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## **The Electoral College: How It Works in Contemporary Presidential Elections**

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Thomas H. Neale  
Analyst in American National Government  
Government and Finance Division

# The Electoral College: How It Works in Contemporary Presidential Elections

## Summary

When Americans vote for a President and Vice President, they actually vote for presidential electors, known collectively as the electoral college. It is these electors, chosen by the people, who elect the chief executive. The Constitution assigns each state a number of electors equal to the combined total of its Senate and House of Representatives delegations; at present, the number of electors per state ranges from three to 55, for a total of 538, a figure which includes three electors for the District of Columbia. Anyone may serve as an elector, except for Members of Congress, and persons holding offices of “Trust or Profit” under the Constitution. In each presidential election year, a group (ticket or slate) of candidates for elector is nominated by political parties and other groups in each state, usually at a state party convention, or by the party state committee. It is these elector-candidates, rather than the presidential and vice presidential nominees, for whom the people vote in the election held on Tuesday after the first Monday in November (November 2, 2004).

In most states, voters cast a single vote for the slate of electors pledged to the party presidential and vice presidential candidates of their choice. The slate winning the most popular votes is elected; this is known as the winner-take-all, or general ticket, system. Maine and Nebraska use the district system, under which two electors are chosen on a statewide, at-large basis, and one is elected in each congressional district. A second alternative, the proportional system, would award electors to presidential tickets in direct proportion to the percentage votes they received in a particular state. Electors assemble in their respective states on Monday after the second Wednesday in December (December 13, 2004). They are pledged and expected, but not required, to vote for the candidates they represent. Separate ballots are cast for President and Vice President, after which the electoral college ceases to exist for another four years. The electoral vote results are counted and declared at a joint session of Congress, held on January 6 of the year succeeding the election. A majority of electoral votes (currently 270 of 538) is required to win. Constitutional amendments to abolish or reform the electoral college system are regularly introduced in Congress. For information on legislative activity in the current Congress, please see CRS Report RL32612, *The Electoral College: Reform Proposals in the 108<sup>th</sup> Congress*, by Thomas H. Neale.

A proposal to establish the proportional system in Colorado will appear on that state’s ballot on November 2, 2004. If the voters of that state approve it, and if it is found to be constitutional, Colorado’s electoral votes for the current election could be allocated according to this plan.

This report will be updated as events warrant.

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# The Electoral College: How It Works in Contemporary Presidential Elections

## Constitutional Origins

The Constitutional Convention of 1787 considered several methods of electing the President, including selection by Congress, by the governors of the states, by the state legislatures, by a special group of Members of Congress chosen by lot, and by direct popular election. Late in the convention, the matter was referred to the Committee of Eleven on Postponed Matters, which devised the electoral college system in its original form.<sup>1</sup> This plan, which met with widespread approval by the delegates, was incorporated into the final document with only minor changes. It sought to reconcile differing state and federal interests, provide a degree of popular participation in the election, give the less populous states some additional leverage in the process, preserve the presidency as independent of Congress for election and reelection, and generally insulate the election process from political manipulation.

The Constitution gave each state a number of electors equal to the combined total of its Senate and House of Representatives membership. The electors were to be chosen by the states “in such Manner as the Legislature thereof may direct....” (Article II, section 1). Qualifications for the office were broad: the only persons prohibited from serving as electors are Senators, Representatives, and persons “holding an Office of Trust or Profit under the United States.”<sup>2</sup> In order to forestall partisan intrigue and manipulation, the electors were required to assemble in their respective states and cast their ballots as state units, rather than meet at a central location. At least one of the candidates for whom the electors vote was required to be an inhabitant of another state. A majority of electoral votes was necessary to elect, a requirement intended to insure broad acceptance of a winning candidate, while election by the House was provided as a default method in the event of electoral college deadlock. Finally, Congress was empowered to set nationwide dates for choice and meeting of electors. All the foregoing structural elements of the electoral college system remain in effect currently. The original method of electing the

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<sup>1</sup> Although the term is not found in the Constitution, the electors have been known collectively as the electoral college since the early days of the republic, an expression that may be misleading, since the college has no continuing existence, never meets in plenary session, and ceases to exist immediately after the electors have performed their function.

