The Electoral College and Presidential Vacancies

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I. THE BIRTH OF OUR PRESIDENTIAL OFFICE.

Our newspapers refer to the office of President of the United States as "the toughest job in the world". There is no reason to quarrel with that thought; but one should add to that estimate of the nature of our Executive's duties, the further fact that those able men who met in 1787 in Independence Hall in Philadelphia to formulate our Constitution found that it was anything but easy to blue-print the job of our President.

It is well known that the Constitution as finally drawn was the result of the compromise of many conflicting views. The very nature of the task illustrates its difficulties. Thirteen Independent Colonies were to be moulded into a strong union in which these separate thirteen composite bodies were still to reserve to themselves a great measure of independence. These men who drew up our Constitution had "to eat their cake and have it too."

Following the Declaration of Independence in 1776, these separate Thirteen Colonies had fought their way to freedom recognized by a Treaty of Peace with England in 1783. Prior to this latter date, the Continental Congress of 1777 had drafted a loose agreement called the Articles of Confederation, which became effective when the last Colony signed on March 1st, 1781. This agreement between the Thirteen Colonies described that Union as a "league of friendship" which it named "The United States of America". A Congress of one house was provided for, and it had power:

* Member of the Bar of Baltimore; A.B. 1899, Johns Hopkins University; LL.B. 1906, University of Maryland.

1 Maryland was the last colony to sign the Articles of Confederation.
2 ARTICLES OF CONFEDERATION, Art. III.
3 Ibid., Art. I.
4 Ibid., Art. V.
“to appoint one of their number to preside, provided no person be allowed to serve in the office of president more than one year in any term of three years”.5

John Hanson of Maryland was appointed first to fill this office; from this fact many people like to call him the “First President of the United States”. But there are technicalities connected with this claim.6

Space is lacking here to relate the reasons for the failure of this “league of friendship”, but its impotency is well known. In consequence, after an abortive meeting at Annapolis, Maryland, in 1786, most of the best minds in the country met in Independence Hall in Philadelphia in 1787.7

Again we lack space to tell any of the details of this meeting, which began in May and wound up its completed task in September, 1787. But even in this restricted account, it would be a sin of omission not to accentuate some high lights of the Convention. Mr. Beck gives us profiles of the men who were present.8 George Washington was, of course, there; but Benjamin Franklin then 81 years of age and in bad health, was the genius who guided the meeting to a successful conclusion. He is credited with bringing together the dissident members from the large and small States when they were about to split on the composition of “The Congress”.

Thomas Jefferson was not present, because at this time he was Minister to France. His absence is of interest because of what the late Newton D. Baker told in addressing the Cincinnati Bar Association in 1925.9 He said they found in Jefferson’s desk at Monticello over 100 constitutions of democracies which had failed, but not one of a successful democracy.

A remarkable feature of the Constitution was the lack of publicity with which the proceedings were conducted. The public and the press were not admitted, and soldiers

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5 Ibid., Art. IX.
7 See Beck, Constitution of the United States.
8 Ibid.
were posted around Independence Hall to keep out anyone but the accredited members, all of whom were sworn to secrecy.10 No member divulged what had transpired until the meeting was over, when several members evidently believed that their pledge of silence ended with the adjournment of the Convention after a form of Constitution had been agreed to and signed by most of the delegates.

The Nation's Chief Executive was an issue, or set of issues, as to which the Convention found great difficulty in having a "meeting of minds". The Presidential term, which is now still an issue, first harassed them. Some wanted a seven, eleven or fifteen year term with re-election barred. Others suggested a three year term. Finally the meeting accepted "the term of four years" with no prohibition against re-election.

Very recently, however (on March 24, 1947), Congress passed a joint resolution for a Constitutional Amendment, which, if adopted by thirty-six states will prohibit the election of any President for more than two terms.10a My information is that, at this writing, six states have ratified this amendment.

