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The Electoral College: Options for Change and 117th Congress Proposals

Electoral College: The Basics

American voters elect the President and Vice President of the United States indirectly: they vote in their states and the District of Columbia for presidential electors pledged to the candidates of their choice. The electors are known collectively as the electoral college. Article II, Section 1 of the U.S. Constitution assigns to each state a number of electors equal to the total of the state's Senators and Members of the House of Representatives, a total of 538 at present, including three electors for the District of Columbia provided by the Twenty-third Amendment. The Twelfth Amendment requires that candidates for President and Vice President each win a majority of the electoral votes cast for their office to be elected. Candidates for the office of presidential elector are nominated by the state political parties. In 48 of 50 states, the candidates winning the most popular votes win all the state's electoral votes, the general ticket or "winner-take-all" (WTA) system; Maine and Nebraska are the only exceptions, awarding electoral votes on combined statewide and congressional district totals. For further information see CRS Report RL32611, *The Electoral College: How It Works in Contemporary Presidential Elections*.

Electoral College: The Record

Since the first presidential election was conducted under the Twelfth Amendment in 1804, the electoral college has delivered a majority of electoral votes to candidates for President and Vice President in 54 of 55 contests, a rate of 98.2%, measured by winning a majority of *electoral* votes. When measured by electoral *and* popular votes, it has delivered the presidency to the candidates who won a majority of electoral votes *and* a plurality or majority of popular votes in 45 of 50 elections—a rate of 90.0%—held since the election of 1824, the first for which relatively complete *popular* vote returns are available. Over time, consistency between the electoral and popular vote winners has come to be seen by some as a second measure of the system's success, as the states provided for choice of presidential electors by the voters. Contemporary press and media coverage, for instance, tends to focus on both the popular vote campaign and the electoral college in the states. The exceptions here are four presidential elections—1876, 1888, 2000, and 2016—in which candidates were elected who won a majority of electoral votes, but fewer popular votes than their principal opponents. In a fifth election, 1824, none of four major candidates won a majority of electoral or popular votes. This instance led to contingent election of the President in the House of Representatives. For information on contingent election, see CRS Report R40504, *Contingent Election of the President and Vice President by Congress: Perspectives and Contemporary Analysis*.

Electoral College Reform: Pro and Con

The performance of the electoral college has not protected the system from criticism and demands for change. More than 700 proposals to reform or abolish it have been introduced in Congress since 1800.

A major criticism centers on the Constitution, which provides for indirect election of the President and Vice President by electors, rather than voters. Indirect election, critics assert, was acceptable in the 18th century, but is incompatible with the norms of contemporary democratic government in the United States. A second constitutional criticism is that the system has elected Presidents who won the electoral college but who received fewer popular votes than their opponents, most recently in 2000 and 2016. Here again, reform advocates maintain that this is irreconcilable with the democratic principle of majority rule. Another criticism is that faithless electors occasionally vote for candidates other than those to whom they are pledged. In 2020, however, the Supreme Court ruled (in *Chiafalo v. Washington*) that laws in approximately 32 states and the District of Columbia requiring electors to pledge to vote for their parties' nominees for President and Vice President, 15 of which provide penalties for or replacement of faithless electors, are constitutionally valid. For further information and a legal analysis, see CRS Legal Sidebar LSB10515, *Supreme Court Clarifies Rules for Electoral College: States May Restrict Faithless Electors*.

Additional structural critiques assert that the system's allocation of electoral votes provides an advantage to less populous states, and that it does not account for changes in state population between each census-driven decennial reapportionment of Representatives (and therefore electors). A widely criticized nonconstitutional feature of the electoral college is the WTA system used in 48 states and the District of Columbia. In WTA states, the candidates winning the most popular votes in a state take all the state's electoral votes, no matter how close the popular vote margin. Critics claim WTA thus disenfranchises voters who choose the losing candidates. They also assert that the system facilitates various "biases" that are alleged to favor different states and groups, for example, the alleged electoral college "lock," a questionable phenomenon that is claimed to have provide a nearly insuperable electoral college advantage to one or the other of the political parties at various points in time.

