is no need for me to dwell on the historical accidents that led the framers to compromise on the hybrid electoral college system, but it is interesting to note what a make-shift arrangement the framers were forced to devise.

The appearance of political party candidates as early as 1800, for example, meant that Alexander Hamilton's original design of a "select assembly" of independent electors already had lost its purpose only a decade after its embodiment in the Constitution. Alexander Hamilton was one of the original Founding Fathers and he wanted to create electors to be an elite group that had complete freedom of choice. He made no apologies for this. But 10 years after the measure was put on the books, parties developed that had not been anticipated by the Founding Fathers. When the party system did develop, Alexander Hamilton's ideas of a "select assembly" went out the window. A Senate report published in 1826 caustically noted that the free and independent electors had "degenerated into mere agents in a case which requires no agency and where the agent must be useless if he is faithful and dangerous if he is not."

This danger was accurately reflected in the remarks of the distinguished Senator from Tennessee (Mr. BAKER) a few moments ago.

But today, more than 125 years later, the elector still retains his constitutionally guaranteed independence.

The elector is to the body politic what the appendix is to the human body. As Henry Cabot Lodge said:

> While it does no good and ordinarily causes no trouble, it continually exposes the body to the danger of political peritonitis.

The prospect of unknown electors auctioning off the Presidency to the highest bidder remain all too real. That is the lesson of 1968, when the present electoral system brought us to the brink of constitutional crisis. A shift from Nixon to Humphrey of only 42,000 popular votes in three States would have denied Nixon an electoral majority. No one would have had an electoral majority on election day. It would have given Wallace, with his 46 electoral votes, the balance of power.

Let me add there that a recent study showed that a change of less than 1½ percent of the vote in one State alone—in California—would have produced the same outcome.

We can avoid this dangerous disease simply by eliminating the elector. But that is not a cure-all for what ails our present electoral machinery. The elector, in fact, is merely a symptom of more fundamental flaws in our system of electing the President.

Mr. President, one of the well-intentioned suggestions that I am sure will be made by one of our colleagues is to remove the elector and just count the electoral votes, so that we remove the independence. That is a step forward, but it is a very small step when we need a great leap forward. We need a major reform to clear up the fundamental flaws of the present system.

Among other things, the present system can elect a President who has fewer votes than his opponent and thus is not the first choice of the voters. The present system awards all of a State's electoral votes to the winner of the State popular vote, whether his margin is one vote or 1 million votes. As I discussed a moment ago, it cancels out all of the popular votes cast for the losing candidate in a State and casts these votes for the winner; it assigns to each State a minimum of three electoral votes regardless of population and voter turnout; and provides for a patently undemocratic method for choosing a President in the event no candidate receives an electoral majority. How can we possibly justify the continued use of such a patchwork of inequity and chance?

One of the major difficulties of the present electoral system is the unit rule, which is not even a constitutional provision. I wonder whether all our colleagues realize that this is the way we operate and have been operating for some time. The State of Maine, I think, made a change at its last legislature. How permanent that will be, we do not know, but prior to that time all of the States, for a great period of time, during most of this century, operated on the winner-take-all unit system, although it is not provided for in the Constitution.

Mr. BAKER. Mr. President, will the Senator yield on that point?

Mr. BAYH. I yield.

Mr. BAKER. Mr. President, I would note also that while Maine has changed the winner-take-all effect by changing the unit rule provision as it pertains to its electoral votes, the action of the State of Maine probably creates a constitutional question in itself that we will not really need to grapple with if we act affirmatively on this amendment. It may be said that some legal scholars will say—and I am sure that some will—that if the State of Maine in its legislative discretion decides to abolish and prohibit the unit rule that the equal rule provision of the Constitution would require an investigation of the unit rule requirement in any other State and that it might be possible that the validity of an election could be challenged on the basis of the equal rule just as it has been challenged on the 18-year-old vote.

I am not sure that a good case could be made. But it seems to me that the very last thing we need is to have a challenge of the electoral system. Even though it is archaic, it is the only thing we have until we act.

Mr. BAYH. Mr. President, I thank the Senator from Tennessee for pointing out the shortcomings that indeed decrease the capability of our system as we indicated a moment ago.

In effect, millions of voters are disenfranchised if they vote for the losing candidate in their State because the full voting power of the State—its electoral vote—is awarded to the candidate they opposed. The obvious injustice of this was pointed out by Thomas Hart Benton—a former U.S. Senator—over a century ago. He said:

> To lose their votes is the fate of all minorities, and it is their duty to submit; but this is not a case of votes lost, but of votes taken away, added to those of the majority and given to a person to whom the minority is opposed.

I found myself about a year ago addressing a joint session of the Arkansas Legislature on this very subject. Suddenly it came to me like a bolt out of the blue—I do not know why it took that long a period after studying the matter for years—as I looked around that beautiful, ornate chamber in Little Rock, that all the representatives were either Democrats or Republicans. Yet, every citizen in Arkansas who voted for either a Democratic or Republican candidate in the 1968 election not only lost his vote but had it cast for Governor Wallace who received barely 38 percent of the popular vote but got 100 percent of the Arkansas electoral vote. That is how the unit rule operates.

One practical consequence of this disenfranchisement is that it discourages the minority party in traditionally one-party States. Simply stated, where there is no hope of carrying the statewide popular vote, the size of the voter turnout for the likely loser is meaningless. This necessarily leads to the atrophying of the party structure in many States. By the same token, the prospective winner has little incentive to turn out his vote because the margin of victory likewise is meaningless. In sum, the unit rule has the unhealthy political effect of both maintaining weak second parties and discouraging voting. This is reflected most clearly in the poor voter turnout in U.S. presidential elections in comparison to most other democratic nations.

Another byproduct of the unit rule is the distortions it produces in the value

of individual popular votes. The unit rule tends to inflate the voting power of a small number of well-organized voters in the handful of large, closely contested States where blocs of electoral votes can be won on the basis of narrow popular vote margins. A candidate, for example, could win an electoral majority by capturing slim statewide pluralities in the 11 largest States—even if he did not receive a single popular vote in all of the other States. This means, in effect that under the present system in 1968, 25 percent of the popular vote could have elected a President. For these reasons, some of those opposed to direct election urge that the present system be retained because it represents "the only effective hold on power that the urban population centers have in the Federal Government today."

On the other hand, some spokesmen for rural America have suggested that the present electoral vote formula should be preserved because it enhances the voting power of citizens of the less populous States. This argument has, I admit, a certain theoretical appeal. The ratio of electoral votes to population indicates that the smaller States would have a voting advantage, because each State is entitled to at least three electoral votes regardless of its size. On this basis, it would appear that a voter in Alaska has five times the power of a voter in California. This argument, however completely ignores the practical advantage of the unit rule. A careful analysis will show that because of the unit rule an individual voter in a more populous State has greater voting power than his small State neighbor, since his vote could swing a much larger number of electoral votes.

But even if one could conclude—as some apparently have—that the present system favors one citizen over another, one region over another, or one group over another, that would not be the end of the question. There is something more important at stake in the debate over electoral reform—a fundamental question of national fairness. The President represents every American, regardless of region or State, and he should be elected by all Americans, fairly and equitably. Every vote should count the same, urban or rural, black or white, rich or poor, North, South, East or West. Any system which favors one citizen over another or one State over another is inherently inconsistent with the most fundamental concept of a democratic society.

Any student of the electoral college system can point out examples of how when all of the large States go one way the voters in the large States have an advantage. However, when the large States are divided, the mathematical advantage of the small States take effect.

I think the important question to ask ourselves here in the United States of America in 1970, in the country that we believe is the world's greatest democracy, is why under any circumstances should any voter have an advantage over another. The answer is that he should not. Everyone ought to have the same right and opportunity to choose the President.

Mr. BAKER. Mr. President, will the Senator yield?

Mr. BAYH. I yield.

Mr. BAKER. Mr. President, I agree entirely. I think that the time when the President is elected by land space or territory, as distinguished from people, is over and that we are in fact a nation of States and demand to be a nation of States and demand equality in the election of magistrates, Vice President, and Presidents and demand that they be elected by people and not by area.

It is unique indeed that the advocates of the popular election and the foes of popular election each claim that it favors one side or the other. The fact of the matter is that the numerical balance tends to be absolute neutrality, which is where it ought to be.

It is a paradox that those who come from smaller States—and I come from a small State; Tennessee has a population of about 4 million which puts us near the median—point out that the minimum guarantee of two Senators gives them some slight advantage in the selection of a President.

I agree with the Senator from Indiana that even a slight advantage is an unconscionable advantage. Those from urban areas say that the 11 most populous States could choose a Vice President and President without any remaining votes at all from the other 39 States.

If it is true, then it is wrong and is an unconscionable advantage. If the electoral system does create an advantage in any way, it is demonstrably improper. The direct popular election of the President is the only way to have absolute equality.

I believe that those who claim that the system of the election of the President grew up as the result of a great compromise by our Founding Fathers have misread history. The great compromise was the creation of a bicameral system with two Members of the Senate from each State and one Representative in the House of Representatives for each representative district.

The electoral colleges was created according to that formula—that is, the sum total of the Senators and Representatives—almost as an afterthought to that great compromise; not a product of the compromise, but a corollary to it. The system was designed to work, as the Senator pointed out, in the nature of an electoral college serving as a nominating committee. After they had nominated five people who were eminently qualified to serve as President and Vice President, the House, which, according to our Founding Fathers, was established on a one-man, one-vote basis—or a representative basis and not a territorial basis—then chose a President. But in usage it did not work that way, and as a result we now have the historical mobilization of a patent inequity; that is, a proportion of electoral votes of the sum total of elected Representatives plus two Senators from each State.

Mr. President, to conclude this interruption, the fact that both urban areas and small States claim the perpetuation of the electoral college system creates some slight advantage in favor of one or the other, depending on which group one talks with, is a demonstration of the clear inequity of the system.

(At this point Mr. NELSON assumed the chair.)

Mr. BAYH. Mr. President, I thank the Senator from Tennessee for elaborating on that point.

I must say, sitting through two or three volumes of hearings over the last 4 or 5 years was not at all times an inspirational experience. Some of the testimony was repetitive. Nevertheless, as chairman of the Subcommittee on Constitutional Amendments, I sat there. I thought it amusing, if not ironic, that on the last day—and I am not going to name individuals or organizations—and after 4 years of study, the last two witnesses appeared before our committee. One witness came before our committee suggesting the present system should be maintained because it gave an advantage to the larger States and the next witness suggested the present system should be maintained because it gave an advantage to the small States.

I think the Senator is absolutely correct. These two advantages balance each other out. We should go ahead with direct election because regardless of what a person believes, no person will have a greater opportunity to choose the President and Vice President than his neighbor across the street.

But despite the seriousness of these defects in the electoral college system, they are not so dangerous as the most fundamental flaw: the fact that the present electoral vote system cannot guarantee that the candidate with the most popular votes will be elected. This dangerous prospect, more than anything else, condemns the present system as a faulty device for recording the sentiment of American voters. In 1824, 1876, and again in 1888, this system produced Presidents who were not the popular choices of the voters. On seven other occasions in this century, a shift of less than 1 percent of the popular vote would have produced an electoral majority for the candidate who received fewer popular votes.

To give an example of how extreme this can be, in 1948, a shift of less than 30,000 popular votes in three States would have given Governor Dewey an electorial vote majority—despite President Truman's 2 million-plus popular vote margin. I suggest to Senators that that is the type of malfunctioning which would bring our Nation to its knees.

Good fortune, not design, has produced Presidents who were the popular choices of the people. A glance at past elections reveals that there have been very few elections where the candidates' percentage of the electoral vote reasonably resembled their percentage of the popular vote.

In runaway elections, of course, any system will produce an electoral victory

for the popular vote winner. It is the accuracy of the results produced in closely contested elections, however, that determines the true soundness of an electoral system. Based on this criterion, the present system is clearly defective. A recent computer study of presidential elections over the last 50 years revealed, for example, that in elections as close as 1960 the present system offered only a 50–50 chance that the electoral result would agree with the popular vote. For an election as close as 1968, where some 500,000 popular votes separated the candidates, there was one chance in three that the electoral vote winner would not be the popular vote winner as well. According to the evidence, the danger of an electoral backfire is clear and present. And as President Nixon said during the 1968 campaign:

> If the man who wins the popular vote is denied the Presidency, the man who gets the Presidency would have very great difficulty in governing.

The tests of an equitable modern electoral system are threefold. First, it must guarantee that the candidate with the most votes is elected President. Second, it must count every vote equally. Third, it must provide the people themselves with the right to directly make the choice. Only direct popular election meets all three tests.

DESCRIPTION OF SENATE JOINT RESOLUTION 1

Senate Joint Resolution 1 proposes an amendment to the Constitution of the United States to abolish the antiquated electoral college and undemocratic "unit vote" system and substitute direct popular election of the President and Vice President. The proposed amendment contains several major features worthy of discussion at this time.

First, the amendment requires the winning candidate to obtain at least 40 percent of the total popular vote. During the past 5 years, questions have been raised as to what percentage of the popular vote—if any—should be required for election. On one hand, it is necessary to establish a reasonable plurality requirement indicating a legitimate mandate to govern. On the other hand, such a requirement should not be set so high that it would disrupt the stability of our political system.

Requiring a majority of the popular vote for election might too easily proliferate the party system and needlessly trigger the runoff. Historically, 15 Presidents have been elected with less than 50 percent of the popular vote. But only once in our history has no candidate for President received 40 percent of the popular vote: In 1860, Lincoln received 39.79 percent of the vote, although his name did not appear on the ballot in 10 States.

It should be pointed out that he came this close to the 40-percent mark. It is fair to assume that if the same rules applied across the board in that election as they have subsequently, at no time has a President failed to get the 40-percent required under Senate Joint Resolution 1.

Mr. President, I believe that a 40-percent plurality requirement would assure a reasonable mandate to govern, while not unnecessarily triggering the runoff election. It is extremely unlikely that neither major party candidate would receive a 40-percent plurality—even with a third party candidate in the race. In 1968, for example, the most significant third party bid since 1924 could only produce 13.5 percent of the popular vote for George Wallace.

Even more to the point, in 1912, in the face of challenges by an incumbent President and a popular former President, Woodrow Wilson still received more than 40 percent of the popular vote. It should be pointed out that in 1912 1 million votes went to the Socialist candidate, Eugene V. Debs. Yet the winner, Woodrow Wilson, had more than the 40-percent mark provided in Senate Joint Resolution 1. The four-way race in 1948, involving Truman, Dewey, Thurmond, and former Vice President Wallace, likewise produced a candidate with well over 40 percent of the popular vote. The likelihood of a major party candidate receiving the required plurality, therefore, is not confined merely to third party races but to multiparty contests as well.

The 40-percent requirement, in short, is a prudent cutoff point because it avoids the likelihood of frequent runoffs, places reasonable limits on the growth of third parties, and provides a sufficient mandate to govern.

Since a 40-percent plurality requirement was established, a contingent election procedure was necessary in the unlikely event that no candidate received the requisite 40 percent. I believe that the popular vote runoff is the most appropriate contingency in a situation where the country is so divided that no candidate receives 40 percent of the popular vote. No other contingency procedure would insure as much legitimacy and would be less susceptible to intrigue and closed-door deals.

A question has been raised as to whether the runoff might unnecessarily encourage third parties to enter presidential elections. Prof. Paul Freund, a distinguished member of the Harvard Law School, is both eloquent and very persuasive on this point, and I should like to quote from Professor Freund's testimony before our subcommittee:

> This provision for a run-off is important not only as a democratic solution to the problem of a deadlock, but as a deterrent to the rise of splinter parties. Some critics of a direct popular vote have feared that by giving effect to every voter in the final tally, the plan would jeopardize the two-party system. If, however, the only achievement that such splinter parties could hope for would be to force a run-off between the two leading candidates, their gain would probably not seem to be worth the candle in the first place, and there would be an incentive to come to terms with a major party, as at present.
>
> The two-party system, in addition, is buttressed by more than the unit count of the present electoral system; it rests on the foundations of the party system in Congress and the States, and there is no solid reason to expect that these foundations would be shaken by the direct election of the President.

In the long run the political health of our democratic system would be strengthened if the final choice rests with the people. A choice by any body other than the people is either useless or mischievous—useless if it reflects the will of the people and mischievous if it does not.

The proposed amendment strikes a necessary balance between traditional State authority and compelling Federal interests in the conduct of presidential elections. I believe such a balance is workable and sound. The proposed amendment empowers the States to establish voter qualifications and election machinery similar to the responsibilities the States now exercise for the election of Senators, Representatives, and for electors of the President and Vice President. Senate Joint Resolution 1 provides that the qualifications for voting in presidential elections are to be prescribed by State law and shall be the same as those voting for members of the most numerous branch of the State legislature. These provisions are identical to the present constitutional requirements spelled out in article I, section 2, relating to the qualifications for voting for Members of the Congress.

The States are further authorized to prescribe less restrictive residence requirements for voting in presidential elections. This provision was deemed necessary in order to prevent the invalidation of existing laws in many States where less restrictive residence requirements for voting in presidential elections are already in effect. Congress, moreover, is expressly empowered with a reserve authority to establish uniform residence requirements. In this age of great mobility, State residence requirements for voting in presidential elections often work an undue hardship on millions of Americans. It is estimated, for example, that in 1968 approximately 5 million voters were arbitrarily disfranchised because of restrictive State residency requirements.

These features do not reflect any doubt whatsoever as to the constitutionality of the Voting Rights Act Amendments of 1970, now awaiting a Supreme Court test.

The mechanical details of providing for a direct popular election, including provision for the runoff, prescribing a uniform election date, and the manner in which the vote is to be ascertained and declared, are left to Congress to legislate.

Mr. BAKER. Mr. President, will the Senator yield?

Mr. BAYH. I am glad to yield.

Mr. BAKER. I agree with the Senator's statement. There are other factors to be left to a later date as to which it might be necessary to take further action. My statement is prompted by a recent decision of the Supreme Court to the effect that a 1 year's residency requirement in order to vote in Tennessee was unconscionably long and deprived a citizen of due process and equal protection. If that be the case, it seems to me that there is another area of great uncertainty that might require some action with respect to statutory election reform.

I inject that note not for the purpose of complicating the subject before the Senate, or of diverting our attention from the obvious necessity of correcting the

defects in the electoral college system, which the Senator from Indiana and I agree should be corrected, but to suggest that we will not have finished our job when we successfully ratify an amendment to the Constitution to provide for direct election of President and Vice President.

I think we ought to give consideration to universal suffrage as far as any citizen is concerned, regardless of his location in whatever State, but reserve the right to every State to fix such requirements as residency and others for a citizen to cast a vote in each State election. I think we ought to provide for a 24-hour vote. I think we have an abominable record of votes cast by those who are eligible to cast them.

Mr. BAYH. It is my honor and privilege to have joined the Senator in providing for corrections in that area.

Mr. BAKER. I thank the Senator for his assistance. We will fight that battle on another day.

The last suggestion I have is that we provide for a national primary, also requiring State preferential primaries for each of the two of our great political parties, making them more responsive, so that the delegates to the national conventions, who ought to be elected, in my judgment, will have a better view of what the people think.

So that is my view of a broader range of refinement and fine tuning of the electoral system that we have to undertake after we complete the first, Herculean task of putting at rest the greatest inequity we have, and that is correction of the inequity under the electoral college system.

Mr. BAYH. I appreciate the Senator's journey into the future. I concur in his statement that the proposed constitutional amendment is the beginning and not the end of our efforts to revitalize and make more equitable and open our electoral process. Certainly, this is a major step, and one which I think provides us with the opportunity to make some uniform recommendations, by statute, if Congress at a later date might prefer to do so.

I am not going to deal in detail with that field now, because I am sure the Senator from Tennessee is fully aware that we are proceeding to the electoral process at this time and leaving the nominating process for consideration on some future date. It is our judgment that, if we were to commingle the nominating process with electoral reform, it would sound the death knell of the basic electoral reform. This whole matter, of course, needs consideration.

Prescribing the times, places, and manner of holding such elections and provision for inclusion on the ballot remain the primary responsibility of the States. The Congress, however, is given a reserve power to make or alter such regulations. In the event a State attempts to exclude the name of a major party candidate from the ballot, for example, the Congress would have the authority to prevent such arbitrary action. Furthermore, such action appears unlikely in view of the Supreme Court's recent decision in *Williams* v. *Rhodes*, 393 U.S. 23 (1968), holding that the equal protection clause of the 14th amendment and the right of assembly guaranteed by the first amendment impose limitations upon a State's freedom to restrict parties in their access to the ballot.

Mr. President, it has been 4½ years since the Subcommittee on Constitutional Amendments began its most recent study of electoral reform. After 4½ years of continuous study and debate, the full Judiciary Committee voted 11 to 6 to report Senate Joint Resolution 1. I believe it is the only authentic reform proposal, the only proposal that guarantees the election of the popular choice, counts every vote equally and works in the manner in which most Americans expect the electoral process to work—directly and democratically.

ALTERNATIVE PLANS

I might take a moment or two of the Senate's time here to discuss very quickly some of the alternative plans, because I am certain that there are a number of our colleagues who share the concern of the Senator from Indiana that reform is necessary, but do not share the judgment of the Senator from Indiana that a direct popular vote is the best alternative.

Because we have studied these alternative proposals in some detail, it might be helpful to the Senators to make a cursory examination of the alternative plans.

There can be no disagreement that direct popular election would produce these results though some may disagree as to the desirability of such basic reforms. Over the years, several other plans have been offered. They may be offered in the course of this debate, and I expect they will. I would like to discuss the drawbacks in these proposals.

I say this without for an instant impunging the motives of those who make these suggestions, because I think it is possible for men of good will and sound judgment to examine a difficult and complicated problem like the morass of the present electoral college system, and come up with different conclusions as to what would be the best reform to propose to the Senate.

THE DISTRICT PLAN

The district plan would retain the electoral vote, with electors chosen from single-member districts within each State and two electors running at large statewide.

The district plan, like the present electoral system, is based on the winner-take-all principle—merely shifting its application from the State level to the district level. As a result, the district plan would continue to produce significant disparities between the popular vote and the electoral vote.

Mr. BAKER. Mr. President, will the Senator yield for an observation on the district plan, which I believe is quite relevant to the remarks of the Senator from Indiana?

Mr. BAYH. I yield.

Mr. BAKER. In a book by Neal R. Peirce entitled "The People's President," he tells what the results of the election of 1960 would have been under a district plan. I quote from page 11 of his book:

> Had the nation, for example, been voting in 1960 under the often-proposed plan that would give each state two electoral votes and each Congressional district one, Nixon would have been elected by 278 to 245—a small but clear electoral majority that would have done nothing to clear up the clouded popular vote and might well have made him a minority President.

I agree with the Senator from Indiana that although the district plan diminishes the inequity of the electoral system, it does not eliminate it, but preserves all of the disadvantages of the winner-take-all theory.

Mr. BAYH. I appreciate the comments of the Senator from Tennessee. A number of comments have been expressed suggesting that the district plan might even produce a popular vote loser or a minority vote winner. We can play all sorts of games with figures. The best example I have found of the disparity which can be produced in any one election was brought to our attention in the 1964 election. To cite just one example of the consequences of the district plan, compare the returns for the First and 15th Illinois Congressional Districts in 1964. These were adjoining congressional districts. President Johnson carried the First District by 167,458 votes. Senator GOLDWATER, in contrast, won the 15th district by only 71 votes. Under the district plan, each candidate would have received one electoral vote. The unit rule operating at the district level would have wasted a net popular vote margin of 167,387 votes for President Johnson.

Mr. CURTIS. Would that have been bad?

Mr. BAYH. Of course, it would have. By wasting large numbers of popular votes, the district system can easily elect a President who is not the popular choice of the voters. I am sure one could find instances, in that same election or other elections prior or since, of the same exaggeration in favor of the Democratic candidate. I say that if we were to allow this unit rule to operate, whether at the National, State, or local level, we would be tossing on the scales of chance the election of the President.

Mr. BAKER. Mr. President, one of my distinguished Republican colleagues was overheard to say, "Would that have been bad," with reference to the outcome of the 1960 elections.

Far be it from the Senator from Tennessee to suggest that from his point of view a different outcome would have been bad, if the Senator will permit me to say so, for the welfare of the country. But the point I am making, and I believe the point the Senator from Indiana makes, is that any election system short of a direct popular election creates circumstances where one party or the other may win under circumstances where it receives fewer votes than the other; and the only system which affords absolute equality of opportunity, and no advan-

tage for any candidate, but straight, undiluted equality of opportunity, is by popular election of the President and Vice President.

Mr. BAYH. I appreciate the analysis of the Senator from Tennessee. It is not the first time his statesmanship has shown that there are things more important than partisan politics, though both of us are strongly partisan. In this particular reform effort, we join hands as partisan Republicans and Democrats, with the best interests of our country as our sole goal.

I thought it might be helpful to pursue one of the other items that was brought to the attention of the Senate by the Senator from Tennessee, namely, the effect of the present electoral college system on the strength of the two-party system.

As in the case of the present system, the district plan would discourage the minority party's voters within each electoral district, thus reducing the incentive to vote. The district plan, in fact, would operate even more effectively to discourage voters because a larger number of congressional districts are safely controlled by one party than are States. Defining a "safe" State or district as one carried by 60 percent of the vote or more, for example, 32 percent of the districts were safe in 1960 and only 10 percent of the States.

So I think this erosion of strength in the 2-party system would also be present under the district plan, well-intentioned as it is, thus providing the same shortcoming as under the present electoral system.

Furthermore, despite the specific requirement of Senate Joint Resolution 12 that electoral districts be "compact, contiguous, and nearly equal in population" it still would be possible for partisan State legislature to gerrymander electoral units. The impracticality of enforcing this vague constitutional standard is another major obstacle to the district plan.

I should add that there is no provision within this well-intentioned alternative plan that the districts from which presidential electors would be chosen should be the same as congressional districts to elect Congressmen. I cannot think of anything that would be more confusing to the general public.

THE PROPORTIONAL PLAN

The proportional plan would retain the electoral vote, but replace the unit rule with a proportional division of a State's electoral vote on the basis of the popular vote in that State.

Had the proportional system been in effect in 1968, it would have produced the following distortions in two States having the identical number of electoral votes:

First, President Nixon captured 43 percent of the popular vote in Virginia and under the proportional plan this would have produced 5.2 electoral votes. Vice President Humphrey's 43 percent of the popular vote in Missouri, likewise, would have produced 5.2 electoral votes. President Nixon, however, only required 590,315 popular votes, whereas Humphrey had to poll 791,444 votes in order to produce 5.2 electoral votes—a startling difference of 201,129 popular votes.

A similar distortion can be found in both Idaho and Utah, which have four electoral votes. In both States, Nixon captured 56 percent of the statewide popular vote, and this would have entitled him to 2.2 electoral votes under the proportional plan. The interesting point is that it required 238,728 popular votes in Utah to produce the same number of electoral votes as 165,369 popular votes in Idaho.

The practical political consequences of the proportional plan is that it enhances the political influence of the "safe" States, which traditionally have had poor voter turnouts. Simply, a popular vote in a State where the voter turnout is poor is worth more than a vote in a State of equal size with a heavy voter turnout.

States sharing marked sectional interests, moreover, would have a great incentive to maximize their electoral influence by encouraging one-partyism. As a result, regional third party challenges are likely to be encouraged. In 1948, for example, the States Rights Party polled only 2.4 percent of the total popular vote, but under a proportional plan, it would have received more than three times that percentage of the electoral vote.

Under certain political conditions, the proportional plan would produce a President who was not the popular choice of the voters. If one candidate won handily in most of the States where the turnout was poor and the results in the remaining States were almost evenly divided, it is likely that the electoral winner would have been the popular vote loser. A perfect example of this division occurred in the election of 1896. Bryan captured 46.7 percent of the popular vote and McKinley won 51.1 percent. McKinley's majority of the popular vote under the present system produced 61 percent of the electoral vote. Under a proportional plan, however, Bryan would have won a 6 vote electoral victory-despite being a popular vote loser.

A recent computer study presented to the committee examined the electoral results produced under a proportional system in close popular elections. The random survey, based on several thousand two candidate races with a popular vote distribution varying from a wide 60–40 split to a 50–50 division, revealed that with a plurality of less than 1 million votes, there was a 14-percent chance of an electoral mishap. In an election as close as 1968, moreover, there was a 25-percent chance—one in four—of electing the popular vote loser.

THE MODIFIED PRESENT SYSTEM

The modified present plan would write into the Constitution for the first time the major defect of the present system—the unit rule. It would leave the election of the President to the strange arithmetic of the unit rule and perpetuate the other inequities in the present system—including the distortions in voting power, the built-in advantage for low voter turnout, and above all the great risk of electing a candidate who is not the first choice of the voters. The adoption of the "Automatic Plan" would not only write into the Constitution the evils of the winner-take-all rule, but also is likely to preclude meaningful reform indefinitely.

THE "FEDERAL SYSTEM PLAN"

The "federal system plan" would provide that in order for a candidate to be elected he would have to receive at least 40 percent of the popular vote and have "confirmed" his mandate by achieving a plurality of the votes in more than one-half of the States or in States having at least one-half the total number of voters. If no candidate received such a plurality, the decision would be made on the basis of the distribution of the popular vote in accordance with the present electoral college system. If none of the candidates received a majority of the electoral vote under this proposal, the electoral votes received by candidates other than the two receiving the greatest number of popular votes would be divided among the first two candidates in accordance with the proportion of the popular vote these two candidates received in the State.