The manner of choosing the President gave the meeting even greater difficulty. This issue was first taken up on June 1, 1787, and an acceptable arrangement was not found until September 6, 1787, when the original sections of the Constitution as to the Presidential election arrangements were approved. After the Jefferson-Burr election in 1800, which threw the contest into the House in 1801, Congress proposed the Twelfth Amendment in 1803. It was ratified in 1804. We shall explain these differences later.

The Convention seems to have been swinging between opposition to anything that smacked of a monarchy, and the popular election of a President. These extremes are represented by the expressed views of Edmund Randolph of Virginia, who objected to a single person in the office

10 No official records of the proceedings were kept; and we are indebted principally to the private notes of James Madison for a record of what happened.

of President, as he regarded it as "the foetus of monarchy". And Elbridge Gerry of Massachusetts thought that "popular election in any form would throw the appointment into the hands of the Cincinnati, a society for the members of which he had a great respect, but which he never wished to have a preponderating influence in the Government".

A learned writer of almost forty years ago credits Senator Ingalls of Kansas with having told his associates in 1886:

"No less than ten methods of choosing a president were seriously proposed and debated".

I have not checked over Madison's voluminous notes of the Convention proceedings to locate all ten suggestions, but I find that popular election of the President was first proposed and rejected. Alternately it was suggested that the election should be made by the Legislatures of the States; by the Executives of the States; by the National Legislature (the Congress). Then the selection of the President by the electors was proposed, the electors to be chosen by the people. All of these were disapproved.

Finally, the selection of electors which "each State shall appoint in such manner as the legislature thereof may direct" was agreed to. And this is the plan now in operation. In effect, the original idea bore some similarity to having a Board of Directors selected by the States elect the President much in the manner in which a private corporation selects its executives.

Alexander Hamilton said of this plan in the 68th number of the Federalist:

"A small number of persons selected by their fellow citizens from the general mass will be more liable to possess the information and discernment necessary to so complicated an investigation".

However, in all the proceedings in the Constitutional Convention of 1787, the idea of a popular election of the

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12 Ibid., 454.
14 U. S. CONST., Art. II, Sec. 1.
President was definitely rejected, but this is what we now have with the qualification that the people now "appoint" the electors in each State, on a ticket for the different Presidential candidates.\textsuperscript{15}

II.

THE ELECTORAL COLLEGE.

As was said centuries ago in the Book of Ecclesiastes, "There is no new thing under the sun". Certainly The Electoral College idea (if not the name) is 600 years old. In the Roman-German Empire, seven princes called Electors chose the emperor. At first, these princes were called Margraves; then their title gave way to that of Elector.

These seven princes were the spiritual electors of Mayence, Treves and Cologne; and the temporal electors of the Rhine Palatinate, Saxony, Bohemia and Brandenburg (later called Prussia). This electoral system passed away with the empire in 1806. Others besides these princes had the title of Elector; the father of George First of England had the title of "Elector of Hanover".

When, after the Declaration of Independence, Maryland, a Palatinate, framed its Constitution in November 1776, its legislature was composed of two houses. One of them was its Senate. The members of this body were elected for five years, while the members of the House of Delegates were chosen for only one year.

The Senate had only fifteen members, chosen at large from the State. "They were elected not immediately by the people, but by electors — two from each county, appointed by the inhabitants for that purpose".\textsuperscript{15a}

This provision was put into the Maryland Constitution by Charles Carroll of Carrollton.\textsuperscript{15b} As Carroll spent some six years of his youth being educated in France and England, he would have been familiar with the Central European Electoral System.

\textsuperscript{15} Our system now in effect is a popular election of the President by States, and as we shall see, infra, sometimes a President may go into office under the electoral system when his opponent may have a greater number of popular votes.

\textsuperscript{15a} SCHARF, HISTORY OF MARYLAND, p. 279.

\textsuperscript{15b} ROWLAND, LIFE OF CHARLES CARROLL, 190.
The prominent commentators on our Federal Constitution, such as Lord Bryce, and the learned statesmen of the 1780's, such as Alexander Hamilton and John Adams, ascribe a large share of credit to the earlier Maryland Constitution of 1776 as forming the basis for the Federal document framed in 1787.

