Department of Justice

Statement

by

Nicholas deB. Katzenbach
Attorney General
of the United States

on

Electoral College Reform

Prepared for Delivery
Before the
Subcommittee on Constitutional Amendment
of the
Senate Judiciary Committee

March 8, 1966

Mr. Chairman and Members of the Committee:

I am pleased to appear before this Subcommittee today. Largely through its efforts Congress has adopted, and the States are presently in the process of ratifying, two of the three major recommendations made in the President's special Message to the Congress in January, 1965, to correct "conspicuous and long-recognized defects" in the Constitution as they relate to the Office of the Presidency. There remains only the recommendation for reform of the electoral college system, a recommendation that was strongly reaffirmed by the President in his special message to Congress on January 20, 1966.

Of the various proposals for reform of the Presidential election system, the one which the Administration endorses is that embodied in S.J. Res. 58, introduced by the chairman of this Subcommittee, which is substantially identical to the proposal which the late President Kennedy introduced as Senator in the 85th Congress (S.J. Res. 132). The proposal is designed to correct the specific defects that have been revealed in the present system without fundamentally altering the method of electing the President that has served the nation so well in the past.

The various proposals before the subcommittee, although generally described as providing for electoral college reform, in fact deal with three distinct matters. The first is the method by which the people elect a President--i.e., the electoral college system as such. The second is the method by which the President is chosen when the popular election is indecisive--i.e., the "contingent election" in the House. And the third is the provision made for the death of a candidate before inauguration. As to each I will consider the existing system, its defects, and the remedies proposed.

I. Reform of the Electoral College System

A. The present system

The manner of selecting the President gave the Framers of the Constitution much difficulty. Direct election by the people, it was feared, would produce turmoil and confusion and, in addition, deprive the smaller States of any effective voice. Election either by the Congress or by the State legislatures, on the other hand, was opposed because it would deprive the President of independence. The compromise adopted was to provide for election of the President by an independent body of electors, appointed in each State, in such manner as its legislature might direct, to serve that one function only. It was hoped, as Hamilton noted, that distinguished citizens would be chosen as electors and that they in turn, exercising an informed and independent judgment free from the stress and excitement of

political campaigns, could be counted on to select a person well qualified for the office. The Federalist, No. 68 (Cooke Ed.), pp. 458-460. The fears of the smaller States were allayed by giving each State an extra two electors regardless of size, and the independence of the President was to be assured by the transience of the electing body.

In practice, of course, the electoral college system never operated in the manner envisioned by its framers. Few voters knew or cared who the electors were, and they were seldom selected in a manner inspiring confidence in their superiority of judgment. Instead, national parties arose and the electors became mere figureheads pledged to cast their votes for the party nominees on whose ticket they ran. State laws providing for the short ballot and related devices institutionalized the practice. See Wilkinson, The Electoral Process and the Power of the States, 47 A. B. A. J. 251, 253-254 (1961). The end result was the system we know today, with the people voting directly for the President and Vice President and with all of each State's electoral votes being cast automatically for the candidate receiving the greatest number of the popular votes in that State.

B. Deficiencies

The system thus evolved, though not the original intent of the framers, has by now become deeply imbedded in our system of government. For the most part, it has worked well. Its most serious deficiency is simply its lack of constitutional sanction, a lack which makes it both dependent on the voluntary action of the States and subject to possible manipulation by the electors.

The risk that a State or its electors will depart from established custom and exploit the constitutional independence of the electors is not fanciful. In 1948, a Tennessee elector, running on both the Democratic and States Rights tickets, voted for the States Rights candidate even though the Democratic candidate had a substantial plurality in the State. In 1960, Alabama and Mississippi elected 14 unpledged electors who then voted for a person who was not even a Presidential candidate--as did also an Oklahoma elector who had been elected on the Republican ticket. New York Times Election Handbook 1964, p. 122. To be sure, such departures from the customary practice have been rare. But so long as there exists the possibility of unpledged electors, or of electors who ignore their pledge, there will always be a grave risk that their Constitutional independence will be exploited and that their votes, however few, will be manipulated in a close race to block the election of a major candidate in order to throw the election into the House of Representatives.

