

# CRS Report for Congress

## The Electoral College: Reform Proposals in the 109<sup>th</sup> Congress

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## Summary

American voters elect the President and Vice President of the United States under a complex arrangement of constitutional provisions, federal and state laws, and political party practices known as the electoral college system. For additional information on contemporary operation of the system, please consult CRS Report RL32611, *The Electoral College: How It Works in Contemporary Presidential Elections*, by Thomas H. Neale.

Despite occasional close elections, this system has delivered uncontested results in 47 of 51 elections since the 12<sup>th</sup> Amendment was ratified in 1804. Down these many years, however, it has been the subject of persistent criticism and numerous reform proposals. In the contemporary context, related measures fall into two basic categories: those that would eliminate the electoral college and substitute direct popular election of the President and Vice President, and those that would retain the existing system in some form, while correcting perceived defects.

Four relevant proposed amendments were introduced in the 109<sup>th</sup> Congress: H.J.Res. 8 (Representative Gene Green, and others); H.J.Res. 17 (Representative Eliot Engel and others); H.J.Res. 36, (Representative Jesse Jackson, Jr., and others); H.J.Res. 50 (Representative Zoe Lofgren and others); and S.J.Res. 11 (Senators Dianne Feinstein and Barbara Boxer). All proposed to eliminate the electoral college and substitute direct popular election, while H.J.Res. 8, H.J.Res. 17, H.J.Res. 50 and S.J.Res. 11 also sought to empower Congress to set federal standards for various aspects of voting registration and election administration procedures. The House measures were referred to the House Committee on the Judiciary and to its Subcommittee on the Constitution, while S.J.Res. 11 was referred to the Senate Committee on the Judiciary. No further action was taken on any of them during the life of the 109<sup>th</sup> Congress.

For additional information on electoral college contingencies and broader aspects of reform proposals, please consult CRS Report RL30804, *The Electoral College: An Overview and Analysis of Reform Proposals*, by L. Paige Whitaker and Thomas H. Neale. This report will not be updated.

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# The Electoral College: Reform Proposals in the 109<sup>th</sup> Congress

## Introduction

American voters elect the President and Vice President of the United States under a complex arrangement of constitutional provisions, federal and state laws, and political party practices known as the electoral college system.<sup>1</sup> Despite occasional close elections, this system has delivered uncontested results in 47 of 51 elections since adoption of the 12<sup>th</sup> Amendment, effective in 1804. In three elections, the electoral college awarded the presidency to candidates who won fewer popular votes than their principal opponents, but a majority of electoral votes. In a fourth, the House of Representatives decided the contest by contingent election, in this case electing a candidate who won fewer popular *and* electoral votes than his principal opponent.<sup>2</sup>

The most recent instance in which the popular vote runner up received a majority in the electoral college occurred in 2000, when George W. Bush was elected President over his opponent, Al Gore, Jr., despite having won fewer popular votes than Gore nationwide. Extremely close and highly contested results in the pivotal state of Florida led to a bitter and protracted struggle that continued for over a month following election day. A Supreme Court decision<sup>3</sup> ended further recounts, leading to certification of Bush electors in Florida, and the Republican candidate's subsequent election.

Following the 2000 presidential election, both the electoral college system and the shortcomings of election administration and voting technology, particularly in Florida, were widely criticized. While no substantive action was taken on electoral college proposals, Congress addressed the latter issue with the enactment of the Help America Vote Act, "HAVA" (P.L. 107-252, 116 Stat. 1666), in 2002. This act established national standards for voting systems and certain election procedures, and

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<sup>1</sup> For additional information on contemporary operation of the electoral college system, consult CRS Report RL32611, *the Electoral College: How It Works in Contemporary Presidential Elections*, by Thomas H. Neale.

<sup>2</sup> In the multiple-candidate election of 1824, the House of Representatives chose John Quincy Adams over Andrew Jackson, who enjoyed a popular and electoral vote plurality, in a contingent election. Prior to the 2000 election, Rutherford B. Hayes was chosen over popular vote winner Samuel Tilden 1876 by one electoral vote, after a protracted political conflict. In 1888, Benjamin Harrison won a majority of electoral votes, and was chosen over popular vote winner Grover Cleveland.

<sup>3</sup> *Bush v. Gore*, 531 U.S. 989 (2000).

included a program of grants to assist state and local governments in meeting the act's goals.<sup>4</sup>

The successful passage of HAVA contrasted with almost complete lack of legislative activity in recent Congresses on proposed constitutional amendments that would eliminate or reform the electoral college system, and served to highlight the comparative difficulties faced by would-be electoral college reformers. The fundamentals of the electoral college system were established by the Constitution, and can only be altered by the much more difficult process of constitutional amendment, rather than by legislation. Moreover, HAVA's prospects for enactment were boosted by the fact that, while few would defend the failures in voting administration and technology that helped promote the act, the electoral college would arguably be enthusiastically supported in Congress and the public forum by its various advocates and defenders.

Notwithstanding these hurdles, however, amendments have been proposed to alter or eliminate the electoral college in almost every Congress since 1789. This report examines and analyzes alternative proposals for change, presents pro and con arguments, and identifies and analyzes related proposals introduced in the 109<sup>th</sup> Congress.

## **Alternative Approaches: Direct Popular Election v. Electoral College Reform**

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

**Direct Popular Election.** The direct election alternative would abolish the electoral college, substituting a single, nationwide count of popular votes. The candidates winning a plurality of votes would be elected President and Vice President. Most direct election proposals would constitutionally mandate the joint tickets of presidential/vice presidential candidates already adopted in state law.<sup>5</sup> Some would require simply that the candidates winning the most popular votes would win. Others, however, would set a minimum number of votes necessary to win election — generally at 40% of those cast, but in some cases, a majority. In the event no presidential-vice presidential ticket were to attain the 40% or majority threshold, these direct election measures generally require the two tickets that

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<sup>4</sup> For additional information on HAVA, please consult CRS Report RL32685, *Election Reform: The Help America Vote Act and Issues for Congress*, by Eric A. Fischer and Kevin J. Coleman. For a general overview of federal election reform issues, please consult CRS Report RS20898, *Election Reform: Overview and Issues*, by Kevin J. Coleman and Eric A. Fischer

<sup>5</sup> This provision, currently in use in all the states, requires each voter to cast a single vote for a joint ticket for President and Vice President, thus insuring that the President and Vice President will always be of the same political party.

received the most votes to compete in a subsequent runoff election. Alternatively, some versions would provide that Congress, meeting in joint session, elect the President and Vice President if no ticket received 40% of the vote.