Moreover, when one considers the facts, it is clear that the Electoral College plan for choosing our presidents came directly from the Maryland Constitution.

As we have seen, what that 1787 Convention desired specially to avoid was the popular election of the President. Thus, evidently with this in mind, Maryland's Luther Martin on July 16, 1787, "moved that the Executive be chosen by Electors appointed by the several legislatures of the individual states". The motion was seconded, but then, as quaintly phrased in Madison's notes, "it passed in the negative".

This idea was toyed with for some time. Rufus King of Massachusetts suggested electing the Electors by the people. This was voted down. Other suggestions were made; and finally after extended debate, the plan as now contained in the Constitution (except for the Twelfth Amendment), was adopted on September 6th, 1787.

In these days when there is so much discussion in Congress about the right of states to require payment of poll taxes as a condition to voting in the national elections, it is significant to record that the development of the present plan of an electoral system was the outgrowth of an idea to give the individual states the power to determine for themselves, whom they wanted for their Electors, without interference of any kind from Congress.

Our Constitution nowhere describes this body of persons appointed to elect our national executives as "The Electoral College". They are merely described as Electors. The convenient phrase "Electoral College" is simply one that the presidential electors have grown up to own. Indeed, I wonder if some bright newspaper writer did not

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16 Supra, n. 11, 395.
17 Ibid.
invent the phrase, as they now so frequently and so aptly
do in other matters.

We should here get straight on our terms. Of course,
every one who elects is an elector; so every citizen who
votes is an elector. A presidential elector is also an elector
because he votes for the President. It would perhaps be
safer to call our citizens "Voters"; and those electors named
in the Constitution, we should call "Presidential Electors"
or merely "Electors". Perhaps the phrase "Electoral Col-
lege" is not a precise description for this body of electors,
but it is very well suited for general use, even if it is not
entirely accurate.

Under the present provisions for presidential elections, each
state appoints its Electors who in number equal the
State's total of senators and representatives. No senator
or representative or person holding an office of trust or
profit under the United States can serve as an Elector. A
New York paper questions if "dollar a year men" can
serve. These Electors are appointed in each State "in such
manner as the Legislature thereof may direct". The
appointment of these Electors is entirely within the con-
trol of the States. Each State may appoint them in any
manner its legislature may decide upon. There is no neces-
sity to have a popular vote for them. In fact, in the early
days of the Union, under the new Constitution many of the
States had the Electors appointed by their legislatures.
South Carolina kept up this practice until 1864. The United
States Supreme Court considered this situation in 1892. In
Chief Justice Fuller's opinion in this case, he reviewed
the prior practices of the different States in this matter,
and he said:

"... the appointment and mode of appointment
of electors belong exclusively to the States under the
Constitution of the United States".

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18 See, U. S. Const., Art. II, Sec. 1, as amended by the Twelfth Amend-
ment.
19 Supra, n. 18.
21 Ibid.
The only Federal control over the State election of Electors is the constitutional provision that "The Congress may determine the time of choosing the Electors".\(^2\) It has chosen "the Tuesday next after the first Monday in November in every fourth year".\(^2\) A current broadcaster says the reason for this cryptic selection was so that business men would not have a Federal Election come on the first day of the month and thus interfere with the monthly accountings.

Since the early days of our Constitution, the very thing the framers of the Constitution aimed to prevent has occurred. In every State the Presidential Electors are chosen by popular vote. As we point out more specifically below, however, the manner of preparing these presidential ballots varies greatly in the different states.