<sup>2</sup> U.S. Constitution, Article II, Section 1. In practice, this formulation also prohibits any person working for the federal government in either a civilian or military capacity from serving as an elector.

President and Vice President, however, proved unworkable, and was replaced by the 12<sup>th</sup> Amendment, ratified in 1804.<sup>3</sup>

## The Electoral College Today<sup>4</sup>

Notwithstanding the founders' efforts, the electoral college system almost never functioned as they intended, but, as with so many constitutional provisions, the document prescribed only the system's basic elements, leaving ample room for development. As the republic evolved, so did the electoral college system, and, by the late 19<sup>th</sup> century, the following range of constitutional, federal and state legal, and political elements of the contemporary system were in place.

**Allocation of Electors and Electoral Votes.** The Constitution gives each state a number of electors equal to the combined total of its Senate membership (two for each state) and House of Representatives delegation (currently ranging from one to 53, depending on population). The 23<sup>rd</sup> Amendment provides an additional three electors to the District of Columbia. The total number of electoral votes per state, based on the 2000 census, ranges from three (for seven states and the District of Columbia) to 55 for California, the most populous state. **Table 1** provides current electoral vote allocations by state and D.C. These totals are adjusted following each decennial census in a process called reapportionment, which reallocates the number of Members of the House of Representatives to reflect changing rates of population growth (or decline) among the states. Thus, a state may gain or lose electors following reapportionment, as it gains or loses Representatives, but it always retains its two "senatorial" electors, and at least one more reflecting its House delegation. The current allocation among the states is in effect for the presidential elections of 2004 and 2008; electoral votes will next be reallocated following the 2010 census, and will be in effect for the 2012 election.

**Popular Election of Electors.** Today, all presidential electors are chosen by the voters, but, in the early republic, more than half the states chose electors in their legislatures, thus eliminating any direct involvement by the voting public in the election. This practice changed rapidly after the turn of the 19<sup>th</sup> century, however, as the right to vote was extended to an ever-wider segment of the population. As the electorate grew, so did the number of persons able to vote for presidential electors, to its present limit of all eligible citizens age 18 or older. The tradition that the voters choose the presidential electors thus became an early and permanent feature of the electoral college system; while the states theoretically retain the constitutional right

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<sup>3</sup> Under the original system, each elector cast two votes for President (for different candidates), and no vote for Vice President. The candidate receiving the most votes was elected President, provided it was a majority of the number of electors (not electoral votes). The runner up became Vice President.

<sup>4</sup> For a list of electors in the presidential election of 2000, consult the National Archives at [[http://www.archives.gov/federal\\_register/electoral\\_college/members\\_2000.html](http://www.archives.gov/federal_register/electoral_college/members_2000.html)]. For information on proposals to reform the electoral college, see CRS Report RL30804, *The Electoral College: An Overview and Analysis of Reform Proposals*, by L. Paige Whitaker and Thomas H. Neale; and CRS Report RL32612, *The Electoral College: Reform Proposals in the 108<sup>th</sup> Congress*, by Thomas H. Neale.

to choose some other method, this would be extremely unlikely under normal circumstances.

The existence of the presidential electors and the duties of the electoral college are so little noted in contemporary society that most American voters believe that they vote directly for President and Vice President on election day. In fact, they are actually voting for a slate of candidates for the office of elector nominated by a party or other political group, and pledged to support the candidates of that party. Although candidates for elector may be well known persons, such as governors, state legislators, or other state and local officials, they generally receive little recognition as electors. In fact, in most states, the names of individual electors do not appear anywhere on the ballot; instead only those of the various presidential and vice presidential candidates appear, often prefaced by the words “electors for.” Moreover, electoral votes are commonly referred to as having “been awarded” to the winning candidate, as if no human beings were involved in the process.