### **Direct Popular Election: Pro and Con.**

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

- They assert that direct popular election would provide for a single, democratic, choice in which all the nation's voters would directly elect the two highest-ranking officials in the United States government, the President and Vice President.
- Further, the candidates who won the most popular votes would always win the election. Under some direct election proposals, if no one received at least 40% of the vote, the voters would be able to choose between the two tickets who gained the most votes in a runoff election. (Other direct election proposals would substitute election by joint session of Congress for a runoff if no ticket received at least 40% of the vote.)
- Every vote would carry the same weight in the election, no matter where in the nation it was cast.
- Direct election would eliminate the potential complications that could arise under the current system in the event of a presidential candidate's death between election day and the date on which electoral vote results are declared, since the winning candidates would become President- and Vice President-elect as soon as the popular returns were certified.<sup>6</sup>
- All the various and complex mechanisms of the existing system, such as provisions in law for certifying the electoral vote in the states and the contingent election process, would be supplanted by these simple requirements.<sup>7</sup>

**Con.** Electoral college defenders attempt to refute these arguments, pointing to what they assert are flaws in direct election:

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<sup>6</sup> For further information on the succession question, please consult CRS Report RL30804, *The Electoral College: An Overview and Analysis of Reform Proposals*, by L. Paige Whitaker and Thomas H. Neale.

<sup>7</sup> In a contingent election, the President is elected in the House of Representatives, with each state casting a single vote, regardless of its population and the election results in that state. The Senate elects the Vice President in such cases, with each Senator casting a single vote.

- Direct election proponents claim their plan is more democratic, and provides for “majority rule,” yet some direct election proposals require that victorious candidates gain as little as 40% of the vote in order to be elected. Others, moreover, include no minimum vote threshold at all. How, ask its critics, could such plurality Presidents be reconciled with the concept of strict “majority rule” enshrined by direct election’s proponents?
- Further, they assert that direct election would foster acrimonious and protracted post-election struggles, rather than eliminate them. For instance, as the presidential election of 2000 demonstrated, close results in a single state in a close election are likely to be bitterly contested. Under direct election, those favoring an electoral college claim, every close election might resemble the post-election contests in 2000, not just in one state, but also on a nationwide basis, as both parties seek to gain every vote. Such rancorous disputes could have profound negative effects on political comity in the nation, and, in the worst case, might undermine the stability and legitimacy of the federal government. To those who suggest that the struggle over Florida’s popular vote returns in 2000 was unique, they could cite the example of Ohio in 2004, where multiple legal actions were pursued even though the popular vote margin for the winning candidates exceeded 118, 000.<sup>8</sup>

**Electoral College Reform.** Reform measures that would retain the electoral college in some form have included a range of different proposals, the most popular of which are listed below.<sup>9</sup> Most versions of these plans would eliminate the office of elector, and award electoral votes directly to the candidates, and would retain the requirement that a majority of electoral votes is necessary to win the presidency. In common with direct election, most would also require joint tickets of presidential-vice presidential candidates, a practice which is currently provided under state ballot laws.

***The Automatic Plan.*** This reform proposal would award all electoral votes in each state directly to the winning candidates who obtained the most votes statewide; in almost all versions, a plurality would be sufficient in individual states to win the state’s electoral votes, while most versions provide for some form of contingent election in Congress in the event no candidate wins a nationwide majority of electoral votes. This alternative would constitutionally mandate the “general ticket” or “winner-take-all system” currently used to award electoral votes in 48 states and the District of Columbia.

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<sup>8</sup> Bush/Cheney: 2,859,764; Kerry/Edwards: 2,741,165. Ohio Secretary of State website, at [<http://www.sos.state.oh.us/>].

<sup>9</sup> For more detailed information on these reform options, consult CRS Report RL30804, *The Electoral College: An Overview and Analysis of Reform Proposals*, by L. Paige Whitaker and Thomas H. Neale.

Proponents of the automatic plan argue that it would maintain the present electoral college system's balance between federal and state power, and between large and small states. Proponents note that the automatic plan would eliminate the possibility of "faithless electors." Further, the automatic plan would help preserve the present two-party system, under a state-by-state, winner-take-all method of allocating electoral votes. This, they assert, is a strength of the existing arrangement, because it tends to reward parties that incorporate a broad range of viewpoints, and embrace large areas of the nation. Opponents, on the other hand, note presidential elections are still indirect under the automatic system. They further assert that "minority"<sup>10</sup> Presidents could still be elected under the automatic system, and it still provides no electoral vote recognition of the views and opinions of voters who chose the losing candidates.

***The District Plan.*** This reform proposal would continue the current allocation of electoral votes by state, and, in common with most reform plans, would eliminate the office of presidential elector. It would award one electoral vote to the winning candidates in each congressional district (or other, ad hoc, presidential election district) of each state. The additional two electoral votes, reflecting the two "constant" or "senatorial" electoral votes assigned to each state, would be awarded to the statewide vote winners. This alternative would constitutionally mandate the system currently used to award electoral votes in Maine and Nebraska.<sup>11</sup>

Proponents of the district plan argue that it would more accurately reflect the popular vote results for presidential and vice presidential candidates than the winner-take-all method, or the automatic plan, because, by allocating electoral votes according to popular vote results in congressional districts, it would take into account political differences within states.<sup>12</sup> They also suggest that in states dominated by

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<sup>10</sup> Presidents and Vice Presidents elected with an electoral vote majority, but fewer popular votes than their major opponents.

<sup>11</sup> The district plan is a permissible state option under the Constitution, which does not specify any particular method for awarding electoral votes. In fact, the district plan was widely used in the 19<sup>th</sup> century.