As the manner of appointing Electors is entirely a State matter, it may enlarge or decrease the classes of persons entitled to vote. For instance, in Georgia in 1944, 18 year olds were permitted to vote. Conversely, we see no reason why any State could not, if it so desired, restrict the voting on Presidential Electors to persons, say, over 40 years of age. But no State could refuse the right to vote to any of its citizens "on account of race, color or previous condition of servitude",\(^2\) nor on account of sex.\(^2\)

No matter in what form the voting in each State may be, even where it is merely for the names of candidates for President or Vice President, the votes cast are in reality for the Electors to which each State may be entitled. These Electors may be chosen by districts, or by State-wide general ballots.\(^2\) Voting by districts necessarily means that a State can choose some Electors of one party and others of another. But now almost all the States vote on a general ticket which means that the majority votes in each State carry that State's entire electorate. The States now do not split their vote. There is, however, noth-

\(^{22}\) Supra, n. 18.
\(^{23}\) 3 U. S. C. (1886) Sec. 1.
\(^{24}\) See, U. S. Const., Art. 15.
\(^{25}\) See, U. S. Const., Art. 19.
\(^{26}\) Supra, n. 20.
ing in the Constitution to prevent a split vote for the Electors.

After the States appoint Presidential Electors they must meet and perform the functions for which they are chosen. The only right that Congress has in this connection is that under the Constitution, it may determine the day on which the Electors shall meet and cast their votes which day shall be the same throughout the United States. Congress has fixed this day as the "first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of that State shall direct". Therefore, the Electors never meet in a single body, but on the designated Monday in December they meet in a single place in each State, and there they vote for the President and Vice President.

One thing seems to be clear, although there is no decision of the Supreme Court on it, and it is, that under the Federal Constitution, the Electors are free to vote for any candidates they may choose, provided, of course, that such candidates have the requisite constitutional qualifications.

While the Presidential Electors have the constitutional right to vote for any qualified person, it is highly improbable under the present practice that they would vote for anybody except the candidates named by their respective National Conventions. Moreover, the practice in most of the States now is to have the names of the Presidential Candidates on the ballots and as the Presidential Electors will be members of the party for whose candidates the people have voted, it would be equivalent to political suicide for the Electors to vote for any other person. As far as I can find out, there was only one occasion when the Electors of one party voted for the opposite party; that was in 1796 when three Democratic Electors voted for John Adams in preference to the candidates of their own party. If two of these Electors had voted for Jefferson, he would have become President in 1797 instead of four years later.

In the Constitution as originally framed, the Electors voted by ballot for two persons, and they made a list of all

27 Supra, n. 20, and 3 U. S. C. (1887), Sec. 5 (probably superseded by Sec. 5A).
the persons voted for, which they signed, certified and transmitted to the seat of the Federal Government. This list also showed the number of votes which each candidate got. It is the duty of the President of the Senate to open the certificates. The votes are then counted. Then the person having the greatest number would be President if such number was a majority of the whole number of the Electors. But if the higher candidates had an equal number of votes, the House of Representatives must immediately choose by ballot one of them for President.

In the election of 1800, Thomas Jefferson and Aaron Burr each received the same number of Electoral votes, so it was up to the House of Representatives to choose a President. After 36 ballots in the House, Thomas Jefferson was elected President by the votes of 10 States out of 16.

In 1803, to obviate any such contest again, Congress adopted the Twelfth Amendment. It was made a part of the Constitution in September 1804 by ratification of three quarters of the States, and still remains in force. Under it, the Electors meet in their respective States, at a single place designated by the legislatures of the States, and there vote by ballot for President and Vice President, one of whom at least shall not be an inhabitant of the same State as themselves. This insures that the President and Vice President will not be residents of the same State. The Electors then vote first for President and in separate ballots for Vice President. They are required to make lists of all persons so voted for and the number of votes for each. These lists they are required to sign and certify and transmit to Washington, directed to the President of the Senate, who, in the presence of both the Senate and the House of Representatives, opens all the certificates "and the votes shall then be counted". The person having the greatest number of votes for President, if such number be a majority of the whole number of Electors, shall be the President, but if no person has such majority, then from the persons having the highest numbers on the list of those voted for

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28 Supra, n. 18.
29 Ibid.
as President, not exceeding three, the House of Representa-
tives shall immediately by ballot choose the President. In
choosing the President, the votes in the House shall be
taken by States, each of which has one vote. A quorum
consists of members from two-thirds of the States and a
majority of all the States is necessary to a choice.