The constitutional independence of the electors would create a particularly acute problem, moreover, were a candidate to die after the November elections but before the electors voted in December, as did Horace Greeley in 1872. The result would be to free the electors from their pledge and leave them free to vote as they might choose: they could vote for their party's candidate for Vice President or some other person designated by their party; they could vote for someone of their choosing; or they could simply scatter their votes among the other candidates, as did most of the Horace Greeley electors. If no other candidate had a majority of the electoral votes, the result would be to place the balance of power in the selection of a President in a group of men who had been elected merely as figureheads.

The electoral college system of electing a President having been replaced in practice by a direct popular election, there can be no justification for continuing the constitutional powers of the electors, powers which today perform no legitimate function but nevertheless remain as a potential means of frustrating the will of the people.

C. S.J. Res. 58

S.J. Res. 58 would remedy that defect in the existing Constitution by abolishing the office of elector and requiring the electoral votes of each State to be cast automatically for the candidates receiving the greatest number of votes in that State. Thus it would do no more than write into the Constitution the system that now exists in practice but without constitutional protection. The electoral votes given to each State would be unchanged and, as now, they would be cast as a unit for the candidates winning a plurality of that State's popular vote. The only effect would be to eliminate the latent power of a State or of an individual elector to depart from the customary practice. The need for that change is, I think, almost universally conceded, and it is the very minimum that is required to protect Presidential elections from the grave risks to which they are now exposed.

D. Other Proposals

The other proposals before the Subcommittee would go much further. Instead of merely giving constitutional protection to the existing system of electing the President, they would change the basic system itself. The proponents of such changes, it seems to me, have a heavy burden. The existing system is familiar and has worked well, and there does not now exist any widespread sentiment in favor of a change in its basic structure. Any change in the distribution of electoral power must inevitably create new

forces that would significantly influence our political institutions. The effects of such changes can never be fully predicted; and those that can be seem to me undesirable. On a matter of such basic importance to the welfare of our country, we ought not abandon the familiar and workable for the new and untried without the clearest sort of demonstration of its inadequacies, and in my judgment no such demonstration has been made.

1. One of the most popular plans--which, indeed, once passed the Senate (in 1950), although it was over-whelmingly defeated in the House--is the "proportional" plan embodied in S. J. Res. 7, introduced by Senators Sparkman and Saltonstall. Under it, the electoral votes of a State, instead of being cast as a unit for whoever received a plurality of the popular vote in that State, would be divided among the candidates in proportion to each candidate's share of the popular vote. The effect would be similar to a national plebiscite in that each voter's vote would directly affect the final national tally; it would differ in that the weight accorded each vote would differ from State to State--e.g., a voter in Alaska would in effect cast 1/20,000 of an electoral vote, while a voter in New York would cast 1/170,000 of an electoral vote.

There are at least two major predictable effects that such a proposal would have. First, it would greatly reduce the importance of the States in the election and work a significant shift in political power from the States with large urban populations, where the two-party system is strongly competitive, to the rural States and perhaps to those few States with historically a one-party political structure. The extra two electoral votes given to each State regardless of population already gives the smaller States power disproportionate to population, but it is now counterbalanced somewhat by the effect of the unit rule. Were the unit rule to be abolished while retaining the present distribution of the electoral votes, the imbalance would be greatly magnified. Moreover, the small rural States now enjoy an advantage disproportionate to population in representation in the legislative branch, and depriving the large urban States of the power they exercise in Presidential elections would leave them with too little influence in our political system. Considering the legislative and executive branches together, the present system has produced a delicate balance of power among the States. Whatever its defects in theory, it has proved satisfactory in practice, and it can be tampered with only at a grave risk of seriously upsetting the balance with results we cannot foresee.