<sup>12</sup> The question of what districts would be used under a district plan has been considered over time. The use of either ad hoc presidential election districts, or existing congressional districts could be mandated, or states could be offered the option of using either method. The ad hoc district variant of the district plan would empower the states to create special presidential election districts, one for every seat the state holds in the House of Representatives, while rewarding the two "senatorial" electors to the statewide vote winner. A further variation might be to eliminate the "senatorial" electors, and establish a number of presidential election districts equal to the *total* Senate and House delegations in each state. Any such districts would undoubtedly need to conform to existing Supreme Court mandates that they be as equal in population as possible, in order to assure that the doctrine of "one person, one vote" is observed. The minimal population differences between congressional districts and the fact they are already in existence might argue for their use. On the other hand, in contemporary practice, congressional districts do not always follow the boundaries of existing political subdivisions, recognized regions, or less formal "communities," thus vitiating one of the arguments in favor of the district system, that it takes into effect the different political leanings of different parts of a state. These options  
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one party, the district plan might provide an incentive for greater voter involvement and party vitality, because it would be possible for the less dominant party to win electoral votes in districts where it enjoys a higher level of support, e.g. “Upstate” New York versus the New York City metropolitan area, or northern California vs. the Los Angeles and San Francisco metropolitan areas. Opponents would note that the district plan retains indirect election of the nation’s chief executive, that the potential for “minority” Presidents would continue, and that it might actually weaken the two-party system by encouraging parties that promote narrow geographical or ideological interests and that may be concentrated in certain areas. In fact, they might suggest that adoption of the district plan would encourage gerrymandering, as the parties maneuvered for advantage in presidential elections.

***The Proportional Plan.*** This reform proposal would award electoral votes in each state in proportion to the percentage of the popular vote gained by each ticket. Some versions, known as “strict” proportional plans, would award electoral votes in proportions as small as thousandths of one vote, that is, to the third decimal point, while others, known as “rounded” proportional plans, would use various methods of rounding to award only whole numbers of electoral votes to competing candidates. Voters in Colorado rejected a proposed state constitutional amendment (Amendment 36) at the November 2, 2004, general election that would have established a rounded proportional system in that state.<sup>13</sup> For further information on this proposal, please consult CRS Report RL32611, *The Electoral College: How It Works in Contemporary Presidential Elections*, by Thomas H. Neale.

Proponents of the proportional plan argue that it comes closer than other reform plans to electing the President and Vice President by popular vote, while still preserving the state role in presidential elections. They also assert that the proportional plan reduces the likelihood of “minority” presidents — those who win with a majority of electoral votes, but fewer popular votes than their chief opponent. They also suggest that it would more fairly account for public preferences, by allocating electoral votes within the states to reflect the actual support attained by various candidates, particularly in the strict, as opposed to rounded, version of the proportional plan, while still retaining the role of the states. Opponents again suggest that it retains indirect election of the President, which they assert is inherently less democratic than direct popular election. They also note that the proportional plan could still result in “minority” Presidents and Vice Presidents, and by eliminating the magnifier effect of the automatic and district plans, might actually result in more frequent electoral college deadlocks, situations in which no candidate receives the requisite majority of electoral votes.

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<sup>12</sup> (...continued)

might open an opportunity for experiment on the “states as laboratories for the nation” model.

<sup>13</sup> The Constitution does not currently provide for fractions or parts of electoral votes, so a strict proportional system would require a constitutional amendment. Since a rounded proportional plan or system would award whole electoral votes, it is currently a permissible state option under the Constitution.

## Electoral College and Electoral College Reform: Pro and Con.

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

- They reject the suggestion that it is undemocratic. Electors are chosen by the voters in free elections, and have been in nearly all instances since the first half of the 19<sup>th</sup> century.
- The electoral college system prescribes a federal election of the President by which votes are tallied in each state. The founders intended that choosing the President would be the action of citizens of a federal republic, in which they participate both as citizens of the United States, and as members of their state communities.
- While electoral vote allocation does provide the “constant two,” or “senatorial” electors for each state, regardless of population, defenders believe this is another federal element in our constitutional system, and is no less justifiable than equal representation for all states in the Senate. Moreover, the same formula also assigns additional electors equal in number to each state’s delegation in the House of Representatives, which more than compensates for any minor distortion.
- Further, defenders reject the suggestion that less populous states like Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont and Wyoming, as well as the District of Columbia, each of which casts only three electoral votes, are somehow “advantaged” when compared with California (currently 55 electoral votes). These 55 votes alone, they note, constitute more than 20% of the electoral votes needed to win the presidency, thus conferring on California voters, and those of other populous states, a “voting power” advantage that far outweighs the minimal arithmetical edge conferred on the smaller states.<sup>14</sup>
- The electoral college system promotes political stability, they argue. Parties and candidates must conduct ideologically broad-based campaigns throughout the nation in hopes of assembling a majority of electoral votes. The consequent need to forge national coalitions having a wide appeal has been a contributing factor in the moderation and stability of the two-party system.
- They find the faithless elector phenomenon to be a specious argument. Only nine such electoral votes have been cast against instructions since 1820, and none has ever influenced the outcome

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<sup>14</sup> For additional information on the voting power theory, please consult CRS Report RL30804, *The Electoral College: An Overview and Analysis of Proposals for Change*, by L. Paige Whitaker and Thomas H. Neale.

of an election. Moreover, nearly all electoral college reform plans would remove even this slim possibility for mischief by eliminating the office of elector.

**Con.** Supporters of direct election, and critics of the electoral college counter that the existing system is cumbersome, potentially anti-democratic, and beyond saving. The following asserted failings are frequently cited.

- The electoral college, direct election supporters assert, is the antithesis of their simple and democratic proposal. It is, they contend, philosophically obsolete: indirect election of the President is an 18<sup>th</sup> century anachronism that dates from a time when communications were poor, the literacy rate was much lower, and the nation had yet to develop the durable, sophisticated, and inclusive political system it now enjoys.
- Moreover, they find the 12<sup>th</sup> Amendment provisions that govern cases in which no candidate attains an electoral college majority (contingent election) to be even less democratic than the primary provisions of Article II, section 1.<sup>15</sup>
- By providing a fixed number of electoral votes per state that is adjusted only after each census, they maintain, the electoral college does not accurately reflect state population changes in intervening elections.
- They assert that the two “constant” or “senatorial” electors assigned to each state regardless of population give some of the nation’s least populous jurisdictions a disproportionate advantage over more populous states, from this viewpoint.
- The office of presidential elector itself, they note, and the resultant “faithless elector” phenomenon,<sup>16</sup> provide opportunities for political mischief and deliberate distortion of the voters’ choice.
- They argue that by awarding all electoral votes in each state to the candidates who win the most popular votes in that state, the winner-take-all system effectively disenfranchises everyone who voted for other candidates. Moreover, this same arrangement is the

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<sup>15</sup> For more detailed information on the contingent election process, please consult CRS Report RL32695, *Election of the President and Vice President by Congress: Contingent Election*, by Thomas H. Neale.