**The Electors: Ratifying the Voters’ Choice.** Presidential electors in contemporary elections are expected, and, in many cases pledged, to vote for the candidates of the party that nominated them. While there is considerable evidence that the founders assumed they would be independent, weighing the merits of competing presidential candidates, the electors have been regarded as agents of the public will since the first decade under the Constitution.<sup>5</sup> They are expected to vote for the candidates of the party that nominated them.

**Faithless Electors.** Notwithstanding the tradition that electors are bound to vote for the candidates of the party that nominated them, individual electors have sometimes broken their commitment, voting for a different candidate or candidates than those to whom they were pledged; they are known as “faithless” or “unfaithful” electors. Although 24 states seek to prohibit faithless electors by a variety of methods, including pledges and the threat of fines or criminal action, most constitutional scholars believe that electors, once chosen, remain constitutionally free agents, able to vote for any candidate who meets the requirements for President and Vice President.<sup>6</sup> Faithless electors have, however, been few in number (since the 20<sup>th</sup> century, one each in 1948, 1956, 1960, 1968, 1972, 1976, and 1988, and one blank ballot cast in 2000), and have never influenced the outcome of a presidential election.

**The General Ticket System.** While the Constitution is silent on the formula for awarding each state’s electoral votes, 48 states and the District of Columbia currently use the “general ticket” or “winner-take-all” system. Under this arrangement, each political party or group or independent candidacy eligible to be on the ballot nominates a group (“ticket” or “slate”) of elector-candidates equal in number to the state’s total number of electors. Voters then cast a single vote for the

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<sup>5</sup> Neal Peirce and Lawrence D. Longley, *The People’s President: The Electoral College in American History and the Direct Vote Alternative*, rev. ed. (New Haven, CT, 1981: Yale U. Press), pp. 24, 96-101.

<sup>6</sup> U.S. Congress, Senate, *The Constitution of the United States of America, Analysis and Interpretation*, S. Doc. 99-16, 99<sup>th</sup> Cong., 1<sup>st</sup> sess., prepared by the Congressional Research Service (Washington: GPO, 1987), pp. 457-460.

ticket of electors pledged to the presidential and vice presidential candidates of their choice; the ticket receiving the most votes statewide (a plurality is sufficient) is elected. These people become the electors for that state.

This is how the general ticket system works in a hypothetical state, State A. State A currently has 10 electoral votes, reflecting its two Senators and eight Representatives. The two equally hypothetical major parties, “X” and “Y” each nominate 10 persons for the office of presidential elector, pledged to the presidential and vice presidential candidates of their party. Voters go to the polls and cast a single vote for the ticket of party electors of their choice. Party A’s slate of elector-candidates receives 51% of the popular vote; Party B’s slate receives 49%. Notwithstanding the closeness of the results, all of Party A’s electors are chosen, and Party A’s presidential and vice presidential candidates normally receive all the state’s electoral votes. Party B gains no electoral votes.

The general ticket system has been favored since the 19<sup>th</sup> century, as it tends to magnify the winning candidates’ victory margin within states, and generally guarantees a national electoral college majority for the winners. It has been criticized on the grounds that it effectively negates the votes for the runners up.

**Alternative Systems: The District and Proportional Plans.** Two alternative methods for awarding electoral votes which pass the test of constitutionality have long been available to the states. They have historically been promoted as avoiding the alleged failings of the general ticket system.<sup>7</sup>

**The District Plan.** The first is the district plan or system, which has been adopted by Maine and Nebraska. Under the district system, two electors are chosen on a statewide, at-large basis (representing the two “senatorial electors” allotted to each state regardless of population), and one is elected in each congressional district.<sup>8</sup> Each voter still casts a single vote for President and Vice President, but the votes are counted twice: first on a statewide basis, with the two at-large elector-candidates who win the most votes (a plurality) elected en bloc, and then again in each district, where the district elector-candidate winning the most votes in each district is elected.