This would be an extremely complicated and confusing method of electing the President and Vice President. Moreover, the plan might tend to fragment the presidential election process, with one candidate hoping to "confirm" his victory by concentrating on the most populous States and the other by concentrating on the smaller States. Such divisiveness should be minimized, not magnified, by the system of selecting our President. Finally, and above all, the plan does not correct the fundamental flaw in the electoral college system. It would not prevent the possibility of electing a President and Vice President who had not received the most popular votes.

CONCLUSION

Mr. President, these are the alternative plans. None of them has the support of a significant segment of the American public. None of them has the slightest possibility of securing passage by a vote of two-thirds of the Members of the Senate. None of them would be ratified by three-fourths of the States.

Indeed, Mr. President, if one of these plans were somehow to be adopted by the Senate and were to secure a two-thirds vote for passage, it would in my opinion foreclose all possibility of reform in this Congress—perhaps in this generation. The House has already expressed its preference in the strongest possible terms, by a vote of 339 to 70, for direct popular election.

No one has put it more succinctly than President Nixon, in his statement of last September 30 in support of direct popular election:

> The House of Representatives has overwhelmingly supported the direct election approach. It is clear that unless the Senate follows the lead of the House, all opportunity for reform will be lost this year and possibly for years to come.

I repeat:

> All opportunity for reform will be lost this year and possibly for years to come.

The President continued:

Accordingly, because the ultimate goal of electoral reform must prevail over differences as to how best to achieve that goal, I endorse the direct election approach and urge the Senate also to adopt it. While many Senators may prefer a different method, I believe that contrary views are now a luxury—that the need for electoral reform is urgent and should be our controlling consideration. I hope, therefore, that two-thirds of the Senate will approve the House-passed amendment as promptly as possible so that all of us together can then urge the States also to give their approval.

The question that confronts the Senate is whether we will have direct popular election or no reform at all.

EXHIBIT 1

S.J. RES. 1

A Joint Resolution proposing an amendment to the Constitution to provide for the direct popular election of the President and Vice President of the United States

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 within seven years from the date of its submission by the Congress:

ARTICLE —

SECTION 1. The people of the several States and the District constituting the seat of government of the United States shall elect the President and Vice President. Each elector shall cast a single vote for two persons who shall have consented to the joining of their names as candidates for the offices of President and Vice President. No candidate shall consent to the joinder of his name with that of more than one other person.

SEC. 2. The electors of President and Vice President in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature, except that for electors of President and Vice President, the legislature of any State may prescribe less restrictive residence qualifications and for electors of President and Vice President the Congress may establish uniform residence qualifications.

SEC. 3. The pair of persons having the greatest number of votes for President and Vice President shall be elected, if such number be at least 40 per centum of the whole number of votes cast for such offices. If no pair of persons has such number, a runoff election shall be held in which the choice of President and Vice President shall be made from the two pairs of persons who received the highest number of votes.

SEC. 4. The time, places, and manner of holding such elections and entitlement to inclusion on the ballot 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 days for such elections shall be determined by Congress and shall be uniform throughout the United States. The Congress shall prescribe by law the time, place, and manner in which the results of such elections shall be ascertained and declared.

SEC. 5. The Congress may by law provide for the case of the death, inability, or withdrawal of any candidate for President or Vice President before a President and Vice President have been elected, and for the case of the death of both the President-elect and Vice-President-elect.

SEC. 6. The Congress shall have power to enforce this article by appropriate legislation.

SEC. 7. This article shall take effect one year after the 15th day of April following ratification.

ANALYSIS OF THE RESOLUTION

The resolution contains the customary provisions that the proposed new article to the Constitution shall be valid as part of the Constitution only if ratified by the legislatures of three-fourths of the States within 7 years after it has been submitted to them by the Congress.

Section 1 of the proposed article would abolish the electoral college system of electing the President and Vice President of the United States and provide for their election by direct popular vote. The people of every State and the District of Columbia would vote directly for President and Vice President. This section prevents a candidate for either office from being paired with more than one other person. Candidates must consent to run jointly.

Section 2 provides that voters for President and Vice President in each State must meet the qualifications for voting for the most numerous branch of the State legislature in that State. The term "electors" is retained, but instead of referring to the electoral college, the term henceforth means qualified voters, as it does in existing provisions dealing with popular election of members of Congress. This clause also permits the legislature of any State to prescribe less restrictive residence requirements and is necessary in order to prevent invalidation of relaxed residence requirements already or hereafter adopted by the States for voting in presidential elections.

The Congress is also empowered to establish uniform residence qualifications. This authority would in no way affect the provisions dealing with residency requirements in presidential elections adopted as part of the proposed Voting Rights Act of 1970. The Voting Rights Act would abolish residency requirements for voting in presidential elections and establishes nationwide, uniform standards relating to absentee registration and absentee voting in presidential elections. This provision, moreover, does not modify or limit in anyway existing constitutional powers of the Congress to legislate on the subject of voting qualifications. The District of Columbia is not referred to in section 2 because Congress now possesses the legislative power to establish voting qualifications for the District under article I, section 8, clauses 17 and 18.

Section 2 is modeled after the provisions of article I, section 2, and the 17th amendment to the Constitution regarding the qualifications of those voting for Members of Congress. As a result, general uniformity within each State regarding the qualifications for voting for all elected Federal officials is retained. Use of the expression "electors of the most numerous branch of the State legislature" does not nullify by implication or intent the provisions of the 24th amendment that bar payment of a poll tax or any other tax as a requisite for voting in Federal elections. The Supreme Court, moreover, has held that a poll tax may not be enacted as a requisite for voting in State elections as well, *Harper* v. *Board of Supervisors*, 383 U.S. 663 (1966).

Section 3 requires that candidates obtain at least 40 percent of the whole number of votes cast to be elected President and Vice President. The expression "whole number of votes cast" refers to all valid votes counted in the final tally. The term "whole number" is consistent with prior expressions in the Constitution, as in the 12th amendment. Section 3 further provides that if no pair of persons receives at least 40 percent of the whole number of votes cast for President and Vice President, a popular runoff will be held among the two pairs of persons who receive the highest number of votes.

Section 4 embodies provisions imposing duties upon the Congress and the States in regard to the conduct of elections. The first part of this section requires the State legislatures to prescribe the times, places, and manner of holding presidential elections and entitlement to inclusion on the ballot—subject to a reserve power in Congress to make or alter such regulations. This provision is modeled after similar provisions in article I and the 17th amendment dealing with elections of members of Congress. States will continue to have the primary responsibility for regulating the ballot. However, if a State sought to exclude a major party candidate from appearing on the ballot—as happened in 1948 and 1964—the Congress would be empowered to deal with such a situation.

Section 4 also requires Congress to establish by statute the days for the regular election and any runoff election, which must be uniform throughout the United States. This conforms to the present constitutional requirement for electoral voting (article II, section 1), to which Congress has responded by establishing a uniform day for the election of electors (3 U.S.C. 1).

Section 4 further requires Congress to prescribe the time, place, and manner in which the results of such election shall be ascertained and declared. The mandatory language is comparable to the mandatory duties imposed upon the States to provide popular election machinery for Members of Congress. In implementing this section, Congress may choose to accept State certifications of the popular vote as it now accepts electoral vote certifications under the provisions of 3 U.S.C. 15. Federal enabling legislation will be required to provide the specific legislative details contemplated in the broad constitutional language of the amendment.

Section 5 empowers Congress to provide by legislation for the death, inability, or withdrawal of any candidate for President and Vice President either before or after a regular runoff election, but before a President or Vice President has been elected. Once a President and Vice President have been elected, existing constitutional provisions would apply. Thus, the death of a President-elect would be governed by the 20th amendment and the death of the Vice President-elect would be governed by the procedure for filling a Vice Presidential vacancy contained in the 25th amendment. Section 5 also empowers the Congress to provide by legislation for the case of the death of both the President-elect and Vice-President-elect.

Section 6 confers on Congress the power to enforce this article by appropriate legislation. The power conferred upon Congress by this section parallels the reserve power granted to the Congress by numerous amendments to the Constitution. Any exercise of power under this section must not only be "appropriate" to the effectuation of the article but must also be consistent with the Constitution.

Section 7 provides that the article shall take effect 1 year after the 15th day of April following ratification. The committee was of the opinion that since State and Federal legislation will be necessary to fully implement and effectuate the purposes of the proposed amendment, a reasonable period of time should be provided between the date of ratification and the date on which the amendment is to take effect. The committee believes that this provision affords both the Congress and the States an adequate opportunity to legislate, but does not foreclose the possibility of securing ratification in time for the proposed article to be in effect before the 1972 Presidential election.

Mr. CURTIS. Mr. President (Mr. CASE) will the Senator yield?

Mr. BAYH. I am glad to yield to the distinguished Senator from Nebraska, and I certainly appreciate his patience.

Mr. CURTIS. I commend the distinguished Senator for a most eloquent defense of a proposition that is both unsound and weak. He has done an excellent job, and I congratulate him upon it.

I should like to ask the Senator a few questions——

Mr. BAYH. If the Senator will yield, I certainly appreciate that compliment.

Mr. CURTIS. The Senator is entitled to it.

In how many States do the voters actually vote for the President and Vice President by name on the ballot?

Mr. BAYH. I do not know the exact number, but in most of them.

Mr. CURTIS. In most of them, yes.

It is probable that many of the people have this in mind, as contrasted to voting for a list of electors when the direct election is used, is it not?

Mr. BAYH. No, I do not think it is. I think most people associate direct election with the same elections they are familiar with in all other offices. When they go into the booth and choose a Senator from Indiana, a Senator from Tennessee, a Governor of Oklahoma, a legislator, or a mayor, they choose by direct popular election. I think that is what the people understand, and I think that is what they want to do with respect to the President.

To answer the Senator's other question, I think 12 States do not specifically name the candidates but list the elector.

Mr. CURTIS. Yes; and in those 12 States they do not get the opportunity to vote for their candidates by name; is that not correct?

Mr. BAYH. That is accurate; yes.

Mr. CURTIS. Now, the Senator spoke of the danger that could have arisen out of the last election with reference to Governor Wallace, and that the danger was based on the fact there was the possibility the other two candidates might lack a majority in the electoral college; is that not correct?

Mr. BAYH. That is one of the specific dangers that the Senator from Indiana and the Senator from Tennessee discussed. There are others, of course, that we also discussed.

Mr. CURTIS. Would the Senator from Indiana state that in order to deal with that particular danger, a lack of a majority in the electoral college, the only solution is to go to a direct election of President and Vice President?

Mr. BAYH. No. I do not think that is the only solution.

Mr. CURTIS. There is a great deal of criticism about the unit rule. Would it be possible—I am not asking would the Senator approve—but I am asking, would it be possible to retain the electoral system of voting and eliminate the evils of the unit rule?

Mr. BAYH. It is rather obvious that there is one proposal that would eliminate the unit rule. But if we are concerned about electing a President and Vice President who have the most votes, if we are concerned about everyone's vote being equal, and if we are concerned about giving the people the opportunity to participate directly in the election of their President and Vice President, without interposing a mathematical formula or agent, there is only one proposal that would meet these three criteria. That is the direct popular vote.

Mr. CURTIS. I am fully aware that the distinguished Senator and many of our other colleagues favor direct election, but the point is that the system of counting electoral votes could be retained and we could still eliminate the unit rule, could we not?

Mr. BAYH. Under the proportional plan——

Mr. CURTIS. Yes.

Mr. BAYH. I understand that the Senator from Nebraska is one of the chief advocates of the district plan. Would he suggest that same shortcoming could be overcome by the district plan?

Mr. CURTIS. I would agree to any plan to stop direct election of a President and Vice President.

Mr. BAYH. Even if it brought the country to its knees, and the chaos we had in 1968?

Mr. CURTIS. We did not have any chaos in 1968.

Mr. BAYH. We came close to it.

Mr. CURTIS. What is the Senator's alternative?

Let me ask this question in regard to the holding of the second election. I realize that the date will be fixed by law, but when would the Senator hold the runoff as provided for in lines 4 and 5 of page 5 of the proposal? When would the Senator hold it?

Mr. BAYH. That would be determined by Congress.

Mr. CURTIS. Yes.

Mr. BAYH. That is a very good question. It is a question and an aspect of Senate Joint Resolution 1 which has given both the Senator from Indiana and the Senator from Michigan pause, and has caused several other Senators pause. Frankly, I do not like to anticipate a runoff election. I think, and I gather that the Senator from Nebraska was listening carefully, that the mathematical possibility of that happening is remote. It would never happen if the same rules applied in all elections. I would suggest that if the Senate endorsed this plan and passed it by a two-thirds vote, and if it were then ratified by three-fourths of the State legislatures, it would become incumbent upon Congress to pass a measure which would govern the possibility of a runoff. I do not think it will happen, but we have to be prepared for it in advance.

Specifically, I could suggest a date, if the Senator would like me to.

Mr. CURTIS. I would like very much for the Senator to suggest a date, because I do not believe any catastrophe happened in this country in 1968, and it did not. It did not. So the fact that we do not expect it to happen has nothing to do with what we write into the Constitution. But I should like to ask the distinguished Senator, as the chief spokesman of this proposal and plan that provides for a runoff election, when would he suggest that election be held?

Mr. BAYH. The Senator from Indiana is not prepared to bind the Senate——

Mr. CURTIS. I understand that.

Mr. BAYH (continuing). By his suggestions. I would suggest that if the people of France are sophisticated enough to have an electoral system in which they can have a runoff election the people of the United States, and Congress in particular, should be sophisticated enough and intelligent enough to pick a date that would work. I would, however, like to point out that if the 40 percent provision contained in Senate Joint Resolution 1 had been operative in France, that country would not have had to have a runoff.

Mr. CURTIS. I am taking the amendment as written here.

Mr. BAYH. Why does not the Senator from Nebraska pick a date?

Mr. CURTIS. I think that is the fatal defect in the proposal.

Mr. BAYH. Would the Senator put a date in there?

Mr. CURTIS. I believe the Senator is forcing the country to choose between one of two alternatives, one wherein we might have a minority President elected by as little as 40 percent, or else we must hold two elections. The runoff election would cause confusion in this fast-moving age. I think that the Senator, as the chief sponsor of this proposal, should give us an idea as to when he would hold that second election. That is my question.

Mr. BAYH. I believe that the Senator from Indiana——

Mr. CURTIS. I know the Senator cannot bind the Senate.

Mr. BAYH (continuing). Would be very glad to give his idea. I would suggest such a time as 2, 3 weeks—I believe that would be ample. I am just saying that. We now have a group of distinguished authorities who have been studying this question.

When we take into consideration the fact that we have recounts now, I think that the Senator from Nebraska must consider that although there is a contingent possibility that we might have to have a recount following the first election, we have that same liability under the present system. We have recounts in the present system, and that system is still functioning. I see no reason why it cannot continue to function, although I think that the runoff possibility is the weakest part of Senate Joint Resolution 1. However, I think that weakness is insignificant compared to the real liability presented by the present system, or by any other well-intentioned alternative.

Mr. CURTIS. I listened carefully to the distinguished Senator and he talked a long, long time about the evils of the electoral vote going to someone who did not have the greatest number of votes, yet here we are asked to hold two elections. Because it is bad on the face of it, then we write into the Constitution that we can elect a President with only 40 percent of the choice of the people.

Now, coming back to the date that the Senator fixed, of 3 weeks, how long does the Senator think it would take to certify the first election, and who would do the certification?

Mr. BAYH. I think that the certifica-

tion could be done either by the States, or as Congress by law would prescribe. We will have to have some reasonable feature in the statute to safeguard and protect what we already have. Does the Senator from Nebraska realize that there are several States today operating with runoff election provisions? I have not seen any of them brought to chaos.

Mr. CURTIS. That is much simpler because that is all within one sovereign State. Who would certify to the grand total of a popular vote that a pair of candidates would receive?

Mr. BAYH. That would be up to the Senate and the House of Representatives.

Mr. CURTIS. I know, but this is the Senator's proposal and I believe that we are entitled to know, before we make a fundamental change in the Constitution, what will flow from that? Will those votes be canvassed by Congress in the manner that the electoral votes are, or does the Senator suggest that an official in the executive branch be ordered to do it?

The Senator is proposing that there be a total vote of all of the votes in the United States in one column. My question is simple. Who will do that?

Mr. BAYH. Mr. President, I suggest that if the Senator wants me to be a bit more specific—and I am not trying to be evasive—this body will work its will and determine the best way in which to do this.

I say that each vote in the popular vote should be certified as it is now.

It is a very simple matter, whether it is done in a joint session in the House of Representatives or by the head of the GAO or the Bureau of the Census. I think this is a mathematical thing that can be handled very simply.

I would be happy to see the popular votes cast the way the electoral votes are cast so that we would know the result.

We now have some freedom of choice by which electors are free when they cast their votes. On the floor of the House the popular votes could be counted in the same way.

Mr. CURTIS. How much time would the Senator provide a State? The Senator says that we would hold a second election within 3 weeks. How much time would the Senator give a State to certify the votes?

Mr. BAYH. However long the Senator from Nebraska or a majority of this body would like.

Mr. CURTIS. Mr. President, I think that is buying a pig in a poke. Under our present system, it takes a number of days in the various States for local counties and boards to certify the votes. They then go to a State agency.

What I am trying to get at is how the Senator justifies holding the second election 3 weeks after the first election.

Mr. BAYH. Mr. President, would the Senator rest easier if it were 4 weeks instead of 3?

It should be whatever period of time the Senate and House determine to be a reasonable time in which to determine the vote count of each State. I think that immediately following that period of time, and without any lengthy campaign period, we could have a second election from the top two candidates.

This is done in States where they have runoff elections. We do not find any great difficulty on a State-by-State basis, and I do not see why it could not be done on a national basis.

Mr. CURTIS. The Senator is dealing with one sovereign State.

Mr. BAYH. Is that not also the case insofar as the electors of each individual State are concerned? They multiply that by 50 and get the certified popular vote in each State before determining who gets the electoral votes.

Mr. CURTIS. Mr. President, the Senator has studied these things for years. How long does it take to do that? Could it be done by the first of December?

Mr. BAYH. Mr. President, I have discussed this matter with Richard Scammon, among others. He was former director of the Bureau of the Census and is a noted writer in this field. He suggests that with the capabilities we have now, this could be done in 3 days.

Mr. BAKER. Mr. President, will the Senator yield?

Mr. BAYH. I yield.

Mr. BAKER. Mr. President, I would make the observation that the electors are elected within one sovereign State and the results are certified.

The Senator from Nebraska was elected within one sovereign State, as was the Senator from Tennessee and the Senator from Indiana. I foresee no difficulty in having each of the 50 States certify the results of the popular election any more than there is difficulty in having States certify to the Secretary of the Senate the results of a State election.

Mr. CURTIS. Mr. President, that is very helpful. Would the Senator suggest that be done according to the presently existing State law?

Mr. BAKER. I think each State ought to have a reasonable latitude in deciding how to do that.

May I ask a question, if the Senator from Indiana would yield briefly, that has occurred to me in the course of his colloquy with the Senator from Nebraska.

I wonder if the Senator from Nebraska is telling the Senator from Indiana and the Senator from Tennessee that if the runoff provision were put at 50 percent, instead of 40 percent, that would remove his objections, at least as far as the imbedding of the minority requirement in the Constitution is concerned.

I have to confess if that is the case, except for my concern over having it passed on now in the well of the House, that I would be tempted as far as I am personally concerned to change it to 50 percent. Would the Senator from Nebraska feel better with 50 percent?

Mr. CURTIS. Mr. President, I feel that the runoff is a fatal defect in the measure.

The State Legislature of Nebraska, which certifies the results of the election of Members of Congress from Nebraska, does so after the Member of Congress has been sworn in on the basis of no objection because the legislature does not meet until after Congress convenes. That is usually in January and is before the State legislature could certify the election results.

Mr. BAYH. Mr. President, the Senator said that the Legislature of Nebraska has to certify the votes.

Mr. CURTIS. The Senator is correct.

Mr. BAYH. Mr. President, I suggest to the Senator from Nebraska, so that we can keep the record straight, that 41 days now exist between the time the people may vote and the time that the statutes mandate that the votes of the electors be cast.

That means that between the election and the third week in December, that legislature has to meet. If they can do it to confirm the vote so that the electors can cast their votes, it seems to me they can do it to ratify the popular vote.

Mr. CURTIS. Mr. President, I am trying to figure out the timetable proposed by the Senator.

Mr. BAYH. I am not proposing any timetable. I have tried to be as courteous as possible to the Senator from Nebraska.

Mr. CURTIS. But the Senator is requiring that that be done. The Senator is the chief sponsor of a proposal not to change the law, but to change the Constitution and call for a runoff election. I think that we have the right to know, not what the Senator's guess is that Congress would do, but what the Senator as the chief spokesman of this measure would feel would be ample time in which to hold that election.

I cannot quite see that we could get that done in 3 weeks.

I believe there are States that have to have as much as 10 days for their tabulations because they involve absentee voters, disabled voters, and others. Those results have to be certified by some State authority. Then some State authority would have to certify that to someone in Washington, I would assume.

I will not dwell on the point. However, I cannot see any way in which we could handle this without the lapse of several weeks and ascertain whether we would have to have a runoff. Then, after that is determined, if we are going to allow some time for the parties and candidates to prepare for the second election, we would have a period of doubt and confusion and a period when the country, particularly in world affairs, would suffer because of this period of indecision.

Mr. BAKER. Mr. President, will the Senator yield?

Mr. BAYH. I yield.

Mr. BAKER. Mr. President, listening attentatively to this further colloquy between the Senator from Nebraska and the Senator from Indiana, I have neglected to hear any criticism by the Senator from Nebraska of the merit and equity of the election of the President and Vice President by popular vote, except those technical requirements for certification. I ask the Senator from Nebraska if there is some technical way in which Senate Joint Resolution 1 could be changed so that popular election of the President and Vice President would be acceptable to the Senator from Nebraska?

Mr. CURTIS. I would say that in my opinion it would be a better proposal if it did not carry the risk of calling for two

elections at this time of tremendous happenings all over the world, and happenings that occur instantly.

But I will leave that point. I will have something to say on my own time about the merits of electing a President by States, and that is all it is, or electing them by individuals. There is nothing evil about either one.

Mr. BAKER. Will the Senator agree that the real issue is the relative desirability of the people electing the President and Vice President or the States electing the President and Vice President, and the rest is technical?

Mr. CURTIS. The people elect the President in any event. It takes people to go in and cast ballots and vote. But whether they vote through instrumentalities of the States or in one great adding machine operation is the issue.

I would like to ask the distinguished Senator from Indiana a few questions about section 2 of the bill.

Mr. BAYH. While we are on this one item could we just proceed a little further?

Mr. CURTIS. Surely.

Mr. BAYH. I make that request for the sake of continuity. I salute the Senator for bringing up this point about the runoff. As I suggested earlier, it has been a point that has bothered me; that there would be some uncertainty if we got into a situation where we would have to have a runoff. Given the past 200 years of history, we would never have had a runoff if the ballots had been treated across the board. Certainly that is a desirable criterion for an election scheme.

Is the Senator suggesting the present system has created certainty at each election?

Mr. CURTIS. Not necessarily. But in regard to the problems the Senator raises about a play for power in the case of a tie, or the lack of a majority, I would say there are other approaches to that, other than the one the distinguished Senator from Indiana has offered. It seems to me that the issue of voting for the President as individuals through the instrumentality of their States or of voting directly should be debated on its merits, and not given a free ride to this untried method as the only way to meet the threat of someone having undue power in the case of a lack of a majority in the present system. They are two different problems and they do not have to be tied together.

Mr. BAYH. I suggest that the Senator from Indiana in talking about the uncertainty is not alluding to the problem of neither candidate getting a majority. I was talking about the uncertainty that exists even if one of the candidates does get a majority. I hope the remarks of the Senator from Nebraska, which I am anxious to hear, dwell on the 1960 election, when there was a runoff, a recount in Hawaii. In the original count Vice President Nixon was awarded the electoral vote of Hawaii. The recount turned out differently and the electoral vote went to President Kennedy. This was not consumated until some time in July under the present system. It was only then that a recount was vacated or not pursued in Illinois.

As I said at the outset, I felt any system devised by man would have the imperfections of man built into it. But life itself is a choice of alternatives, and if we are dealing with the question of certainty, whether it is the certainty of the Senator from Indiana or not, it has not happened in 200 years. The matter that concerns the Senator from Nebraska has never happened in 200 years, but the matter that concerns the Senator from Indiana happened 10 years ago. We weigh the alternatives and hopefully we get the best package with the least uncertainties.

Mr. HRUSKA. Mr. President, will the Senator yield?

Mr. BAYH. I am glad to yield to the Senator from Nebraska.

Mr. HRUSKA. Of course, the situation in Hawaii was a situation that was very extreme, and it was a limited and compartmentalized situation. There was no hope of overturning the result of that election whichever way those three votes went. That would not be true under the Senator's proposal because if there were a difference of 6,000 votes or 8,000 votes every State would have the opportunity to participate and would cast votes. Instead of a contest in one State there would be contests and recounts and proceedings that would be raised in as many as 10 or 12 States. That matter was discussed thoroughly in the testimony before the Committee on the Judiciary and it was generally agreed that that would be the result. There was no advantage in the recounts in 1960 in most of the States because the result in these States was such a foregone conclusion. But that would not be true if the result were very close and if a combination of actual votes in any series of States would have the impact of throwing the majority—that is, the total votes in favor of one candidate—over into the other column. Conceivably those recounts and election contests—honest-to-goodness election contests and not a mechanical recounting of the votes—where legal questions are involved would take months.

Recently in a case that reached the Supreme Court that involved a race for the office of attorney general in Oregon, it was not until May the following year that the case was considered by the Supreme Court, and that was pretty much by default rather than a conscientious effort to get those proceedings extended further.

So when we say that no system is perfect, we can grant that, but that does not justify or warrant the adoption of a measure which would proliferate and make serious, dangerous, menacing, and even disastrous the alternatives, and that is precisely what this would do.

Mr. BAYH. The Senator is eloquent, as usual. I must say I am proud to serve with him on this subcommittee as well as on the Committee on the Judiciary. However, his memory of the 1960 election is different than mine. If the recount in Hawaii had turned out the other way in 1960, then there would have been a recount in Illinois where a change of less than 8,000 votes could have shifted the electoral votes of Illinois. To suggest otherwise flies in the fact of history. The suggestion that the present system has merit because a handful of votes can be distorted and magnified, because changing a few popular votes would change a large proportion of electoral votes, hardly recommends this system as equitable.

Mr. HRUSKA. Is not that process limited to those States where the vote margin is small under the present compartmentalized system of votes for each State? How much further would it have gone besides Hawaii and Illinois? In most of the States there was such a big difference that it would have availed them nothing to challenge the results of the electoral process. So there is an automatic braking system in there. If it were nothing but a popular vote, then the whole system, the whole recount, could go on indefinitely; but that is not true under the present system. There are only a few States now where the margin is so small that there can be any hope of overturning the results on a recount. Therein lies the trouble with the proposed system.

Mr. BAYH. Mr. President, I yield now to the Senator from Tennessee.

Mr. BAKER. Mr. President, I think we are anticipating problems in the colloquy between the distinguished Senator from Nebraska and the distinguished Senator from Indiana that we do not now have to face, because under Senate Joint Resolution 1 as now framed, and as overwhelmingly adopted by the House of Representatives, it is still the province of Congress to decide how it shall be handled, to whom certificated, and on what basis. Congress can, in its judgment and wisdom, provide that each of the 50 States can certify, just as they decide now, as to who will be certified as electors. So the question of fraud and dilution of the fraud would be the same under that system as it is today.

If we followed a different route and said, "We will simply certify the votes cast and there will be a single national certification," that would be different. There would be a further dilution of the fraud.

I do not intend to be caustic, but I observe that the argument on the compartmentalization because it tends to restrict the election process smacks a little of saying that if the fraud were a little fraud, it might be challenged, but if the fraud were a massive and overwhelming fraud, or if the election were embedded in a massive and overwhelming fraud, then it would be beyond the pale and no one could consider it.

It seems to me one of the advantages of the proposed election process is the dilution of fraud—that is, the margin of the 8,000 votes which were in dispute in Illinois in 1966 was extraordinarily significant in terms of the electoral vote in Illinois—but if we followed the second method I have suggested, with our further implementation of it by statute, those votes would have been diluted greatly if they had been included in the total number of votes cast in the United States.

I think, once again, we have a rather considerable leeway in deciding the question of certification and compart-

mentalization after we ratify the constitutional amendment. That probably is the way it ought to be—that something having the permanency and dignity of a constitutional amendment ought to decide the theory and the general practice, and that we leave to statute, which may be changed more readily, the matter of implementation, because circumstances will change more rapidly.

That is why I asked the distinguished junior Senator from Nebraska a moment ago whether or not there was some change in method of certification for his State on a runoff, or the percentage required to avoid a runoff, or the elimination of runoff entirely that in his judgment would make direct popular election of President and Vice President acceptable and agreeable to him.

We look forward to hearing him on that question, and he said he would speak further on that subject later.

This final observation: I think there is a tendency in our colloquy to confuse, as the saying goes, apples and oranges. We are talking about two different things. When we speak of the election of a minority President, that is one thing, which Senate Joint Resolution 1 is directed to. The other thing is the absolute equality of every vote cast for President and Vice President. There we have taken care of it by the same solution, Senate Joint Resolution 1. But they are separate problems. They are interrelated only casually.

In this entire colloquy I have heard nothing that attacks the proposition that direct popular election of President and Vice President is the only method by which we have absolute equality of every vote cast in every State by every person under every circumstance.

Mr. CURTIS. Mr. President, will the Senator yield?

Mr. BAYH. I am glad to yield to the Senator from Nebraska.