<sup>16</sup> Faithless electors are those who cast their votes for candidates other than those to whom they are pledged. Notwithstanding political party rules and state laws, most constitutional scholars believe that electors remain free agents, guided, but not bound, to vote for the candidates they were elected to support. For further information, please consult CRS Report RL30804, *The Electoral College: An Overview and Proposals for Change*, by L. Paige Whitaker and Thomas H. Neale.

centerpiece of one category of electoral college reform proposal, the automatic plan.

- Critics further note that, although all states currently provide for choice of electors by popular vote, state legislatures still retain the constitutional option of taking this decision out of the voters' hands, and selecting electors by some other, less democratic means.<sup>17</sup> This option was, in fact, discussed in Florida in 2000 during the post-election recounts, when some members of the legislature proposed to convene in special session and award the state's electoral votes, regardless of who won the popular contest in the state. The survival of this option demonstrates that even one of the more "democratic" features of the electoral college system is not guaranteed, and could be changed arbitrarily by politically motivated state legislators.
- Finally, the electoral college system has the potential to elect presidential and vice presidential candidates who obtain an electoral vote majority, but fewer popular votes than their opponents, as happened in 2000, 1888, and 1876. While a system that allows such a miscarriage of the popular will might have been acceptable in the 19<sup>th</sup> century, opponents maintain that it has no place in the 21<sup>st</sup>.

## Reform Proposals in the 109<sup>th</sup> Congress

### H.J.Res. 8.

H.J.Res. 8, the Every Vote Counts Amendment, was introduced on January 4, 2005, by Representative Gene Green, and was cosponsored by Representatives Brian Baird and William D. Delahunt. The amendment sought to provide for direct popular election of the President and Vice President and also empower Congress and the states to establish voter qualifications with respect to age and residence.

Sections 1, 3, 4, and 5 dealt with the election process. Section 1 specified election by "the people of the several States and the district constituting the seat of government." This provision recapitulated existing requirements of state residence (or residence in the District of Columbia), and implicitly excludes Puerto Rico and U.S. territories.<sup>18</sup> Section 3 set a plurality, rather than a majority requirement for

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<sup>17</sup> U.S. Constitution, Article II, Section 1, clause 2: "Each State shall appoint *in such Manner as the Legislature thereof may direct* [emphasis added], a number of Electors equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress...."

<sup>18</sup> A number of election proposals in recent years have suggested that inhabitants of these jurisdictions should also have the right to vote for President and Vice President, based largely on the fact that they are U.S. citizens. See, for instance, H.J.Res. 109, 108<sup>th</sup> Congress (introduced by Rep. Jesse Jackson, Jr. and others), which provided for election by "the citizens of the United States, without regard to whether the citizens are residents of a state." For additional information on this proposal, please consult CRS Report RL32612, *The* (continued...)

election. Section 4 established in the Constitution the joint candidacies currently provided in state law.<sup>19</sup> Section 5 empowered Congress to provide by law for: (1) the death of candidates prior to election day; and (2) any tie vote in a presidential election. This language appeared to give Congress broad authority in these situations, extending to such options as rescheduling elections in case of candidate vacancies that occurred close to election day, or providing for a second round election, or election by Congress, in the event of a tie. It is less clear whether the amendment would have made an implicit grant of authority to Congress to intervene in the process of replacing party candidates under such circumstances, a process which the parties historically have addressed through internal procedures. If so, this would have constituted a considerable departure from current practice and political tradition by empowering Congress to intervene in the internal workings of the political parties.

Section 2 contained three elements relating to voter qualifications. First, it specified that voters for President and Vice President “shall have the qualifications requisite for electors of Senators and Representatives....” This sentence built on, and explicitly extends to the presidential electorate, existing constitutional voter qualifications stated in Article I, Section 2 (for the House), and the 17<sup>th</sup> Amendment (for the Senate), and as further defined and guaranteed by the 14<sup>th</sup>, 15<sup>th</sup>, 19<sup>th</sup>, 24<sup>th</sup>, and 26<sup>th</sup> Amendments. Next, it empowered the states to set “less restrictive qualifications with respect to residence....” In contemporary practice, most states have reduced voting residence requirements to an average of 30 days. Since the states already possess the power to reduce or eliminate these periods, this section may perhaps be regarded as providing encouragement, admonishment, or a constitutional imprimatur to efforts to adopt shorter residency requirements for voters, or to eliminate them altogether. Finally, Section 2 sought to empower Congress to “establish uniform residence and age requirements.” Here again, this provision would have constitute a mandate for a potential expansion of congressional power. Voting residence requirements, as noted previously, have been traditionally a state responsibility, but the amendment would have vested in Congress authority to supersede state laws in this area, at least for presidential elections. Similarly, Congress would have been empowered by the amendment to establish a lower voting age for presidential elections.<sup>20</sup>

Section 6 of the proposed amendment set the time when it would come into force if ratified, that is, for the first presidential election that occurred one year or longer after the date of the amendment’s ratification. For instance, if the amendment were successfully proposed by Congress, and ratified by the states in 2009, it would be effective with the presidential election of 2012.

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<sup>18</sup> (...continued)

*Electoral College: Reform Proposals in the 108<sup>th</sup> Congress*, by Thomas H. Neale.

<sup>19</sup> See footnote 5.

<sup>20</sup> Although H.J.Res. 8 did not specify a vehicle by which Congress could effect these changes, statute law seems to be the likely candidate. Since the amendment referred explicitly to presidential elections only, a further constitutional amendment would probably be required if these provisions had applied to other elections as well, such as those for state and local elected officials.