This is how the district system might work in State A. Assume that Party X again receives 51% of the statewide vote, and Party Y 49%. Party X’s candidates for the two statewide (or senatorial) elector offices are thus elected. Assume also that Party X receives a plurality or majority of the popular vote in five of State A’s congressional districts, while Party Y wins three of the districts. Under the district

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<sup>7</sup> For information on how electoral votes would have been allocated under the district and proportional plans in the presidential elections of 1992, 1996, and 2000, please consult CRS congressional distribution memorandum *Alternative Methods to Allocate the Electoral Vote: The Winner Take All, Proportional, and District Systems Compared Using 1992, 1996, and 2000 Data*, by David C. Huckabee. Available to Members of Congress and congressional staff from the author.

<sup>8</sup> Some versions of the district plan would use ad hoc presidential election districts to award these votes, rather than congressional districts, but both Maine and Nebraska, which use the district system, tally their votes by congressional district.

plan, the “district” electoral votes would be similarly awarded, so that Party X would receive seven electoral votes, reflecting the statewide electors and the five congressional districts it won, while Party Y would receive the three electors that reflected its congressional district majorities.

The claimed advantage of the district system is that it more accurately reflects differences in support in various parts of a state, and does not necessarily “disenfranchise” voters who picked the losing ticket. For instance, a state that has one or more large cities and a large rural and suburban population with differing political preferences and voting patterns might well split its electoral vote under the district system. Opponents suggest that the district system, with its division of electoral votes within states, would more frequently lead to deadlocked elections in which no candidate receives a majority of electoral votes. Perhaps ironically, however, neither Maine nor Nebraska has split its electoral vote during the time the district system has been in place. In every presidential election, the overall winners also gained the most votes in each congressional district.

***The Proportional Plan.*** The other commonly proposed option is the proportional plan or system, which has never been adopted by a state, but which will be the subject of a proposed Colorado constitutional amendment that will be decided at the November 2, 2004 general election. For further information on the Colorado amendment, see under “Current Developments” later in this report. The proportional plan allocates electors and electoral votes in direct proportion to the number of votes gained by each state. Unlike the district plan, it does not account for geographical voting patterns, but allocates electors on a purely statewide basis. Two variations of the proportional plan exist: the strict proportional plan, which would allocate electoral votes to thousands of electoral votes, that is to the third decimal point, and the rounded proportional plan or system, which would use some method of rounding to allocate only whole electoral votes.

This is how the rounded proportional plan might operate in State A. Party X, once again, receives 51% of the popular vote, and Party Y receives 49%. When these totals are rounded, Party X would be awarded five electors, and Party Y would also gain five electors.<sup>9</sup>

Proponents of the proportional system argue that this is the fairest plan, since it most accurately reflects in its elector/electoral vote allocation the preferences of the voters, acting as a statewide political community. They also note that it would provide recognition for new- or third-party candidates that achieve a substantial level of support in a state. Opponents suggest that, like the district system, the proportional plan would more frequently lead to deadlocked elections in which no candidate receives a majority of electoral votes.

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<sup>9</sup> Given that the strict proportional plan, by providing for fractions of electoral votes, would almost certainly require a U.S. constitutional amendment, and since the proposed Colorado constitutional amendment would establish a rounded proportional system, the strict proportional plan allocation of electoral votes has not been included in this hypothesis.

**Nominating Elector-Candidates: Diverse State Procedures.**

Nomination of elector-candidates is another of the many aspects of this system left to state and political party preferences. Most states prescribe one of two methods: in 34 states candidates for presidential elector are nominated by state party conventions, while 10 states mandate nomination by the state party's central committee. The remainder uses a variety of methods, including nomination by the governor (on recommendation of party committees), by primary election, and by the party's presidential nominee.

**Joint Tickets: One Vote for President and Vice President.**

General election ballots, which are regulated by state election laws and authorities, offer voters joint candidacies for President and Vice President for each political party or other group. Thus, voters cast a single vote for electors pledged to the joint ticket of the party they represent. They cannot effectively vote for a President from one party and a Vice President from another, unless their state provides for write-in votes.