In most cases the successful candidate has a majority of
the whole number of Electors; then there is no question
about his appointment. If, however, no candidate has a
majority of the Electors' votes, then the House must elect
a President. The constitutional amendment referred to,
further provides that if the House of Representatives fails
to choose a President before the fourth of March next
following, "the Vice President shall act as President, as in
the case of the death of or other constitutional disability of
the President". 80

Similar machinery is employed for the election of a
Vice President. If a majority of the Electors vote for a
candidate as Vice President, then he is elected as such.
But if no candidate has a majority of the whole number
of Electors appointed, then from the two highest numbers
of the list transmitted to the President of the Senate, it
shall choose a Vice President. This is different from the
case of a President when the House of Representatives
functions.

A quorum of this senatorial balloting consists of two-
thirds of the whole number of Senators. A majority of
them is necessary to a choice. There is no provision in the
12th Amendment that in voting for a Vice President the
Senate shall vote by States. It is obvious, however, that
such provision is unnecessary because as each State has
only two Senators the same result is accomplished without
any specific clause to that effect.

The above outline is the complicated machinery under
which at the present time the President and Vice President
are elected. In a normal case, candidates are elected by a
majority of the whole number of Electors appointed and
nothing arises to cause any difficulty or complaint. It has

80 Ibid. Under U. S. Constitution, Twentieth Amendment, January 20th
would be substituted for March 4th.
happened, however, in several cases that Presidents have been elected by a majority of the votes of the Presidential Electors when the popular vote of their opponents was greater. We refer to these several instances in a later topic.

There are many situations, however, for which the carefully drawn 12th Amendment together with the other portions of Article II of the Constitution do not make specific provision. These are, of course, defects or insufficiencies in the system which in some cases Congress has tried to correct by legislation which it has passed. There is considerable doubt, however, about the constitutionality of such laws. We shall refer to them more in detail in the next topic.

III.

DEFECTS IN THE SYSTEM.

1.

Total Electoral Vote may be Greater than Total Popular Vote.

At the "Lame Duck" Congressional Session of 1944, one or more members of Congress announced their intention of submitting to Congress a constitutional amendment to abolish the Electoral College. During almost the entire time that this system has been in effect under the Constitution of 1787 with only the one comparatively slight change made by the Twelfth Amendment in 1803, complaints about the system have been voiced many times by the States as well as by members of Congress. As far back as 1825, an amendment to abolish the Electoral College was submitted to Congress. It was not passed nor have any of the other changes since then, except the Twelfth Amendment, reached maturity. We doubt very much, therefore, that the intentions expressed at the 1944 session referred to will ever reach the point where 36 states will be found willing to approve such a constitutional amendment, as to amend the Constitution a mere quarter
of the States plus one more, can prevent a proposed amendment becoming effective. I have no political prescience, but I am inclined to believe that 13 states will be found unwilling to abolish the present system.

The present complaint seems to arise from the fact that it is possible for a man to be elected President who has a majority of the electoral votes but fails to get a popular majority. This has, in fact, occurred in the history of the country on three occasions. In 1876, Rutherford B. Hayes received more electoral votes than his opponent, Samuel J. Tilden, but the latter received the popular majority. The same thing happened in 1888 when Benjamin Harrison was elected by the Electoral College, though his opponent, Grover Cleveland, received the popular vote. Also, in 1825 the contest between John Quincy Adams and Andrew Jackson was thrown into the House because neither candidate got the vote of a majority of the electors. Although Adams became President by a vote of the House, his electoral vote was 84 against Jackson's 99; also Jackson had the greater popular vote, but six States had no popular vote as the Electors were appointed by their Legislatures.