H.J.Res. 8 was referred to the House Committee on the Judiciary on January 4, 2005, and to its Subcommittee on the Constitution on March 2. No further action was taken for the balance of the 109<sup>th</sup> Congress.

### **H.J.Res. 17.**

H.J.Res. 17 was introduced on February 9, 2005 by Representative Eliot Engel, and was cosponsored by Representatives Lane Evans, Barney Frank, Alcee Hastings, and Michael McNulty. The amendment would have provided for direct popular election of the President and Vice President, and also included various other election administration provisions.

Section 1 proposed to establish direct popular election of the President and Vice President by U.S. citizens. Its second sentence specified that U.S. citizens may vote in a state without regard to whether they reside in the state so long as they were registered in that state. The import of this sentence was not entirely clear; it did not prohibit state residence requirements for voting *registration*, but it appeared to supersede any residence requirement for the act of *voting* itself, at least in presidential elections.

The first part of Section 2 would have established procedures for: (1) state action on popular vote results; (2) transmission of returns to Washington; and (3) the joint session of Congress at which the state returns would be counted and the President and Vice President declared elected. This section would have superseded existing statutory provisions governing electoral votes contained in 3 U.S.C. 2-18. The second part of Section 2 would establish 40% of the popular vote as the minimum required to win the presidency. If no joint ticket of candidates for President and Vice President received at least this percentage, then the amendment required a second election, contested by the two sets of candidates who received the highest number of popular votes. This provision, which was intended to guarantee that any person elected President had the support of a substantial plurality, if not a majority, of the voters, was been included in many earlier reform proposals.

Section 3 would have required Congress to enact legislation that would: (1) establish presidential election day as a national holiday; and (2) set national standards for voting registration for the presidential elections. Both these provisions would have broken new ground for federal involvement in elements of election administration that have traditionally been the responsibility of state governments. Proposals to establish election day as a legal public holiday have been discussed for many years. Proponents argue that this would lead to higher voter participation rates, while opponents assert: (1) that it would have only limited effect, since the holiday would probably be observed primarily by public sector employees; (2) that there is no guarantee that time off would promote turnout; and (3) that the costs to federal, state, and local treasuries of a paid holiday would need to be weighed against any benefit obtained.<sup>21</sup> Proposals to establish national voter registration have also been

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<sup>21</sup> For further information, please consult CRS congressional distribution memorandum, *Making Election Day a Holiday or Moving Election Day to Saturday and Sunday: A Pro* (continued...)

considered in many Congresses over the years. Here again, this would arguably have constituted a potential for further involvement in functions once performed almost exclusively at the state level. On the other hand, the course of federal legislation over the past 20 years may argue that this could be part of an evolving trend. For instance, the Uniformed and Overseas Citizens Absentee Voting Act of 1986, the National Voter Registration Act of 1993, and the Help America Vote Act of 2002 all established national standards applicable to federal elections in the fields of voter registration and election administration.<sup>22</sup>

Section 4 would have established a timetable for the amendment, which would have become effective with the first presidential election held at least one year after the effective ratification date of the amendment.

Section 5, defined the term “state” as including “the several States, the District of Columbia, and any other Commonwealth, territory, or possession of the United States.” This section would thus have expanded the presidential vote to include such U.S. territories as Guam and the U.S. Virgin Islands, as well as the Commonwealth of Puerto Rico. It also arguably intended that the proposed amendment extend presidential voting to American Samoa, which is also a U.S. territory, and to the Commonwealth of the Northern Mariana Islands, which is in political union with the United States. It should be noted, however, that the inhabitants of American Samoa are U.S. nationals, rather than citizens, and the inhabitants of the Commonwealth of the Northern Marianas can be either U.S. nationals or U.S. citizens.

H.J.Res. 17 was referred to the House Committee on the Judiciary on February 9, 2005. No further action was taken for the balance of the 109<sup>th</sup> Congress..

### **H.J.Res. 36.**

H.J.Res. 36 was introduced on March 2, 2005, by Representative Jesse L. Jackson, Jr., and was cosponsored by Representatives Lloyd Doggett, Barney Frank and Fortney Pete Stark. Section 1 of the proposed amendment sought to provide for direct popular election of the President and Vice President, by the “citizens of the United States,” specifying a single vote for a joint candidacy for those offices. It further specified that the election shall be conducted “without regard to whether the citizens are residents of a state.” The implications of this latter provision were arguably substantial. For instance, it could be interpreted to require that state and local election authorities accept the vote of any person who could prove citizenship

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<sup>21</sup> (...continued)

*and Con Analysis*, by Kevin J. Coleman. Available to Members of Congress and congressional staff from the author.

<sup>22</sup> For further information, please consult CRS Report RS20764, *The Uniformed and Overseas Citizens Absentee Voting Act: Background and Issues*, by Kevin J. Coleman; CRS Report RL31105, *The National Voter Registration Act of 1993: History, Implementation, and Effects*, by Government and Finance Division; and CRS Report RL32685, *Election Reform: The Help America Vote Act and Issues for Congress*, by Eric A. Fischer and Kevin J. Coleman.

status, without regard to existing residence or voter registration requirements, thus superseding these systems.

Section 2 specified that the candidates who jointly receive the greatest number of votes shall be elected, provided that number is a majority. In this provision the proposed amendment differs from many direct election proposals; these more commonly require a 40% plurality, or a simple plurality, to win (see H.J.Res. 17). While establishing this majority requirement, H.J.Res. 36 omits any procedures for cases in which a majority is not obtained. The lack of such procedures could present problems in presidential elections wherein no candidate wins a majority.<sup>23</sup> On the other hand, Section 3 could arguably provide for such situations, and various others, as it would empower Congress to “enforce and implement this article by appropriate legislation.” This relatively broad legislative mandate could arguably be interpreted to include such non-majority elections, and other eventualities.

Section 4 would have established a timetable for the amendment, which would become effective with the first presidential election held at least one year after the effective ratification date of the amendment.

H.J.Res. 36 was referred to the House Judiciary Committee on March 2, 2005. No further action was taken during the balance of the 109<sup>th</sup> Congress.

