



Department of Justice

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STATEMENT OF ATTORNEY GENERAL JOHN N. MITCHELL
ON ELECTORAL REFORM BEFORE THE HOUSE JUDICIARY
COMMITTEE, THURSDAY, March 13, 1969.

Mr. Chairman, Members of this distinguished Committee.

I am pleased to have the chance to come before you today to present - and in the process perhaps amplify - the Administration's views on Electoral Reform.

I have a fairly short statement, and then I will be glad to answer questions.

Let me begin by describing the basic theme and concern of the President's electoral reform proposal. More than anything, it is a weighing of practicalities and priorities. As I shall emphasize in my testimony, I believe that this is a wise and proper approach.

This Committee has under consideration a very wide spectrum of electoral system reforms. In the first place, there are a number of mechanical changes - ranging from the abolition of individual electors to provisions for the death of the President-elect - upon

which virtually everyone can agree as to desirability. I will spell these out in more detail in just a moment.

Next, there are changes which reach beyond mechanics to reshape our Federal system. As one would expect, these are highly controversial. I refer to the proposals for direct election of the President and for proportional or district-by-district breakdown of a state's electoral votes.

As President Nixon indicated in his recent message, he, personally, would like to see the candidate who receives the most popular votes become President. At the same time, however, he doubts that a Constitutional Amendment including such a provision could make its way through both Congress and the states. Moreover, he feels that a Constitutional Amendment making uncontroversial reforms is badly needed and should not be sacrificed by the inclusion of a provision likely to defeat the entire package.

Two other proposals, proportional or district-by-district allocation of states' electoral votes, represent a compromise of

sorts between direct election and the present electoral unit vote system. As such, these proposals appeal to persons and states unfavorably disposed towards direct election. Thus, if proponents of direct election will also endorse them, they stand a good chance of mustering requisite approval in the states. With these prospects in mind, the President has expressed his support of a Constitutional Amendment which would combine needed mechanical reforms of our presidential selection system with movement towards more effective reflection of popular voting preference.

Now I would like to describe some mechanical and generally uncontroversial reforms in our electoral system: ones which the President has proposed and which recent circumstances show ought to be put into effect without delay. I hope this Committee and Congress will act favorably and decisively upon these proposals by incorporating them in a ratifiable Constitutional Amendment.

First of all, whether we have direct election, proportional or district electoral vote allocation, or retention of the state unit vote system, we must do away with the anachronism of having electoral votes cast by individuals free to act by whim. Electoral votes, if retained, must be awarded mechanically to a ticket of a Presidential and Vice-Presidential candidate from one party.

Originally, the framers of our Constitution intended the individuals chosen as presidential electors to include the nation's foremost leaders. However, as a Committee of Congress noted even back in 1826, the electors "have degenerated into mere agents, in a case which requires no agency, and where the agent must be useless, if he is faithful, and dangerous, if he is not."

In the last eight years, two electors - one in Oklahoma in 1960 and one in North Carolina in 1968 - have given us proof of the danger. Any Constitutional Amendment proposed by Congress must do away with individual electors.

Next, it seems desirable to provide that 40% of the vote - either popular or electoral as might be decided - can elect a President. This change is necessary to reduce third parties' ability to stymie our electoral system. Furthermore, such a 40% provision would strengthen the two-party system by minimizing third-party balance of power prospects from the start.

I have noted with interest that the principal direct election and proportional system proposals include such a 40% provision. I believe that this basic change is one that can generally be agreed upon.

Third, there remains the need to deal with the possible situation where no candidate obtains even 40% support, be it in popular or electoral votes. In that case, the President has proposed a run-off election between the top two candidates, victory to go to the popular vote winner. The District of Columbia would participate in the run-off just as it participates in the general election. And

in lieu of unwise specificity, we believe that Congress should be authorized to determine by law the date of the run-off and the handling of other dilemmas.

Under the present system, there is little chance that no candidate will win 40% of the electoral vote, but under direct election or the proportional system, the likelihood of not reaching a 40% level would be increased. Clearly, we must provide for the contingency.

Besides these changes in the mechanics of actual election, it is also necessary, as the President has indicated, to resolve some uncertainties of the post-election period.

To begin with, our Constitution should specify that if a presidential candidate who has received a clear electoral vote plurality dies before the electoral votes are officially counted, the successful Vice-presidential candidate should become President. As things now stand, the succession of the Vice-President-elect is provided for only if the President-elect dies after the counting of electoral votes.