The second predictable effect of the proposal is that it would weaken the two-party system and encourage the development of splinter groups. At present, minor parties can have little effect on Presidential elections, since they must capture an entire State's electoral votes to have any impact on the final outcome. Under a proportional system, however, just as under a

national plebiscite, each vote for any candidate would enter into the final tally, thus permitting a relatively small minority vote, distributed among a number of States, to block the election of either of the major candidates. Even were the requirement of an absolute majority of the electoral vote to be relaxed--as some have proposed--there would remain a much increased incentive for the development of splinter groups or a third party. In theory, of course, there may be arguments in favor of a multi-party system. Once again, however, I would take experience as our guide, and the experience of countries with multi-party systems can hardly be reassuring. The two-party system works and works well, and I would view with the greatest concern any change in the method of electing the President that would tend to weaken or undermine that system.

Because it would both seriously affect the existing balance of power among the States and jeopardize the two-party system, therefore, the proportional plan seems to me to be clearly objectionable.

During the 1956 debates on electoral college reform, then Senator Kennedy summarized the disadvantages of proportional voting plans as follows (102 Cong. Rec. 5251):

> "The importance of State lines in presidential elections would be severely reduced; the likelihood of Presidents being elected with less popular votes than their opponent would be greatly increased; the prospects for obtaining a President with broad experience in a large State would be reduced; the overrepresentation in the Government of the small rural areas of the country would be tremendously increased; the effective electoral strength of most States would be greatly distorted; voting interest in those States would be sharply reduced; the one-party system in other States would be greatly intensified, with incentive for fraud and additional franchise restrictions; Federal voting standards would be invited; splinter parties would be greatly encouraged; hairbreadth elections, with all of their divisive effects, would be made more frequent; the chances for victory of the Republican Party, and consequently the strength of the two-party system, would be permanently ended; and the election of a President and Vice President from different parties would again be made possible."

2. A slightly different proposal is the "national election" plan under which electoral votes, and the role of the States, would be eliminated entirely and the President would be elected directly by the people in a nation-wide election. An example is the proposal contained in S. J. Res. 4, introduced by Senators Margaret Chase Smith and Aiken. Since it

differs from the "proportional" plan only in that votes in every State would have the same weight, the same basic objections are applicable to it. Since the discard of the unit rule would be accompanied by an elimination of the disproportionate number of electoral votes given smaller States, the shift of power from the large urban States might be somewhat less, but it would still be substantial. And, if anything, the plan would weaken the two-party system even more than the "proportional" plan. Indeed, I would say that it almost assures splinter parties.

An additional feature of the "national election" plan that would probably be objectionable to most States is that there would be strong pressures on the States to lower voter qualifications. While I am in favor of eliminating obstacles to the franchise, the national election plan would also increase the pressure for national voting standards. With the popular vote in each State being translated into a fixed number of electoral votes regardless of the number of persons voting, differences in voting qualifications among the States do not directly affect the ultimate outcome. But with the popular vote being counted on a national basis, the number of persons voting in each State would directly determine the influence of that State's voters on the final outcome. Unless uniform voting qualifications were adopted, therefore, the States with more restrictive qualifications would be disadvantaged. Moreover, if the election is to be a truly national one, with State boundaries otherwise playing no part, it would be difficult to justify permitting 18-year-olds, for example, to vote in one State but not in another. While I would not object to having 18-year-olds vote, many state legislatures do not as yet share that view.

Apart from these objections, it is most unlikely that this plan, regardless of its theoretical appeal, will be adopted since it deprives the small States of the advantage they now enjoy of having two extra electoral votes (for their two Senators) regardless of their population. The Subcommittee will recall that in 1956, the Senate decisively defeated a proposed amendment embodying the direct election plan - the vote was 66 to 17.

3. The third proposal for changing the method of electing the President is the "district" plan, an example of which is embodied in S.J. Res. 12, introduced by Senator Mundt and eight co-sponsors. Under that proposal, each State would continue to have the same total number of electoral votes, but only two of them would be cast on the basis of a State-wide election and the others would be cast on the basis of an election in each Congressional (or equivalently-sized) district. */

*/ S.J. Res. 12 would not abolish the office of elector, but the electors would be constitutionally bound to vote for the candidate on whose ticket they ran, producing the same effect.