#### **H.J.Res. 50.**

H.J.Res. 50 was introduced on May 12, 2005 by Representative Zoe Lofgren; Representatives Jim McDermott, Fortney Pete Stark, Jose E. Serrano and Lynn C. Wolsey joined as co-sponsors on the same day.

Section 1 of the resolution would have provided for election of the President by the people of the several states and the District of Columbia.

Section 2 would have established voter qualifications similar to those set by the Constitution for the House of Representatives, i.e., those who are eligible to vote for “the most populous branch of the legislature of the State....” The section also went further, however, by empowering Congress to establish uniform age qualifications to vote. This language would give Congress authority to change the voting age for the presidency by law.

Section 3 sought to incorporate the longstanding practice of joint presidential candidacies for into the Constitution, thus eliminating the potential for a President and Vice President of different parties or political groups. It also would have eliminated one of the more archaic features of the electoral college system by removing the prohibition against voting for only one candidate who might be from the same state as the elector. This provision was originally included in the

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<sup>23</sup> For instance, in four of the 12 elections held between 1960 and 2004, Presidents were elected with a plurality, but not a majority, of the popular vote (1960, 1968, 1992, and 1996). *America Votes 23: A handbook of contemporary American election Statistics* (Washington: CQ Press, 2001), pp. 9, 13, 17.



Constitution<sup>24</sup> to discourage presidential electors from voting for candidates only from their own states. The founders' intent here was to encourage, or rather require, electors to broaden their horizons to consider candidates from other parts of the nation, and is best understood in the context of the time. When the Constitution was written, there was little national political consciousness or community, and beyond George Washington, the "indispensable man," there were few, if any, nationally known political figures. The original language, as supplanted by that of the 12<sup>th</sup> Amendment, has generally been regarded as obsolete for many years, and this provision of Section 3, although it applies to voters, rather than presidential electors under the electoral college system, could be described as a minor perfecting change.

Section 4 would have established a simple plurality of popular votes as sufficient to elect. It makes no provision for vote threshold, or for a runoff election, although Section 6 would empower Congress to provide by law for procedures in the event of a tie vote.

Using language identical to that found in Article 1, Section 4, clause 1 of the Constitution concerning congressional elections, Section 5 of the proposed amendment sought to empower Congress to provide for the "times, places, and manner of holding such [presidential] elections..." This would supersede the existing language of Article I, Section 1, clause 5, which empowers Congress to "determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."<sup>25</sup> Arguably, the most important element of the proposed language was contained in the word "manner," which could be interpreted to include an exceptionally wide range of activities.

It could be argued that the changes proposed in Section 5 would have provided a necessary symmetry, giving Congress identical authority over both congressional and presidential elections, and again, that a broad national authority is required to administer a national election, insuring uniformity and equality of election rules and regulations in order to guarantee the fairest and most accurate expression of the public will. Opposition would have likely centered, again, on charges this provision would lead to the usurpation of traditional state and local functions; that, contrary to the above assertion, a "one size fits all" approach is not appropriate for a federal republic that embraces 50 different states and a federal district; and that a further potential outcome would be the imposition of costly "unfunded" mandates on the states and local governments.

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<sup>24</sup> "The Electors shall ... vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves: ..." U.S. Constitution, 12<sup>th</sup> Amendment. The language here is identical to that found in the original at Article II, section 1, clause 3 of the Constitution.

<sup>25</sup> The question of congressional authority over federal elections is discussed at greater length in CRS Report for Congress RL30747, *Congressional Authority to Standardize National Election Procedures*, by Kenneth R. Thomas. Interestingly, this report notes, in pages 3-6, recent court decisions concerning the Help America Vote Act (HAVA, P.L. 107-252) that suggest Congress already possesses this power.

In addition, Section 5 would also have provided Congress the additional authority to determine “entitlement to inclusion on the [presidential general election] ballot.” This provision could arguably have resulted in a further expansion of federal authority into an area traditionally left to the states. The states, through their legislatures, have controlled ballot access on all levels since the earliest years of organized political parties, and they have been criticized for almost as long on the grounds that the legislatures enact laws that favor established parties at the expense of new or minor parties and independent candidates. Although ballot access requirements for such candidates have eased in recent decades,<sup>26</sup> existing arrangements were criticized by proponents of the Perot candidacy in 1992, and by supporters of Ralph Nader’s two recent presidential bids, in 2000 and 2004.

Supporters of this proposal and others like it could argue that, here again, a federal standard is required to insure that existing minor parties, new parties, and independent candidates for the presidency are fairly represented on the ballot for our only national election. A broader range of choices, they might suggest, would stimulate public interest in and debate on policy alternatives, leading to a more engaged national electorate, and increased voter turnout. Conversely, opponents could raise arguments against congressional interference in what has traditionally been a state and local responsibility. A single standard for ballot access, they might argue, would be awkward and perhaps unworkable in a nation with such diverse local political traditions and cultures. It would enhance national power at the expense of the federal principle, and, as noted earlier, would lead to the imposition of “unfunded” mandates on the states and local governments. Finally, they might suggest that Congress, like the state legislatures, is also dominated by the two major parties, and it, too might be influenced to use power over ballot access to discriminate against — or in favor of — different groups for political purposes.

Another interesting point in connection with Section 5 of H.J.Res. 50 was the particular language similar to that of H.J.Res. 8 granting Congress authority over “the times, places and manner of holding such elections and entitlement to inclusion on the ballot”. It stated that all these objects “shall *be determined* by Congress [emphasis added]”, rather than the more common formulation “Congress shall *provide by law* [emphasis added]...” The appropriate vehicle would seem to be public law, but the question could be raised as to the intent and implications of this wording: was the difference inadvertent or intentional? If so, could it be interpreted to provide some vehicle *other* than public law by which Congress could exercise these powers?

Section 6 would have given Congress the power to provide by law for instances in which any candidate died or was disqualified before the election, or if there were a tie in the popular vote. The former provision, if exercised, could have affected existing party procedures for filling vacancies on the ballot prior to the election.<sup>27</sup>

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<sup>26</sup> The 1980 independent candidacy of Rep. John B. Anderson, in particular, resulted in a range of court decisions striking down some of the more stringent state requirements.

<sup>27</sup> For additional information on these procedures, consult CRS Report RL32969, *Presidential Succession: An Overview with Analysis of Legislation Proposed in the 109<sup>th</sup>* (continued...)