Mr. CURTIS. I think it is incumbent upon the proponents of this measure to give the Congress and the country a general idea of what they think would be a reasonable time for the determination as to whether or not there would have to be a runoff election, and then how long a time they would allow afterward for the printing of the ballots, the appearance of the candidates before the electorate, even though it is done by television.

I am not going to press for an answer now. I am aware that not all the details should be embodied in the Constitution, but in debating an amendment to the Constitution that calls for certain procedure, it is incumbent that we have the best possible estimate as to the time in which that procedure could be carried out. I would like to go to another——

Mr. BAYH. Before the Senator leaves that point, let me ask unanimous consent to have printed in the RECORD at this point an article from the Dickinson Law Review. This article points out rather eloquently, and perhaps amazingly to some, that under the present provisions of the electoral colleges, the electors meet on the Monday after the second Wednesday in December, only 40 days after they are appointed by election. Therefore, if there is a contest in any of the States, it must be completed 6 days prior to that date, only 34 days after the election, in order for those votes to have a binding effect when they are cast.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

[From the Dickinson Law Review, June 1961]

ELECTION CONTESTS AND THE ELECTORAL VOTE

(By L. Kinvin Wroth*)

The extremely close presidential election of 1960 stirred a problem that has long lain dormant. As the result of a recount of the popular vote in Hawaii, Congress, in its joint meeting to count the electoral vote, was presented with conflicting returns from a state for the first time since the Hayes-Tilden controversy of 1877. Since the outcome of the election was not affected, the joint meeting accepted the result of the recount proceeding, and the votes given by Hawaii's Democratic electors were counted.[1] The once fiercely agitated question of the location and nature of the power to decide controversies concerning the electoral vote was thus avoided.

This question, arising from an ambiguity in the Constitution, has long been deemed settled by the statutory provisions for the count of the electoral vote made in the aftermath of the Hayes-Tilden controversy.[2] The system for resolving electoral disputes which this legislation embodies has never been tested, however. The events of 1960 raise serious doubts as to whether the present provisions would be effective either in resolving election contests on their merits or in producing a smooth solution to a political crisis on the order of 1877. Moreover, Mr. Kennedy's narrow margin is a reminder that the possibility of controversy is always present. With broad electoral reforms once again under consideration in Congress,[3] it seems appropriate to take a fresh look at the present constitutional and statutory scheme for dealing with disputed electoral votes.

The basis of our system of electing a President is laid down in the Constitution, which 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 the State may be entitled in Congress; but no Senator or Representative, or person an office of trust or profit under the United States shall be appointed an elector.

* * * * *

"The Congress may determine the time of choosing the electors and the day on which they shall give their votes, which day shall be the same throughout the United States.[4]

"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 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, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President to the Senate;—The President of the Senate shall, in the presence of the Senate and 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 President, if such number be a majority of the whole number of Electors appointed." [5]

The only other constitutional limitations on the election of a President are those which establish the age and citizenship requirements for eligibility to the office.[6]

Pursuant to the constitutional plan the electors are "appointed"—now uniformly by popular vote—on the Tuesday after the first Monday in November.[7] The procedure for counting the vote and ascertaining the results varies from state to state,[8] but in general it is something like this: The ballots, or the contents of the voting machines, are tabulated at the polls by precinct election judges, who send their tally sheets forward to a county canvassing board. This board makes an abstract of the votes shown for each candidate in the precinct returns, which it sends to a state canvassing or returning board. The state board tallies all the county returns and determines who have been appointed electors. This result is then relayed to the governor of the state, who under federal law is required to make a certificate of the result based on this ascertainment and forward it to Washington.[9] The electors, who have also received the governor's certificate meet on the Monday after the second Wednesday in December to cast their votes, which they certify and send to the President of the Senate.[10] On January 6th, at a joint meeting of Congress, these votes are opened and tabulated and the result declared.[11]

At a number of points in this process, controversies may arise which could affect the validity of a state's electoral vote. (1) There may be fraud or error at the polls on the part of voters or election officials. (2) There may be fraud or error in the initial count of the ballots at the precinct level. (3) There may be fraud or error on the part of the county or state canvassing board, or one of these agencies may abuse whatever powers are given to it by state law. (4) The governor may act fraudulently or erroneously in certifying the electors. (5) An elector may be appointed who is constitutionally ineligible for the office. (6) The electors may act erroneously in the signing and sealing of their certificates of the vote. (7) The electors may cast their votes for an ineligible person. (8) The electors may vote on a day other than that ordained by Congress. (9) The electors may be influenced by fraud or a third party may somehow tamper with their deliberations. (10) The right of a state to participate in an election, or of a particular government to attest to the acts of a state may be called in question.

This group of controversies may be divided into those concerning the recognition of state governments and the status of states; those concerning the qualifications and acts of the electors in giving their votes; and those concerning the manner in which the popular vote is given, counted, canvassed and communicated to Congress. The problems of greatest importance are those of the last class. Questions of statehood and the recognition of state governments are unlikely to arise short of another Civil War. When they do come up, Congress has sole jurisdiction.[12] Questions concerning the electors would be important in a great crisis such as that of 1877,[13] but they involve technicalities which are no longer of the essence of our electoral system. We view our presidential elections as popular elections. If the President is to take office free of uncertainty or scandal that might weaken his authority, controversies concerning the popular vote in a close election must be promptly resolved by a method that leaves no doubt of its fairness on the merits.

Problems of all three classes arose during the stormy century of legislative history which culminated in the Electoral Count Act of 1887.[14] Controversy focused on the congressional counting sessions, where three great questions were continually agitated. First, does the Constitution give the President of the Senate sole power to exercise whatever discretion the count involves, or

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are the two Houses of Congress the final judge of the validity of votes? Secondly, is the power to count merely the power to enumerate votes given by electors declared by state authority to have been appointed, or is there power to determine the correctness of the state authority's declaration and to examine the validity of the acts of the electors? Thirdly, whatever the scope of the power, how is the evidence necessary to a decision to be presented, and by what means is the decision to be made?

Close scrutiny of the debates of the Constitutional Convention reveals no direct discussion of these problems. The possibility that a dispute might arise with which Congress would have to deal does not seem to have been considered. In fact, the machinery of the Electoral College, a compromise between popular election and election by Congress, was designed to provide a means for the election of a President free from any hint of the evils of Congressional influence.[15] The plain implication of the original scheme is that the states in their control of the manner of appointment were to provide for the settlement of whatever controversies might arise. Only local interests would be at stake in the appointment process, because the electors were to be independent of any presidential candidate[16] and would thus be chosen solely on their own merits. Local authorities would naturally resolve any contest.

While state control guarded state interests, other features of the plan protected the national interest. If certain states failed to appoint electors, the President was still elected by a majority of those who were appointed.[17] If no state had appointed electors, the provisions for failure of a majority would come into play, and the election would devolve upon the House.[18] The method for electing a President may be contrasted with the provisions for congressional elections. In the latter instance, as Hamilton pointed out in the *Federalist*,[19] Congress must have ultimate control over the manner of election of its own members, lest the states, by refusing to elect Congressmen, cause the whole structure to fall. In the case of the presidency, since the House was ready to carry out the election if the states failed, congressional control was not only undesirable but unnecessary.

The absence of two elements in the original plan made is impossible to determine when a state had failed in its obligations. No provision was made for the states to validate their choice of electors to Congress, and the power to determine what were valid votes was neither defined nor expressly granted. The former gap was filled in 1792 by a statute providing that the "executive authority" of each state was to give to the electors a certificate of their appointment which they were to forward to the President of the Senate with their votes.[20] That this provision did not solve the problem, however, became apparent as the result of a development unforeseen in the Convention. After a very few elections the electors virtually lost their independence.[21] Their election thus took on a national interest, requiring that the electoral votes counted be those given by electors who were actually chosen, whatever the executive certificate might say. In the absence of provision as to the second missing element, it was considered that the President of the Senate had the power to "count," and thus to determine what votes were to be counted.[22] The dangers in such a system, especially when that officer was a presidential candidate soon appeared, however, and it was urged that Congress could by legislation provide a more satisfactory procedure.[23]

These problems were first faced after the good will surrounding Washington's administrations had been dissipated by strife over John Adam's efforts to deal with the foreign and domestic consequences of the French Revolution. In the spring of 1800 both Houses of the Federalist Congress, in a last ditch effort to stem the tide of Jeffersonian Republicanism,[24] passed different versions of a measure under which a joint committee was to meet prior to the count of the vote, with "power to examine into all disputes relative to the election of President and Vice President of the United States, other than such as might relate to the number of votes by which the electors may have been appointed." All petitions for the contest of electoral votes were to be referred to the Committee, which was to take any necessary additional evidence, and make a report of its entire proceedings, without opinion, to both Houses. Congress was then to meet in joint session, for the count of the vote. If objection was made to the vote of any state, the Houses were to decide it without debate in separate session. As passed by the House the bill provided that a disputed vote was to be counted unless the Houses concurred in rejecting it.[25] The Senate, agreeing in every provision of the bill but this one, passed an amendment providing that a disputed vote was to be *rejected* unless the Houses concurred in counting it. The House, would permit rejection by vote of the Senate alone. The bill failed when neither House would yield.[26]

The bill of 1800 was a measure designed to achieve partisan ends. While it prohibited Congress from questioning a state's popular vote, it did not bind Congress to accept a particular determination of the popular result. Since the facts reported by the Committee were in no way made the basis of the ultimate decision, there was not even a procedural guarantee that the result reached by the two Houses would be based on a fair assessment of the facts. If the bill did not provide a satisfactory means of validating a state's votes, however, it left no doubt as to where the power to validate lay. Even the Republican members of both Houses seemed to concede that Congress had full power to deal with the matters over which the bill gave it jurisdiction.[27] In light of this understanding it can be argued that the Twelfth Amendment, the remedy for other defects appearing in the election of 1800, embodied the view that the power to count the vote lay in Congress, rather than in the President of the Senate.[28]

No measure materially affecting the electoral count was passed in the years prior to the Civil War,[29] but on three occasions, Congress assumed the power to reject the votes of a state which had not completed the formalities necessary for admission to the Union.[30] The only other question concerning the electoral vote during this period arose in 1857, when the votes of Wisconsin, unavoidably given on the wrong day, were counted after an inconclusive debate.[31] In all four of these cases, the disputed votes had no effect on the outcome of the election. The only consistent pattern in the debates is the call for legislation to deal with the problem of the count.[32]

Congress asserted total power over the electoral vote with the adoption of the Twenty-second Joint Rule in 1865. Even more than the bill of 1800, the Rule was a political measure, passed and used by Republican majorities of both Houses to assure control over the votes of the recently rebellious southern states. It thus contained no machinery at all for solution of disputes on the facts. The Rule first provided for the joint meeting of the two Houses, at which the certificates were to be opened by the President of the Senate and read out by tellers. The critical portion was as follows:

"If, upon the reading of any such certificate by the tellers, any question shall arise in regard to counting the votes therein certified, the same having been stated by the Presiding Officer, the Senate shall thereupon withdraw, and the question shall be submitted to that body for its decision; and the Speaker of the House of Representatives shall in like manner state the question to the House of Representatives for its decision; and no question shall be decided affirmatively, and no vote objected to shall be counted, except by the concurring vote of the two Houses, which being obtained, the Houses shall immediately reassemble, and the Presiding Office shall then announce the decision of the question submitted; and upon any such question there shall be no debate in either House. And any other question pertinent to the object for which the two Houses are assembled may be submitted and determined in like manner." [33]

Since concurrence was required to count a disputed vote, either House, by its negative, could cause rejection. This procedure created no problem, because in the post Civil War political climate there was little prospect of disagreement over which votes to reject.

The Twenty-second Joint Rule was not applied in the count of 1865.[34] In 1869, although serious questions arose, no votes were rejected under the Rule.[35] The count of 1873, in which the Rule was applied to the votes of five states, is the first case in which a dispute over the popular vote was presented to Congress.[36] In four cases objection was made to the acts of the electors and to alleged technical faults in the certification.[37] When the votes of Louisiana came up, Congress for the first time dealt with a "double return," the device with which all subsequent legislation has been designed to deal. Two bodies in the state claimed to be the final canvassing authority. One had certified the state's Grant electors, while the other had validated a slate of Democrats, who also had the certificate of the governor. After a debate in which members of both parties said that Congress could look to the fact of a disputed election, in order to prevent the acceptance of a corrupt return, the Senate Committee on Privileges and Elections was empowered to investigate the situation.[38] The Committee found that neither canvass was valid, and held that Congress itself could not canvass the votes without usurping the state's constitutional powers. The Committee's report suggested, however, that it would be proper for Congress to go behind the governor's certificate to determine whether a legal canvass had been made.[39] In the count proceedings this report was not mentioned, but objections based on its facts were made and both sets of votes were rejected by concurrent vote.[40]

Under the Twenty-second Joint Rule Congress not only claimed the power to count, but defined that power as permitting it to reject an invalid state canvass. As in 1800, however, Congress would not undertake to decide for itself which electors had actually been appointed. Moreover, the make-shift fact-finding provisions relied upon were effective only because the state contest was not material to the outcome of the national election. The solution that was reached may have been just, as far it went, but it left unresolved the question of who actually carried Louisiana.

Between 1873 and 1876 Congress tried vainly to pass permanent legislation to regulate the electoral count. A bill drafted by Senator Oliver P. Morton of Indiana passed the Senate in February 1875,[41] but the House failed to act upon it. The bill was in essence the Twenty-second Joint Rule, with a provision that a single return from a state could not be rejected unless both Houses concurred in the action, but that in case of a double return, no vote could be counted unless both Houses concurred. Brief debate was permitted in the separate sessions of the Houses, but an amendment creating a committee to find the facts was rejected.[42] Since any serious contest would present a double return the bill gave no greater guarantee of a non-political

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decision than did the Rule. When the 44th Congress convened in December 1875, the House was Democratic for the first time since before the Civil War.[43] In this situation the Senate did not readopt the Twenty-second Joint Rule, in effect repealing it.[44] The Morton bill was brought up again in an effort to fill the gap, but members of both parties apparently felt that the time was not ripe for a measure which would permit the action of one House to control the other. The bill was laid aside for good in August 1876.[45] The nation thus faced the election of 1876 with no machinery for resolving disputes over the electoral vote. Perhaps both sides expected a close fight and neither wished to put into effect a plan which might work to its disadvantage.

All such expectations were more than justified in the election of 1876, which resulted in the Hayes-Tilden controversy, the one great test of our electoral system.[46] In no other election have disputed electoral votes been sufficient to affect the outcome. On this occasion Tilden, the Democratic candidate, could win either by picking up one of twenty contested votes or by prevailing in an election in the Democratic House. Unless Hayes won all of the contested votes, he would lose the presidency. In the count the chief problem was presented by double returns from Florida, Louisiana, and South Carolina, where Republican returning boards, claiming that the Democrats had used force and fraud among the Negro voters, had thrown out sufficient Tilden votes to carry the states for Hayes. Questions were also raised as to the eligibility of certain Hayes electors in Florida and Louisiana, and in Oregon, where the Democratic governor had certified a Tilden elector in place of the ineligible Republican. To resolve the controversy, a bi-partisan majority of both Houses passed an act [47] creating the Electoral Commission, a body with "the same powers, if any, now . . . possessed by the two Houses," to take evidence upon and arrive at a decision of the disputes. In the joint session for the count, single returns were to be dealt with as in the Morton Bill.[48] Questions involving double returns were to be sent to the Commission. Its decision was to be binding upon Congress in the count, unless rejected by the vote of both Houses.

The composition of the Commission reflected a game but unsuccessful attempt to attain impartiality. It consisted of five Senators, five Representatives, and five Justices of the Supreme Court. In this group there were seven Democrats and an equal number of avowed Republicans. The fifteenth man, a Justice to be chosen by the other four Justices, was to be the neutral balance. After Mr. Justice Davis, an independent, thankfully declined the honor in somewhat dubious circumstances,[49] it fell upon Mr. Justice Bradley, a Republican, who seemed to the Democrats the next most likely to decide impartially. Whether for partisan reasons, or because he saw the issues that way, Bradley consistently voted with the Republicans, giving Hayes an eight-man majority on every important question before the Commission. As a result, the view that the decision was at least influenced, if not corrupted, by political considerations was widely held at the time and seems difficult to avoid today.[50]

The main issue before the Commission was its power (and thus the power of Congress) to go behind a state's own determination of the results of the popular election, as reflected in the findings of the returning board, duly certified by the governor. It seems clear, that whatever acts of violence the Democrats may have committed, in the three southern states, the Republican boards, in throwing out votes wholesale, had exceeded even the broad powers which reconstruction statutes had given them.[51] The Democrats argued that pursuant to the national interest in a true result, the Commission should look to the facts of the election and find that the Tilden electors had been appointed. In the alternative they urged that, as in the case of Louisiana in 1873, that there were no valid returns from the states in question. These arguments failed to persuade the Republican majority of the Commission, which held by an eight to seven vote in each case that it was bound by the certificates based on results reached by the validly constituted state returning boards and would look to no evidence of the facts of the election.[52] The Commission also held that it had power to look into eligibility only if ineligibility at the time of voting were alleged. In the case of Oregon it made clear that the unchallenged result reached by the returning board could not be overruled by the governor's certificate.[53] In denying that it had power to go behind the returns, the majority was careful to leave open the possibility that Congress might provide by law some proper means for determining such questions.[54]

The decision of the Commission was accepted by the Senate in each case and so was binding in the count in spite of rejection by the House. The more eager Democratic partisans threatened to prolong the proceeding past the end of Grant's term on March 4, but other forces were working for compromise. Those who honestly feared civil tumult worked with those who saw the chance for personal advantage in a series of desperate negotiations that finally persuaded a majority of the House to desist, in time for Hayes to be declared elected on March 2.[55]

Congress had again taken control of the power to validate electoral votes, but Democratic hopes that the validation would be based on the merits of the individual controversies were illusory. The Commission not only refused to make impartial findings of fact, but allowed itself to be bound by the findings of partisan state agencies that were the source of the dispute. In spite of its judicial trappings, the Commission was a political body, an arm of Congress, and so it reached a partisan result. This result did not itself resolve the great controversy. It rather provided a medium for political compromise. The legal arguments involved had merit on both sides and would have divided Congress unalterably on political lines. The Commission prevented such a split by reaching a result which one House was bound to accept. A House compromise could then be reached without loss of face on either side. Considering the potential for civil disturbance which underlay the Hayes-Tilden controversy, an acceptable political solution was of great importance. Crisis might have been avoided altogether, however, if there had already been in effect a provision for fair determination of state controversies on the merits.

The Hayes-Tilden decision marked the end of a fifteen-year period of national crisis but it did not halt congressional efforts to pass legislation that would solve the problems made manifest in 1877. The bill which finally became the Electoral Count Act was introduced by Senator Edmunds of Vermont in May 1878.[56] Spurred by two close presidential elections,[57] the Senate passed the bill three times in the next decade, but each time could not win the agreement of the House.[58] Finally, in 1887, when the passions of Reconstruction had cooled, the Republican Senate and Democratic House of the 49th Congress were able to pass a compromise measure in an atmosphere relatively free of partisan pressures.[59]

The Electoral Count Act as introduced in 1878 and passed in 1887 involved one significant change from the plan of the Morton Bills of 1875–76. If a state provided for the determination of contests over the electoral vote, the result of any proceeding under such a provision was to be binding on Congress in the count. Only in the failure of such a determination was Congress to have the power to reject votes. In its report in December 1886, the House Select Committee on the Election of President and Vice President described the effect of the proposed legislation:

"The bill provides the means of determining what is the vote, how it shall be counted, its count, and the authoritative declaration of the result.

"The two Houses are by the Constitution authorized to make the count of the electoral votes. They can only count legal votes, and in doing so must determine from the best evidence to be had, what are legal votes; and if they cannot agree upon which are legal votes, then the state which has failed to bring itself under the plain provisions of the bill and failed to provide for the determination of all questions by her own authorities will lose her vote.

"Congress having provided by this bill that the State tribunals may determine what votes are legal coming from that State, and that the two Houses shall be bound by this determination, it will be the State's own fault if the matter is left in doubt." [60]

The great problems of the first century of our electoral system seemed solved. A measure had finally been passed providing for a fair determination of the facts of individual contests that would be binding upon Congress in the count. The national interest in a true result was thus vindicated without offense to state control of the process of appointment. While Congress claimed full power to validate votes, its role was limited to cases in which a state had failed to settle its own disputes and to questions beyond state competence. If the Act worked in practice, no dispute could again disrupt the orderly process of a presidential election.

The pertinent provisions of the Electoral Count Act as presently found in the United States Code [61] are as follows:

"If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned." [62]

Congress is to meet in joint session in the House at one P.M. on January 6th for the count of the vote, with the President of the Senate in the chair. The latter is to open "all the certificates and papers purporting to be certificates of the electoral votes," in alphabetical order by states and hand them to tellers who are to read them out.

"Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument the ground thereof, and shall be signed by at least one Senator and one member of the House of Representatives before the same shall be received. When all objections made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representa-

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tives for its decision; and no electoral vote or votes from any state which shall have been regularly given by electors whose appointment has been lawfully certified to according to Section 6 of this title[63] from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in Section 5 of this title[64] to have been appointed, if the determination in said section provided for shall have been made . . .but in case there shall arise the question which of two or more of such State authorities determining that electors have been appointed, as mentioned in Section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State under the seal thereof, shall be counted."[65]

A survey of the sessions of Congress called to count the vote under the Electoral Count Act shows that prior to 1961 no question was presented to any count that might have called any of these provisions into play.[66] It is thus necessary to look closely at the language of the Act and its legislative history in order to understand its operation and effect in dealing with the problems of single and double returns so familiar to its drafters.

(1) *Single Returns.* If those who wish to contest the vote of a state have not sent forward a paper purporting to be a certificate of the electoral votes which they urge to be the correct ones, then the return which Congress has received is given virtually binding effect. The intention here was to insure that the election result reached by proper state authority would not be questioned in Congress if it were unchallenged in the State. Even in such a case, however, Congress must have power to see that the state governor has certified the results actually reached in the state canvass, and to deal with any irregularity in the acts of the electors.[67] By concurrent action the Houses may thus reject even votes in a single return that they find not "regularly given by electors whose appointment has been lawfully certified to" by the executive authority of the state under the terms of the Act.

The power of Congress over a single return is carefully limited to these two areas, but even in carrying out this mandate, difficult problems of interpretation could arise. Presumably votes "regularly given" are given in accordance with the requirements of the Constitution as to time and form. The language undoubtedly also means that the electors have acted without mistake or fraud. Does it have the further meaning that they have voted for an eligible candidate? Likewise, votes "lawfully certified to" would seem to be votes certified to in accordance with the terms of the Act. Presumably the phrase also extends to a case in which the governor has certified electors other than those shown to have been elected by the state canvass, as in the case of Oregon in 1877. Could Congress look further under this provision and refuse to accept a governor's certificate based on a canvass illegally made? Does a vote cast by an ineligible elector otherwise properly certified to, who is ineligible to the office of elector fall within either of these categories upon which Congress may act? These unanswered questions could lead to the arbitrary congressional action which the Act sought to avoid.

(2) *Double Returns.* Since a return need only "purport" to be a certificate of the vote to merit consideration under the Act, in any serious contest, double returns will be presented. There are four situations which may arise.

(a) *Final Determination by Appropriate State Authorities.* The state contest provision was considered the central provision of the Act. Since the result of a contest was to be absolutely binding upon Congress as to the identity of the electors,[68] a return so validated would be counted if otherwise proper. The Act requires that only votes "regularly given" must be counted. The implication seems clear that votes not meeting this standard could be rejected as in the case of a single return,[69] and the problems of interpretation in that case would again be present.

Unfortunately the contest provisions present such difficulties, both of interpretation and application, that in the great majority of cases they will not apply. In the first place there is another problem of definition. Although the language of the Act was intended to give the states the broadest latitude to provide for the final determination of contests by any means—judicial or otherwise—only 19 states have passed contest legislation expressly dealing with presidential electors in any way.[70] In the remaining states a variety of provisions exist which deal generally with election contests.[71] In these states the courts would first have to decide whether they had jurisdiction in a contest involving electors.[72] If a state court took jurisdiction, Congress would then face two questions: (1) Does the language of the Electoral Court Act include contest provisions which do not specifically deal with electors? (2) If the state result is otherwise binding, is it the "final determination" envisioned by the Act? The Act does not provide for the decision of such questions. There seem to be grounds for argument that concurrence would be required to reject a state determination on these grounds, as in the case of a single return, but the question is open.

Problems of definition aside, there is a further difficulty in the time provisions of the Act. In Edmund's original bill a state determination made at any time prior to the date of the meeting of the electors would bind Congress. To insure that contests would be completed, the electors were to be appointed on the first Tuesday in October and were not to meet until the first Monday in January.[73] In the Act as passed, although a November election day was retained and the requirement that a state determination be made at least six days prior to the meeting of the electors was added,[74] contests were still practicable, because the electoral meeting was to be on the second Monday in January.[75] When the Twentieth Amendment changed Inauguration Day from March 4 to January 20, the legislation enacted to implement it made a corresponding change in these provisions.[76] The electors now are to meet on the Monday after the second Wednesday in December, only 40 days after they are appointed. In order to be of binding effect, a contest must be completed six days prior to that date, a mere 34 days after the election.

In only two states are the election contest provisions certain to produce a final result within this short period.[77] In the rest, finality would depend on a number of factors, such as the diligence of the contestant, the success of his opponent with delaying tactics, the number of votes questioned, and the time limitations of the contest procedure.

The aftermath of the 1960 election highlights the time problem. In Hawaii the official count of the popular vote showed that Mr. Nixon had carried the state by a mere 141 votes out of some 184,000 cast.[78] In the latter part of November the Democratic electors petitioned in the circuit court for a recount, which was allowed on December 13th, over the protest of the State Attorney General that federal law required a decision six days prior to the meeting of the electors.[79] Both sets of electors met on the appointed day, December 19, 1960, and cast their votes. The governor of Hawaii gave his certificate to the Republican electors. On December 30, 1960, the court handed down its decree, finding that the Kennedy electors had prevailed by 115 votes. On January 4, 1961, the governor forwarded to the Administrator of General Services a copy of the court decree and his revised certificate, validated the Democrats.[80] In the counting session the certificate of the Republican electors with its validation by the governor, the certificate of the Democratic electors, and the governor's revised certificate were all presented. After ascertaining that there was no objection, Mr. Nixon, presiding as Vice President, accepted the revised determination, with a careful statement that he was not to be considered as setting a precedent.[81] With the best will in the world the contestants in Hawaii were not able to reach a result until seventeen days after the deadline set in the Act. If Hawaii's three votes could have affected Mr. Kennedy's lead, Republican objections to the acceptance of the decree as binding would have been sound, whatever their fate in a Democratic Congress.

In Illinois, where Mr. Kennedy had prevailed by 8900 votes out of 4½ million cast, Republicans launched a vigorous campaign to uncover vote frauds in heavily Democratic Cook County and carry the state's 27 electoral votes for Mr. Nixon.[82] Amidst charges and counter-charges, they soon discovered that even without hindrance from Democratic election officials, it would be impossible to achieve a result in time.[83] They then urged that there was sufficient evidence of fraud that the State Election Board could refuse to certify the Democratic electors.[84] After maximum delay the Board, which was four-to-one Republican, certified the Kennedy electors, in the absence of "an overwhelming showing of fraud."[85] While the Republican tactics had an obvious political motivation, the episode illustrates that in a state the size of Illinois,[86] any kind of final state determination would be impossible within the time allowed by the Electoral Count Act. The combination of inappropriate procedures, large numbers of votes to be recounted, and delaying tactics would undoubtedly mean that in any serious contest no state result could be reached six days prior to the meeting of the electors.

(b) *Conflicting Determinations by Different State Authorities.* The question of which state tribunal has been empowered by the legislature to determine contests could arise either in a dispute between two groups of men, each claiming to be the same final authority, or between two different tribunals, each claiming the power to act under a different provision of state law. The drafters of the Act left the decision of this problem to Congress. The concurrence of the two Houses was necessary for an affirmative result, as in any question of the recognition of a state government.[87] If the Houses cannot agree on

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the authoritative determination, or, if, as in the case of Louisiana 1873, they agree that no determination was authoritative, the principle of the Twenty-second Joint Rule is applied and no vote from the state in question is counted. This result follows regardless of the governor's action. Congress in this case looks to the executive certificate only as evidence of the decision reached by a tribunal authorized by the state legislature. If the decision of the authorized tribunal cannot be made out, then there is no valid return for the governor to certify.[88] Congress must here decide a difficult factual and legal question, in addition to the problems already noted in the cases of single returns and single determinations.

(c) *No Determination by State Authorities.* As the previous discussion of state contest provisions indicates, this situation is the one most likely to arise. If the Houses are in agreement, they can decide to count any set of votes that they find to have been "cast by lawful electors appointed in accordance with the laws of the State." This language presents difficulties. If double returns are presented they must be based on conflicting versions of the true state canvass. The decision of the governor should not be permitted to bind Congress if the state has not made him its final canvassing authority, but how far may Congress go? Is it limited to determining which of the two contesting bodies is the lawfully appointed canvassing board of the state, or can it find that the lawfully appointed board has itself violated state law in the manner of its canvass? [89] If the Act really does embody a policy that Congress may act in the national interest to find the true result when the states have failed to do so,[90] then the latter course should be permissible. There might be practical limitations on reaching a fair result in the case, however. If the question were merely one of the legal effect of the board's action, the decision would be easy to make, but if the board had taken no action, and there were unresolved contests in the state, Congress would be ill-equipped to solve the problem on its merits.