From my own point of view, I am not convinced that when sometimes a successful candidate for President does not get the popular majority this is a defect, because the framers of the 1787 Constitution had to accomplish a very difficult task in molding 13 (now 48) independent sovereignties into a centralized government. In creating this Union it was desired to retain much of the sovereignty which the individual States possessed. Though the electoral system is, as we shall later point out, lacking in some respects in sufficiency, it does to an extent preserve in Presidential Elections the identity of the States. However, to those persons who believe that state lines should be obliterated or that better results would be accomplished by having a total popular vote of the United States counted in Washington by one set of canvassers, and the recipient of a majority of these votes, regardless of state lines, declared to be the President, then the present system is, of course, insufficient.
2.

Counting the Electoral Votes.

The Twelfth Amendment provides that the Presidential Electors shall meet in their respective states, cast their votes in accordance with this amendment, and make distinct lists of all persons voted for, which they shall sign, certify and transmit sealed to Washington, directed to the President of the Senate. This official is required thereupon to open all the certificates "and the votes shall then be counted". There is no provision as to just how this counting shall be done. Of course, if the certificates are all in order and the counting is a mere matter of arithmetic, then no difficulty will arise. But experience in the past has shown that in many instances the certificates are not in order, because of conflicts among the electors in certain States, or for other reasons. The Constitution is entirely silent as to who shall decide these conflicts.

Ever since the Presidential Election of 1796, difficult questions have arisen as to the Electoral Votes of some States. In most cases the decision of such questions was immaterial because the successful candidate for the Presidency was so far ahead, that it made no difference who received the disputed electoral votes.

The crux of the matter is that Congress has assumed to handle these situations, and has passed some special legislation as well as acts of general application to care for them. But let me here make a brief resume of these acts and the conditions which required their passage.

In 1796, the vote of the Vermont electors was sent in, though the Legislature of that State had passed no act "directing" the manner of their appointments. Various minor matters like this came up from time to time until the Civil War when, in the 1864 election, the Congress was harassed by the fear of the Lincoln vote being upset by electoral votes from some of the seceded States. As a result of this, Congress passed a Joint Rule that the elec-

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[a] Ibid.
[b] Supra, n. 13.
toral vote of no State that was objected to would be counted unless both the Senate and the House concurred in so doing. The votes of Louisiana and Tennessee, which were sent in, were not accepted in the 1864 election.

Following the election in 1876, a contest developed over the electoral votes in Louisiana, Florida, South Carolina and Oregon. So Congress, in 1877, passed an act applicable only to the pending issues, creating an Electoral Commission. This Commission functioned, and both it and the House voted for Hayes on political lines, as a result of which he was declared elected over Tilden, who had the greater popular vote.

In 1887, in 1928 and in 1934 Congress passed general acts creating machinery for canvassing, counting and handling the electoral votes. These statutes are still in force. Their constitutionality is in doubt, but just what court or body can determine this issue is not clear.

3.

No General System of Appointing Electors is Provided.

Another complaint is that the Constitution nowhere provides for any general system of appointing electors throughout the United States. The only provision is the one contained in the original Constitution requiring each state to appoint its authorized number of electors "in such manner as the Legislature thereof may direct".

Prior to 1832 there was a great variety in the manner in which the various states acted under this provision. In the early elections many States (if not a majority of them) appointed their electors entirely by their State Legislatures. South Carolina kept up this practice until 1864; and even later, Florida in 1868 appointed its electors by its Legislature; and in 1876 Colorado did likewise.

**3 U. S. C. (1887), Sec. 6.
**3 U. S. C. (1928), Secs. 5(a), 7(a), 9(a).
**3 U. S. C. (1934), Secs. 5(a), 11(b), 11(c), 17.
**Supra, n. 18.
Many states followed a district system of voting, which the Supreme Court in the case of *McPherson v. Blacker*,\(^{37}\) has held was legal, as each State had the right to decide upon its method of choosing its electors. Under this system, the States were divided into such number of districts as they were entitled to Presidential Electors, and one Elector was voted for in each district in the manner that Congressmen are now elected. It will be seen that in this way the vote of a particular state could be split between the different parties, just as now the representation of States in both the Senate and the House may be split.