To some extent, the "district" plan would move in the opposite direction from the "national election" and "proportional" plans. Whereas the latter would enlarge the unit in which popular elections are held from the State to the nation, S.J. Res. 12 would narrow it from the State to the Congressional districts. Instead of focusing on national problems in a national campaign, the emphasis would to a considerable degree be shifted to matters of local concern within a particular district. I see no point to localizing a national election. The principal effect of S.J. Res. 12 would be, I judge, to expand the influence of rural areas at the expense of the cities. To some, of course, that is its virtue, but to others it is a vice. Certainly, however, there is not now a consensus in the country that the rural areas are underrepresented in the government, at either the State or national level.

S.J. Res. 12, to be sure, requires the "elector" districts to be "compact and contiguous" and to be as equal as practicable in population. But even assuming that restriction could be enforced, there would remain an almost infinite number of ways in which a State could be divided into "compact and continguous" districts. Senator Kefauver, after a careful study of the matter, concluded that even with requirements of compactness and contiguity, boundaries could "still be drawn for political advantage". And while, as he also noted, "neither party has a monopoly on this sort of thing," densely populated metropolitan areas "are obviously more vulnerable to this divide and conquer partitioning." Kefauver, The Electoral College: Old Reforms Take on a New Look, 27 Law & Contemp. Prob. 188, 199 (1962).

Finally, since a minority or splinter party would need to capture only a district to influence the final outcome, the district plan, like the other plans--though perhaps to a somewhat lesser extent--would encourage the development of third parties or splinter groups and weaken the two-party system. I have already voiced my concern at any such development, and that objection is likewise applicable to the district system.

In addition to those specific objections to the plans to change the method of electing the President, I should like to reemphasize the point that any change in so delicate a matter is likely to have influences, for good or ill, that cannot wholly be foreseen. That alone is enough to counsel against any such change until the demonstrated need for it has become overwhelming, which surely is not the case today. I would add one practical point: Whatever their theoretical merits, I think it clear that there is not now, nor is there likely to be, any consensus in favor of any one of the competing plans for fundamental changes. In my judgment, the reforms proposed by S.J. Res. 58 are the most there can be any hope of having adopted. Those reforms are urgently needed and their desirability, as far as they go, is almost universally conceded. While I respect the views of those who like to have more thorough-going reforms, it is my hope that their advocacy of more drastic changes will not be at the expense of jeopardizing the attainment of the beneficial objectives of S.J. Res. 58, for which there is both a great need and overwhelming public support.

II. The Contingent Election

A second area in which reform is needed is in the method of selecting the President and Vice President when the popular vote is indecisive -- i. e., when no candidate receives a majority of the electoral votes cast on the basis of the popular vote. To be sure, an election has actually been thrown into the House only twice in our history--in 1800 and 1824-- and the first instance was attributable to a defect that has since been corrected by the 12th amendment. The threat is ever present, however, and in 1948 a contingent election was avoided by only the narrowest of margins: a change of less than 0.6% of the votes for Mr. Truman in two States would have made the electoral vote indecisive and thrown the election into the House. On so crucial a matter as the election of the President, even remote contingencies should be provided for. Notwithstanding the relatively slight likelihood of an indecisive electoral vote, therefore--at least under S.J. Res. 58--we should take care to correct also whatever deficiencies exist in the contingent election system.

At present, if no candidate received a majority of the electoral vote, the President would be selected from among the three leading candidates by the House, with each State delegation having one vote (decided by a plurality vote of its members) and with an absolute majority being necessary to a choice. The Vice President would be selected from among the three leading candidates by the Senate, with each Senator having one vote and an absolute majority again being required.

The most objectionable feature of that system is the equal vote given to each State. It gives a State with a population of 250,000 the same power in the election of the President as a State with a population of over 17 million. The practice was sharply criticized by both Jefferson and Madison as early as 1823. Endorsing Jefferson's criticism, Madison concluded that--

> "the present rule of voting for President by the House of Representatives is so great a departure from the Republican principle of numerical equality, and even from the Federal rule, which qualifies the numerical by a State equality, and is so pregnant also, with a mischievous tendency in practice, that an amendment to the Constitution on this point is justly called for by all its considerate and best friends." Dougherty, The Electoral System in the United States, p. 330 (1960).

Voting by States in a contingent election is not only unjust and undemocratic but also anomalous, for there can be no justification for the distribution of power among the States in a contingent election being different from that in the popular election. The very existence of that difference, moreover, may give an incentive to attempt to cause the election to be thrown into the House, where the influence of some states would be greatly increased.