If the House disagrees, then the votes certified by the state executive are counted. Presumably the Houses could then agree that some or all of the votes so certified were not "lawful," that is, not "regularly given" [91] and so reject them. This turnabout, however, is politically unlikely. The provision reflects a long-standing concern that no votes should fail merely through disagreement of the Houses, but it seems more dangerous than the ill that it is meant to cure. In an election where contested votes in one or two states are decisive, the actual choice of a President will devolve upon the governors, who may act to serve a personal interest in the outcome.

(d) *No Executive Certification; Conflicting Certificates.* None of the returns presented may have a valid certificate because the governor has refused to certify any electors, or because one who has certified votes may have done so without authority under state law. There may be two claimants to the office of governor, or to the right to exercise executive authority under state law, each of whom has certified a different return. In these cases if the two Houses concur, either return may be counted, subject to the problems noted in the case where there is a governor's certificate. If the House disagree, the clear implication of the Act is that the vote of the state fails altogether, merely through lack of concurrence.[92]

The contest provisions of the Electoral Count Act were intended to provide a balance of the state interest in the process of appointment and the federal interest in reaching a result free of fraud or unfairness in time to inaugurate the winning candidate. If these provisions work as planned, contests over the popular vote will be resolved in a fair manner, and few matters will be left to the decision of Congress. State contests are not likely to be effective, however. All disputes—even those involving the facts of the popular election—will thus be presented to Congress in the first instance.

The questions of fact or law which Congress must resolve in these disputes are problems of the sort which courts are accustomed to decide, but Congress is not a court. The facts upon which a court bases its decision are adduced according to stringent rules of evidence, and the legal questions before it are decided under long-established canons of construction and interpretation. At best Congress can get its facts at second hand through the medium of an investigating committee,[93] with only a little further light to be shed during the brief debate which the act permits. Moreover, even if the facts are carefully and completely put before it, Congress is under no obligation to justify its decision by reference to the evidence or to rules of law. Courts may not be free from bias and prejudice in their treatment of the issues before them, but the paraphernalia with which their decisions are surrounded at least forces them to carry the burden of self-justification. Moreover, courts decide single cases, whereas Congress would unavoidably be dealing with the entire range of political questions involved in the election. There is no way of demonstrating whether each Congressman who votes on a question such as an electoral contest would pose is deciding it on the merits, but it is a fair inference that he is not.[94] Perhaps he should not even be expected to so decide, since he was elected to serve the political interests of those whom he represents. Congress is thus not only ill-equipped to solve the kind of problems which it will face, but is more than likely to decide these problems according to political needs. It is difficult to imagine public confidence of a high order in an election result arrived at in this manner.

If the Houses of Congress are of differing parties, partisanship may reach such heights that no decision under the Act is possible. While there is some question as to the effect of the rejection of votes on the number needed for a majority,[95] the situation could arise in which enough votes were rejected to throw the election into the House.[96] If in spite of the provision of the Act designed to guard against dilatory tactics, the count is prolonged past January 20th, the Speaker of the House would assume the presidency until one of the candidates should have qualified, or until the next election, if the deadlock is impenetrable.[97] In either case, while the country is not left without a leader, the public is unlikely to feel that its interests have been served in the choice.

Congressional control of any phase of the appointment of electors can be justified only if it serves the interest of all the states in finality and accuracy of result. The Electoral Count Act gives to Congress a substantial measure of control, but it fails to serve the requisite national interest. If a dispute arose the mechanism of the Act would undoubtedly lead Congress to a final result, but a President chosen in this way could never completely refute the charge that his title depended on mistake or illegality in the election process.

The Electoral Count Act must be revised to provide for the impartial and conclusive settlement of all contests arising out of popular vote. It is possible that the number of such contests could be reduced by state election law reform [98] and their effect minimized by change in or abolition of the Electoral College,[99] but prospects for these developments are unclear. The dangers in an unresolved electoral dispute are clear, however, and provision must be made to meet them, whatever other reforms are enacted.

There are at least four possible methods by which the present system might be improved. The basic pattern of the existing legislation could be retained, with revisions that would make effective its original provisions for the final determination of state contests by state authority. The existing legislation could be strengthened by making a state determination within certain time limits mandatory, with an alternative action in federal court if the state failed to provide an appropriate procedure. Exclusive jurisdiction of contests could be lodged in the federal courts. Finally, federal control might be established over all phases of the presidential election. Federal contest jurisdiction is the most satisfactory of these alternatives. Technical changes in the present plan would not insure a state finding in every case, because the requirement of a timely proceeding is not binding. If the state proceeding was made mandatory, this objection would be met, but the removal proceedings would be cumbersome and subject to abuse by a dilatory defendant. A provision for total federal control, which would have to be made by constitutional amendment, would totally defeat the wisdom of the original plan by making the executive at least indirectly subject to control by Congress.

Exclusive federal jurisdiction of contests offers a number of advantages. It insures that questions which are suitable only for judicial decision are heard by a tribunal versed in the law and accustomed to the role it must play. It utilizes the federal judiciary. State judges and other state officials are often subject to election and may be dependent upon a local political leader with national ambitions. Federal judges, on the other hand, having life tenure, are less likely to be influenced by partisan considerations.[100] Other advantages are procedural. Congress can provide a schedule for filing, hearing and decision of all contests. Since this schedule and other rules of procedure applied by the federal courts will be uniform, a contest in any state will be decided according to a single standard and within the time requirements of the electoral system.

For maximum fairness and effectiveness the plan must contain certain features. Selection of judges on an impartial basis must be provided for in advance, perhaps by requiring each circuit to establish an election contest calendar prior to the election.[101] The importance of the questions to be decided and their potential for conflict with state authority might justify trial before a special three judge court.[102] The court should have jurisdiction of all questions arising out of the popular election which affect the validity of votes and the accuracy and fairness of the count and canvass. To preserve state control over the manner of appointment the court would be bound to apply state election law in these matters.[103] The court's jurisdiction should further extend to questions of the eligibility of the electors under the Constitution. It should be made clear that an objection on these grounds is waived unless it is raised during the contest proceeding. In addition to the ordinary powers of a trial court to compel testimony and subpoena documents, the court should have express power to order the preservation of the ballots for a recount under the direction of a court-appointed master.[104]

A maximum of sixty days should be allowed between election day and the date of meeting of the electors. A complaint could be filed at any time after the election and until ten days after the completion of the state canvass. Answer and hearing should follow within ten days at most. This period is none too long for settling a controversy in a major state, but the nation cannot afford

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a longer period of uncertainty between administrations. At this point the interest in continuity of government must prevail even over the interest in an absolutely accurate result. The shortness of the time limit will be alleviated to some extent by procedures designed to achieve the maximum speed commensurate with fairness and accuracy. Moreover, the short time limitations will tend to prevent the bringing of exploratory contests without specific claims of mistake or fraud. Provision for direct appeal to the Supreme Court within the time limit should be made.

To eliminate the double return problem altogether, the court rather than the state governor should certify the electors to Congress, even in states where no contest has been brought. Upon completion of the canvass the final state canvassing authority should certify its results to the appropriate court. If a contest has been, or is filed, the court should hear it and certify the result to Congress. If no contest is filed within ten days after the final state canvass is received, the court should forward the state certificate with the endorsement that it is uncontested. In any case Congress will be bound to accept as duly appointed and as eligible those electors named in the certificate of the court, subject to the action of the Supreme Court on appeal.

Certain questions will necessarily remain for Congress to decide. As previously noted, no other authority can determine the right of a state to participate in an election, or of a given government to represent it.[105] If such a situation arose, the court might properly refuse jurisdiction. As long as there are electors, there will be the possibility that they will carry out their trust in a fraudulent or erroneous manner. The vestigial nature of the office and the publicity attendant on any effort to corrupt them decrease the probability that such problems will arise. If they do come up, they must be left to Congress. A tribunal can be appointed to find the facts, but the action which Congress will take on the findings is not as clear as in the case of a contested election. Whether a given deviation is sufficient ground for disfranchizing all who voted for a challenged elector is a policy question which only Congress should answer.[106] Finally, if for some reason the judicial system failed to reach a result, the old problems would be present. This situation, too, is an unlikely one. Should it come to pass, Congress would have to decide the underlying questions as best it could.

In those questions which are remitted to Congress, the present provision for acceptance only by the separate and concurrent vote of the two Houses should be retained. No plan can eliminate the political motivations of individual legislators. When the two Houses act as legislative bodies, however, individual prejudice is at once removed from the final decision, and they may serve as a check on one another. If the Houses are divided, they reflect a divided sentiment in the country. In these circumstances it is better that a vote not be counted at all than that one House be able to dictate a result.

The effect of the rejection of votes on the number needed for a majority should be made clear.[107] If it is found that there was no valid election in a state, then no electors were appointed there, and the number needed for a majority should not include the votes of that state. Likewise, the votes of a state excluded from the count by Congress for failure to comply with the conditions of statehood do not reflect electors who have been appointed, and should reduce the majority figure accordingly. When votes are rejected for reasons that do not have to do with failure of appointment, rejection should have no effect on the majority.[108]

A statutory provision for federal court jurisdiction of contests over the appointment of presidential electors could be enacted by Congress under the Constitution as it now stands. Until the passage of the Electoral Count Act of 1887 Congress had always refused to look into the facts of a state election. It was often suggested, however, that Congress could, by legislation passed prior to the election, give itself the power to do so. The Electoral Count Act may be construed as an expression of this view.[109] If Congress itself can step in to protect the national interest in honest and accurate election results, there would seem to be nothing to prevent the delegation of the task to the federal courts.

The power of Congress to establish federal jurisdiction over contests in presidential elections has never been ruled on by the courts. In the absence of specific provision it is clear that no such jurisdiction exists.[110] The Supreme Court has recognized that state power over the appointment of electors is broad enough to justify state prosecution of violations of state law in presidential election.[111] This state jurisdiction is not exclusive, however. The federal courts would undoubtedly take jurisdiction of a criminal or civil proceeding under the appropriate Civil Rights Acts, based on a discriminatory deprivation by state action of the right to vote in a presidential election.[112] Moreover, the the court has upheld statutory criminal penalties for individual action which interferes with the lawful conduct of presidential elections. This decision was justified on the ground that Congress has inherent power to protect the vital structure of the nation by preserving the purity of elections.[113]

With this inherent power Congress may provide a means for settling contests over the appointment of electors. Each state has a right to control the manner of appointment of its electors, but this right does not permit a state to determine that it shall appoint no electors, or that its appointment process shall be tainted with fraud or error. Any candidate for the office of elector, or any voter for that office, as a citizen of the United States, has a right to insist that the states carry out their function in a manner that will insure the integrity of the national government. That right is one granted by the federal Constitution. The mere fact that the Constitution provides that the right shall be made effective through state law does not deprive the federal courts of jurisdiction. There are numerous other situations in which rights that are defined by state law may be enforced in federal court.[114] In each such instance a national interest is present which establishes the right to federal enforcement. Diversity jurisdiction embodies a national interest in providing justice for citizens outside of their own states.[115] The interest involved in admiralty is that in having a single forum to dispense a uniform maritime law.[116] Here, the clear national interest is in preserving national stability through a fair and accurate presidential election.

Although there are strong arguments in favor of congressional power to provide by statute for electoral contests, it would be desirable to make the necessary changes by constitutional amendment. Legislation is now pending in Congress for amendments which would provide other much-needed reforms in the electoral system.[117] In an amendment is finally passed that alters the system in such a way that the requirements for contest provisions will be radically changed, the location of the power to resolve contests under it should be made explicit. Even if the basic structure of the electoral system is altered only in minor detail, the chance to make a new provision for contests should not be overlooked. At the very least, an amendment should provide that Congress may resolve, or pass legislation to resolve, all controversies arising out of the count or canvass of the popular vote.[118] While such a provision would finally settle the question of the location of the power to resolve disputes, it would not insure a timely and accurate resolution in every contest. Even if Congress were to pass legislation, there is good reason to expect that in a real crisis the provisions might be evaded or ignored altogether. Clearly, if the President approved, legislation providing an *ad hoc* political solution for a particular crisis could be passed, whatever prior statutes said. For this reason a constitutional amendment should make clear that contests involving the popular vote are to be decided by the federal courts in a trial on the merits. The plan could then be implemented by legislation similar to that suggested in the absence of constitutional change.

In a government of divided powers, no judicial decision, however fair, can prevent Congress from exercising its political authority in the election of a President. On the other hand, a Congress which hopes to preserve political stability cannot exercise its authority in a manner that is so clearly erroneous or self-seeking that it is offensive to the electorate at large. A legislative scheme that provides stringent measures for the fair decision of election contests will act as a check on arbitrary action. If Congress ignores or evades such a scheme, it carries a heavy burden of demonstrating that it has governed fairly. The present system for resolving contests imposes no such burden. Fair-minded men could reach a fair result under it, but unfair men could easily act to serve their own interests. In either case there is no certainty that the result reached is the true one.

The President of the United States will increasingly require strength based on national and international respect if he is to guide the nation through times of mounting crisis. This respect will not come to one who is elected under the slightest suspicion of error or fraud. To insure that no electoral contest will mar or disrupt the orderly succession to the presidency in the difficult future, Congress must give to the federal courts the power to reach a timely, final, and binding decision of all controversies.

FOOTNOTES

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[1] 107 CONG. REC. 281–284 (daily ed., Jan. 6, 1961). For an account of the proceedings in Hawaii, see *infra*, notes 78–81.

[2] Act of Feb. 3, 1887, ch. 90, 24 Stat. 373, [hereinafter referred to as the Electoral Count Act]. For subsequent legislative history, see *infra*, notes 61, 63, and 76. The Act provoked considerable debate following its passage, but recent commentators have treated it only in passing, or have viewed it as solving all problems. See Burgess, *The Law of the Electoral Count*, 3 POL. SCI. Q. 633 (1888); Carlisle, *Dangerous Defects in Our Electoral System*, 24 FORUM 257, 264 (1897); DOUGHERTY, THE ELECTORAL SYSTEM OF THE UNITED STATES, 214–249 (1906); Tansill, *Congressional Control of the Electoral System*, 34 YALE L.J. 511, 524 (1925); Mullen, *The Electoral College and Presidential Vacancies*, 9 MD. L. REV. 28, 41–42 (1948); Dixon, *Electoral College Procedure*, 3 WEST. POL. SCI. Q. 214 222–223 (1950); WILMERDING, THE ELECTORAL COLLEGE XI (1958).

[3] *Infra*, note 117.

[4] U.S. CONST. art. II, § 1

[5] See *infra*, notes 18 and 28.

[6] U.S. CONST. art II, § 1.

[7] 3 U.S.C. § 1 (1958). As to state methods of appointment, see Wilkinson, *The Electoral Process and the Power of the States*, 47 A.B. A.J 251, 253–4 (1961).

[8] See HARRIS, ELECTION ADMINISTRATION IN THE UNITED STATES, 236–307 (1934).

[9] 3 U.S.C. § 6 (1958). See *infra*, note 63.

[10] 3 U.S.C. §§ 7–11. To insure safe arrival of the electors' certificates, five duplicates are

deposited with various other officers. *Id.*, § 11. Provision is made for the President of the Senate to send for these duplicates if necessary. *Id.*, §§ 12–14. See 20 OPS, ATT'Y GEN. 522 (1893).

[11] *Id.*, §§ 15–18.

[12] See *infra*, note 30.

[13] See *infra*, note 53.

[14] *Supra*, note 2. The history of the electoral system can be only sketched here. For fuller treatment, see MCKNIGHT, THE ELECTORAL SYSTEM OF THE UNITED STATES (1878); DOUGHERTY, *op. cit. supra*, note 2; STANWOOD, A HISTORY OF THE PRESIDENCY FROM 1788 TO 1897 (Bolton ed. 1926); Tansill, *supra*, note 2. A complete compilation of all congressional proceedings on the subject from 1789 until 1876 may be found in *House Special Committee on Counting Electoral Votes*, H.R. MISC. DOC. No. 13, 44th Cong., 2d Sess. (1877) [Hereinafter cited as *Counting Electoral Votes*]. When appropriate, reference will be made to this work, rather than to the original sources in the congressional debates. Dates will be given, however, so that the referenced matter may be found in the original.

[15] See 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 109, 501 (Farrand ed., 1911). The Convention wavered between election by Congress and a number of other methods. The Congressional plan was actually approved and then reconsidered. *Id.* 101, 171.

[16] U.S. CONST., art. II, § 1; 2 RECORDS OF THE FEDERAL CONVENTION, *supra*, note 15, at 500–501. THE FEDERALIST No. 68, at 452 (Ford ed. 1898) (Hamilton).

[17] Before the present language was adopted in the Convention, a motion that the provision read "who shall have balloted," intended to prevent the number needed for a majority from being increased by non-voting electors, was lost. 2 RECORDS OF THE FEDERAL CONVENTION, *supra*, note 15 at 515.

[18] U.S. CONST., art. II, § 1; *cf. id.*, amend. XII. In the original provision, if the electoral vote ended in a tie, or if no candidate had a majority, the House, balloting by states, was to choose the President from the tied pair. If there were no majority, the choice was to be from among the five highest candidates. In any case the Vice President was to be the man who placed second. The Twelfth Amendment, in providing for the separate election of the Vice President, preserved the power of the House over the Presidential election and gave the Senate similar powers in the case of the Vice President. See *infra*, note 28.

[19] The Federalist, *supra*, note 16, No. 59, at 392-393, Hamilton did not discuss the electoral count or contests over the electoral vote. *Id.*, No. 68.

[20] The Act of March 1, 1792, ch. 8, 1 Stat. 239, also established the times at which the electors were to be appointed and were to vote, as well as the date on which Congress was to meet for the count of the vote.

[21] The rise of party feeling was apparent enough by 1796 to cause outspoken comment when a Federalist elector voted for Jefferson, STANWOOD, *op. cit. supra*, note 14, at 51. While the electors retain their independence as a theoretical matter, in practice virtually every elector ever appointed has voted at his party's call. DAVID, GOLDMAN & BAIN, THE POLITICS OF NATIONAL PARTY CONVENTIONS 222n (1960); *cf.* CORWIN, THE PRESIDENT—OFFICE AND POWERS. 1787–1957 40–41 (4th rev. ed 1957). One court has gone so far as to suggest that mandamus would lie to compel an elector to vote as the party directed. Thomas v. Cohen, 146 Misc. 836, 262 N.Y. Supp. 320, 326 (Supp. Ct. 1933) (dictum), and the statutes of at least five states require a pledge. Wilkinson, *supra*, note 7 at 254. The Supreme Court has indicated, however, that while a political party may exact a pledge from a primary candidate, its enforceability is constitutionally dubious. Ray v. Blair, 343 U.S. 214, 230 (1952) dictum). Recent legislation in the southern states seems to embody express recognition of the principal of independence. CORWIN, *supra*, at 41; Wilkinson, *supra*.

[22] Resolution of September 17, 1787, 2 RECORDS OF THE FEDERAL CONVENTION. *supra*, note 15, at 665–666; *Counting Electoral Votes* 7–8 (April 6, 1789); 1 KENT, COMMENTARIES ON AMERICAN LAW 258–259 (1826); MCKNIGHT, *op. cit supra*, note 14 at 140–147, 157–167, 179–181.

[23] In 1797 John Adams did not hesitate to count for himself the four votes of Vermont, which apparently had been improperly cast by the state legislature. STANWOOD, *op. cit. supra*, note 14, at 52. Although this act gave Adams the presidency, no objection was raised in the counting session. *Counting Electoral Votes* 13, 15 (Feb. 8, 1797). In the tied election of 1800, Jefferson, also without opposition, counted dubious votes that gave a majority to himself and Burr. 2 DAVIS, MEMOIRS OF AARON BURR, 71–73 (1837); STANWOOD, *op. cit. supra*, at 69–73; *Counting Electoral Votes* 30 (Feb. 12, 1801). As to the idea that Congress could by legislation provide another agent for the count, see *Counting Electoral Votes* 16 (Senate, Jan. 23, 1800); KENT, *op. cit. supra*, note 22; H.R. REP. No. 31, 40th Cong., 3d Sess. 84–88 (1869). *cf.* 2 STORY, COMMENTARIES ON THE CONSTITUTION § 1470 (3d ed. 1858).

[24] Their purpose was to prevent the appointment of Republican electors by the Pennsylvania legislature. BEVERIDGE, THE LIFE OF JOHN MARSHALL 452–458 (1916); MCKNIGHT, *op. cit. supra*, note 14, at 262–269; DOUGHERTY, *op. cit. supra*, note 2, at 62–63.

[25] *Counting Electoral Votes* 23, 27 (April 25, May 2, 1800). The original version of the bill in the Senate had provided for a "Grand Committee" with a majority of its members drawn from the Senate, having power to arrive at a binding final determination of all disputes except those over the popular vote. *Id.*, 21 (March 27, 1800). The milder House version reflected the efforts of John Marshall, a somewhat more moderate Federalist than his New England colleagues, to prevent the passage of a measure that would have excited even greater popular ill will against his party. BEVERIDGE, *op. cit. supra*, note 24.

[26] *Counting Electoral Votes*, 28, 29 (May 8, 9, 1800).

[27] In both Houses they had urged substitute measures that gave the power to decide disputes to a majority of the joint convention. *Id.* 19 (Senate, March 25, 1800); *id.* 26 (House, April 30, 1800).

[28] The amendment did not alter the language of the original instrument regarding the count of the vote. *Cf.* U.S. CONST. art. II, § 1. As to the changes actually made, see *supra*, note 18. The amendment was passed by the Republican 8th Congress on December 8, 1803, in a strict party line vote. 2 Stat. 306; STANWOOD, *op. cit. supra, note* 14, at 77–82. The language of the act which implemented it suggests that someone other than the President of the Senate was to count the vote. Act of March 26, 1804, ch. 50, 2 Stat. 295. The language used in the count of 1805 indicates an understanding that Congress was the counting authority. *Counting Electoral Votes*, 36, 37 (Feb. 13, 1805).

[29] In 1824, another year of impending crisis, the Senate passed a bill providing that the Houses should separate to decide disputed votes, with votes to be rejected only if the Houses concurred. The bill died in the House without being considered. *Id.* 57–60 (March 4–April 21, 1824). The Act of January 23, 1845, ch. 1. 5 Stat. 721, established the present elction day and permitted the states to remedy minor defects in the electoral process. See 3 U.S.C. §§ 1, 2, 4 (1958).

[30] In 1817 the votes of Indiana were counted after a debate in which it was assumed that if Indiana were not a state her vote would not be counted. *Counting Electoral Votes* 44–47 (Feb. 10–11, 1817). In 1821, Missouri not having complied with the anti-slave conditions to its admission, Henry Clay put through a compromise resolution which provided that the result should be announced in alternative form, both as though the vote of Missouri had been counted and as though it had not. *Id.* 48–56 (Feb. 6–14, 1821). Michigan's vote was counted in similar fashion in 1837, and the ineligibility of certain electors was pointed out. *Id.* 70–76 (Jan. 26–Feb. 8, 1837). The power of Congress to make such decisions is derived directly from its power to provide for the admission of new states. U.S. CONST., art. IV, § 3. If the two Houses cannot agree as to whether a certain entity is a state, or whether certain acts are the acts of the lawful government of a state, no other authority can resolve the question. See Luther v. Borden, 48 U.S. (7 How.) 1 (1849). For the treatment of similar problems in 1865 and 1869, see *infra*, notes 34, 35.

[31] *Counting Electoral Votees* 87–144 (Feb. 11–12, 1857).

[32] *Id.* 47 (House, Feb. 11, 1871), 52 (House Feb. 14, 1821), 71 (Senate, Feb. 4, 1837), 129–132 (Senate, Feb. 12, 1857).

[33] *Id.* 224 (Senate, Feb. 6, 1865). The rule was hastily passed in sparsely attended sessions of both houses. *Id.* 223–226. *Cf. id.* 536 (March 13, 1876) (Remarks of Senator Whyte).

[34] The Twenty-second Joint Rule was only an alternative to the chief measure upon which the Radical Republicans relied to block the votes of lately reconstructed Louisiana and Tennessee. The Houses had previously resolved that no votes from those two states should be counted. *Id.* 147–149 (House, Jan. 30, 1865); *id.* 149–223 (Senate, Feb. 1–4, 1865; House, Feb. 4, 1865). In the count of the vote this resolution, reluctantly approved by Lincoln at the last minute, was relied on by the President of the Senate to keep the votes of Louisiana and Tennessee from the floor. *Id.* 227–228 (Feb. 8, 1865). In a message received two days after the count Lincoln made it clear that he deemed his approval of the measure unnecessary, if not improper, since Congress had "complete power to exclude from counting all electoral votes deemed by them to be illegal." *Id.* 229–230 (Senate, Feb. 10, 1865).

[35] The vote of Louisiana was objected to under the Twenty-second Joint Rule on the ground that no valid election had been held there. During the debate it appeared that there was no evidence of any misconduct, and the Houses concurred in accepting the questioned votes. *Id.* 237–244 (Feb. 10, 1869). The votes of Georgia, whose statehood was then pending before Congress, were counted under an alternative measure similar to those used in the pre-war crises, *supra*, note 30. The radicals of the House had sought to have Georgia's vote rejected altogether under the Twenty-second Joint Rule. Outraged, they debated a censure proposal for two days after the count. *Id.* 231–236 (Senate, Feb. 8, 1869; House, Feb. 8, 1869); *id.* 246–266; 267–320 (House, Feb. 11, 12, 1869). After the election an intensive and enthusiastically partisan investigation in New York City by a House Committee produced evidence of fraud which Republican members claimed would have given the state's electoral votes to Grant. H.R. REP. No. 31, *supra*, note 23.

[36] In several instances between 1836 and 1872, the returns of isolated counties had been thrown out in the state canvass for various irregularities, but no protest was made in the count. BURNHAM, PRESIDENTIAL BALLOTS, 1836–1892 895–949 (1955).

[37] Three votes from Georgia cast for Greeley, the Democratic candidate who had died after the election were rejected on the vote of the House, the Senate voting to accept them. *Id.* 368, 377 (Feb. 12, 1873). Objections

on various technical grounds to the votes of Texas and Mississippi were denied by both Houses. *Id.* 369–371, 380, 383, 386–389. Arkansas's votes for Grant were rejected by the Senate for lack of a seal, suggesting that the Republicans were seeking to create an impression of fairness. *Id.* 402. It later appeared that Arkansas had no seal at the time of the election. *Cf. id.* 510 (Feb. 25, 1875) (Remarks of Senator Logan).

[38] *Counting Electoral Vote* 336–345 (Senate, Jan. 7, 1873).

[39] *Id.* 358–363 (Senate, Feb. 10, 1873). The Republican returning board had been upheld by the state supreme court, but the majority voted to ignore this fact, since the decision came after the meeting of the electors. *Id.* 362. See State *ex rel.* Attorney General v. Wharton, 25 La. Ann. 2 (1873).

[40] *Counting Electoral Votes* 399, 406 (Feb. 10, 1873).

[41] *Id.* 519 (Feb. 25, 1875). Prior efforts to pass a Constitutional Amendment giving Congress "power to provide for holding and conducting the elections of President and Vice President and to establish tribunals for the decision of such elections as may be contested," had been unsuccessful. *Id.* 345–357 (Senate, Jan. 17, 1873), 408–444 (May 28, 1874, Jan. 21–27, 1875). A proposal to change the Twenty-second Joint Rule to provide that concurrence was necessary for rejection also failed. *Id.* 444–458 (Feb. 4, 1875).

[42] S. 1251, 43 Cong., 2d Sess., *id.* 459 (Feb. 25, 1875). The amendment was thought too great a delegation of the congressional power over the count. *Id.* 480–487, 498–499. An amendment to eliminate the broad language of the Twenty-second Joint Rule, *supra*, note 33, permitting decision of "any other question" was passed, in order that the bill would not be construed as covering questions over which Congress had no jurisdiction, such as the determination of state contests. *Id.* 463.

[43] U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES 692 (1960) [Hereinafter cited HISTORICAL STATISTICS].

[44] *Counting Electoral Votes* 786–787 (Jan. 20, 1876).

[45] *Id.* 519–520, 676–687 (Senate, March 13, April 19, August 5, 1876).

[46] For fuller treatment of the controversy, see HAWORTH, THE HAYES-TILDEN ELECTION (2d ed. 1927); DOUGHERTY, *op cit. supra*, note 2, at 105–213; NEVINS, ABRAM S. HEWITT 305–399 (1935); WOODWARD, REUNION AND REACTION (1951); Lewis, *The Hayes-Tilden Election Contest*, 47 A.B.A.J. 36, 163 (1961). The proceedings of the Electoral Commission are found in 5 CONG. REC., part 4 (1877), a separately paged supplement to the CONGRESSIONAL RECORD [Hereinafter cited as 5(4) CONG. REC.]. See also U.S. CONGRESS, ELECTORAL COMMISSION, ELECTORAL COUNT OF 1877 (1877).

[47] Act of Jan. 29, 1877, ch. 37, 19 Stat. 227. For a summary of the debates on the Act, see DOUGHERTY, *op. cit. supra*, note 2, at 110–135. The committee deliberations that led to the acceptance of the measure are documented in NEVINS, *op. cit. supra*, note 46, at 342–364.

[48] During the count single returns from Michigan, Nevada, Pennsylvania, Rhode Island, Vermont, and Wisconsin were objected to on eligibility grounds. All were accepted, either by concurent vote or by the vote of the Senate, 5 CONG. REC. 1720, 1728, 1938, 1945, 2054, 2608 (1877).

[49] Davis was unexpectedly chosen by the Illinois legislature to fill a vacancy in the United States Senate. It is unclear whether this transpired through Democratic stupidity or Republican cleverness. See NEVINS, *op. cit. supra*, note 46, at 361–367.