Electoral college defenders assert that the system is durable because of its record of performance, noting that it has delivered an electoral vote majority in 54 of 55 presidential elections since 1804, and an electoral college winner who also received a popular vote plurality or majority in all but

five of those elections. They also maintain that it is democratic because presidential electors are popularly elected. From a practical standpoint, they claim that it is a key support of the federal system, that it has contributed to a stable and moderate political party system, and that by tending to magnify electoral vote margins, WTA actually enhances the winning candidate's legitimacy.

Prospects for Change

Because many of the electoral college system's procedures are set by the Constitution, it would take a constitutional amendment to revise or replace them. The Constitution, however, is not easily amended: proposal by Congress requires a vote by two-thirds of Senators and Representatives, followed by ratification by three-fourths of the states. In addition, amendments adopted since the 18th Amendment have usually included a seven-year ratification deadline. According to the Senate Historian, approximately 11,770 amendments were introduced between 1789 and 2019; 33 were proposed by Congress, and 27 have been ratified. Congress actively considered electoral college reform or replacement from the 1940s through the 1970s, but no proposed amendment reached the floor of either chamber after 1979. Since the 2016 election, congressional interest has revived, focusing on amendments that would replace the electoral college system with direct popular election.

Reform Options

Reform options include proposals to retain the basic electoral college system; these would eliminate the office of presidential elector but retain electoral votes. Beyond this common feature, three principal options for reform have been proposed over time: (1) the automatic plan, which would mandate the general ticket WTA system in all states and the District of Columbia; (2) the district system, currently adopted in Maine and Nebraska, which would allocate electoral votes by congressional district and at-large in each state; and (3) the proportional system, which would award electoral votes in direct proportion to the percentage of votes gained by the competing candidates in each state.

Since the late 20th century, most electoral college proposals would eliminate the system entirely and replace it with direct popular election of the President and Vice President, with either a plurality or majority of the popular vote necessary to win.

Direct popular election proposals fall into two categories; the first includes resolutions that would establish direct popular election but otherwise make few other changes in the presidential election process.

The second category would establish direct popular election, and would also enable Congress to provide by law for enhanced federal authority over a range of election-related issues. Some of these elements include authorizing Congress to provide by law for (1) the times, places, and manner of holding presidential elections; (2) uniform residence standards; (3) vacancies in presidential candidacies; (4) a definition of citizenship for the purposes

of voting; (5) national voter registration; (6) inclusion of U.S. territories in the presidential election process; (7) establishment of an election day holiday; and (8) congressionally legislated federal ballot access standards for parties and candidates.

An Enlarged Federal Role in Presidential Elections?

Electoral college supporters arguably would oppose any proposal to eliminate the system for reasons cited earlier in this document, but they might express added concern about the prospect of increased federal authority over presidential election administration. Their questions might include the following: Would federal involvement in traditionally state and local practices impose additional responsibilities and uncompensated costs on state and local governments? Would the states' expenses be compensated by federal assistance? Would an enlarged federal role in election procedures constitute an intrusion in responsibilities traditionally carried out by state and local governments? Would a federalized election administration system be able to manage efficiently the wide range of differences in state and local conditions? Would there be long-term negative implications for federalism?

Conversely, proponents might assert that enhanced federal authority in the context of direct popular election would be appropriate for national elections. In the 117th Congress, H.R. 1, the For the People Act of 2021, includes relevant provisions. See CRS In Focus IF11097, *H.R. 1: Overview and Related CRS Products*, for further information.

117th Congress Reform Measures

One joint resolution proposing direct popular election has been introduced to date in the 117th Congress.

H.J. Res. 14

This resolution was introduced on January 11, 2021, by Representative Steve Cohen and eight cosponsors. It was referred to the House Judiciary Committee on the same day. The resolution contains specific proposals for the establishment of direct election. To date, there has been no further action.

It would (1) provide for direct election of the President and Vice President by the people; (2) define voters as "electors of the most populous branch" of the state legislature in each state; (3) empower Congress to set "uniform age qualifications"; (4) formalize the joint candidacy of President and Vice President on the same ticket; (5) declare the candidates winning "the greatest number of votes" to be elected; (6) authorize Congress to provide for the "times, places, and manner of holding such elections and entitlement to inclusion on the ballot"; and (7) authorize Congress to provide by law for the case of death of a candidate or a candidate's departure from the ticket. The resolution sets a seven-year deadline for ratification.

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