Another defect arises from the present requirement of an absolute majority for election. That requirement makes possible--indeed, likely--a deadlock among the three candidates. Were the deadlock to continue beyond Inauguration Day--a mere 17 days after Congress convenes--the nation would be left without a President. The Vice President or, if his election were also deadlocked, the Speaker could, of course, act as President until a President was chosen, but the tenure of an acting President in those circumstances would be of the most precarious sort and he could exercise no real leadership or authority. The breaking of the deadlock, moreover, would almost inevitably be accompanied, at least in appearance if not in reality, with the making of "political deals" in exchange for votes. The prospect of reliving the election of 1800, when the country suffered through 36 ballots in the House and was alive with rumors of political intrigue and machination, is surely not one that can be viewed with equanimity. And once again, the possibility is illustrated by recent history: it is said that, if the 1948 election had been thrown into the House, the delegations of four States which had been carried by the State's Rights candidate could have deadlocked the election. */

A final defect of the present system is that, since the House would elect the President while the Senate would elect the Vice President, there would be a substantial likelihood of the President and the Vice President being elected from different parties. Harmonious working relationships between the President and the Vice President require that they share a common political philosophy, and it is today generally agreed that the election of a split ticket would be highly undesirable.

S.J. Res. 58 would remedy those defects by having both the President and the Vice President elected by the Senate and the House of Representatives sitting in a joint session, with each Member casting one vote. A quorum of three-fourths of the members of both Houses would be required, but a plurality of the votes cast would be sufficient for election. Since the representation of each State in the joint session would be exactly equal to the number of its electoral votes, the contingent election under that proposal would be fully as representative as is the popular election. With the same body electing both officers, the likelihood of a split ticket being elected would be diminished. And with a plurality being sufficient for election, the possibility of a deadlock would be avoided. Those changes are in my judgment much to be desired, and I strongly support them.

*/ Committee Print, The Electoral College, a Memorandum prepared by the Staff of the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, 87th Cong., 1st Sess., p. 19 (1961).

On this matter, the other proposals that have been made are far less divergent. Most of them would similarly utilize a joint session of Congress for the contingent election and differ only in requiring an absolute majority for election (e.g., S.J. Res. 7, 12, 28). Because of the drastic effects of a deadlock, however--both for the turmoil and confusion in the country it would produce and for the opportunities for political intrigue it would create--it seems to me far preferable to assure an election by a single ballot, and with three candidates from whom to choose that can be done only by making a plurality vote sufficient.

Some of the proposals would also modify the circumstances under which an election is to go to Congress by making 40% of the electoral votes sufficient for election. That change, however, is tied to the proposals to modify the unit rule in the original election; it is made necessary because the change in the unit rule would encourage a splintering of the electoral vote. If, as I urge, the unit rule is retained, there would be far less reason to relax the requirement of a majority of the electoral vote; and keeping it would reinforce the pressures tending to preserve the two-party system.

Finally, one proposal would eliminate the role of Congress altogether and provide for a run-off election if the original election were indecisive. That proposal, however, is included with the plan to eliminate the electoral votes and substitute a direct national election, and in that plan it is obviously necessary: with the encouragement the "national election" plan gives to splinter groups and third parties, it is quite likely that no candidate would receive a majority of the popular vote; unless a runoff election were provided, the result would be to throw a substantial number of the elections into Congress. Under the existing electoral-vote system, however--which S.J. Res. 58 would preserve--there is only a remote possibility of the original election being indecisive, at least if experience be a reliable guide. Providing for a run-off election, moreover, may to some extent be self-defeating: voters secure in the knowledge that they will have another opportunity to make their votes "count"might be more inclined to cast "protest" votes for minor candidates in the original election. The very fact that the voters have only one chance to elect a President and must give him a majority of the electoral votes in order to do so is in itself one of the factors that has produced a strong two-party system. If we change that aspect of the electoral machinery, we risk changing the political structure to which it has given rise, all with unknown and largely unknowable consequences.