[50] The letters of Mr. Justice Miller, avowedly a Republican, leave little doubt that he was heavily in favor of Hayes and greatly relieved by the outcome. FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT, 1862–1890 280–291 (1939). For the torrent of abuse to which Mr. Justice Bradley was subjected both before and after the proceedings, see Klinkhamer, *Joseph P. Bradley: Private and Public Opinion of a "Political" Justice*, 38 U. of DET. L. J. 150 (1960). The role of the five justices in the controversy increased public criticism of the opinion of the Court in the Granger Cases (Munn v. Illinois), 94 U.S. 113, handed down on March 1, 1877. 2 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 583 (Rev. ed. 1926). For more recent views, see NEVINS, *op. cit. supra*, note 46, at 370–373, 378n; FAIRMAN, *op. cit. supra*, at 292; WOODWARD, *op. cit. supra*, note 46, at 155–163.

[51] The applicable Florida statute provided that the Board of State Canvassers might throw out any returns which appeared so false and fraudulent that the Board could not determine the true vote. Acts and Resolutions of Fla. 1872, ch. 1868, § 4. See FLA. STAT. ANN. § 102.131 (1960). The Board had taken testimony regarding alleged offenses and had thrown out numerous individual votes. In the gubernatorial contest the state supreme court ruled this action illegal, holding that the statute gave the Board discretion to look only to the *bona fides* of the returns, not to the votes themselves. State *ex rel.* Drew v. Board of State Canvassers, 16 Fla. 17 (1877). In Louisiana the statute set up an elective returning board. If sworn complaints regarding fraud or violence at the polls were made to it, the board could investigate the charges and exclude from the count any return which it found materially affected by these influences. Acts of La. 1872, No. 98. § 3. Without complying with these formalities, the board had thrown out some 13,000 Democratic votes. 5(4) CONG. REC. 60–61. The South Carolina statute gave the State Canvassing Board power to decide "cases under protest or contest." S.C. REV. STAT. tit. 2, § 26 (1873). See S.C. CODE § 23–476 (1952). The Board had refused to entertain Democratic allegations of fraud in certain of the county canvasses. 5(4) CONG. REC. 180. For the unsuccessful efforts of the South Carolina Democrats in the state courts, see State ex rel. Barker v. Bowen, 8 S.C. 382 (1876); *Id.* 400 (1877).

[52] 5(4) CONG. REC. 56, 119, 192. In the case of Florida the Commission further held invalid the certificate of the newly elected Democratic governor based on a state quo warranto proceeding completed subsequent to the date of meeting of the electors. In Louisiana it decided that a group of Democrats claiming to be the returning board was not authorized to act as such. In South Carolina it rejected Democratic arguments based on the failure of the state to enact a registration statute required by its constitution and on alleged federal interference in the election. *Ibid.* See generally, DOUGHERTY, *op. cit. supra*, note 2, at 136–183, 202–207.

[53] 5(4) CONG REC. 38, 57, 117, 119, 179. DOUGHERTY, *op. cit. supra*, note 2, at 153, 160, 180, 184–202.

[54] 5(4) CONG REC. 56, 192; *cf. Id.* 263–264 (Opinion of Mr. Justice Bradley).

[55] 5 CONG. R53. 2068 (1877). The story of the negotiations is told in full detail in WOODWARD, *op. cit. supra*, note 46. See also, NEVINS, *op. cit. supra*, note 46, at 379–399.

[56] S. 1308, 45th Cong., 2d Sess., 7 CONG. REC. 3739. *Cf.* Edmunds, *Presidential Elections*, 12 AM. L. REV. 1, 15–19 (1877).

[57] Garfield defeated Hancock in 1880 by only 7,368 votes out of some 9,000,000 cast, and won in the Electoral College by 214 votes to 155. In 1884 Cleveland's popular vote lead was some 68,000 out of 9,500,000, but his electoral vote lead was a mere 37. He carried New York with its 36 electoral votes by a plurality of only 1,167 out of nearly 1,200,000 votes. HISTORICAL STATISTICS 682–683, 689, *Cf.* BURNHAM, *op. cit. supra*, note 36, at 130, 137. As to the counts in 1880 and 1884, see *infra*, note 58.

[58] S. 1308, *supra*, note 56, passed the Republican Senate in December 1878, but was allowed to die in the still Democratic House. 8 CONG. REC. 51–54, 68–74, 157–170, 197 (1878). In the 46th Congress, with both Houses Democratic, efforts to pass legislation to control the count of 1881 failed, and a compromise was adopted, providing for the alternative count of the votes of Georgia, which had been cast on the wrong day. STANWOOD, *op. cit. supra*, note 14, at 399; 11 CONG. REC. 19–32, 39–48, 61–73, 132–134 (1880). The count proceeded peacefully under this device. *Id.* 1386–1387 (1881). The bill reappeared in the Republican 47th Congress as S. 613, 13 CONG. REC. 859, 2651–2652 (1882). It died in the House, after an unsuccessful effort to amend it to provide that the losing candidate might contest the election in federal court after the President of the Senate had declared the result. *Id.* 5142–5150. On its next appearance the bill passed a Republican Senate for the third time. S. 25, 48th Cong., 1st Sess., 15 CONG. REC. 430 (1883). The House, again Democratic, passed a substitute giving decision of all questions to a per capita vote of the joint session, which was unacceptable to the Senate. *Id.* 5460–5468, 5547–5551 (1884); 16 *Id.* 1618 (1885). As in 1876, neither party would give ground in an election year, but the count of the vote in 1885 passed without incident. *Id.* 1532. As to the composition of Congress, see HISTORICAL STATISTICS 692.

[59] S. 9, 49th Cong., 1st Sess. It was introduced in the form in which it had last passed the Senate. 17 CONG REC. 122, 242 (1885). After a brief debate, a substitute was reported back. *Id.* 1021, 1057–1064, 2387 (1886). This version passed the Senate without amendment. *Id.* 2427–2430. Numerous amendments were added in the House, and the final form of the bill was the result of a conference, 18 CONG REC. 29–31, 45–52, 77 (1886); 668 (1887).

[60] H.R. REP. No. 1638, 49th Cong., 2d Sess., 18 CONG. REC. 30 (1886).

[61] Act of February 3, 1887, ch. 90, 24 Stat. 373, 3 U.S.C. §§ 5–7, 15–18 (1958). Technical changes were made by the Act of October 19, 1888, ch. 1216, 25 Stat. 613, and by the Act of May 29, 1928, ch. 859, 45 Stat. 945. For later changes, see *infra*, notes 63, 76. The Act, prior provisions still in effect, *supra*, notes 20 and 29, and subsequent changes were codified as 3 U.S.C. §§ 1–20 (1958), by Act of June 25, 1948, ch. 644, § 1, 62 Stat. 672.

[62] 3 U.S.C. § 5 (1958).

[63] *Id.* § 6 provides that the executive of each state, "as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment," is to mail a certificate of the electors appointed and the number of votes to the Administrator of General Services. Copies of this certificate are also given to the electors, who forward them with the certificates of their votes. *Supra*, note 10. If there is a subsequent determination of a controversy under 3 U.S.C. § 5, *supra*, note 62, evidence of it is to be forwarded in similar fashion. As to the role of the Administrator of General Services, see 107 CONG. REC. 265 (daily ed. Jan. 6, 1961) (Remarks of Senator Russell). This function was transferred from the Secretary of State as part of the reorganization of 1950. Act of Oct. 31, 1951, ch. 655, §§ 4–9, 65 Stat. 711.

[64] *Supra*, note 62.

[65] 3 U.S.C. § 15 (1958). The Act also provides for brief recesses during the count, *id* § 16; for a maximum of two hours of debate in separate session, with each speaker limited to five minutes, *id.* § 17; and in joint session for no debate and consideration of no other question except a motion to withdraw, *id* § 18.

[66] In the count of 1889 there was some confusion, but no actual problems were present.

20 CONG. REC. 1859–1860. For the subsequent counts, see 3 HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, §§ 1960–1963 (1907); 6 *Cannon's Precedents of the House of Representatives*, §§ 442–446 (1935); 81 CONG. REC. 83 (1937); 87 *id.* 43 (1941); 91 *id.* 90 (1945) 95 *id.* 89 (1949); 99 *id.* 130 (1953) 103 *id.* 294 (1957). The procedure presently followed has been purely a formal ritual for many years. See *Cannon's Procedure in the House of Representatives*, H.R. Doc. No. 122, 86th Cong., 1st Sess., 193–196 (1959).

[67] See 8 CONG. REC. 54 (1878) (Remarks of Senator Edmunds); 18 CONG. REC. 30–31 (1887) (Remarks of Mr. Caldwell); *id.* 49 (Remarks of Mr. Eden); *id.* 668 (1887) (Report of Conference Committee).

[68] CONG. REC. 52 (1878) (Remarks of Senator Edmunds). In the course of the debates in 1882, the Senate rejected an amendment that would have given the two Houses power to overturn the state determination by concurrent vote. The proponents of the bill made it clear that they deemed the state's determination to be absolutely binding. 13 CONG. REC. 2651–2652. *Cf.* H.R. REP. No. 1638, *supra*, note 60.

[69] 8 CONG REC. 54 (1878) (Remarks of Senator Edmunds); 18 CONG. REC. 31 (1886) (Remarks of Mr. Caldwell).

[70] As to the legislative intent, see 17 CONG. REC. 2387, 2427 (1886). In five states the legislature has provided a special contest proceeding in an existing court. COLO. REV. STAT. ANN. §§ 49–14–1, 49–14–2 (1953); CONN. GEN. STAT. ANN. §§ 9–315, 9–323 (1958); DEL. CODE ANN. tit. 15, §§ 5921–5928 (1953); MASS. ANN. LAWS, ch. 54, §§ 119–120 (1953); S.D. CODE, §§ 16.1902–1914 (1939). In two states a special court has ben established. IOWA CODE ANN. §§ 60.1–60.6 (1949); N.D. CENT. CODE §§ 16–06—16–15 (1960). In two states express provision is made for trial in the manner decreed for contests for other offices. OKLA. STAT. ANN. tit. 26, §§ 518, 392 (1955), 391 (Supp. 1960); PA. STAT. ANN. tit. 25, §§ 3291, 3351–3352, 3456–3475 (1938). The legislature of one state has provided that it shall determine all contest for the office of elector. WERNONS ANN. MO. STAT. § 128.100 (1952). Three states have provided for final determination of contests by the canvassing authority. KANS. GEN. ANN. § 25–1433 (1949) R.I. GEN. LAWS ANN. § 17–22–4 (1956); VERNON'S ANN. TEX. STAT. EECTION CODE, § 9.29 (1952). In two other states there are similar provisions, but court decisions cast doubt on their finality. ME. REV. STAT. ANN. ch. 5 § 50 (1954) (See Rounds v. Smart, 71 Me. 380 (1880)); *cf. infra*, note 71; S.C. CODE §§ 23–475, 23–476 (1952) (See Redfearn v. Board of State Canvassers, 234 S.C. 113, 107 S.E.2d 10 (1959)). In two states the provisions specifically applicable to electors are not the exclusive form of contest. FLA. STAT. ANN. tit 9, §§ 102–121, 131; 99.192–221 (1960) (See *infra*, note 71); N.H. REV. STAT. ANN. §§ 59:94–98, 68:1–11 (1955) (See *infra*, note 71). Two southern states have passed identical legislation giving to a special board powers over the electoral vote which might be construed to include final power to determine contests. ARK. STAT. ANN. § 3–327 (Supp. 1959); GA. CODE ANN. § 34–2515 (Supp. 1960). If the Arkansas provision does not apply, then contests would be tried as for supreme court judge. ARK. STAT. ANN. § 3–313 (1947). In Georgia the contest provisions for members of the General Assembly would govern. GA. CODE ANN. §§ 34–2101, 2901, 2801–2803 (1936). One proposal for legislation to implement the Twenty-third Amendment, giving the District of Columbia the presidential vote, would provide both a recount and a special contest proceeding in the United States District Court for the District of Columbia. Washington Star, April 2, 1961, § 1, p. 7; cf S. 1883, 87 Cong., 1st Sess., 107 CONG. REC. 7478–9 (daily ed. May 16, 1961).

[71] In 17 states provision has been made for the contest in the state courts of election to "any office" "any public office," "any state office," or a similar variation. ALASKA Sess. Laws 1960, ch. 83, §§ 4.71–4.93; ARIZ. REV. STAT. ANN. §§ 16–1201–1207 (1956); CAL. ELECTIONS CODE §§ 8510–8575; FLA. STAT. ANN. tit. 9, §§ 99.192–99.221 (1960) (See *supra*, note 70); HAWAII REV. LAWS §§ 11–85.1 (Supp. 1960); ILL. ANN. STAT. ch. 46, §§23.19–.30 (1944; Supp. 1960); KY. REV. STAT. §§ 122.070–.090 (1955); MD. ANN. CODE art. 33, §§ 145–146 (1957; Supp. 1960); MINN. STAT. ANN. §§ 209.02–201.10 (Pamphlet Supp. 1959); MONT. REV. CODES ANN. §§ 23–1459–1467 (1955); NEV. REV. STAT. §§ 296.505–.515 (1959); N.J. STAT. ANN. §§ 19:29—1–11 (1940); N.M. STAT. ANN. §§ 3–9–1—3–9–10 (1953); N.Y. ELECTION LAW §§ 330–333, *cf.* N.Y. CIVIL PRACT. ACT §§ 1208–1221; OHIO REV. CODE §§ 3515.08–.15 (Baldwin, 1960); ORE. REV. STAT. §§ 251.025–.090 (1957); UTAH CODE ANN. §§ 20–15–1—15–12 (1953). Two states provide for such contests in the legislature. IND. STAT. ANN. tit. 29, §§ 5601–5617 (1949); N.C. GEN. STAT. §§ 163–99 (1952). The general contest provisions of the remaining states do not extend to presidential electors, but all of these states provide an action in quo warranto against one who "usurps, intrudes into or unlawfully holds or exercises any public office." In 11 of the states there is little doubt that a lack in the general contest provisions is to be supplied by a quo warranto proceeding. ALA. CODE tit. 17, §§ 231, 254 (1959), *id.* tit. 7, §§ 1136–1155 (1960) (Provision that no election triable under the Code may be tried by quo warranto is to be strictly construed. Walker v. Junior, 247 Ala. 342, 24 So. 2d 431 (1946); IDAHO CODE ANN. §§ 34–2001–2011, 6–602–609 (1948) (See Tiegs. v. Patterson, 79 Idaho 365 318 P.2d 588 (1957)); ME. REV. STAT. ANN. ch. 129, §§ 21, 22 (1954) (Common law right of action preserved) (See *supra*, note 70); MICH. STAT. ANN. §§ 27.2315–2326 (1938), 6.1861–1892 (1956) (Statutory recount proceeding does not abridge common law right); MISS. CODE ANN. §§ 1120–1145, 3287–3290 (1956) (Quo warranto lies in cases not covered by election contest provisions. Kelly v. State *ex rel.* Kiersky, 79 Miss, 168, 30 So. 49 (1901); Warren v. State *ex rel.* Barnes, 163 Miss. 187, 141 So. 901 (1932)); N.H. REV. STAT. ANN. § 491.7 (Supp. 1960) (Common law right of action preserved. Stickney v. Salem, 96 N.H. 500, 78 A.2d 921 (1951) (See *supra*, note 70); TENN. CODE ANN. §§ 2–1901–2017, 23–2801–2821 (1955) (Provision that no election triable under the Code may be tried by quo warranto is designed to insure that there be only one contest proceeding. State *ex rel.* Anderson v. Gossett, 77 Tenn. 644 (1882)); VT. STAT. ANN. tit. 12, §§ 4041–4045 (1958), tit. 17, §§ 1361–1365 (1959) (See State *ex rel.* Ballard v. Greene, 87 Vt. 515, 89 Atl. 743 (1914)); WASH. REV. CODE §§ 29.65.010–.130 (1951), WASH. REV. CODE ANN. §§ 7.56.010–.100 (1961) (See State *ex rel.* Holt v. Hamilton, 118 Wash. 91, 202 Pac. 971 (1921)); WIS. STAT. ANN. §§ 6.66 (1957), 294.01–.13 (1958) (See State *ex rel.* Dithmar v. Bunnell, 131 Wis. 198, 110 N.W. 177 (1907)); WYO. STAT. ANN. §§ 22–296, 22–306–324 (1957), 1–896–929 (1959) (See State *ex rel.* Walton v. Christmas, 48 Wyo. 239, 44 P.2d 905 (1935)). In the remaining four states serious doubts exist as to whether the writ would lie in an election contest. LA. STAT. ANN. §§ 18:1251, 42:76–85 (1951); NEBR. REV. STAT. §§ 25–21,121–21,134 (1956), 32–1001–1034 (1960); VA. CODE ANN. §§ 24–419–434 (1950), 8–857–865 (1957); W. VA. CODE ANN. §§ 193–207, 5310–5316 (1955). As to quo warranto generally, see MCCRARY, AMERICAN LAW OF ELECTIONS §§ 393–395, 425 (4th ed. 1897).

[72] This question in most cases would turn on the definition of the term "public" or "state" office in the applicable statute. The United States Supreme Court has held that electors are "state officers" in denying habeas corpus in a conviction under state law for vote fraud in a presidential election. In re Green, 134 U.S. 377 (1890). Interpretation in state courts has varied from case to case, however, according to the intention of the legislature. *Compare* State v. Mountjoy, 83 Mont. 162, 271 Pas. 466 (1928), *with* Spreckels v. Graham, 194 Cal. 516, 228 Pac. 1040 (1924); Harless v. Lockwood, 85 Ariz. 97, 332 P. 2d 887 (1958), *with* Lane v. Melamore, 169 S.W. 1073 (Tex. Civ. App. 1914); *cf.* Annot, 68 A.L.A. 2d 1320 (1959). See also Smith v. Ruth, 308 Ky. 60, 212 S.W. 2d 532 (1948); Lillard v. Cordell, 200 Okla. 577, 198 P. 2d 417 (1948).

[73] 8 CONG. REC. 51 (1878).

[74] In the third version of the bill, S. 25 *supra*, note 58, Senator Hoar, floor manager, insisted that it was unchanged from its previous passage in the Senate, but the six-day requirement was in the version taken up by the House. 15 CONG. REC. 430, 5076 (1884). Amendments to eliminate the provision from the final version of the bill, S. 9, *supra*, note 59, were rejected in the House. 18 CONG. REC. 77 (1886).

[75] 24 Stat. 373.

[76] Act of June 5, 1934, ch. 390, §§ 6–7, 48 Stat. 879. The Twentieth Amendment altered Inauguration Day to January 20th, and the first meeting of the new Congress to January 3d. The Act, in providing that the counting session should be on January 6th, insured that the count would not be made by a lame-duck Congress.

[77] The statutes of Connecticut and Iowa, *supra*, note 70, expressly provide that a result is to be reached prior to the deadline in the federal statute.

[78] N.Y. Times, Dec. 16, 1960, p. 28, col. 2 (city ed.).

[79] Lum v. Bush, Civil No. 7029, Circuit Court of the First Judicial Circuit. See N.Y. Times, Nov. 30, 1960, p. 29, col. 7(city ed.); *Id.* Dec. 2, 1960, p. 17, col. 6; *id.* Dec. 15, 1960, p. 39, col. 1; 107 CONG. REC. 282–3 (daily ed. Jan. 6, 1961). See Hawaii's contest statute, *supra*, note 71.

[80] For the various certificates; the court decree, and the governor's letter of explanation, see *ibid.* The governor noted that the time for appeal would not expire until January 9th, but that no appeal was planned. *Id.* 282.

[81] *Id.* 283. *Cf.* N.Y. Times, Jan. 7, 1961, p. 1, col. 4; p. 8, col 2 (city ed)

[82] N.Y. Times, Nov. 29, 1960, p. 17, col. 1 (city ed.); *id.* Nov. 30, 1960, p. 29, col. 1; *id.* Dec. 2, 1960, p. 17, col. 2; *id.* Dec. 3, 1960, p. 23, col. 3. *Cf.* 107 CONG. REC. A–1402 (1961).

[83] Under Illinois law a "discovery" recount, which is of no effect on the official count or in a subsequent contest, may be undertaken by a defeated candidate in order to determine whether or not he has grounds for contest. ILL. ANN. STAT., ch. 46, § 22–6 (Supp. 1960). This proceeding bogged down due to a difference of opinion between the parties as to the scope of the recount. N.Y. Times, Dec. 1, 1960, p. 22, col. 3; *id.* Dec. 3, 1960, p. 23, col. 3; *id.* Dec. 6, 1960, p 30, col. 1. An attempt to get mandamus requiring the Cook County Canvassing Board to change its result in accordance with the discovery proceeding failed. Id. Dec. 13, 1960, p. 23, col. 1.

[84] The Board, composed of the governor and four other executive officers, is required to meet within twenty days after the election and "proceed to open and canvass" the returns from the counties in order to ascertain which presidential electors are the winners. ILL. ANN. STAT. ch. 46, §§ 1–3, 7–14, 21–2, 21–3 (1944; Supp. 1960). The Republican claim was based on a "1912" decision which would permit the Board to reject county returns. The Democrats consistently argued that the Board had ministerial powers only and could do no more than tabulate

the county canvasses. N.Y. Times, Dec. 1, 1960, p. 22, col. 4 (city ed.); *id.* Dec. 7, 1960, p. 24, col. 3. The Republicans' case was apparently People *ex rel.* Hill v. Deneen, 256 Ill. 536, 100 N.E. 180 (1912), in which the state board was permitted to refuse a revised proclamation by a county board based on a court proceeding in which there was no jurisdiction. The board was directed to accept the original county canvass. This case is far from giving the state board power to hear facts and decide a contest for itself. If anything, it stands for the proposition that the county canvass is conclusive upon the board unless attacked in a proper proceeding, which under Illinois law is a statutory election contest. *Supra,* note 71. See People *ex rel.* Wilson v. Mattinger, 212 Ill. 530, 72 N.E. 996 (1904); People *ex. rel.* Ganschinietz v. Renner, 334 Ill. App. 302, 79 N.E. 2d 298 (4th Dist. 1948).

[85] N.Y. Times, Dec. 15, 1960, p. 39, col. 1 (city ed.).

[86] Illinois ranked fourth in the 1960 census, with 10,081,158 inhabitants. Chicago, with a population of 3,550,404 is the nation's second largest city. *World Almanac 1961* 81–82.

[87] 8 CONG. REC. 52–54 (1878). See *supra,* note 30.

[88] In the debates and in the final report of the Conference Committee, it is clear that the provision for the governor's certificate to control in the disagreement of the Houses was to apply only in the case of double returns without a state determination. See 17 CONG. REC. 1020, 1022 (Remarks of Senator Hoar); 18 *id.* 49–50 (Remarks of Mr. Eden); *id.* 668 (1887) (Conference Committee Report).

[89] This situation might have arisen if the Illinois Election Board had failed to certify the Kennedy electors. See *supra,* note 84. In 1877 the Electoral Commission would not extend Congressional power beyond an inquiry into the credentials of the state board. *Supra,* note 52.

[90] This was the view of Mr. Caldwell of Tennessee, House floor manager of the bill. 18 CONG. REC. 30–31 (1886).

[91] *Id.* 31.

[92] 17 *id.* 2427–2428 (Remarks of Senator Hoar).

[93] In the Senate the Committee on Privileges and Elections, now a standing subcommittee of the Committee on Rules and Administration, has jurisdiction over "matters relating to the election of the President, Vice President, or Members of Congress; corrupt practices; contested elections; credentials and qualifications; Federal elections generally." Senate Standing Rule XXV 1(o)(1)(D), *Senate Manual,* S. Doc. No. 2, 87 Cong., 1st Sess. (1961). Similar jurisdiction is vested in the appropriate sub-committee of the Committee on House Administration. House Rule XI.9. (K), *House Manual,* H.R. Doc. No. 358, 85 Cong., 2d Sess. (1959). See GALLOWAY, THE LEGISLATIVE PROCESS IN CONGRESS 358 (1953). *Cf.* the activities of Senate investigators in 1873, *supra,* notes 38–40, and committees of both Houses in 1877, DOUGHERTY, *op. cit. supra,* note 2, at 141, 164.

[94] Congress has long had a reputation for the partisan decision of contests over its own membership. Out of 382 cases decided in the House between 1789 and 1907 only three members not of the majority party were seated. ALEXANDER, HISTORY AND PROCEDURE OF THE HOUSE OF REPRESENTATIVES 313–324 (1916). Decisions in the years since 1907 seem to have been somewhat less partisan. 1 HAYNES, THE SENATE OF THE UNITED STATES 126n (1938); *cf.* GALLOWAY, *op. cit. supra* note 93. In the most recent contest in the House, minority members of the Sub-Committee which has conducted a partial recount agreed in seating the Democratic candidate, but accused the majority of partisanship in certain decisions regarding the application of Indiana law. Roush v. Chambers, H.R. REP. No. 513, 87 Cong., 1st Sess. 65–70 (1961). On the floor Republican members raised the same objection, urging that the state determination should have been binding, but conceded that to object was "an exercise in futility" in view of the Democratic majority in the House. 107 CONG. REC. 9647–9661 (daily ed. June 14, 1961).

[95] In 1877, because no votes were rejected, the problem never arose. Since the constitutional language, *supra,* note 5, calls for election by a majority of the electors appointed, the answer would seem to depend on whether the votes in question were rejected because of a failure in the appointment process, or because of a subsequent failure on the part of the elector. Precedents drawn from other electoral counts are inconclusive. In 1873 the total announced by the President of the Senate as necessary for a majority included the votes of Louisiana, even though both sets of electors had been rejected because neither was found to be supported by a valid canvass. *Counting Electoral Votes* 408 (Feb. 12, 1873). In the years in which the vote was counted in the alternative, the number needed for a majority was reduced by the amount of the questioned votes. In these cases, however, it is clear that a state which cannot vote at all has not appointed electors. *Id.* 266 (Feb. 10, 1869); see *supra,* note 30; *cf.* 11 CONG. REC. 1387 (1881) (electors voted on wrong day; majority not reduced). On several occasions the majority figure was reduced to account for electors who had been appointed but had not voted through death or disability, *Counting Electoral Votes* 40 (Feb. 8, 1809); *id.* 50 (Feb. 14, 1821); *id.* 226, 229 (Feb. 8, 1865); see STANWOOD, *op. cit. supra,* note 14, at 63, 113. This practice is in direct contravention of the express intention of the Constitutional Convention, *supra,* note 17. Whatever the precedents, the sponsors of the Electoral Count Act clearly intended that votes rejected under it would reduce the number needed for a majority accordingly. 17 CONG. REC. 821 (1886) (Remarks of Senator Hoar).

[96] U.S. Const. amend. XII.

[97] For the succession, see CONST. amend. XX; 3 U.S.C. § 20 (1958).

[98] See HARRIS, ELECTION ADMINISTRATION IN THE UNITED STATES (1934); *cf.* Note, 106 U. PA. L. REV. 279 (1957).

[99] See WILMERDING, THE ELECTORAL COLLEGE 85–86, 115–116, (1958); *cf.* Margolin, *Proposals to Reform Our Electoral System,* 30, 46, 66 (Library of Cong. Legisl. Ref. Serv. 1960).

[100] Federal judges owe their positions to executive appointment with the advice and consent of the Senate, but they have life tenure during good behavior and may be removed only by impeachment, U.C. CONST. art. II, §§ 2, 4; art. III, § 1; art. I, §§ 2, 3.

[101] In England, where contested seats in Parliament are tried before a two judge election court, all the judges of the King's Bench Division meet annually to select three of their number to serve on a special rota for the court during the coming year. Supreme Court of Judicature Act (Consolidation), 1925, 9 & 10 Geo. 5, c. 64, § 67. See Representation of the People Act, 1949, 12 & 13 Geo. 6, 68, §§ 119–137. *Cf.* SCHOFIELD, PARLIAMENTARY ELECTIONS: 503–544 (3d ed. 1959). Efforts to introduce such a system for congressional contests have been unsuccessful. Haynes, *op. cit. supra,* note 94, at 122n.

[102] These factors led to the present requirement that a three judge court sit on proceedings where injunction of state action is sought. 28 U.S.C. §§ 2281–2284 (1958). See HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 47–48, 843—849 (1953).

[103] Federal courts apply state substantive law in many cases in which they serve as the forum for the enforcement of state-defined rights. See Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) (Diversity jurisdiction); Hess v. United States, 361 U.S. 314 (1960) (Admiralty); cases and sources cited in Hill, *The Erie Doctrine in Bankruptcy,* 66 HARV. L. REV. 1013, 1033–34, nn.87–89 (1953) (National bank winding-up, trade-mark infringement, tax appeal, bankruptcy). Congress in deciding contested congressional elections, has often claimed the power to view state law as merely advisory in such questions as the validity of ballots. HAYNES, *op. cit. supra* note 94, at 155; H.R. 513, *supra,* note 94, at 22, 69–70. This power is justified in the complete control over its own elections and contests which the Constitution vests in Congress. U.S. CONST., art. I, §§ 4, 5. Since there is no such federal control provided over the appointment of electors, the courts should be limited to the liberty which they now exercise in appropriate cases to interpret state law freely in the absence of a clear state pronouncement on the point in question. 1 MOORE, FEDERAL PRACTICE ¶¶ 0.307–0.309 (2d ed. 1959).

[104] To insure that the recount is carried out as quickly and impartially as possible, great care must be exercised in the selection of the personnel who actually count the ballots. In the most recent contest in the House, this chore was performed by auditors from five regional offices of the federal General Accounting Office. H.R. REP. 513, *supra,* note 94, at 12. If it is objected that what are essentially executive employees should not participate in the count of the presidential vote, then the court might be authorized to assign private accountants to the job.