**General Election Day.**

Elections for all federal elected officials are held on the Tuesday after the first Monday in November in even-numbered years; presidential elections are held in every year divisible by four (November 2, 2004) for the next presidential election). Congress selected this day in 1845 (5 Stat. 721); previously, states held elections on different days between September and November, a practice that sometimes led to multiple voting across state lines, and other fraudulent practices. By tradition, November was chosen because the harvest was in, and farmers were able to take the time needed to vote. Tuesday was selected because it gave a full day's travel between Sunday, which was widely observed as a strict day of rest, and election day.<sup>10</sup> Travel was also easier throughout the north during November, before winter had set in.

**The Electors Convene.**

The 12<sup>th</sup> Amendment requires electors to meet "in their respective states...." This provision was intended to deter manipulation of the election by having the state electoral colleges meet simultaneously, but keeping them separate. Congress sets the date on which the electors meet (3 U.S.C. 7), which is currently the first Monday after the second Wednesday in December (December 13, 2004). The electors almost always meet in the state capital, usually in the capitol building or state house itself. They vote "by ballot"<sup>11</sup> separately for President and Vice President (at least one of the candidates must be from another state). The results are then endorsed, and copies are sent to the following officials: the Vice President of the United States (in his capacity as President of the Senate); the secretary of state of their state; the Archivist of the United States; and the judge of the federal district court of the district in which the electors met (3 U.S.C. 11). The electors then adjourn, and the electoral college ceases to exist until the next presidential election.

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<sup>10</sup> In most rural areas, the only polling place was at the county seat, frequently a journey of many miles on foot or horseback.

<sup>11</sup> 12<sup>th</sup> Amendment; this provision is interpreted to require paper ballots for President and Vice President.

**Congress Counts, Ascertain, and Declares the Vote.** The final step in the presidential election process (aside from the presidential inaugural on January 20) is the counting, ascertainment, and declaration of the electoral votes in Congress.<sup>12</sup> The House of Representatives and Senate meet in joint session in the House chamber on January 6 of the year following the presidential election, at 1:00 P.M.<sup>13</sup> No debate is allowed in the joint session. The Vice President, who presides in his capacity as President of the Senate, opens the electoral vote certificates from each state, in alphabetical order. He then passes the certificates to four tellers (vote counters), two appointed by each house, who announce the results. The votes are then counted, and the results are announced by the Vice President. The candidates receiving a majority of electoral votes (currently 270 of 538) are declared the winners by the Vice President, an action that constitutes “a sufficient declaration of the persons, if any, elected President and Vice President of the States” (3 U.S.C. 15).<sup>14</sup>

**Objections to State Electoral Vote Returns.**<sup>15</sup> Objections may be offered to both individual electoral votes and state returns as a whole. Objections must be filed in writing, and be signed by one Senator and one Representative. If an objection is received, and determined to be valid, then the electoral vote count session is recessed. The Senate returns immediately to its chamber, and the two houses of Congress consider the objections separately. By law, these sessions cannot last more than two hours, and no member of either house may speak for more than five minutes. At the end of this period, the houses vote separately to agree or disagree with the objection. The Senate then returns to the House chamber, and the joint session reconvenes. The decisions of the two houses are announced. If both houses agree to the objection, then the electoral vote or votes in question are not counted. Otherwise, the vote or votes stand as submitted, and are counted as such.<sup>16</sup>

## Current Developments: The Proposed Colorado Amendment

On November 2, 2004, voters in Colorado will cast ballots on a proposed state constitutional amendment<sup>17</sup> that would establish a “rounded” version of the proportional system which would be effective with the current election. That is, if the amendment passes, and is not found unconstitutional, it would provide

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<sup>12</sup> 3 U.S.C. 15-18.

<sup>13</sup> Congress occasionally sets a different date for the electoral vote count session, particularly in years when January 6 falls on a Sunday.