Since 1832 the States generally (but by no means unanimously) have followed what is called the "general ticket system". That is, the vote for electors is state-wide and under this system unless one or more Electors chooses to withdraw from his party and vote for some candidate not a member of the party on the ticket by which he was elected, all of the State Electors are put in office to vote solidly for the predominating candidate. Without going too deep into figures, it will be seen that in this way the thousands of voters of a particular State may by a small majority carry the unanimous vote of the State for all of its Electors. For instance, in 1832 in New Jersey all of its eight Electoral votes were given to Andrew Jackson over Henry Clay, although the total of the Jackson votes exceeded the Clay votes by only 232. In Maryland in 1904, Theodore Roosevelt exceeded Alton B. Parker by a mere 51 votes. It is this factor in the general system which makes it possible for a candidate to be elected by a majority of the Presidential Electors, yet on account of the varying numbers of registered voters in the different States he may have less than a popular majority.

Even now there is no unanimity in the way the States "appoint" their Electors. The Electors are local political candidates who are nominated for the office in some States by the political conventions, or otherwise as local practices may require. As we have seen, the manner in which they

\(^{37}\) *Supra*, n. 20.
are voted for varies in the States. But in all of the States now the appointment of Electors is by popular voting.

Whether or not the lack of a uniform practice among the States is a "defect", depends upon the point of view.

4. Status of Electors is not Determined.

Another defect lies in the fact that there is nothing in the Constitution which determines the legal status of these Presidential Electors selected by the different States in such manner as they may determine. As we indicated above, the Supreme Court has held that the method of appointing Electors is entirely a State function in which the States may choose their own methods unrestrained by anything except constitutional discrimination against voting by reason of race or sex.

All of the courts which have had occasion to consider the status of these Electors, including the Supreme Court of the United States, have decided that Electors are State, not Federal, officers. But the Federal Courts say that Congress can define and provide punishment through the Federal Courts for offenses committed in connection with the voting for Electors.

In most cases, it is unimportant just what courts, or what legislative bodies, may exercise rights in connection with these Electors. In 1789, New York failed to appoint Electors because the two Houses of its Legislature were at odds and New York sent in no Electoral vote.

And it is conceivable from some recent indications that the Electors in some States might refuse to vote at all. Of course, Electors have a constitutional right to vote for whom they please, but when elected they should perform the duties for which they were appointed. In the event of their failure or refusal to vote at all, it is not clear what authority could compel them to act.

88 Supra, n. 24.
89 Supra, n. 25.
We do not believe that in the case any State refuses to participate in the appointment of Electors, there is any Federal authority to compel it to act. Certainly, the Supreme Court decisions which decide that a State which refuses (even arbitrarily) to surrender fugitives from justice to another State, cannot be compelled by any Federal authority to do so, are in point here.41

But there is a great difference between forcing a State to act, and directing a State official to perform the constitutional duties for which he was appointed.

5.

Uniform Date for Meeting of Electors.

One further defect lies in the provision of the Constitution, in Sec. 1, Art. 2, which requires Congress to determine the day on which the Electors shall give their votes, which day shall be the same throughout the United States. In 1856, it happened that the Wisconsin Electors were prevented by a severe snowstorm from meeting at the place within the State which its legislature had picked for the performance of their electoral functions. They were, therefore, unable to vote on the day which Congress had specified, as the day on which they should cast their votes. They did meet and vote on the next day. In this election the Wisconsin votes were not important, because the election was not close. But if the issue had depended on the Wisconsin votes, who can say whether these votes were valid or not?

IV.

Vacancies in the Presidential Office and among the Candidates.

Seven Presidents have died in office—four by natural deaths—William Henry Harrison, Zachary Taylor, Warren G. Harding and Franklin D. Roosevelt; three by assassina-

41 Commonwealth of Kentucky v. Dennison, Governor, etc., 24 Howard (U. S.) 66 (1860).
tion—Abraham Lincoln, James A. Garfield and William McKinley. Only one candidate for office has died—Horace Greeley in 1872.

On occasions there has been national concern when two Presidents were too ill to perform the duties of the office—James A. Garfield and Woodrow Wilson; but it is not within the scope of this work to deal with such situations. We merely undertake to point out the rights and possibilities of succession when vacancies have occurred in the Presidential Office, or among the candidates.