[105] *Supra,* p. 5; note 30.

[106] All of these problems would be resolved by what one political scientist has pointed out to be the simplest and least controversial of all Electoral College reforms—eliminating the office of elector. Burns, *A New Course for the Electoral College,* New York Times, Dec. 18, 1960 (magazine), p. 10, at 28. President Kennedy proposed such a change as a Senator in 1957. S.J. Res. 132, 85th Cong., 1st Sess. The Kennedy plan is again pending in the Senate. See *infra,* note 117.

[107] See *supra,* note 95.

[108] The distinction may be difficult to make. Has an ineligible elector been "appointed"? When votes are rejected merely because the Houses disagree, has the state appointed electors? Questions of interpretation such as this must await an actual case.

[109] See H.R. REP. No. 31, *supra,* note 23, at 84–88; *cf., supra,* note 54.

[110] See State ex rel. Barker v. Bowen, 8 S.C. 382 (1876). Congress has given the District Courts jurisdiction of election disputes in which the sole question arises out of the denial of the right to vote on account of race, creed, color, or previous condition of servitude. The offices of elector, Senator, representative, and state legislator are excluded from these provisions, however, 28 U.S.C. § 1344 (1958). The provision has been held to bar federal jurisdiction over a contest in a primary election for United States Senator. Johnson v. Stevenson, 170 F.2d 108 (5th Cir. 1948), *cert. denied,* 336 U.S. 904 (1949). After the 1960 presidential election jurisdiction over a contest proceeding was refused by the United States District Court for the Southern District of Texas. New York Times, Dec. 13, 1960, p. 23, col. 1 (city ed.).

[111] In re Green, 134 U.S. 377 (1890). As to the variety of methods of appointment permissible, see McPherson v. Blecker, 146 U.S. 1 (1892).

[112] See Nixon v. Herndon, 273 U.S. 536 (1927); *cf.* James v. Bowman, 190 U.S. 127 (1903); see Wilkinson, *The Electoral Process and the Power of the States,* 47 A.B.A.J. 251, 252–3 (1961).

[113] Burroughs v. United States, 290 U.S. 534 (1934). The decision was based on the broad language of *Ex Parte* Yarborough, 110 U.S. 651 (1884), which did not distinguish between congressional and presidential elec-

tions in holding that Congress could legislate to preserve the rights of citizens that were essential to the continuance of the government. These cases may be distinguished from Walker v. United States, 93 F.2d 383 (8th Cir. 1937), *cert. denied*, 303 U.S. 644; *reh. denied*, 303 U.S. 668 (1938) in which it was held that a conspiracy against the right to vote for presidential electors could not be prosecuted under a federal statute making conspiracy to injure a citizen in his constitutional rights a crime. The latter case holds only that the citizen's individual right to vote is not protected by the Constitution, since it is subject to the control of the state legislatures. The power of Congress to protect the integrity of elections remains unchallenged.

[114] See *supra*, note 103.

[115] See HART & WECHSLER, *op. cit. supra*, note 102, at 892–893.

[116] *Id.* 20–21, 789–790.

[117] See S. 102, a proposal for "a commission to study and propose improvements in the methods of nominating and electing the President and Vice President"; S.J. Res. 1, a proposal for a Constitutional amendment to abolish the electoral college altogether in favor of direct popular election, including power in Congress to provide by legislation for the settlement of controversies; S.J. Res. 2, a proposed amendment to abolish the electors and to apportion the electoral vote among the candidates according to the proportion of the popular vote each has received; S.J. Res. 4, a proposal similar to S.J. Res. 2, with the proviso that if no candidate gets at least 40% of the vote a combined session of the House and Senate will choose the President and Vice President; S.J. Res. 12, a proposed amendment that would divide the states into equal districts in which each person votes for a district elector and for two electors at large; S.J. Res. 17, a proposal similar in effect to S.J. Res. 1, *supra*, with no provision for settling controversies and with some additional features S.J. Res. 28, a reintroduction of S.J. Res. 2, 81st Cong., 1st Sess., in the form in which it passed the Senate in 1950, a proposal generally similar to S.J. Res. 4, *supra;* S.J. Res. 113, a proposal embodying the Kennedy plan, *supra*, note 106. Similar measures have been introduced in the House. Hearings began before the Senate Constitutional Amendments sub-committee on May 23, 1961, New York Times, May 24, 1961, p. 13, col. 1 (city ed.). For a general discussion of the various proposals, see Margolin, *op. cit. supra*, note 99.

[118] The only measure presently pending which deals with the problems of contests has such a provision. S. 102, *supra*, note 117.

Mr. BAYH. Mr. President, I call to the attention of Senators the fact that, according to that law review article, there are only two States now in which the election contests are certain to be final within the period presently called for by the 20th amendment to the Constitution.

So we are really trading uncertainty for uncertainty. I do not like uncertainty, but I think the Senator from Tennessee hit the nail on the head when he said we are straining at a gnat rather than looking at the basic grievances we are trying to correct.

I appreciate the Senator from Nebraska's bringing this matter out. The reason I have been less than enthusiastic about being tied down to a specific date is that before a law is passed, we should call upon the judgment of those in this body and the other body and ask how recounts have worked out in their States.

I would like to point out at this time that in Alabama 4 weeks are permitted for a runoff. Our colleague from Alabama can tell us how well that has worked. I refer to the time before the runoff election.

In Arkansas it is 2 weeks. In Florida it is 3 weeks. In Georgia it is 2 weeks. In Louisiana it is 6 weeks. In Mississippi it is 3 weeks. In North Carolina it is 4 weeks. In Oklahoma it is 3 or 4 weeks. In Rhode Island it is 4 weeks. In South Carolina it is 2 weeks. In Texas it is 4 weeks. In Virginia it is 5 weeks.

So to suggest that runoff is not workable flies in the face of election history. That is how it has operated in these States. I do not think runoff is foreign to our purposes, although I do not think the likelihood of this ever happening is very great, as I said before.

Mr. CURTIS. Well, has there been an election under the procedure set forth in the Senator's proposal?

We have never held such an election.

Mr. BAYH. That is accurate.

Mr. CURTIS. Yes. So we do not know. Judging from what the Senator just read, some States would have as many as 5 weeks to settle a contest. I would hardly think that the runoff could be held within 3 weeks; would the Senator say so?

Mr. BAYH. I am sure the Senator was listening when our friend from Tennessee suggested that this provision could be established uniformly across the board—and I think it would be—by this body. So whether it was 5 weeks, 3 weeks, or 2 weeks would be up to this body. I think we could find a time that would be agreeable and workable. It has worked up to now in the States, and it has worked in other countries.

Mr. CURTIS. Then at this time the Senator is abandoning——

Mr. BAYH. In the last election in France, I should point out, there was a 2-week hiatus between the first election and the runoff. This is not foreign, either to this country or other nations.

The question is whether we are going to trade one relatively insignificant uncertainty for another relatively insignificant uncertainty which exists under the present law; and at the same time, as zeroed in on by the Senator from Tennessee, deal with three or four basic inequities and malfuntions that have in fact occurred under the present system.

Mr. CURTIS. No, I do not think having this country on dead center so far as its government is concerned while we hold a runoff is a trifling matter. I do not think it is trifling at all, compared to the procedure that could be taken along other lines to deal with the question of a contested election.

Mr. BAYH. Will the Senator yield at that point?

Mr. CURTIS. Because none of them call for a runoff. I think the Senator has the floor. I would like to ask him about some of the other provisions.

Mr. BAYH. I thank the Senator. I shall not impose further on his good nature.

Mr. CURTIS. The junior Senator from Nebraska refrained from asking questions after the Senator from Indiana said he would rather finish his statement.

Mr. BAYH. That is why I say I will not impose further on the Senator's good nature, but I hope in his statement he will speculate on what might have happened if there had been a change of less than 42,000 votes in the last election; also, if he cares to so speculate, as to how long it would have taken our colleagues in the House of Representatives to elect a President. I think it could have gone on forever.

Mr. CURTIS. I think perhaps one rollcall.

Mr. BAYH. We had one President elected after 27 rollcalls. What makes the Senator from Nebraska feel that it might not be 37, 47, or 57 this time? We are playing a guessing game, and I do not think——

Mr. CURTIS. No, no. It would not take as long.

I am not defending the present system for deciding the contest. I think the Senator has latched onto a proposal that is entirely separate and apart from that. They may be related, but it is not necessary that we abandon the principle of electing the President through State action in adopting what the Senator terms a direct election of the President, that we go on record as favoring minority Presidents down to 40 percent, and that we have two elections in order to deal with what defects may now exist in the method of determining the winner under our electoral system as we now have it.

Mr. BAYH. Does the Senator see anything in this report saying we are in favor of electing Presidents down to 40 percent?

Mr. CURTIS. Yes.

Mr. BAYH. Or that we will not elect a President with less than 40 percent?

Mr. CURTIS. Well, it is "at least 40 percent"; and the Senator spent a great deal of time talking about the evil of some President being elected but not having a majority of the vote.

Mr. BAYH. No, a plurality, if the Senator will recollect. I did not say a majority; I said a plurality, because we have had several plurality Presidents. It is when we have a President elected who did not have a plurality, as we have had three times, that the Senator from Indiana is concerned. The Senator from Nebraska is not concerned, I am sure, because there is a President in the White House now who had less than 50 percent of the popular vote; is he?

Mr. CURTIS. Well, I would be much more concerned if his opponent were there.

Mr. BAYH. I think that speaks for itself.

Mr. CURTIS. The Senator asked if I was concerned.

Mr. BAYH. The Senator is expressing concern over the 40 percent. But we have had several minority Presidents, of which the present distinguished occupant of the White House is just one.

Mr. CURTIS. I would like to ask the Senator some further questions about the Senator's proposal.

Mr. HRUSKA. Mr. President, before the Senator does that, will the Senator from Indiana yield to me just briefly?

Mr. BAYH. I am happy to yield to the senior Senator from Nebraska.

Mr. HRUSKA. It has been suggested that some uniform rule could be developed, and that we could solve these

mechanical defects, and that we have heretofore solved many more complex problems.

That issue was taken care of, I believe, when Theodore White was before our committee, on two scores. One had to do with recount, and the other with this uniform rule that would have to be applied.

Professor Freund was quoted by the Senator from Indiana to this effect:

If apart from fraud, recounts are called for, this is a sign that every vote counts. This is not a bad thing itself.

And, of course, here is the answer that Mr. White gave:

Mr. WHITE. Theoretically, you see, all of the proponents of direct elections are pure and theortically sound. It is very difficult to object to a proposition which on paper seems to be noble, but on the basis of my reporting the good professor's suggestion does not work. I have a dozen questions to ask the good professor. Who decides where and what we recount? Are we going to recount the entire Federal vote, all 70 million of it, or is some electoral commission here going to decide what we recount and what not? Are we going to recount only Oregon or are we going to recount only Florida? Who decides on recounts? Is it to be decided by the local authority, as it is right now? And the local authority decides we can squeeze a few more thousand out of this.

The good professor's theory sounds perfect to me, but it does not answer my reporter's questions. I am sorry I disagree with him.

That has to do with recounts. Now, what about a uniform rule? Mr. White had this to say about that:

If you are arguing for a Federal surveillance system of 180,000 Federal agents out surveying each precinct box, I think it becomes an almost integral part of your amendment. If the polls are going to be watched by the present party officials, the same kind of fraud will go on—I hope in a diminishing measure, but if we are going to be watched by the same kind of party agents as we have right now, then fraud remains. If you say that your proposition applies to Federal surveillance in every 180,000 precincts, you have a point.

There is where we start amending the Constitution and our system of government with a venegeance, because then no longer do we have a Federal Republic, but one monolithic Nation trying to decide a question of this kind.

Those answers that I read from Mr. White are going to be debated here at great length, and I suppose they will unfold as we go along. There is only one brief comment I would like to make to my distinguished colleague from Tennessee. He says the only way that we can achieve absolute equality is to give every citizen the same kind of voting power.

Mr. President, it is that very proposition I greatly oppose, because the small States, 34 of them, will lose voting power. They have voting power under the circumstances we have now, through the assignment to each State of a certain number of electoral votes, equal to the number of Representatives in Congress added to the number of Senators from each State. I say that I am not ready to let go of that concept, because it will mean that the small States of this Nation will be heavily penalized and discriminated against and degraded in their political influence. The crux of this debate, it seems to me, as we advance in it, will be whether we are ready to abandon the small States for the sake of giving each man a supposedly equal vote. Goodness knows, in the 34 less populous States, each of which would lose some voting power, that will be a heavy factor. It will also be a heavy factor in the minds of the State legislatures that will be called upon to ratify this amendment.

President Nixon was right in his February message on this point, and his shift of position did not alter the fact that one of the greatest objections to the proposed amendment is the difficulty—in fact, the great unlikelihood—of its being ratified by the States.

If that is true, the opportunity to reform our electoral system in a reasonable way will go by the board. It will be most difficult to formulate and get another amendment before the States.

That amendment, as the Senator has indicated, does not indicate that the present system of runoff is good. That can be corrected, and the discretionary power of the elector can be corrected. In fact, the office of elector can be abolished altogether and the results certified directly by each State.

As this debate unfolds, these problems will be more and more developed, to the point where I am hopeful the Senate will turn down the proposal, on behalf of something more sensible, more workable, and more acceptable.

Mr. BAKER. Mr. President, will the Senator yield?

Mr. CURTIS. Mr. President, will the Senator yield?

Mr. BAYH. I yield to the Senator from Tennessee.

Mr. BAKER. I thank the Senator for yielding, so that I may respond to the remarks of the distinguished senior Senator from Nebraska, especially the portion that alluded to my previous reference about a challenge to the concept of equality.

Mr. President, I reiterate, in reply, what I said earlier in this colloquy. One of the fundamental questions we must determine is whether States or people elect the President. For my part, I believe people should; geography should not, nor should 50 sovereignties.

I believe that no one—I reiterate, no one—nor did the distinguished senior Senator from Nebraska, challenge the concept that the only way to provide equality so that every man's vote counts the same as every other man's vote is by the popular election of the President and the Vice President.

I reiterate again: The only arguments I have heard so far, including that just put by the distinguished senior Senator from Nebraska, is that it is too difficult or risky or uncertain to provide equality; therefore, we should provide something short of equality. With all deferential respect to one of the greatest men in the Senate, the distinguished senior Senator from Nebraska, I disagree with that. I believe that equality is the fundamental matter in debate here and that the balance of our consideration is one of mechanics—that is, after we dedicate ourselves to the basic proposition that every man's vote is equal to every other man's vote, we must set ourselves about the business of trying, in our collective judgment and wisdom, to devise a statutory method for doing that in the least disruptive and most satisfactory way.

I have no doubt in my mind that we can do that and that we can have equality—that, indeed, we must have equality—of the vote of every man and woman in the United States, and that we must then find the least disruptive way—not a nondisruptive way, but the least disruptive way—to implement that.

I reiterate: I reject the idea, on the part of the junior Senator from Tennessee, that we can sacrifice equality of the vote on any altar—certainly not on the altar of difficulty in drafting legislative language. Once we have established the requirement and dedicated ourselves to the necessity of equality of the vote, then we set ourselves about the business of trying to find how best to do it.

That is why I again commend the distinguished Senator from Indiana for drafting Senate Joint Resolution 1, so that we create the principle of equality, further embed it in the fabric of the Constitution, and leave full discretion to Congress and to the President to decide by statute how we do the less difficult job of implementing it.

Throughout this debate—and it will be a long debate, I judge; throughout this debate—and it will be a heated one, I judge—we ought not lose sight of the fact that we are dealing with the most fundamental of all American rights, and that is equality. For my part, I will not sacrifice it for any other purpose.

Mr. CURTIS. Mr. President, will the Senator yield?

Mr. BAYH. I will be glad to yield in a moment.

I appreciate the comments of the distinguished Senator from Tennessee.

For the sake of continuity in the RECORD, I think it should be pointed out that the senior Senator from Nebraska, in quoting Theodore White's reference to Professor Freund—it is somewhat like Tinker to Evers to Chance—perhaps did not emphasize one very important part of this discussion, and that is that Professor Freund and Theodore White were talking about having the same type of policing done at the local level that is now being done.

The Senator from Indiana does not anticipate the need for some giant influx of Federal policemen in each polling place. But I think the Senator from Tennessee and the Senator from Indiana were trying to point out that if we have a system whereby each vote counts, then the incentive is going to be on the Republican precinct committeeman and the Democratic precinct committeeman to make sure that each one of those votes is valid. Presently they could not care less in some States. If you are going to carry Indiana by 165,000, there is no real incentive to watch it closely and cut it down to 65,000. Nor is there is an incentive to push it up to 300,000. I think the direct popular vote, where each vote counts, is the best way of guaranteeing close, accurate policing by the precinct official who is supposed to be doing this in the first place.

I do not anticipate any big influx of Federal officials into this area. I think it is going to be done by each State, and it is going to be done better than it has been done in the past.

I must say in supporting the Senator from Tennessee—who needs no support from the Senator from Indiana—that it would be a rather ironic chapter in our history if we fail to make this needed major electoral reform because the Senate of the United States does not feel that Congress has enough ingenuity to deal with purely mathematical and technical questions. How in the world can we say that we, as a nation, have enough capacity, know-how, ingenuity, drive, and foresightedness to land a man on the moon, when we cannot write a common, ordinary, everyday election statute?

PRIVILEGE OF THE FLOOR FOR STAFF MEMBERS OF COMMITTEE ON THE JUDICIARY

Mr. HRUSKA. Mr. President, I ask unanimous consent that Judiciary Committee staff members may have access to the floor during all the debate on the pending joint resolution.

The PRESIDING OFFICER (Mr. CASE). Is there objection to the request of the Senator from Nebraska? The Chair hears none, and it is so ordered.

Mr. CURTIS. Mr. President, I direct this chief sponsor of the proposal to section 2, which states—

The electors of President and Vice President in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature, . . .

What is included in the term "qualifications"?

Mr. BAYH. It is in the Constitution right now—the same language. We took that language from the Constitution, feeling that Senators would accept it again if it was in the Constitution once.

Mr. CURTIS. There is no question about that. I ask that as a prelude to my next question. It includes such things as age, does it not?

Mr. BAYH. I think that is accurate; yes.

Mr. CURTIS. Citizenship?

Mr. BAYH. That is accurate. Residency would be another.

Mr. CURTIS. Yes, residency. Are there any others? I imagine citizenship in its broadest terms would cover that.

Mr. BAYH. Age, residency, and citizenship. Also the ability to read and write, but, as to residency and age, that is now subject to a possible Supreme Court decision on the 1970 Voting Rights Act. I might point out that these will be matters that will really go by the board if the Supreme Court upholds the 1970 Voting Rights Act.

Mr. CURTIS. Suppose it does uphold the 1970 Voting Rights Act and some State chooses to permit, through its State legislature, 17-year-olds to vote, may it do that?

Mr. BAYH. Yes. I would suppose it could.

Mr. CURTIS. If another State chose not to have any citizenship requirement, may it do so?

Mr. BAYH. For what office?

Mr. CURTIS. Electors for President and Vice President.

Mr. BAYH. Yes; I suppose it could.

Mr. CURTIS. So that if a State wants to permit aliens to vote, they can vote and those aliens would be included in the adding machine tabulation to find out who was President and Vice President.

Mr. BAYH. They could do that with convicts on death row, I suppose, if they wanted to, and go down the list, but I do not believe that is going to happen. Does the Senator?

Mr. CURTIS. Yes; I think there are States in the Union that do not require full citizenship to vote.

Mr. BAYH. Well, that would not change any, would it?

Mr. CURTIS. Yes, it would. It would give an uneven contest, if here is a State that my party is expecting to carry in a big way, and it changes the rules so that more people can vote. Yet those same kinds of people are denied the right to vote in another State, and we end up with an uneven contest; is that not correct?

Mr. BAYH. Of course, there is nothing to prevent that from happening under the present rules, is there?

Mr. CURTIS. The difference is that they vote by States under our present program. The State determines who is eligible to vote, yet here we are committing 50 States to abide by the outcome of one adding machine tabulation, and at any time the several States can write their own rules so as to add their numbers to that computation.

Mr. BAYH. Except in the vital areas, as the Senator knows, Congress retains authority for uniformity——

Mr. CURTIS. Uniformity of what?

Mr. BAYH. The Senator knows—residency——

Mr. CURTIS. Just residency?

Mr. BAYH. Congress already has the power to act in relation to age and literacy. That question is before the Supreme Court right now for final resolution. So we may, in effect, already have a uniform law in these areas.

Mr. CURTIS. Did I not understand the Senator to say that if the 1970 Voting Rights Act is upheld by the Supreme Court, they all could go below that if they wanted to?

Mr. BAYH. Yes; that would be my judgment.

Mr. CURTIS. Yes, so it would be possible for States, with the exception of residency, to write their own rules which will result in a number of votes that they can cast that will go into a contest, where other States have a more restrictive voting requirement; is that not correct?

Mr. BAYH. Does not the Senator realize that although the States have flexibility to do what they please, so far as some of the State offices are concerned, we are talking about the election of the President, a Federal officer. Congress can, if this type of thing gets out of hand, set uniform provisions across the board.

Mr. CURTIS. As to what?

Mr. BAYH. For example, suppose the statute is——

Mr. CURTIS. There is no such language in the proposal. We have the right to set uniform requirements as to residency——

Mr. BAYH. Would the Senator please repeat his question?

Mr. CURTIS. I think I can restate it. Is it true that under the Senator's proposal as written, the States can determine who could vote, with the exception of residency requirements, and thus could have a greater input or "advantage" over the other States that had a more restrictive set of qualifications for voting?

Mr. BAYH. Any State that is willing to let 17-, 16-, 15-, 14-, 13-, 12-year-olds vote for its State legislature can also let these same people vote for President. The Founding Fathers showed great wisdom, I think, by incorporating that same criteria into the Constitution so far as voting for Congress was concerned. Thus I think the question has worked very well. We do not see any rash of people rushing on out to get a bigger input as to who should vote for Congressmen. I do not believe that will happen, because the average legislator is thinking about who will vote for him. I do not think we will lower the barriers as promiscuously as the Senate suggests.

Mr. CURTIS. The Senator from Indiana talked about 12-, 13-, and 14-year-olds——

Mr. BAYH. I was just anticipating the Senator's next question——

Mr. CURTIS. In New York State, or in California, if we took their rules, if we are closer to 18- and 17-year-olds, they can vote, there would be nothing ridiculous about that, but the Senator could add hundreds of thousands of votes. The fact remains that the Senator has written some rules here that would be uneven so far as the States are concerned.

My next question is this, Is it not true, to make the Senator's system work properly, we should have uniform qualifications for voting throughout the country?

Mr. BAYH. Well, with a very few exceptions, as I think I have said twice already, that is just about what we have right now. I, for one, would be willing to permit the States to have the leeway if the 1970 Voting Rights Act is affirmed by the Supreme Court. If that is upheld, then we will have established the right of Congress to set uniform age requirements, and to establish the 18-year-old age, and we can deny them the right to go down to 17. We have established the 30-day uniform Federal residency law. We have stricken from the books all literacy laws. The question as to whether a person is an alien, I do not anticipate that as being a significant problem.

Mr. CURTIS. What is the answer to my question, that in order to have the Senator's system work, we should have uniform qualifications for voters throughout all the States?

Mr. BAYH. Mr. President, I think to have this resolution work properly, it ought to have the provision in it that the Senator from Nebraska refers to there.

Mr. CURTIS. Mr. President, the Senator is evading my question.

Mr. BAYH. This was passed by the House and was given extensive hearings

by the House Judiciary Committee. It was gone over and over. We tried to walk a very delicate line between giving the States an opportunity to take into consideration the local customs and that type of thing and yet give Congress authority under the section referred to by the Senator from Nebraska.

Mr. CURTIS. Mr. President, will the Senator yield?

Mr. BAYH. I yield.

Mr. CURTIS. We have had the high privilege of hearing a lot of oratory this afternoon about the equality of voting. We will hear a lot more in the weeks and months ahead in which we will be considering this measure. So, I want to ask the Senator if, in all seriousness, he feels that to carry out this proposal he should have uniform qualifications for voters throughout all States.

Mr. BAYH. Mr. President, I will be glad to answer the question again.

Mr. CURTIS. The Senator has not answered the question.

Mr. BAYH. I appreciate the Senator's perseverance. The second answer and the third answer will be the same as the first.

I think the measure deals with it very well. We have basic uniformity throughout the country and provide some flexibility for States. If it gets out of hand, we have the authority to impose the type of authority that the Senator from Nebraska says he supports.

Does that concern the Senator?

Mr. CURTIS. Very much so. I think that before the Senate passes on it and the State legislatures consider it for ratification, we should know whether we will have uniform voting requirements for voters throughout the country.

That may be a good thing. But I think that the forthright thing to do is to take a position on that so that we know what to expect.

Mr. BAYH. Mr. President, I will read this and we will let the RECORD stand.

It reads:

SEC. 2. The electors of President and Vice President in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislature, except that for electors of President and Vice President, the legislature of any State may prescribe less restrictive residence qualifications and for electors of President and Vice President the Congress may establish uniform residence qualifications.

That is rather specific. I do not think there is much question about what that says. That says what the Senator from Indiana feels we need.

Mr. CURTIS. Mr. President, I will ask another question. I do not think that I got an answer to my other question.

I have the right to elicit from the chief sponsor of this proposal whether he feels there ought to be uniform requirements for voters in all 50 States to implement the type of proposal he suggests.

Mr. BAYH. Mr. President, I appreciate the perseverance of the Senator. I think I have answered the question. If the Senator feels that the answer is not the answer the Senator is seeking, that is another thing.

I am suggesting that we permit each State to set the same qualifications they set for their State legislature. We reserve the right to establish uniform residence qualifications. If the Voting Rights Act goes through, we have established literacy and age as congressional prerogatives in all elections. These two matters are satisfactory to the Senator from Indiana because he supported that act.

Beyond that, I do not know why it is incumbent upon Congress to go through all of these minutiae involving local and State customs that might be taken into consideration in determining qualifications for the State legislature.

I appreciate the concern of the Senator from Nebraska. As a former member of the State legislature, I must say that I think a lot of my former colleagues in the Indiana General Assembly were probably more concerned about the qualification of the voters to cast votes for them than they were about the qualifications of the voters to cast votes for the President.

If the Senator from Nebraska has any concern over the fact that there would be hordes of voters who would be qualified to vote for the President, I suggest that that same horde of voters would be qualified to vote for the members of the State legislatures.

Mr CURTIS. Mr. President, I never referred to any group of voters as a horde of voters. I have stood on the position that if we choose the President on one tabulation of voters, we should have the same requirements prevail in all sections of the country to determine who is eligible to vote.

The Senator from Indiana merely refers me to this language. I am not critical of him as an individual. But I do not take the view that the Senate or the people of the country generally cannot answer until after the Supreme Court rules that the Federal Government should impose uniform rules.

I will pass that and ask another question.

Mr. BAYH. Mr. President, I do not want to evade the question that the Senator persists in asking. I think I have answered it. I will try to answer it again.

I think that the language proposed in section 2 of the proposed constitutional amendment deals with the criteria imposed by each State. These criteria are the criteria applied to the most numerous branch of the State legislature. They are the same criteria that have been applied for almost 200 years in the election of Members of Congress.

In the area of age and literacy tests, the Senator from Indiana is perfectly comfortable with uniformity. I can see that if we let the 18-year-olds vote in one State and not in another, it would pose a problem.

Mr. CURTIS. Mr. President, I think it poses very much of a problem. It cannot be likened to the discrepancy under our present system. Certainly it cannot be likened to voters participating in their own States to elect Congressmen or a member of a State legislature. All voters participating in those elections are subject to the same rules.

Here we have a proposal for a method of choosing the President, and on the face of it different rules will be applied to different voters in different States on an uneven basis.

We do not need to get ridiculous and suggest that we are proposing that the 12-year-olds vote. Not at all. However, the life insurance rule, to which I referred a while ago, says, "If you are closer to 18 than you are to 17, you are 18." If the State of California adopts that rule, they would probably pick up votes that would be greater in number than the difference in some of these elections. I do not know how many votes it would involve.

Does the Senator from Indiana believe that it would be necessary under his proposal to have Federal registration of voters?

Mr. BAYH. No.

Mr. CURTIS. That disturbs me, because the right to vote must be preceded by registration.

If one State can adopt one procedure of registration and another State can be very, very lax in its rules of registration, it makes an uneven contest. In other words, the proponents of this measure have failed to distinguish this point about voting jurisdiction, where all the votes which are to be tabulated and counted, must have within that jurisdiction equality of voter qualifications and equality of registration laws because they are competing against each other. It is totally inconceivable that we would have before us a proposal suggesting that we choose a President by tabulating the total vote in one pool, one adding machine tabulation, if you choose, when the different States could have different rules to decide who was going to vote and they would have different rules, different methods as to who would register and how registration would be accomplished.

Mr. President, if you are going to have that all one jurisdiction, one voting arrangement, you must have uniformity. Before this debate is over I hope the proponents will tell us something about the national registration of voters that they propose. I think that is pertinent here.

Mr. BAYH. The Senator has not found one word in that measure that talks about national registration. The patience of the Senator from Indiana is not unlimited. If the Senator can find one word about national voter registration, I would be glad to have him do so.

Mr. CURTIS. The Senator knows there is nothing in there.

Mr. BAYH. Why does the Senator blatantly suggest the sponsors are for national registration? If the Senator is for national registration, let him offer such a proposal. But I understand he is not for national registration.

Mr. CURTIS. That is my point. The Senator is suggesting a nationwide contest without a nationwide set of rules as to who would vote or how they would register.