<sup>14</sup> If there is no majority, due to a tie or division of the electoral vote among three or more candidates, the President is elected in the House of Representatives, and the Vice President in the Senate by the contingent election process. For further information, see CRS Report RS20300, *Election of the President and Vice President by Congress: Contingent Election*, by Thomas H. Neale.

<sup>15</sup> 3 U.S.C. 15.

<sup>16</sup> For information on efforts to file objections to electoral vote returns from Florida at the 2001 electoral vote count session, please consult CRS congressional distribution memorandum, *Congressional Objections to Electoral Votes for President*, by Jack Maskell, available to Members of Congress and staff from the author.

<sup>17</sup> Amendment 36.

proportional allocation of Colorado's presidential electors for the current, 2004, election. If so, it could have a serious impact on the election outcome, and might lead to challenges as to its constitutionality that could further result in prolonged post-election legal struggle.

Colorado is among the 18 states that provide for the proposal and approval of amendments to their state constitutions by popular vote. In order to place an amendment on the ballot in Colorado, registered voters equal in number to 5% of the number of votes cast for the office of State Secretary of State at the last election must sign petitions. The amendment is then placed on the ballot at the next general election; approval by a majority of those voting is required for passage.<sup>18</sup> On August 13, 2004, Colorado's Secretary of State announced that the proposed amendment had gained sufficient voter signatures to qualify for inclusion on the ballot at the November 2 general election.<sup>19</sup>

The amendment would allocate electoral votes and electors based on the popular proportional share of the total statewide ballots cast for each presidential ticket. The percentage of each ticket's vote would then be multiplied by Colorado's electoral vote total, nine. These figures would then be rounded to the nearest whole number of electors and electoral votes, but any ticket that did not receive at least one vote under this method would be eliminated from the total. If the sum of whole electoral votes derived from this computation were to be *greater* than nine, then the ticket receiving at least one whole electoral vote, but fewest popular votes, would have its electoral vote total reduced by one. This process would continue until the computed allocation of votes reached nine. Conversely, if the sum of whole electoral votes awarded after rounding the percentages of popular votes were *less* than nine, then such additional electoral votes as necessary to bring the number up to nine would be allocated to the ticket receiving the most popular votes, until all nine electoral votes were so allocated. In the event of a popular and electoral vote allocation tie (i.e., Candidates A and B each receiving 4.5 electoral votes), then the Secretary of State would determine by lot who would receive the evenly split electoral vote.<sup>20</sup>

The amendment includes several additional features.

- In Section 1(f), it states that the voters "by approving this initiative ... understand, desire, and expect that the popular selection of presidential electors is intended to apply retroactively and thus determine the manner in which our state's presidential electors are chosen and our state's votes are cast for the general election of 2004." The apparent retroactive nature of this requirement might be subject to legal challenge, calling into question whether the

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<sup>18</sup> Council of State Governments, *The Book of the States*, 2004 edition, vol. 36 (Lexington: KY, The Council of State Governments, 2004), p. 14.

<sup>19</sup> *USA Today.com*, "Colorado Weighs Proportional Electoral Votes, Aug. 16, 2004. at [http://www.usatoday.com/news/politicselections/state/colorado/2004-08-16-colo-electoral\_x.htm] , visited Sept. 3, 2004.

<sup>20</sup> Proposed Colorado Amendment 36, § 2-4.

amendment, if adopted, would apply to the election of 2004, or only to later elections.

- In section 2, it directs that “[e]ach presidential elector shall vote for the presidential candidate and, by ballot, vice-presidential candidate on the presidential ticket of the political party or political organization that nominated that presidential elector.” While this requirement would theoretically prohibit faithless electors, as noted earlier in this report, the question of whether the states have the power to so bind their electors remains at issue.<sup>21</sup>
- In Section 6, it provides for the determination of which elector-candidates would be elected. Each party or political group would nominate a full slate of nine elector-candidates, and the number of electors allocated to each candidate would be determined by the formula described above. The Colorado Secretary of State would then determine, by lot, which of the elector-candidates would be elected. In other words, if Candidate A received five electoral votes under the proposal, and Candidate B received four, then the Secretary of State would determine by lot which five elector-candidates on Candidate A’s ticket would be chosen, and which four would be chosen from Candidate B’s ticket.