For the foregoing reasons, I would neither eliminate the role of Congress in contingent elections nor change the circumstances under which an election would be thrown into Congress.

III. Death of a Candidate

The final matter dealt with in the proposals is the least controversial: the making of provisions for the death of a candidate before inauguration.

The 20th Amendment provides that, if the President elect dies before inauguration, the Vice President elect shall become President. The term "President elect" is not defined, but the history of the Amendment makes clear that it means the person chosen by the electors. Thus no provision is made for the death of a successful Presidential candidate between the election in November and the meeting of the electors in December, the choice in that event being left to the electors.

The abolition of the office of elector, as proposed by S.J. Res. 58, obviously requires that the rule of the 20th Amendment be extended to apply to the death of the successful Presidential candidate at any time after the popular election in November. S.J. Res. 58 accomplishes that by providing that, if at the time Congress convenes to count the votes (January 6) the person otherwise entitled to receive a majority of the electoral votes for President shall have died, the person entitled to receive a majority of the votes for Vice President shall become President. It also empowers Congress--again in conformity with the pattern of the 20th Amendment--to provide for the case of the death of both the successful candidates or the death of any of the persons from among whom Congress may choose a President or Vice President. Deaths occurring after the counting of the votes by Congress but before inauguration are not provided for, but they are already adequately covered by section 3 of the 20th Amendment, which would remain in effect.

Those are basically only technical changes necessary to accommodate the abolition of the Electoral College and the revised contingent-election procedure; their desirability is manifest; and I am aware of no controversy over their inclusion.

IV. Suggested Modifications of S. J. Res. 58

While S. J. Res. 58 is, in our judgment, the most acceptable proposal for correcting the deficiencies in the existing system of electing the President, there are, we believe, several minor respects in which it can be further improved. We have previously submitted to the counsel for this subcommittee a revision of S. J. Res. 58 containing our suggested changes, and I understand that copies of the revision have been distributed to the members.

Four of the changes concern only matters of style and organization and have no substantive effect. They would:

(1) Preserve the clause of the original Constitution vesting the executive power in the President (Art. II, § 1, cl. 1). No reason is apparent for repealing such a basic clause of the Constitution and reenacting it as part of an amendment.

(2) Recast the provisions governing the popular election and the casting of the electoral vote (the second, third and fourth paragraphs of S. J. Res. 58) into a more logical order (the second and third paragraphs of the revised draft). We have also suggested some minor word changes elsewhere in the bill, as well as some changes in the division of the sections.

(3) Incorporate and supersede the provisions of the 23rd Amendment providing for the participation of the District of Columbia in Presidential elections.

(4) Remove the time limit for ratification (7 years) from the body of the amendment and incorporate it into the resolving clause.

The remaining changes we have suggested are of somewhat greater substance. They would:

(5) Clarify the requirement for ticket voting to assure election of a President and a Vice President from the same party. The existing Electoral College System, as implemented by the States, now operates effectively to prevent election of a split ticket, and the change does little more than provide an equivalent safeguard with respect to the new system of electing the President.

(6) Extend the participation of the District of Columbia to elections thrown into Congress. That is accomplished by providing that, in such an election, there is to be automatically cast for the person for whom the electoral votes of the District of Columbia were cast a number of votes

equal to the number of such electoral votes. The same reasons that justified giving the people of the District of Columbia a vote in the popular election equally require that they have a voice in the election of a President and Vice President by the Congress, and our suggestion is the simplest method by which that can be accomplished. If the District's electoral votes were cast for a person not among the three candidates from whom Congress may choose, they would of course be ineffective, but the provisions necessary to provide for that remote contingency are too elaborate to be warranted.

(7) Give Congress general power to enforce the article by appropriate legislation and, in particular, make the places and manner of holding Presidential elections subject to regulation by Congress. That does no more than give Congress the same power to regulate Presidential elections that it now has to regulate Congressional elections, and there is surely no reason why its power should be less.