Mr. BAYH. Because the Senator feels there should be a national registration provision, I think it is unfair for him to suggest that I suggested it.

Mr. CURTIS. I did not——

Mr. BAYH. We could have the reporter

read what the Senator said. A moment ago the Senator said the proponents should discuss the questions about the national registration plan they are proposing.

Mr. CURTIS. No; the national registration plan to carry out what they have proposed.

Mr. BAYH. With all due respect, I do not think that will be necessary.

Mr. CURTIS. I think it will after the Senator thinks it over. I do not understand how any Senator would seriously contend that voters participating in the same contest to be decided by the same totals should not have the same ground rules in all the States. Therefore, I think the question is pertinent as to the thinking of the proponents of this measure.

The Senator has been very generous in yielding. I do want to say one thing; then I will yield the floor.

I hope it will not be understood by anyone in the country that we have on one side a direct election of the President and on the other side an evil system where individuals' votes count differently. What we have is a federal system of 50 sovereign States, and there is not an argument made here today for the direct election of the President, and each man having the same vote, that could not be applied to the election of U.S. Senators. There are Senators serving in this body who are here by reason of a few hundred thousand votes or very few total votes in their States. There are other Senators here who have the mandate of millions of people. That is part of our federal system. Just as the States have equal representation in the Senate and representation in the House based on population, our country has chosen a federal system and the counting of the votes for the election of the President is a blend of those two things. No man can insist on one man, one vote for the choosing of a President and thus wipe out the significance of the sovereign States and at a later time come in and defend equal representation of the States in the Senate.

That is why I have referred to the excitement that has been raised about a possible contest last election when Governor Wallace was in the race. Instead of dealing only with better and more modern methods of dealing with such a contest if no one gets a majority, we have before us a proposal to change the fundamental structure of the country, to wit, the abandonment of our federal system ending of the election of the President through State action. At the present time every State has as many electoral votes as has Senators and Representatives. That is our system. There has not been an argument made that that has not worked well. It has nothing to do with the method of how we determine the contest if no one receives a majority. We can deal with any questions involving electors if we keep them and the system of voting according to the way the States vote. It is not necessary that we change our basic system in choosing a President.

Mr. President, the distinguished Senator from Indiana has been very gracious in yielding to me.

Mr. BAYH. Mr. President, I have enjoyed this opportunity to share views with my distinguished colleague from Nebraska. I would like the RECORD to show I do not believe that my earlier remarks could accurately be described as being uncritical of the way the system has worked. The item about which the Senator from Nebraska expressed concern, the possibility that no candidate would receive a majority of the electoral votes on election day, is just incidental compared to the real problem that the people now do not vote directly for their President; they vote for electors who are free to ignore their vote. As the Senator from Tennessee and I described, all votes are not counted the same way, some are not counted, and some are cast for candidates not listed.

There is no need to pursue this matter at great length. We have discussed at considerable length our desire to strive for equality.

I wonder how the people of the Second Congressional District of North Carolina must have felt in 1968, particularly those who cast their votes for the present President of the United States, Richard Nixon. The only way one could vote for Richard Nixon in the Second Congressional District of North Carolina was to vote for the Republican elector. If a citizen wanted to vote for Hubert Humphrey, he could vote for that elector. If he wanted to vote for Wallace, he could vote for that elector. But if he were a dues-paying Republican in 1968, the only way he could express his vote for Nixon in that election was to vote for the Republican elector.

How would that person feel when he suddenly learned that the man he had voted for as the Republican elector had gone to the State capital and cast that vote for Wallace, totally disfranchising the Republican voters in the Second Congressional District of North Carolina?

I point that out as an actual malfunction of the system we have today. We do not have to resort to hypotheticals of what may have happened or what could have happened. We looked at the way the system now functions and found it wanting.

It is for that reason that I, the Senator from Tennessee, and the distinguished Presiding Officer of the Senate at this moment, the Senator from Oklahoma (Mr. BELLMON), who, I may point out, was one of the original, one of the charter members of the American Bar Association's Commission on Electoral Reform, have made our proposals. I am looking forward, hopefully in the near future, to hearing the Senator from Oklahoma describe the tortuous process that the Commission went through and the studies and processes that the Senator from Oklahoma, a former Governor of the State of Oklahoma, went through in his own mind.

The fact is that the direct election proposal is one, it seems to me, that embraces a broad range of party and philosophy and is geographically dispersed, for one basic reason. It comes closest to solving the problem which confronts us. It is not perfect, as I have said two or three times. It comes the closest to perfection, we think. It is the only one that gives the people the right to vote for their President and Vice President. It is the only proposal that counts each vote equally. It is the only one that guarantees that the candidate who gets the most votes in the election will win the election.

I yield now to the Senator from Tennessee.

Mr. BAKER. Mr. President, I thank the Senator for yielding.

On tomorrow, assuming I gain recognition, I intend to have further statements of my support of Senate Joint Resolution 1.

I think it is vitally important to face up to the problem that confronts the public and the need of fine-tuning our electoral system.

I think that it would not be amiss for me to reiterate what I said before. I hope we do not lose sight of the several considerations which are involved in this debate. There are several, not the least of which is the method of implementing the election of President and Vice President by direct popular vote.

I disagree with our distinguished junior colleague from Nebraska when he indicates, as I understood him, that Senate Joint Resolution 1 would destroy the federal system in the United States. I would point out that the several States now prescribe the method by which the electors will be elected and the electors in turn will elect the President.

Senate Joint Resolution 1 provides nothing as to whether the States provide for the certification of their returns to the State boards of election, the legislatures, or otherwise. It provides nothing with respect to national registration of voters or national uniformity of voting requirements; and, very properly, in my judgment, leaves it to this and future Congresses to decide the method of implementation according to their judgment at that time.

The point of the matter is that nothing contained in Senate Joint Resolution 1, in the judgment of the junior Senator from Tennessee, detracts in one iota from the nature and strength of federalism in the United States. The one immutable argument that I have not heard attacked today is that nothing else except direct popular voting for the President and Vice President provides equality of the vote of every man to that of every other man.

I think it is fundamental to this debate that we commit ourselves to the proposition that nothing will subvert the nature of equality in this field at this time.

I thank my colleague from Indiana for affording me the opportunity to make these random remarks from time to time. I look forward to continuing my participation in this debate as it progresses.

Mr. BAYH. Mr. President, once again I wish to express appreciation to the distinguished Senator from Tennessee for the enlightenment that he has brought to this debate. He is a long-time student of this problem, as I am. He expresses, in a very articulate and convincing manner, the real need. He also points out that, although some persons would suggest we are interjecting some foreign mechanism into the American electoral

system, in fact we are trying to make consistent with the rest of the elections in the country that part of the electoral process that is inconsistent.

I think we will be successful. We have had a warning. I hope we will heed the warning bell and take action.

I appreciate the contributions of the Senator from Tennessee, the Senator from Oklahoma, and other Senators who have helped and who will help in this matter. Because of their perseverance, I think, and I hope, we will be successful.

I yield the floor.

Mr. HRUSKA. Mr. President, one of the most distinguished witnesses in our series of hearings on the pending resolution while it was considered by the Committee on the Judiciary was Mr. Charles Black, Henry Luce professor of jurisprudence at the Yale Law School. He stated:

I think a case can be made for the proposition that this amendment, if it passes, will be the most deeply radical amendment which has ever entered the Constitution of the United States.

Mr. President, during the 91st Congress we in the Senate have considered many extremely important issues—ABM, our continuing presence in Vietnam, crime legislation, postal reorganization, tax reform, to name just a few—but not one of these is, in my judgment, as vital to the continued existence of this Nation as we know it as the issue we now take it—constitutional change in the manner in which we select our Chief Executive.

For 180 years our system of electing our Presidents has worked extremely well. In the main we have chosen wise and capable leaders, quite often great and prescient ones. It is no accident that this has come about. Our present electoral college method for selecting the President guarantees a leader who has a true mandate to govern; a man who has the majority of the votes in a majority of the States behind him.

The framers, in creating the college, sought an instrument which would give the States as well as the people a say in the choice of our Presidents, an instrument which would carry out the general Federal principle of the Constitution. Just how wise their selection was can be seen in the 46 times we have chosen the Chief Executive and the 46 times power has changed hands efficiently and peacefully. What other nation on earth can make that claim? Not once has a constitutional crisis arisen; not once has the legitimacy of the new Government been challenged. In large measure we owe our stable Government and our unparalleled prosperity and well-being to this smooth transition from one President to another; often from one of our great political parties to another.

There are those who claim that the present electoral college system is not the perfect or ideal method for choosing our Chief Executive.

To this I believe there is general agreement. I happen to be one who has suggested some changes in the college. For many years now I have joined with many of my colleagues in looking for an alternative to the winner-take-all method of electoral vote counting. Ten years ago I first testified on this question to the Senate Constitutional Amendments Subcommittee upon which I now sit. Since that time that subcommittee has earnestly sought to find a proper manner in which to amend the present system. Some of us have favored the district plan, others the proportional, others the automatic, while still others favor the plan before us today: direct election without any intervening electoral colege at all and without any intervening State entities.

I am certain that all those who champion one plan or another believe they do so with the best interests of the Nation uppermost in their minds.

But, in all seriousness and all candor, I must say that those who espouse direct popular election of the President are wrong if they believe this plan is best for this Nation. It is the most mischievous and dangerous constitutional amendment that has ever received serious consideration by the Congress.

To adopt it would be to set out on a vast uncharted sea, with no guarantee that the slightest political breeze might not capsize and destroy our ship of state. During discussion on this resolution I expect to have a great deal more to say concerning the dangerous consequences that adoption of this plan may have for this Nation.

In the Judiciary Committee report which accompanies this resolution, six senior members from both parties have included a minority report which is on each Senator's desk today. I urge each of my colleagues to read that report with special care and then compare it with the views of the majority. Which is the most persuasive? I earnestly believe that a fair reading of the entire document will convince many that the minority has carried the day.

Those who seek to alter our Constitution have the burden of proof to show that there is a legitimate need for change and that their proposed substitute is an improvement over the original. I do not believe that those who champion Senate Joint Resolution 1 today have successfully carried that heavy burden.

In our report we suggest that direct election of the President would:

Destroy the two party system and encourage the formation of a host of splinter parties;

Undermine the federal system by removing the States as States from the electoral process;

Remove an indispensable institutional support for the separation of powers;

Radicalize popular opinion and endanger the rights of all minorities by removing incentives to compromise;

Create an irresistible temptation to electoral fraud;

Lead to interminable electoral recounts and challenges;

Necessitate national direction and control of every aspect of the electoral process.

Each of these seven consequences of direct election seem to me to pose grave dangers to our system of government as we have it today. Many of us shall be most anxious to see if the supporters of direct election answer these indictments of their proposal. We do not believe that it can be done satisfactorily, just as we do not believe that under a system of direct election of the President, our federal form of government can survive. Doomsday language is not popular but sometimes it is essential. I believe that this is one of those times. It is impossible to overstate the case against direct election.

As one eminent scholar of jurisprudence told our committee—I opened my remarks with this quotation, but it is so important that I am going to repeat it:

I think a case can be made for the proposition that direct election, if it passes, will be the most deeply radical amendment which has ever entered the Constitution of the United States.

Mr. President, those who advocate direct election assume that our political system will remain basically unchanged if this resolution is adopted. That assumption is totally unwarranted. I believe that a completely different electoral system cannot help but affect profoundly the political institutions that have grown up around the present arrangement. We began with the electoral college system and the Presidency; our political institutions, customs, and traditions came later. Now to destroy the keystone is to remove the underpinnings from our entire political structure.

The proposed constitutional amendment, like the statement of the proposition itself in the minority report, is disarmingly short and succinct. On the surface the change is made to appear simple and reasonable. Direct election is touted as a panacea which will sweep away all the obsolete and antiquated features of the present system. It promises to erect a shiny perfection in its stead where the voters will have direct and final control over who occupies the White House through the simple instrumentality of the ballot box.

Those who oppose this fundamental change will seek to show the churning turmoil which will occur below the surface should this proposal be adopted.

As an American, I am deeply committed to preserving our present form of government against any challenge. As a Nebraskan, I am committed also to do those things which are in the best interest of my State. Direct election would, in my opinion, lead to a new form of tyranny which would number Nebraska and other less populous States among its victims. Thirty-four States and the District of Columbia—more than two-thirds of the primary governmental jurisdictions in this Nation—would be adversely affected should direct election be approved. I urge my colleagues to pause for a moment and consider whether this resolution is in the best interests of this Nation and their States. I believe their answer must be negative.

In addition to all the problems which could be created by the adoption of the direct election amendment, there is one very practical consequence which should

be considered. That is the very real likelihood—in fact, I would say virtual certainty—that direct election would never be ratified by the requisite number of States.

After Congress has approved any amendment, the legislatures of three-fourths, or 38, States must ratify it. There are in this Nation 99 State legislative bodies—every State having two except my own State of Nebraska, which has only one. Therefore, just 13 houses of the State legislatures which refuse to approve the amendment could end any chance of electoral college reform. It is not unreasonable to think that many more than 13 would fail to register their approval, especially in light of the statement made earlier in these remarks that 34 States and the District of Columbia would lose voting power under the direct election proposal.

Would it not be far better to use this time to work on and approve a revision of the present electoral college system which has a substantial chance of ratification? Those of us who are serious in our desire for reform believe that such a course would be more useful and more prudent.

It could be accomplished, Mr. President, by first abolishing the electoral college, or at least by removing from the electors the personal discretion now vested in them as to the candidates for whom they can vote; and second, by devising a different system for resolving college deadlocks, perhaps substituting a joint session of Congress instead of giving each State one vote in the body at the other end of the Capitol.

As I mentioned earlier, I intend to have a great deal to say before the Senate consideration of the pending proposal is concluded. At a later time, I shall expand on the points I have alluded to today. Those of us who perceive a grave danger in this proposed amendment intend to bring before the Senate a great deal of evidence and learned opinion to support our case. It is my sincere belief that, in the end, direct election will be rejected.

Mr. President, let me conclude this opening statement by saying that before we reject the electoral college and 180 years of testing, adaptation, and stability, let us make certain that what we erect in its stead is an improvement on the old. Direct popular election of the President is not an improvement; it could be a disaster.

Mr. President, I yield the floor.

Mr. BAYH. Mr. President, I have listened with great interest as the distinguished Senator from Nebraska described the opposing position expressed in the minority views in the report of the Committee on the Judiciary. I, too, am hopeful that Senators will look at the majority and minority views and base their judgments on the relevant arguments presented therein.

I thought it might be helpful if the distinguished Senator from Michigan (Mr. GRIFFIN), who had the foresight to conduct a poll of State legislators, would let us have the benefit of his thinking relative to what the legislators might do.

I must say that I hope the Senate will not base its judgment on what any one Senator or, indeed, more than one Senator might anticipate a State legislature might do or not do on this matter. It is rather risky business to base our judgment on something that certainly is not scientifically proved, if there is any evidence of proof to the contrary. I do not want to interfere with what the Senator from Michigan has done, but he might give us some background on what he found when he took the leadership in this field and polled State legislators.

Mr. GRIFFIN. Mr. President, I would respond to the Senator from Indiana in this way: It is true that during several weeks preceding August 7, 1969, my office did undertake to conduct a survey among State legislators in 27 States. We selected 27 States having the smallest population, States which had the most to lose through the adoption of the direct election proposal. We put to each State legislator the question whether he, individually, would vote in his State legislature to ratify a direct popular election proposal to amend the Constitution. We also asked, whether he would vote to ratify a proportional plan or a district plan, which were and are the other two major alternatives.

I must say that the junior Senator from Michigan had been reluctant to support the direct election plan because he had assumed prior to the survey that the direct election proposal would not have a chance for ratification.

I feel strongly that the present system of electing the President of the United States does need reform. Prior to the survey I leaned in the direction of favoring the proportional plan because I felt that it would stand a better chance of ratification by the several States.

Mr. President, I ask unanimous consent to have printed in the RECORD a summary of the results of the questionnaire which I sent to each State legislator in the 27 States.

There being no objection, the questionnaire was ordered to be printed in the RECORD, as follows:

RESULTS OF ELECTION REFORM QUESTIONNAIRE

[Percent]

State	Legislators responding	Direct election				If direct election fails, legislators would favor					
		Individual support [1]		Predicts legislative approval [1]		Proportional plan			District plan		
		Yes	No	Yes	No	Yes	No	Undecided	Yes	No	Undecided
Alabama	32	60	40	49	45	62	27	11	33	31	36
Alaska	43	69	31	57	23	35	50	15	30	55	15
Arkansas	52	75	23	59	34	61	12	27	50	23	27
Delaware	41	63	37	50	42	66	17	17	25	12	63
Georgia	44	56	39	41	50	49	29	22	54	24	22
Hawaii	34	92	8	92	8	69	12	19	38	19	43
Idaho	50	47	53	27	70	38	30	32	66	21	13
Louisiana	25	79	15	67	22	56	16	28	62	8	30
Maine	43	63	37	52	42	43	29	28	54	26	20
Maryland	48	70	30	51	35	62	24	14	36	34	30
Mississippi	53	59	40	47	47	55	35	10	38	30	32
Montana	63	65	34	57	32	53	36	11	42	28	30
New Hampshire	41	69	31	48	41	62	20	18	37	27	36
New Mexico	42	70	30	67	31	50	26	24	39	43	18
Nevada	50	73	27	67	30	83	7	10	14	43	43
North Carolina	36	58	42	30	60	53	27	20	65	28	7
North Dakota	51	37	60	20	72	44	31	25	46	29	25
Oklahoma	29	53	47	35	47	47	24	29	50	21	29
Oregon	52	66	32	54	36	42	37	21	52	29	19
Rhode Island	37	81	19	78	18	71	16	13	33	38	29
South Carolina	47	62	35	51	43	58	28	14	43	34	23
South Dakota	55	66	34	50	45	42	30	28	52	20	28
Texas	43	60	38	53	40	63	23	14	44	25	31
Utah	40	69	29	64	31	67	20	13	28	33	39
Vermont	52	77	23	62	30	59	25	16	34	34	32
Virginia	54	55	43	39	50	61	32	7	44	35	21
Wyoming	54	55	43	37	55	53	32	15	27	47	26
Total	44	64	34	50	41	55	26	19	43	29	28

[1] Where total of those responding to direct election questions does not equal 100 percent, the difference represents those legislators who were undecided.

Mr. GRIFFIN. Mr. President, to my surprise and great interest, there were only two States in which less than a majority of those responding indicated they would ratify the direct election plan; and furthermore, to my surprise and great interest, I found that the proportional plan and the district plan alternatives enjoyed less support among the individual State legislators than the direct election proposal.

So among the three, at least at that particular stage in debate in August 1969, it appeared clear to me that if reform were to be based on any of the three proposals, the best chance to achieve ratification was through the route of the direct election plan rather than approval by Congress of either the proportional or the district plan.

I have no reason to believe that the attitude of State legislators has changed since August 1969, although I recognize that a considerable period of time has elapsed.

I hope that this information will be of assistance during the debate.

Mr. BAYH. I appreciate the Senator's permitting me to impose upon him. As I stated in my earlier, prepared remarks, the Senator from Michigan has made a significant contribution toward putting this question in proper perspective. We can all speculate—indeed, the Senator from Michigan would be the first to admit it, as I am sure he has mentioned—but there is really no way of knowing how legislators who are to be elected in 1970 will vote in 1971. I have had 8 years' experience as a State legislator, but I do not think State legislators are a unique breed. I think they pretty well represent their constituencies. Although the Senator from Nebraska (Mr. HRUSKA) would be the first to take issue with me, I just cannot conceive of a State legislator making such an important judgment on this question by some sort of mathematical formula. When 80 percent of the people of a State feel that something ought to be done, I think there is a reasonable chance that the State legislature will respond, just as I think there is a reasonable chance that this body will respond, as the House has already responded, because this is an idea whose time has come.

I should like to quote a statement made by our lovely lady colleague, who has put this proposal in exactly the right perspective. The distinguished Senator from Maine (Mrs. SMITH), who has been a longtime supporter of direct election, said about what might happen if this proposal is agreed to:

> The foremost objection to the popular election vote proposal is that under it the small population States like my own State of Maine would lose proportional power to the large population States.
>
> My answer to that argument is that it is the will of the people—the will of a majority of the voters—rather than the proportional power of any State that is important and that should prevail—the people should not be secondary and subservient to the States.

I think the Senator from Maine put it very well. Interestingly enough, if we go down the list of some 40 cosponsors, we find the names of both the Senators from Maine, both the Senators from Rhode Island, one Senator from Alaska, one Senator from Hawaii, both Senators from Montana, and one Senator from New Mexico. There does not seem to be any indication that they are concerned about supporting direct election while being from a small State.

I respect the judgment of anyone who looks at the matter differently. But I think that basically most Senators will look at this situation from the best interests of their country and not try to figure out whether they are losing a proportionate share of their influence in the electoral college, particularly when one takes into consideration the very real and practical consequence of the unit rule and how this is a tremendous advantage to the large States. I think that sometimes the large States have an advantage and sometimes the small States have an advantage.

I do not know whether we have to play this electoral roulette business and hope that everyone comes out well.

I must say that as I listened to the comments of the Senator from Nebraska, my recollection of history is a bit different than his. I think that we can look back and see some malfunctions and constitutional crises that developed under this system. We can see some very near misses.

Thank God for our Founding Fathers and we are grateful for their wisdom, but it was not infinite wisdom. And if there was one area in which they did not have foresight, it was in the way in which they drafted the electoral college system. It is not functioning today in the way in which they intended to have it function.

Although the Constitution was not finally concurred in by the requisite number of States until late in the 18th century, by 1804 we had the 12th amendment to the Constitution which was the direct result of the constitutional crisis brought on in 1800 by the very electoral college which, according to the Senator from Nebraska, has never subjected us to a constitutional crisis.

The John Quincy Adams-Andrew Jackson race in 1824, in my judgment, came very close to presenting us with a constitutional crisis.

I do not see how we can call the Tilden-Hayes matter anything but a constitutional crisis. We ended up by choosing a man as President who had fewer votes than his opponent.

In 1948, if there had been a change of 30,000 votes, we would have sent to the White House a man with an electoral majority but with 2 million fewer votes than his opponent.

We are all familiar with what happened in 1968.

If we take the situation in 1948 and apply it to 1972 or 1976, I am deeply concerned that we would have chaos that would be unparalleled in this country. We cannot expect the President of the United States to be an effective leader if he had 2 million votes less than the man he was running against.

Those are not isolated examples of what could happen. Those things very nearly did happen. Those are numbers that actually did result. We have had what I feel were malfunctions of the system which I alluded to in my earlier remarks.

As the Senator from Nebraska knows, I strongly disagree with his feeling that this would destroy the two-party system. Frankly, I think it would strengthen it. It is the only plan that would guarantee to the Democratic or Republican precinct workers that they should get out and hustle the votes because the votes will count. Sometimes they do not count. Sometimes they count for the person for whom the voters did not vote.

I think the best way to strengthen our two-party system is to assure the men and women who work at the grass roots level that the direct election system does bear fruit and that they should go out and get the votes.

I will not go down the point-by-point indictment given so eloquently by the Senator from Nebraska. However, later we will have a chance to see what the historians say happened in Philadelphia. I was not there and no other Senator was there. We do not know.

Most historians say that the electoral college had nothing to do with the "grand compromise." As the Senator from Tennessee has pointed out, the "grand compromise" established the Senate and the House of Representatives. It had nothing to do with the electoral college. The matter of fraud, recount, challenges, and national control were dealt with earlier.

Rather than delay the Senate any longer at this time by going over the same ground a second time, I will wait until later.

Mr. HRUSKA. Mr. President, the Senator from Indiana and the Senator from Nebraska are in agreement on one point. There will be ample time during which we can knock down each other's arguments.

I would imagine that if the arguments advanced on both sides are all knocked down, we would find that those who want very drastically to change our Constitution had not met their burden of proof.

With reference to 1804 when the 12th amendment was adopted, it must be said that that amendment left untouched and unchallenged and fully effective the assignment of a given number of electoral votes to each State. Indeed, I find it striking that, even though there was an unanticipated tie in the electoral vote in 1800, no one dared to suggest in the discussion over the 12th amendment that the concept of electoral votes be destroyed. The 12th amendment is striking proof that the electoral system can be intelligently reformed when necessity requires it, without destroying the system altogether.

Now then as to the idea that State legislatures are not judged by a strict mathematical formula of approval or disapproval on the pending amendment, let me suggest this very simple statistic. It is something that is going to interest every one of the legislatures of the less populous States. Each one of the less populous States has a larger agricultural orientation than industrial. Some of the larger States, like Indiana, have a vast orientation toward the agricultural votes of their State.

Last Saturday, a preliminary report of the Bureau of the Census was pub-

lished. It showed that the farm population in 1960 was roughly 15 million people. The report for 1970 shows 10 million people—a reduction of 5 million people or 33⅓ percent.

Are we to think that the legislatures and the legislators of those States—and we can just imagine that tremendous bread basket area in the Midwest—are going to look at those figures and say, "We will concede to these heavily populated States with metropolitan areas—conceivably not more than a dozen of them—the power to overrule any semblance of choice we have?"

I think not.

They have a little leverage power now. Nebraska has a total of three Representatives plus two Senators. It is not enough to dominate but it is enough to neutralize and contain in a reasonable way any excesses that might be practiced upon the less populous States by the more populous States. That would not appeal to those who seek strict mathematical equality; but it appeals to us as a matter of survival.

We know the relative position of the farm bloc 25 years ago and 30 years ago, and the position now. It used to be big and it used to be influential; it no longer is. We who come from States comprising the farm bloc no longer have the power we used to have. It is a battle now to get a sensible farm plan and have it adopted, particularly in the other body. The only way we have been able to contend with the situation in a reasonably effective way has been to adopt such features as appeal to metropolitan areas such as food stamp plans and the free distribution of food to the poor, the oppressed, and the hungry and to say, "We will do this much for your people but you will have to do these things which have a direct impact on the agricultural population in order that that segment of our Nation can continue to remain economically feasible."

That is the only way we have been able to do it. Given the impact of the heavily populated areas, this minority will be shunted to one side and its impact destroyed. That is not the only minority. There are many minorities in America: the poor, the black, the yellow, the red. Mr. Richard Goodwin testified most eloquently on that point. I know of no one who has been more eloquent than he in speaking on behalf of minorities.

The impact and the influence of minorities will be heavily, heavily handicapped and discounted and in some places totally obliterated if the mass monolithic direct election process is approved.

Mr. BAYH. It is interesting to see that the Senator from Nebraska used Richard Goodwin to support his contention when Richard Goodwin is arguing that the large States have the advantage under the present system; but the Senator from Nebraska is arguing that the small States have the advantage under the present system.

Mr. HRUSKA. No. Mr. Richard Goodwin said that the minorities are virtually snuffed out.

Mr. BAYH. Would that suggest that when an expert agrees with you he speaks the Gospel but when he reaches another conclusion he is no longer accepted?

Mr. HRUSKA. That is poetic license in which all debaters engage. The Senator from Indiana and the Senator from Nebraska are no exceptions to that rule.

Now, I wish to turn to the so-called poll of the State legislatures taken by the Senator from Michigan. I have before me an analysis of the poll that was prepared for me, and I shall read it in the RECORD. I wish to call attention to some of the points in this analysis.

I understand the Senator did ask that the poll be printed in the RECORD.

Mr. GRIFFIN. That is correct.

Mr. HRUSKA. This analysis was prepared by a member of my staff in whom I have great confidence and I have high regard for his integrity and honesty in these computations. If there is anything in here that is in error, I will make corrections on the floor of the Senate.

My analysis indicates that the national mail poll was sent to 3,943 legislators in 27 States. Responses were received from 44 percent of them. Of those answering, 65 percent, or a total of 28.2 percent of those polled indicated they favored direct popular election.

In weighing the value of the poll in each of the 27 States, it must be noted that the percentage of legislators who responded from each State varied tremendously. It ranged from a low of 25 percent in Louisiana to a high of 55 percent in South Dakota. In 16 of the 27 States less than 50 percent answered. In no States were the responses from legislators favoring direct election high enough to establish that the State would approve direct election.

We can extrapolate and conjecture and say that so many went this way and so many that way, but the figures are the facts to which I advert now.

This poll does not establish the existence of a groundswell of support for direct popular election. The percentage of any State legislature actually "voting" for direct election never exceeded 41 percent. That was in Montana. Vermont followed closely with 40 percent.

What kind of basis is this upon which to base the conclusion that legislatures would be for direct election? Why, in this body, when we do not have 50 percent, we suspend operations until we get 50 percent to continue operations. I think that example would be well followed in this instance.

Responses from five other States showed that more than one-third of the legislators favored direct election. Between one-fourth and one-third of the legislators in 13 States were favorable, and less than one-fourth were favorable in the other seven States polled. A State-by-State breakdown has been placed in the RECORD by the Senator from Michigan.

There was no breakdown of the responses by the houses within a State; that is, between members of the lower house and the upper house. That is very important. There could be a 90–10 break in the composite legislature but if they voted separately, that breakdown could be very important. I do not know what it would show but we should consider it in this composite picture.

The legislators in seven States predicted the amendment would not be ratified by their State: Georgia, Idaho, North Carolina, North Dakota, Oklahoma, Virginia, and Wyoming. In three other States, fewer than 50 percent of those answering predicted victory: Alabama, Mississippi, New Hampshire.