***Implications of the Colorado Amendment.*** If it were implemented retroactively, as proposed in the preamble, the Colorado amendment could have profound implications for the 2004 presidential contest, particularly if the election proved to be close.

For instance, in 2000, the Republican Bush-Cheney ticket won 50.8% of the popular vote in Colorado, the Democratic Gore-Lieberman ticket won 42.4%, the Green Party Nader-LaDuke ticket 5.3%, and other candidates won 1.6%. Under the familiar rules of the general ticket system, the Republican nominees gained all eight of Colorado’s electoral votes.<sup>22</sup>

Proponents of the amendment maintain that awarding the state’s electoral votes proportionally would end the general ticket system’s alleged disenfranchisement of those whose preferred candidates who received fewer popular votes in the state. Opponents claim that it would reduce Colorado’s importance in the electoral process: “It takes Colorado out of play for any presidential election, ... And I think that impacts future decisions on things like potential [military] base closings or federal highway funding allocations.”<sup>23</sup>

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<sup>21</sup> See elsewhere in this report under “Faithless Electors”.

<sup>22</sup> Colorado gained one House seat, and hence, one electoral vote, as a result of the 2000 census, thus raising its current total to nine.

<sup>23</sup> Dan Hopkins, spokesman for CO Governor Bill Owens, quoted in Jo Becker, “Colorado Initiative Could Be Key to Presidential Race,” *Washington Post*, Sept. 18, 2004, p. A12.

The proposal also figures in the national political context. If a proportional system like that currently under consideration had been in place in Colorado in 2000, the state's electoral vote results would have been different, with the Republican nominees winning five electors in Colorado, and the Democratic nominees three.<sup>24</sup> (The Green Party and minor parties would not have qualified for any electors under the provisions of Amendment 36). The change resulting from the loss of those three electoral votes by the Bush ticket would have reduced its nationwide total to 268. Conversely, the Gore ticket's total would have risen to 269, giving the Democrats a plurality in the electoral college. This would have left Vice President Gore one vote short of an electoral college majority, conceivably leading to contingent election in Congress. These numbers do not, however, account for the single blank electoral vote cast by a District of Columbia elector to protest the election results. Under the circumstances described above, the said elector might rather have chosen to cast her ballot as instructed, providing the Democratic ticket with the majority of electoral votes required by the Constitution, and thus changing the election's outcome.

**Constitutional Questions.** Other questions have been raised as to whether this effort to change the allocation formula for Colorado's electoral votes by initiative is constitutional. Specifically, the U.S. Constitution (in Article II, section 1, clause 2) provides that, "Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress...." Since the early years of government under the Constitution, the state legislatures have generally exercised this grant of power by authorizing the voters to choose electors, and they have usually specified the winner-take-all or general ticket system as the means by which the voters' decision is used to allocate electors and electoral votes.

The fact that Colorado's proposed Amendment 36 would alter the formula for awarding electoral votes by *a vote of the people* is the salient issue here. The Colorado legislature's right under Article II to establish a proportional system is not in dispute; the question rather, is, does the Colorado legislature have authority to *subdelegate* its Article II powers to determine and change the existing method of appointing electors to a popular vote? Can the voters of Colorado act in place of, or *as* the state legislature? The Colorado Constitution specifically empowers the people of the state to "to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly ..."<sup>25</sup>

Proponents of Amendment 36 could argue that this is sufficient authority to change the allocation of electoral votes by popular vote. Further, it could be argued that the U.S. Constitution's failure to expressly prohibit this procedure, or others like it, provides an implicit endorsement. On the other hand, opponents could arguably assert that the U.S. Constitution clearly delegates this power to the state legislatures,

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<sup>24</sup> Results computed by CRS from *America Votes 24: A Handbook of Contemporary American Election Statistics* (Washington: CQ Press, 2001).