Here again, the language appeared to give Congress broad authority in these situations, extending to such options as rescheduling elections in case of candidate vacancies that occurred close to election day, or providing for a second round election, or election by Congress, in the event of a tie. As noted above, it is less clear whether the amendment would have made an implicit grant of authority to Congress to intervene in the process of replacing *party nominees* under such circumstances, a process which the parties historically have addressed through internal procedures. If so, this would have constituted a considerable departure from current practice and political tradition by empowering Congress to intervene in the internal workings of the political parties.

Section 7 was technical, prescribing that the amendment would be effective “one year after the first day of January following ratification.”

H.J.Res. 50 was referred to the House Committee on the Judiciary on May 12, 2005. No further action was taken during the balance of the 109<sup>th</sup> Congress.

### **S.J.Res 11.**

S.J.Res. 11 was introduced by Senator Dianne Feinstein on March 16, 2005, and has been cosponsored by Senator Barbara Boxer. Section 1 of this proposal sought to establish direct popular election of the President and Vice President, eliminating the electoral college system.

Section 2 would have established the same voting qualifications for President as for Representative in Congress, in effect citizens 18 years of age or older. The section continued with language almost identical to that of H.J.Res. 8, allowing the states to set “less restrictive” residence qualifications, and also empowering Congress to establish uniform residence and age qualifications for voters in presidential elections. Here again, this language would have offered the potential for a considerable expansion in federal authority over aspects of election previously exercised by the states. As noted previously in this report, most states have reduced voting residence requirements to an average of 30 days. Since the states already possess the power to reduce or eliminate these periods, this section may perhaps be regarded as providing encouragement, admonishment, or a constitutional imprimatur to efforts to adopt shorter residency requirements for voters, or to eliminate them altogether.

Finally, Section 2 also empowered Congress to “establish uniform residence and age requirements.” This provision would have constituted a mandate for a potential broad expansion of congressional power. Voting residence requirements, as noted previously, have been traditionally a state responsibility, but the amendment would have vested in Congress authority to supersede state laws in this area, at least for presidential elections. Similarly, Congress would have been empowered by the amendment to establish a lower voting age for presidential elections. Section 2’s last

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<sup>27</sup> (...continued)

*Congress*, by Thomas H. Neale. See especially under “Succession During Presidential Campaigns and Transitions.”

sentence sought to empower Congress to establish qualifications for voters in the “district constituting the seat of government of the United States,” that is, the District of Columbia. This provision would not have added to Congress’s powers, since Article I section 8 of the Constitution already establishes congressional authority “To exercise exclusive Legislation in all Cases whatsoever” over the seat of government.

Section 3, in its first sentence, would have confirmed and enhanced congressional authority over scheduling for presidential elections, giving it the power to determine the “time, place, and manner” of holding such elections, language similar to that governing elections for Representatives and Senators. Also, existing language in Article 2, section 1, clause 4 of the Constitution currently states, “The Congress may determine the Time of chusing the Electors and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.”

This section of the proposed amendment would also have empowered Congress to regulate the process of counting votes and declaring the results in law. Of these two functions, the former has traditionally been performed in the states and localities according to state requirements. The grant of authority in this case would have enabled Congress to establish by law uniform requirements for vote tabulation, and, by extension, for challenges, recounts, and other related activities.

Two points are suggested here. First, as noted elsewhere in this report, legislation establishing broader federal control over the election administration process might be criticized both as an unfunded federal mandate, as well as an intrusion into responsibilities traditionally performed at the state and local level. A second point is that the amendment, if ratified, would cover only elections for President and Vice President, leaving the potential for a cumbersome two-tiered structure of election laws and practices, one for presidential elections, and another for congressional, state, and local contests. In response, it could be argued that presidential elections are the ultimate expression of the voters’ will in the United States, and that they are properly regulated at the federal level. Moreover, such arguments could continue, the recurrence of election irregularities or allegations of irregularities in 2004 make a compelling case for a simple, nationwide process to govern this most important exercise in democratic self rule. With respect to a two-tiered system of election administration, such a cumbersome and costly structure would almost certainly be avoided by states, which would likely conform their practices to those enacted by Congress.

Finally, it could be noted that this and other arguably controversial grants of potential authority over election administration to Congress could only be accomplished “by law,” a requirement that brings into play all the time-honored elements of the nation’s system of legislative checks and balances.

Section 4 would have established within the Constitution the longstanding practice of joint candidacies for President and Vice President. As noted elsewhere in this report, this would prevent the anomaly of a President and Vice President of different parties. In the interests of uniformity, the section also required that the same two candidates would appear as a team on the ballot in every state.

Section 5 of the proposed amendment also followed the example set in H.J.Res. 8. It would have empowered Congress to provide, again by law, for the death of any candidate, or for a tie vote in the election. Here again, as noted earlier in this report, this language arguably appeared to give Congress broad authority in these situations, extending to such options as rescheduling elections in case of candidate vacancies that occurred close to election day, or providing for a second round election, or election by Congress, in the event of a tie. It is less clear whether the amendment would have made an implicit grant of authority to Congress to intervene in the process of replacing party candidates under such circumstances, a process the parties historically have addressed through internal procedures. If so, this would have constituted a considerable departure from current practice and political tradition by empowering Congress to intervene in the internal workings of the political parties.

Section 6 included standard language providing that the amendment would come into force one year after “the twenty-first day of January following ratification.”

S.J.Res. 11 was read twice in the Senate on March 16, 2005, and immediately referred to the Senate Committee on the Judiciary. No further action was taken during the balance of the 109<sup>th</sup> Congress.

## Concluding Observations

### Trends in Electoral College Reform Proposals.

Although the volume of electoral college reform proposals introduced has remained generally steady over the past several Congresses, two trends are noticeable to the long term observer. First, the volume of proposed amendments that would *reform* the electoral college, as opposed to those that would *eliminate* the electoral college and substitute direct popular election, has declined almost to zero. Second, the scope of proposed direct popular election amendments is arguably evolving in the direction of greater complexity and detail.