The only other recent poll was conducted by the UPI, May 12, 1969. UPI interviewed legislative leaders in all 50 States. The result, in several cases are in direct conflict with the Griffin poll. UPI listed the following States as unlikely to approve direct election while the Griffin poll showed they were likely to approve: Alabama, Arkansas, Utah. The Griffin poll showed opposition while UPI showed a liking for direct election in North Dakota and Oklahoma. UPI listed Nebraska and Arizona as unlikely to approve direct election. Senator GRIFFIN did not poll those States.

I want to say that in the State of Nebraska the legislature has gone on record very overwhelmingly against direct election. The majority party of the State of Nebraska, hopefully to become the majority party in this body next January, held a State convention last Saturday and overwhelmingly opposed the idea of direct election. They understand full well what is here involved—not only a throwing to the wolves of the voting power of the less populous States, but also the idea of losing a very great part of their present vote.

I make these remarks not in a personal way at all, but as an analysis of figures that have been compiled. I am sure that in due time additional polls will be taken, perhaps too late for the purposes of debate, but I think these polls should be the subject of a little cogitation and thought and analysis and criticism and should well be explored before we accept the conclusion that a predominant number of States are in favor of this proposal.

Now I am happy to yield to the Senator from Michigan who, I am sure, has some telling points to make.

Mr. GRIFFIN. I do not know that that is the case. I thank the Senator for yielding.

Concerning the statement made by the Senator from Nebraska on the survey—and those facts are obtainable from an examination of the report and a summary of the results—I would say to the Senator from Nebraska that a return on any questionnaire survey of 40 percent is an extraordinarily high return. I have often heard that if a Member of Congress or a Senator receives a 15-percent response to a questionnaire sent out to his constituents it is considered very high.

Of course, I would be much more satisfied and pleased with the survey if every one of the State legislators had responded. In evaluating the results, I think it is appropriate to point out that we did not get a 100-percent response. Nevertheless, I do not think the results can be easily discounted because the percentage of return was 40 percent, or 35 percent, in this or that State.

As I indicated earlier, I sent out the survey, believing, without any basis, that the so-called proportional or perhaps the

district plan would stand a better chance for ratification by the legislatures of the several States than would a direct popular election proposal.

In his comments the distinguished Senator from Nebraska did not touch on the fact that the survey does reveal, in an interesting way, that there is more support, among those who responded, for the direct popular election plan than for either of the other two proposals.

I could not avoid the conclusion, looking at the results of the survey, that if we are to have election reform, and the choice is to be among those three alternatives, we stand the best chance of achieving reform by approving the direct popular election proposal.

Mr. HRUSKA. I could not quite agree with that last suggestion and conclusion by the Senator from Michigan, and I will tell the Senator why, frankly. A little while ago a statement was made that there was no division between the two Chambers of the legislature. That further dilutes what is already a skinny basis on which to form any conclusion. Normally, 40 per cent is a very high response, especially on a rank-and-file basis. We have heard of Professor Gallup and others taking 13 or 14 percent and then extrapolating it from that. That was done in England, and they got "fouled up" on it, and they did not quite get the drift of things, to the delight of Mr. Heath.

But when we are representing people in a representative capacity and when there is no known alliance between those in one House and those in the other House, each of which must vote separately, a great deal of doubt is cast onto the picture. There is no doubt about that.

There is this further element which is going to come out very soon, because when the dangers that led to Professor Black's conclusion—the conclusion he reached and articulated in the course of the hearings—becomes known to the legislatures—the seven grounds upon which the minority views are predicated—I have an idea that when that concept is coupled with the loss of voting power, with the likely destruction of the political party system in the country, with the disappearance of one of the two remaining characteristics of a federated republic concept, when all those factors sink into the consciences and thinking of the legislatures, and they hear from their voters, the outcome will be a resounding "No."

I might observe that there are only two vestiges, two traces, two evidences of the federated system. The Chamber in which we sit, which houses 100 Members of the U.S. Senate, is one. The electoral college is the other. Given the approval of the direct election amendment, there will be only one, because the election of a President by that system will destroy any role of States as States in the election process.

All the other Federal institutions having been taken away. Not even the States can say how they want their legislatures composed. We were not guilty of that. A body of nine men down the street did that. No longer is there intrastate commerce; it is only interstate commerce, because those words and clauses have been defined as anything which affects interstate commerce, and there is not anything that does not affect interstate commerce.

The list is long, but the process of erosion and the process of destruction of the federated system is almost complete. The only two aspects that we have that are recognizable, that are identifiable, and that are so fundamental and so important are the electoral college and the Senate of the United States.

Mr. President, already the literature has been printed and the declarations by those interested in politics have been set into motion—the Senate is next.

In the hearings on the one-man, one-vote rule and the resolution for a constitutional convention to consider that subject, in the legislature of the great State of Illinois, a man representing a large segment of the political picture in that State frankly said, "Yes; when we get through this and see to it that the legislatures are what the Supreme Court said they should be, and not what each sovereign State determines that they should be, the next target is the U.S. Senate."

Mr. President, if and when that becomes a reality, and we face the type of debate which we are commencing today, then I do fear for the durability of this Republic. Then there will be dominance of the national picture by the populous States, and they will number a dozen, more or less. The rest of the States can resign themselves to the proposition of taking a highly inferior role, and one that will degrade their standing and their rights, and will represent a total obliteration of consideration, even in the limited fashion which they now receive.

I say again, the weighting of the electoral votes assigned to each State does not give them control or a veto; it gives them just a little assistance, so that collectively, in the Mississippi Valley, for example, it would have some slight effect on the voting power of that vast area which has so many common interests.

If the small States are deprived of that, then indeed they will be consigned to the tender mercies of those States which, even now, under our present system, sometimes rush pellmell into situations that might subserve their respective States, particularly in the matter of garnering votes, but which, on a national basis, are not good, and which could even portend disaster, because, in the long run, economic losses cannot be defined by legislation. Too many unsuccessful attempts have been made in that direction.

So, Mr. President, I say, as we proceed in this debate, I hope these points will be considered laboriously. I hope the debate will not be tedious, but will be thorough, and I feel satisfied that when the scales are measured out, this body will not follow the path of discarding one of the most fundamental, deeply rooted, and highly necessary elements in our federated system of constitutional government as we have known it from the outset.

Mr. BAYH. Mr. President, I have listened with a great deal of interest to my friend from Nebraska as he has pleaded the cause of the farmers of this country. He is looking at one of them. I have had dirt under my fingernails and other ingredients of farm life on my clothes, and I am a little bit familiar with the plight of the American farmer.

I suggest to the Senate that for us to think that the farmer is being saved by the electoral college system totally ignores the fact of what has been happening to the farmer under the electoral college system.

Come, let us stand shoulder to shoulder, I say to my colleagues from Nebraska and others who are concerned about the plight of the farmer in America, but let us not rely on such faulty evidence as would suggest that the present presidential election system is any safeguard for the farmers of America. The rural economy of this country is going right down the drain, but that fact has no relationship at all, I say to my friend from Nebraska, to the type of electoral system we have been using.

If the electoral college system is the savior of the farmers of America, with friends like that the poor farmer does not need enemies.

What we are talking about is an entirely different type of thing. I share the Senator's concern that we not ignore the vast reaches of this country which provide the sustenance for America; but I must say I wonder just how much influence they really have under the present system.

The Senator from Nebraska speaks eloquently of the fact that, at the rate we are moving toward large metropolitan areas, before long a dozen or so will be able to control the country and elect the President.

Right now, as the Senator from Indiana reads the 1970 Census figures, 11 States, under the unit rule, can indeed elect the President of the United States, and all a candidate has to do is carry each of those States by a handful of popular votes. It does not have to be any broad mandate. If you carry those 11 States, theoretically, by one vote each, your man is elected President of the United States. This is so even if the Nevadas, the Utahs, the Nebraskas, the Arizonas, the New Mexicos, the Idahos, and the Montanas all vote the other way.

What sort of a voice does the farmer in those areas really have under the present system in electing his President? Why is it that in the last election campaign, the major candidates did not go to Omaha, Nebr., with its 380,000 people? They all went to Oakland, Calif., with its 380,000 people.

It is obvious why they went to Oakland and did not go to Omaha: Because they were after those electoral votes. It did not make any difference how many people lived there; but they thought, If you can change a few votes in Oakland, you are not really dealing with 380,000 people, you are dealing with those 40 electoral votes.

They have done this time and time again. There is Topeka, Kans., with about 110,000 people. In the last election, none of the major candidates went to speak in Kansas. They did go to Battle Creek, Mich. They did go to Springfield, Ill., Canton, Ohio, Lancaster, Pa., and

Rochester, N.Y., each with 110,000 people.

The answer is the same. I ask the Senator, Why do we not want a system, why do we not urge a system whereby, if you live in a hometown that has 110,000 people, or 380,000 people, or a half million, the candidates will go there because there are that many people who live there? Why do we have to interject the artificial factor of electoral votes?

When I was in Anchorage, Alaska, last summer, I was approached by the democratic floor leader of the State senate, a very fine young man.

He said, "Senator BAYH, I want to tell you frankly that I have followed your proposal very carefully, and I want to tell you that when that direct popular vote thing gets up here to Alaska I am going to have to be against it."

I asked, "Why is that?"

He said, "We would lose our vote. We would lose our influence."

I said, "I do not want to step on your toes, but how much influence do you now have?"

He asked, "What do you mean?"

I said, "When is the last time we had any candidates who were so interested in your influence that they came up here?"

Of course, he said, 1960, when Richard Nixon came up there.

I repeated to him what Theodore White, whom we have been quoting so profusely here today, said in his book. He said that Nixon would have been elected in 1960 if he had not gone to Alaska, but instead had campaigned around Cook County.

But we do not know. We are playing a numbers game, and do not gain a great deal from it. There are some instances when small States can have great advantage; there are other situations where the large States can come in together and elect the President of the United States. I must say I think we are going to find more patronage, more campaigning, and all those things in the more populous States as time goes on.

I think we must not overlook that what is important in this country is not political advantage, but people. We now have a system which largely ignores the people, and that is why I hope this measure will be successful; because then, instead of being concerned about State boundary lines, we will be concerned about the people, where they live, and what their problems are, and will not always be thinking about that angle of how to be successful in getting a few more electoral votes. Instead we will really be concerned about the problems of the people who live in the various areas.

As I have pointed out—I do not think the Senator from Nebraska was here, but it will be in the RECORD—it was interesting to me, while sitting there listening to those hearings, to have one very learned individual come in and suggest that the present system ought to be kept sacrosanct because it protects the large States that have an advantage, and to have the very next fellow, equally expert, come along and say he thinks it ought to be kept intact because it protects the interests of the small States.

I think it is a compounding of that irony when my friend from Nebraska quotes Richard Goodwin to sustain one of his points, because Goodwin is one who is arguing contrary to the Senator from Nebraska. Unlike the Senator from Nebraska, Goodwin feels that the large States have an advantage.

I do not know whether Goodwin is right or our distinguished friend from Nebraska is right. But I say that if we are really worried about equity, duty, justice, and equality, we are going to wipe away all the disadvantages. We are going to see that each vote counts one time, and one time only, and see to it that the man who wins is the man who gets the most votes; and the only system that guarantees that result is direct popular election.

I want to say one word in defense of the Senator from Michigan, although after listening to him, I do not think he needs any defense. I must say his poll includes the sort of mathematics we need. His poll is one of the most sophisticated polling efforts I have ever seen, especially when compared with some of the polls sent out by some of our brothers here or over on the other side. The Senator from Michigan was obviously concerned about what those legislators felt. He gave them the alternative solutions. Perhaps a 40-percent return does not speak as well as it should for direct election. But the Senator from Nebraska, as I recall, has been supporting the district plan. That fares much worse in this poll. In fact, I have not been out of the State legislature too long to be unsympathetic to State legislators. However, we are in the U.S. Senate now, and the Senator from Nebraska suggests that there are those who say that now it is the Senate's time, the Senate is next.

But I wonder whether there really is any place for the U.S. Senate if we make our final judgment as to whether there should be a constitutional amendment or not by going hat in hand to the State legislatures and trying to figure out exactly how they are going to vote. I think we must pass the best amendment we can.

The Senator from Michigan has shown that certainly this is not an uphill battle. 339 Members of the House of Representatives voted in favor of it. I do not think that these people, who have to run every 2 years, can be too far out of touch with their constituencies. We are told that 81 percent of the people of this country are for direct popular vote. The League of Women Voters studied this matter for over a year and have received a favorable response of approximately 89 percent. Interestingly enough, favorable sentiment was equally dispersed throughout the country. The chamber of commerce polled its members and received a more favorable response for direct popular vote than for all the other plans put together. Add to this the support of the AFL–CIO and the UAW, and I will take my chances with that of State legislatures. I will take my chances, because I think most legislators want to do what is right for the country.

I think that the plan we are presenting comes closest to meeting the problems that exist. This plan also lets the President of the United States truly represent the whole country—the entire country—and lets each voter have the chance to cast his vote and be counted. Direct election does not allow this decision to be made in some smoke-filled room, where the power brokers parcel out the presidency, with the people not really knowing what is going on.

I think this is the true test, and I hope we do debate it fully and then let the Senate work its will. I am willing to abide by the Senate's decision, because the Senate has proved historically that it usually comes down on the right side when the hour is late.

Mr. HRUSKA. Mr. President, I shall not delay the Senate any longer. I ask unanimous consent to have printed at this point in the RECORD the last two full paragraphs on page 37 of the report on this bill, together with the first full paragraph on page 38.

There being no objection, the excerpt was ordered to be printed in the RECORD, as follows:

> The proponents of direct election may reply that they bear no animus against the federal system, that, on the contrary, they support it by recommending retention of State equality in the Senate. State equality in the Senate is certainly a strong underpinning of federalism, but with the great powers at the disposal of the President, would it not be foolish to rely upon the Senate alone as the bulwark of the federal system? Certainly, the Framers did think that equality of representation in the Senate would be sufficient—which is why they decided to give the States a role in the selection of Presidents, a role that has been reinforced by our federally structured political parties.
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> If one day, someone comes forward to say that it is surely an absurdity to give New York and Hawaii equal representation in the Senate, that a recent computer study has conclusively demonstrated that a citizen of New York is disfranchised 33 times relative to a citizen of Hawaii; and that, in so important a matter as the passage of national legislation this is tantamount to a denial of equal protection of the laws—when that day comes, what argument can the proponents of direct election make to defend State equality in the Senate?
>
> The proponents of direct election must be asked how they proposed to defend the federal system in principle. It is one thing for them to say that they favor the retention of the federal system; it is quite another for them to make an argument for federalism on the basis of the logic which impelled them to propose direct election in the first place.
>
> The federal system is an explicit departure from the doctrine of mere numerical majorities, from the doctrine of "one-man, one-vote." If no departure from the doctrine is to be permitted in the Presidency, by what reasoning is it to be defended in the federal system? Conversely, if it is to be tolerated in the federal system, why should it not be tolerated in the Presidency?

Mr. HRUSKA. This bears upon the proposition of the federal system being eroded little by little to the point of final disappearance.

I am happy that this debate started before we consider the farm bill that we are going to have here soon. It is suggested that rural life is going down the drain with the electoral college, and I suggest that perhaps this amendment could be offered as a part of the farm bill so as to revive and make prosperous once

again the agriculture of this country. It would make just as much sense, Mr. President, to make that kind of amendment to the farm bill as it would to contend, as did the Senator from Indiana, that the farmer is not in good shape under the electoral system and therefore we ought to get rid of it.

Mr. BAYH. The Senator from Nebraska was the one who opened the argument about the farm problem. He said unless we were able to keep the electoral college, the poor farmer was going to get it in the neck.

I just suggested, as one farmer who has been getting it in the neck under the electoral college, that this kind of argument does not make much sense.

Mr. HRUSKA. With full due respect to the Senator from Indiana, he will see, upon reviewing the record, that I say that the adoption of the direct election will result in a loss of voting power for the President by the agricultural States, and I stand by that statement. If they do not have as much political clout as they had 25 years ago, it is going to be reduced by almost 30 percent, I think—that is subject to verification—under the transfer from the electoral system to the direct popular system. I do not see how that vast interest known as the agricultural economy of this country can profit from 30-percent loss in voting power for the President.

I recall with some pleasure that there was virtually unanimous decision in the electoral vote in the Mississippi Valley, in all the agricultural States, on behalf of the present incumbent in the White House. That means something, acting as a unit. But to cut that down by 30 percent, or whatever the figure is, would not serve their interest quite so well. I stand on that proposition, not that it is going to directly bring prosperity back to the farmer. But it gives him a little instrument with which to work.

Mr. President, I ask unanimous consent to have printed at this point in the RECORD an article published in this afternoon's Washington Star, written by James J. Kilpatrick, entitled, significantly, "The Most Deeply Radical Amendment."

There being no objection, the article was ordered to be printed in the RECORD, as follows:

THE MOST DEEPLY RADICAL AMENDMENT

The United States Senate launches itself this week into one of the most fateful debates in American constitutional history. By the end of this month—by early October at the latest—the Senate will have voted up or down a resolution proposing the direct national election of Presidents.

"I think a case can be made," Yale's Prof. Charles Black has said, "for the proposition that direct election, if it passes, will be the most deeply radical amendment which has ever entered the Constitution of the United States."

That assessment is shared by many others, both lawyers and non-lawyers, who see in the direct election proposal a fundamental alteration in the structure of American federalism. Yet the resolution has passed the House already; it reportedly commands strong popular support; and the action to be taken by the Senate has this unrecognized meaning: If the Senate approves, and the resolution goes out to the States for ratification, any further effort at electoral reform would be effectively blocked for seven years. That is the period allowed by the resolution in which three-fourths of the states must ratify or fail to ratify.

Consider, for a moment, the changes that would occur in the whole business of nomination and qualification for the ballot. Under existing law, political parties hold national conventions and nominate their presidential and vice presidential candidates. Then state parties, acting under state law, undertake to get those tickets listed on state ballots.

It is at this point that the machinery of federalism begins its delicate braking action. Major parties ordinarily have no trouble in getting their candidates on the ballot in every state. The petition process makes it more difficult for third parties. George Wallace, it will be recalled, had a terrible time in 1968 before he could get his American Independent Party qualified. When Strom Thurmond ran in 1948, he made it to the ballot in 15 states only.

The machinery of state-by-state qualification, coupled with electoral voting by states, has worked to inhibit the power of third parties. Only four times in this century has a minority party won electoral votes. The Socialists, Progressives, Prohibitionists, Constitutionalists and others have sputtered ineffectively within their state compartments. And because each of the two major parties has been compelled to make a broad appeal, the United States has benefited from political stability and prudent compromise.

Under the pending resolution, this machinery would be junked. No matter what its sponsors say, the direct election amendment would require (and its language so permits) that ballots be uniform throughout the United States. Nothing else would make sense. An entire new system would have to be created by which any group calling itself a political party filed the names of its candidates with a Federal Board of Elections. We could reasonably expect a Black Peoples party, a Peace party, a Revolutionary party, a Young Americans party. I am myself a Whig, and might run. In a nation so large and so passionately diverse, a dozen "parties" surely would bid for a footnote in history.

Then what? State lines no longer would matter. We are now thinking of cumulative votes, across the nation as a whole. It requires no great work of the imagination to conceive that such an aggregation of States Righters, New Leftists, Anti-Fluoridationists, and Ban-the-Bombers could drain enough votes to prevent either of the major parties from winning 40 percent of the total.

In 1968, even with the machinery of federalism working, it was Nixon 43.5 percent; Humphrey 42.8; and Wallace 13.5, with two-tenths split among Gene McCarthy, Eldridge Cleaver, a Communist named Mitchell, the Prohibitionist Munn, and others. Given a similar situation, under the pending amendment, a run-off would be held between the top two—probably the first week in December—amidst wild cries of "deal" and "sell-out."

Is this what we want? Is this prospect of chaos truly better than the "obsolete" but functioning system that now exists? The questions are squarely before the Senate now.

Mr. BAYH. Mr. President, I ask unanimous consent to have printed at this point in the RECORD a statement by our illustrious majority leader, the Senator from Montana (Mr. MANSFIELD) on the federal system under direct election.

There being no objection, the statement was ordered to be printed in the RECORD, as follows:

The Federal System is not strengthened through an antiquated device which has not worked as it was intended to work when it was included in the Constitution and which, if anything, has become a divisive force in the Federal System by pitting groups of states against groups of states. As I see the Federal System in contemporary practice, the House of Representatives is the key to the protection of district interests just as the Senate is the key to the protection of State interests as State interests. These instrumentalities, and particularly the Senate, are the principal constitutional safeguards of the Federal System, but the Presidency has evolved, out of necessity, into the principal political office . . . for safeguarding the interests of all the people in all the states. and since such is the case . . . the Presidency should be subject to the direct and equal control of all the people.

Mr. BAYH. I think it is important for us to put this matter in proper perspective. None of us wants to destroy the federal system, but I think that if we look at what was said by Madison and Hamilton and some of the other illustrious gentlemen of a bygone age, we really see that the Senate, not the electoral college, is the key to the federal system. We are on a very weak reed if we think the electoral college was any part of it.

Mr. President, I have not had a chance to read the article by Mr. Kilpatrick which the Senator from Nebraska put in the RECORD, but I wonder whether the Senator will let me know whether Mr. Kilpatrick referred to Professor Black in that article.

Mr. HRUSKA. Yes. And I have read similar articles on the same subject by that very fine columnist—and a wise and levelheaded man he is, very intelligent. I bank on his general philosophy, and when he deals with "the most deeply radical amendment," he deals with it successfully and well.

Mr. BAYH. In order to be consistent, I ask unanimous consent to have printed in the RECORD an article published in this morning's Washington Post, written by columnist David S. Broder, which I think deals with this matter rather lightly, yet accurately, if one reads about the strange bedfellows who exist in this particular debate. I say "bedfellows" in the finest sense of the word.

There being no objection, the article was ordered to be printed in the RECORD, as follows:

CLASS IN POLITICAL ADVICE

Following are taperecorded excerpts from this morning's seminar in contemporary issues as Professor John Henry Galbissinger's Academy of Political Understanding:

Professor: All right, class, settle down. It's been a nice holiday, but now we must commence again the thinking. I have for you, a little riddle.

Johnny: OK, pops but not too tough. We've been away all summer.

Prof: What do the following men have in common: Nicholas deB. Katzenbach, Congressman William L. Clay of Missouri, Richard Goodwin, Theodore H. White and Professors Alexander Bickel, Harry V. Jaffa, Ernest Brown and Charles Black?

Mary: What a question! I never even heard of half of those cats.

Prof: All right, I'll help you. Nicholas Katzenbach was Robert Kennedy's successor as attorney general.

Class: Cool!

Prof: Mr. Clay is a black Congressman from St. Louis, a liberal Democrat. Richard Goodwin, you all know?

Johnny: Oh, yes. He's cool. He was for Kennedy and McCarthy and peace and everything.

Prof: Theodore White—the "Making of the President" author?

Mary: Oh, he's a dreamy writer. And how about those others, the professors?

Prof: Distinguished lawyers and political scientists from Yale and Harvard and so on. Now, think. What do they have in common?

Butch: Spiro Agnew has attacked them?

Prof: A good guess, but not quite right, I'll give you a hint. They have something to do with a current question before Congress.

Mary: They're a committee to outlaw the ABM.

Johnny: They're trying to repeal the no-knock law.

Butch: They've all opposed the Vietnam war.

Prof: Good guesses, but you're still not on target. I'll ask it this way. There are six senators who use these men as their intellectual advisers. I'll give you an A if you can name one of the senators.

Mary: George McGovern.

Butch: Charley Goodell.

Mary: Mark Hatfield.

Others: Harold Hughes, Charles Percy.

Prof: No, no. I can see you are very out-of-touch. Nicholas Katzenbach, Congressman Clay, Richard Goodwin, Theodore White and the four professors are the intellectual heroes of—are you ready?

Prof: James Eastland, John McClellan, Sam Ervin, Roman Hruska, Hiram Fong and Strom Thurmond.

Class: You're kidding! What've you been smoking, pops?

Prof: I am not kidding. Those six senators are the members of the Judiciary Committee who oppose the constitutional amendment for direct election of the President, which we will discuss these next few weeks, while it's under debate in the Senate. I want you to read the minority report they filed, and you will see that their authorities—the only contemporaries they quote to back up their own arguments—are the men I mentioned.

Johnny: Well, what's their beef with direct election?

Prof: As you will see if you do your homework, they say it is a "truly radical" proposal, and they cite Katzenbach and Goodwin and Theodore White to prove it.

Mary: But to guys like Eastland and Thurmond and Hruska, those cats must seem pretty radical themselves. And you say this congressman they're quoting all over the place is a black? McClellan and Eastland and Thurmond are quoting him? Why don't they quote any conservatives?

Prof: Perhaps they think it takes a radical to spot a radical proposal. It's odd. The groups you would consider conservative—like the Chamber of Commerce and the American Bar Association—are the ones who are really pushing this amendment, so they can't quote them. They can't even quote President Nixon—he's for it.

Butch: But—isn't it kind of embarrassing to those senators to have to quote Dick Goodwin and Teddy White and all those Ivy League professors?

Prof: Well, how do you think Goodwin and Katzenbach and White and the professors feel about being quoted by those senators? It balances out, I'd guess.

Johnny: Hoo-boy, that would be some caucus if all those cats got together to make plans. Wouldn't you love to have that picture? Ole Strom and Dick Goodwin! Man, I'm dreamin'.

Prof: Settle down, class. I can see you've forgotten what Washington is like. . . .

Mr. GRIFFIN. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. GRIFFIN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. GRAVEL). Without objection, it is so ordered.

ADJOURNMENT UNTIL 10 A.M. TOMORROW

Mr. GRIFFIN. Mr. President, if there be no further business to come before the Senate, I move, in accordance with the previous order, that the Senate stand in adjournment until 10 a.m. tomorrow.

The motion was agreed to; and (at 5 p.m.) the Senate adjourned until tomorrow, Wednesday, September 9, 1970, at 10 a.m.

NOMINATION

Executive nomination received by the Senate September 8, 1970:

NATIONAL CREDIT UNION ADMINISTRATION

Herman Nickerson, Jr., of Maine, to be Administrator of the National Credit Union Administration; new position.

EXTENSIONS OF REMARKS

FORMER TEXAS GOV. COKE STEVENSON RECEIVES FRED EARWOOD MEMORIAL AWARD

HON. O. C. FISHER

OF TEXAS

IN THE HOUSE OF REPRESENTATIVES

Friday, August 14, 1970

Mr. FISHER. Mr. Speaker, at the recent annual convention of the Texas Sheep & Goat Raisers' Association in San Antonio, Tex., the coveted Fred Earwood Memorial Award was given to former Gov. Coke Stevenson. It was a highly deserved recognition not only for the contribution Governor Stevenson has made to the sheep and goat industry but also for the distinguished record he has made as a statesman in the constant battle for good government.

The Fred Earwood Memorial Award was created last year by the growers in memory of the late and lamented Fred Earwood who resided at Sonora, Tex. Following Mr. Earwood's death more than 2 years ago the Texas Sheep & Goat Raisers' Association created a special fund "to memorialize one of the outstanding leaders of our industry, and to annually recognize some deserving person whose contributions exemplify Fred Earwood's dedication and efforts for the welfare of all sheep and goat producers."

Hundreds of Mr. Earwood's admirers made voluntary contributions, and I understand the fund now totals more than $10,000. Income from this fund is used annually for some appropriate way to recognize the recipient. Last year it was my honor to have been the first to receive the award, which to me was a source of much pride.

Mr. Speaker, under leave to extend my remarks I include an article about the award to Governor Stevenson, which appeared in the August edition of the Texas Sheep and Goat Raiser magazine. The article follows:

EARWOOD AWARD GIVEN EX-GOVERNOR OF TEXAS

The Texas Sheep and Goat Raisers' Association honored its only living charter member here today at the 55th convention by presenting former Texas Governor Coke R. Stevenson with the Fred Earwood Memorial Award.

Created some two years ago by TS&GRA directors, the Earwood Award is the highest award of distinction given by the association. Following the death of Fred Earwood, friends and associates brought about the formation of a special fund to memorialize him. Each year some deserving person whose contributions exemplify Earwood's dedication and efforts for the welfare of all sheep and goat producers is recognized.

Coke Stevenson of Junction was singled out for his continued support and aid to the sheep and goat organization for over 55 years. Since the first meeting in Del Rio in 1916, his services and advice have aided in the building of the association.

"I doubt if any of us realized how important that meeting was, or what a great organization it would lead to," said Governor Stevenson recently as he recalled the Del Rio meeting. "At the time, there wasn't much about it that would make us think we ought to try to remember it in later years."

He said the purpose of the meeting was to stop large-scale stealing of sheep and goats.

"The talk in Kimble County was that somebody was doing a lot of stealing, but nobody was able to catch them. We set some traps, and pretty soon we caught a man. We found out he would go out into a pasture, stretch a wagonsheet in the gate and drive the sheep across. The wagonsheet kept them from leaving tracks. We sent him to the penitentiary."

"Agitation had grown to form a statewide organization of sheep and goat raisers to stamp out the stealing. The charter was established that day in Del Rio," he added.

Governor Stevenson bought his first ranch land in 1913 and at all times when not engaged in public service, operated the ranch at Telegraph and practiced law.

He was elected to the state legislature in 1929. He later was elected Speaker of the House. He was re-elected Speaker in 1935. For the first time in the history of the Texas Legislature a Speaker succeeded himself!

He is the first Texan to hold the three highest executive posts: Speaker of the House (1933–37), Lieutenant Governor (1939–41), Governor (1941–47). He still holds that record. He was also the first man to have more than two terms as governor.

As Governor of Texas, Coke Stevenson and his administration became known for putting the state on a sound financial basis directing a deficit of 34 million dollars from a column of red figures to a column of black ones. There was no curtailment of services. On the day Stevenson became Governor, the