<sup>25</sup> Constitution of the State of Colorado, Article V, section 1, clause 1.

and only the state legislatures.<sup>26</sup> Moreover, commentary on the Colorado amendment by initiative process notes that, “An amendment is not valid just because the people voted for it. The initiative gives the people of a state no power to adopt a constitutional amendment which violates the federal constitution.”<sup>27</sup>

A subsidiary question is whether the amendment can be retroactively instituted, as stated in the preamble. Proponents could cite commentary on the initiative device in Colorado notes that, “The initiative and referendum provision is in all respects self-executing. It is not a mere framework, but contains the necessary detailed provisions for carrying into immediate effect the enjoyment of the rights therein established without legislative action.”<sup>28</sup> Opponents could argue that the retroactive provision is an attempt at political manipulation of the election results to gain a short term benefit for one candidate, and that it runs contrary to notions of fair play.

These questions might be raised following an extremely close presidential election in 2004, particularly if proportional electoral vote allocation in Colorado appeared to reverse the nationwide results. Legal challenges to the amendment on various grounds would arguably be likely under these circumstances, and might lead to a prolonged and bitter dispute, such as occurred following the 2000 election.

## Concluding Observations

The electoral college system has demonstrated both durability and adaptability during more than two centuries of government under the U.S. Constitution. Although its structural elements remain largely unchanged, in operation it has never worked in quite the way the founders anticipated, and has evolved into a patchwork assemblage of constitutional provisions, state laws, political party practices, and enduring traditions. The electoral college system has always had flaws and critics, and it has been the subject of controversy on five occasions,<sup>29</sup> but it has delivered a President and Vice President in 54 elections under the Constitution. Given the high hurdles faced by proposed constitutional amendments, it seems likely to remain in place unless or until its alleged failings become so compelling that large concurrent majorities in the public, the Congress, and the states, are prepared to undertake its reform or abolition.

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<sup>26</sup> See, e.g., *McPherson v. Blacker*, 146 U.S. 1,25 (1892), holding that the word “legislature” in Article II, section 1, clause 2 of the U.S. Constitution operates to limit the states); *Hawke v. Smith*, No. 1, 253 U.S. 221 (1920), (holding that the language of Article V is “plain”, and that there is “no doubt in its interpretation” that ratification of amendments is limited to the only two methods specifically granted by the Constitution); but see, *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), (holding that a referendum did not violate the use of the word “legislature” in Article I, section 4, clause 1 of the Constitution).

<sup>27</sup> *Colorado Revised Statutes, 2003*, vol. 1 (n.p. : LexisNexis, 2003), p. 380.

<sup>28</sup> *Ibid.*, p. 373.

<sup>29</sup> 1800, 1824, 1876, 1888, and 2000.

**Table 1. Electoral Vote Allocation by Jurisdiction, 2004-2008**

State	Electors	State	Electors	State	Electors
Alabama	9	Kentucky	8	North Dakota	3
Alaska	3	Louisiana	9	Ohio	20
Arizona	10	Maine	4	Oklahoma	7
Arkansas	6	Maryland	10	Oregon	7
California	55	Massachusetts	12	Pennsylvania	21
Colorado	9	Michigan	17	Rhode Island	4
Connecticut	7	Minnesota	10	South Carolina	8
Delaware	3	Mississippi	6	South Dakota	3
District of Columbia	3	Missouri	11	Tennessee	11
Florida	27	Montana	3	Texas	34
Georgia	15	Nebraska	5	Utah	5
Hawaii	4	Nevada	5	Vermont	3
Idaho	4	New Hampshire	4	Virginia	13
Illinois	21	New Jersey	15	Washington	11
Indiana	11	New Mexico	5	West Virginia	5
Iowa	7	New York	31	Wisconsin	10
Kansas	6	North Carolina	15	Wyoming	3