Next, it also seems wise to clarify that in the event of the death of the successful Vice-Presidential candidate before the counting of the electoral votes, the President-elect, is empowered, upon taking office, to follow the procedures otherwise provided in the Twenty-Fifth Amendment for filling the unexpired term of the Vice-President.

There is also the possibility, however remote, that both the President-elect and Vice-President-elect, may die before the electoral college meets. No present constitutional provision adequately deals with this contingency. To fill this gap Congress should be empowered to provide for the selection - by a new election, presumably - of persons to serve as president and Vice-President.

As yet another mechanical step, we should authorize Congress to provide for the contingency of the death or withdrawal of a presidential or vice-presidential candidate prior to the regular election.

These reforms I have listed - both procedural changes in our election mechanism and clarifications of post-election status and succession - meet the needs spotlighted by the events of recent years.

First and foremost, they eliminate the possibility that a third-party candidacy could stalemate the presidential selection process and shift the choice of a chief executive to Congress under the uncertain guidelines which now exist. Secondly, they resolve several post-election situations inadequately dealt with by present constitutional provisions.

The remaining elements of electoral reform being considered by this Committee are not technical proposals to improve and perfect the existing system. On the contrary, they are controversial proposals designed to substantially or wholly restructure the underlying Federal premise of our existing electoral system. The direct election, district and proportional plans are all suggestions for major alteration of our nearly two centuries-old method of selecting a President. A change of this magnitude must be viewed with caution.

Ours is not a nation which has often - or easily - changed its governmental structure. No Constitutional Amendment has ever been enacted to make a substantial alteration in our Federal system. And as President Johnson said in 1965 "our present system of computing and awarding electoral votes by States is an essential counterpart of our Federal system and the provisions of our Constitution which recognize and maintain our nation as a unit of states." This and other reasons lead me to doubt - and the President has

indicated that he shares these doubts - that any Constitutional Amendment proposing abolition or substantial modification of the electoral vote system could win the requisite approval of both Congress and three-quarters of the States.

This Committee has witnessed the uncertainty and controversy which surrounds the proposal to abolish the electoral college in favor of direct election of the President. Some witnesses have said that we need direct election of the President to have full-fledged popular democracy; others have said that direct election would undermine the two party system which has been so important to our political stability. Some witnesses have favored retention of the electoral college because it favors the big, urban states; others have urged its retention because it is biased towards the small rural states. Protagonists and antagonists of all plans disagree among themselves on whom the electoral college favors and what, if anything, should be done about it.

Moreover, it appears unlikely that a direct election Constitutional Amendment can succeed in the states. In the Southern states, very little congressional support has developed thus far for direct election constitutional amendment, and if this is indicative of local ratification prospects, then national prospects are also dim. I believe that it is very unlikely that thirty-eight states can be persuaded to support a direct election Constitutional Amendment. After all, only thirteen states are needed to defeat such a proposal.

For this reason, I do not believe - and neither does the President - that a Constitutional Amendment including the basic reforms which have already been listed should be jeopardized by the addition of a direct election provision likely to bring defeat upon the entire measure.

On the other hand, the proposal for proportional allocation of electoral votes represents a compromise between direct election and retention of the existing electoral vote system. And given the

important support it can command among persons unfavorable to direct election, the proportional plan might be a good strategic as well as ideological compromise.

In a nutshell, this compromise between the present electoral system and purely popular voting is the one which we believe can win ratification by enough states to amend the Constitution. Such an amendment would meet the goal of combining much-needed improvements in our presidential election and succession mechanisms with a structural change designed to move our Federal system in the direction of concern with popular votes rather than state units.

This is my judgment of what is plausible and what ought to take priority. Similar considerations also underlay the President's message.

At the same time, however, we recognize that Article Five of the Constitution assigns to Congress the responsibility for proposing Constitutional Amendments to the States. Because the Constitution

gives the Executive Branch no role in the amendment of the Constitution, our determination of priorities and plausibilities can only be advisory.

Therefore, Congress has a unique opportunity and responsibility to serve as a crucible of Constitutional expertise, legislative judgment and reflection of the wishes of public opinion. It is Congress' responsibility to shape a Constitutional Amendment which can both meet proven needs and win necessary support in the states. To the extent the amendment so determined agrees with the positions favored by the President in his message, it will have the support of this Administration in the quest for ratification by the States.

I appreciate the chance to make this statement, and commensurate with the policies I have expressed, I will be happy to try to answer any questions.