(8) Eliminate the prohibition against a State's electoral votes being cast for Presidential and Vice Presidential candidates both of whom are inhabitants of that State. Disabling one State (the home of the candidates) from voting for a ticket which all other States may vote for is basically inconsistent with the purpose to prevent the election of a split ticket. The prohibition should therefore either be extended to disqualify co-inhabitants of one State from running together in any State or be eliminated altogether. I favor its elimination. The prohibition was originally designed to guard against undue provincialism by unpledged electors and seems unnecessary and anachronistic in the context of today's nationwide political parties and campaigns. For the foreseeable future, political pressures are almost certain to prevent nomination of a ticket all from one State.

(9) Authorize Congress to provide for the case of the death of a candidate shortly before the election--e.g., by postponing the election for a sufficient period to permit a new candidate to be nominated. That is the one contingency left uncovered by S.J. Res. 58, and it seems clearly desirable to empower Congress to provide for it.

There is one other technical change I might suggest which is not included among those we have previously submitted. It concerns the relationship of the provisions of S.J. Res. 58 dealing with the death of a candidate and section 3 of the 20th Amendment.

The 20th Amendment now adequately provides for deaths occurring between the time the Electoral College votes in December and Inauguration Day. S.J. Res. 58 would substitute new provisions, of like import, to govern the period between the election in November and the counting of the electoral votes in January, leaving the 20th Amendment in effect for the

period after the vote counting until inauguration. While I perceive no substantive problems arising from the overlapping of the two provisions, their relationship is somewhat confusing and there may be a simpler way to correct the existing deficiencies.

The failure of the 20th Amendment to cover the entire period after the November election arises from the fact that it applies only to the death of a "President elect," a term not expressly defined but intended to mean the person elected by the Electoral College in December. To make the 20th Amendment applicable to the entire period, therefore, all that would be necessary would be to make clear that, as a result of the abolition of the Electoral College and the automatic casting of the electoral votes, the person who in the November elections becomes entitled to a majority of the electoral votes is the "President elect." That technique would remove the necessity of having two separate and overlapping sets of rules to govern the periods before and after the counting of the votes in January.

That change, if considered desirable, could be accomplished by substituting for the first paragraph of section 4 of the revised draft the following language:

> "SEC. 4. For purposes of section 3 of the twentieth article of amendment to this Constitution, the persons who in an election held pursuant to section 2 of this article become entitled to receive a majority of the electoral votes for President and Vice President shall be the President elect and the Vice President elect, respectively."

If no person received a majority of the electoral votes, the persons elected by Congress would of course be the President elect and Vice President elect, but it is unnecessary expressly so to provide since their status under the 20th Amendment is clear and would be unaffected by any of the changes made by S.J. Res. 58.

Were that change adopted, the second clause of the second paragraph of section 4 (dealing with the death of both successful candidates) could also be omitted, since the 20th Amendment already provides for the death of both the "President elect" and the "Vice President elect." The first clause of the second paragraph, dealing with the death of any of the persons eligible to be elected by Congress in a contingent election, although substantively the same as section 4 of the 20th Amendment, is needed in order to conform the provision to the revised contingent-election procedures. The third clause, of course, would still be needed, since it deals with a subject (death of a candidate prior to the election) not covered by the 20th Amendment.

Conclusion

S.J. Res. 58 undertakes, not to change the existing system of electing the President, but merely to give it constitutional protection and to correct several specific defects. It would accomplish essentially three things:

First, by abolishing the office of elector, it would eliminate the grave risk of the constitutional independence of the electors being exploited to frustrate the will of the people.

Second, it would reform the contingent-election procedure to eliminate the undemocratic and anomalous procedure of voting by States, avoid the possibility of a deadlock and remove the risk of a President and a Vice President being elected from different parties.

Third, it would more adequately provide for various contingencies occurring in the course of the election.

Each of those changes is urgently needed, and they are, in my judgment, the very minimum that is required to correct the serious deficiencies in the existing constitutional framework governing the election of the President.

The other proposals before the Subcommittee are of a different order, for they would change, rather than merely perfect, the existing system. Whatever their theoretical merits, they would present a grave risk of influencing our political institutions in ways that cannot wholly be predicted and are not, in my judgment, likely to be acceptable. S.J. Res. 58 makes the reforms which are urgently needed and it has the great virtue of not exchanging the known for the unknown. I urge the Congress to adopt it.