It is unclear whether the first development reflects a decline in support for the electoral college (either as it exists or reformed), a lack of organized interest in these reform proposals, or simply the absence of a sense of urgency on the part of Members who might be inclined to support or defend the current system in some form. It is arguable, indeed likely, that, if a direct election amendment gained broad congressional support and began to move through Congress toward proposal to the states, Members who support the current system in some form would coalesce in ad hoc groups to defend the electoral college. Alternatively, they might be spurred by the prospect of action to propose reform measures. This was the case the last time a direct election amendment came to the floor (in the Senate), during the 95<sup>th</sup> Congress (1979-1980).<sup>28</sup>

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<sup>28</sup> For an account of action in both the 94<sup>th</sup> and 95<sup>th</sup> Congresses, consult Neal R. Peirce and Lawrence P. Longley, *The People’s President: The Electoral College in American History and the Direct Vote Alternative*, rev. ed. (New Haven, CT: Yale University Press, 1981), pp. 198-206

Another apparent trend is that more recent reform proposals go beyond the concept of simply substituting direct election for the electoral college. In the past two to three Congresses, these amendments have been more likely to include provisions that would enhance and extend the power of the federal government to regulate in such areas as residence standards, definition of citizenship, national voter registration, inclusion of U.S. territories and associated areas in the presidential election process, establishment of an election day holiday, ballot access standards for parties and candidates, etc.<sup>29</sup> This trend almost certainly reflects frustration on the part of many voters and their elected representatives over the uncertainties and inconsistencies in local election administration procedures that were revealed in the 2000 and 2004 presidential elections. If the amendments in which such proposals have been incorporated were proposed and ratified, they could be used to set broad national election standards (provided such legislation were enacted) which would supersede many current state practices and requirements.

This eventuality raises two possible issues. The first is the question of whether such federal involvement in traditionally state and local practices would impose additional costs on state and local governments, and thus be regarded as an “unfunded mandate.” One response by the state and local governments might be to call for federal funding to meet the increased expenses imposed on them by federal requirements. Precedent for this exists in the grant program incorporated in HAVA. A second issue is related, and centers on perceptions as to whether such an amendment would be regarded as federal intrusion into state and local responsibilities. For instance, a more far-reaching scenario might include the gradual assumption of the entire election administration structure by the federal government. In this hypothetical case, questions could be raised as to: (1) the costs involved; (2) whether a national election administration system could efficiently manage all the varying nuances of state and local conditions; and (3) under these circumstances, what would be the long term implications for federalism? Conversely, it could be argued that a national election administration structure is appropriate for national elections, and that state or local concerns are counterbalanced by the urgent requirement that every citizen be enabled and encouraged to vote, and that every vote should be accurately counted.

### **Prospects for Change in the Contemporary Context.**

Some observers assumed that action of the electoral college in 2000, in which George W. Bush was elected with a slight majority of electoral votes, but fewer popular votes than Al Gore, Jr., would lead to serious consideration of proposals to reform or eliminate the electoral college. Notwithstanding these circumstances, however, none of the proposals introduced in either the 107<sup>th</sup> through 109<sup>th</sup> Congresses received more than routine committee referral.<sup>30</sup> In the 107<sup>th</sup> Congress, attention focused on proposals for election administration reform, resulting in

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<sup>29</sup> See, for instance, H.J.Res. 17 and S.J.Res. 11, above, and H.J.Res. 103 and H.J.Res. 109 in the 108<sup>th</sup> Congress.

<sup>30</sup> For further discussion of the hurdles faced by electoral college reform proposals, see CRS Report RL30844, *The Electoral College: Reform Proposals in the 107<sup>th</sup> Congress*, by Thomas H. Neale.

passage of the Help America Vote Act (P.L. 107-252, 116 Stat. 1666) in 2002. This legislation, as noted earlier in this report, substantially extended the role of the federal government in the field of voting systems and election technology through the establishment of national standards in these areas and the provision of aid to the states to improve their registration and voting procedures and systems.<sup>31</sup>

Other factors may also contribute to the endurance of the electoral college system. Perhaps foremost is the fact that the U.S. Constitution is not easily amended. Stringent requirements for proposed amendments, including passage by a two-thirds vote in each chamber of Congress, and approval by three-fourths of the states, generally within a seven-year time frame, have meant that successful amendments are usually the products of broad national consensus, a sense that a certain reform is urgently required, or active long-term support by congressional leadership.<sup>32</sup> In many cases, all the aforementioned factors contributed to the success of an amendment.<sup>33</sup> Further, while the electoral college has always had critics, its supporters can note that it has ratified the people's choice in 47 of 51 presidential elections held since ratification of the 12<sup>th</sup> Amendment, a success rate of 92.2%.<sup>34</sup>

In the final analysis, given the high hurdles — both constitutional and political — faced by any proposed amendment, the electoral college system seems likely to remain in place unless or until its alleged failings become so compelling that large concurrent majorities in Congress, the states, and among the public, are disposed to undertake its reform or abolition.

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<sup>31</sup> For additional information on the Help America Vote Act, please CRS Report RL23685, *Election Reform: The Help America Vote Act and Issues for Congress*, by Eric A. Fischer and Kevin J. Coleman.

<sup>32</sup> Article V of the Constitution also provides for amendment by a convention, which would assemble on the application of the legislatures of two-thirds of the states. Any amendments proposed by such a convention would also require approval of three-fourths of the states. This alternative method, however, has never been used.

<sup>33</sup> These conditions have been met in some cases only after a long period of national debate; for example, the 19<sup>th</sup> Amendment, which extended the right to vote to women, was the culmination of decades of discussion and popular agitation. In other instances, amendments have been proposed and ratified in the wake of a sudden galvanizing event or series of events. An example of this may be found in the 25<sup>th</sup> Amendment, providing for presidential succession and disability, which received a tremendous impetus following the 1963 assassination of President John F. Kennedy.

<sup>34</sup> The exceptions, as noted earlier, were the elections of 1876, 1888, and 2000, when candidates were elected who had a majority of electoral votes, but fewer popular votes than their major opponents. The one case in which the electoral college was hopelessly deadlocked occurred in 1824, when contingent election resolved an electoral college deadlock. Even in this case, the President, John Quincy Adams, was able to govern successfully, despite criticism that he was selected in the House of Representatives.