The death of a President both after inauguration and before inauguration and as a candidate presents four situations in which a question might arise as to who should succeed to the Presidential Office in the event of his death:

A. After the Inauguration.
B. Before the Inauguration and After his Election.
C. Before the Election by the Electoral College and after the Popular Election.
D. Before the Popular Election.

A. After the Inauguration. This is the only situation for which the Constitution as originally drawn made provision. In one of the later paragraphs of Sec. 1, Article II, is the provision by which in the event of the removal of a President from office or of his death, resignation or inability to discharge the powers and duties of his office, these shall devolve upon the Vice President, and Congress may by law provide for the situation when for the same causes both the President and Vice President are unable to serve.

In 1886 Congress passed an act making provision for this situation whereby the Secretary of State would succeed to the office in the event of the inability of both the President and Vice President to serve. The act also makes provision for the various members of the Cabinet who are next in order of service: The Secretary of the Treasury; the Secretary of War; the Attorney-General; the Postmaster General; the Secretary of the Navy, and lastly the Secretary of the Interior. As the Departments of Commerce, of Agriculture and of Labor were created since this
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act was passed, the heads of these Departments are not mentioned in it and they could not, therefore, be called upon to serve as President.42

Just recently, Congress changed the order of succession provided by the Act of 1886. Now, the Speaker of the House succeeds the Vice-President. Then next is the President Pro Tempore of the Senate. The further succession, beginning with the Secretary of State continues as directed by the Act of 1886, with two exceptions.42a

The still more recent act merging the armed forces under one head, called the Secretary of Defense, required that this new secretary be in the place of the Secretary of War; the former Secretary of the Navy is eliminated entirely.42b

The earlier of the two acts just referred to recognizes the existence of the Departments of Agriculture, Commerce, and Labor by placing their respective Secretaries, in the order named, at the end of the earlier created Cabinet officers.

Congress has passed an act providing that the only evidence of a refusal to accept or a resignation of the Office of President or Vice President shall be an instrument in writing, signed and delivered to the Office of the Secretary of State.43

B. Death of the President-Elect. This situation was not provided for until the 20th Amendment, which was ratified by the States and became a part of the Constitution in 1933. Under it, if the President-Elect shall have died, the Vice President-Elect would become President. If, however, due to inability of the Electoral College or of the House to agree upon a President, one shall not have been

42 The Department of Agriculture was created by an Act of Congress on May 15, 1862, but was headed by a commissioner. The Commissioner was renamed Secretary of Agriculture and became a member of the cabinet by Act of Congress passed on February 8, 1889. The Department of Commerce and Labor was created by Act of Congress on February 14, 1903, with its Secretary as a member of the Cabinet. In 1913, the Department was divided into the present Department of Commerce and Department of Labor, and the Secretary of each was made a Cabinet member.
42a 80th Cong., Ch. 264, Pub. L. 199 (approved July 18, 1947).
42b 80th Cong., Ch. 343, Pub. L. 253 (approved July 26, 1947).
43 See, 3 U. S. C., Sec. 23, Rev. St. 151.
elected, or if the President-Elect shall have failed to qualify, then the Vice President-Elect shall act as President until a President shall have qualified.

The 20th Amendment further authorizes Congress to pass a law providing for a case wherein neither the President-Elect nor the Vice President-Elect shall have qualified, but so far Congress has not acted in this connection so that if both the President-Elect and the Vice President-Elect should die before inauguration, it is difficult to say what would happen. One might raise a Constitutional question by suggesting that an act passed by Congress after this event shall have happened, would be defective.

C. Death of the Presidential Candidate after a Popular Election and Before the Electors Act. Under our system as outlined above, the real election of the President is when the Presidential Electors meet in December in their respective states to elect the President. It is perfectly clear that under the Federal Constitution notwithstanding the manner of the State election the Presidential Electors are free to vote for any qualified persons who they think would be suitable for the appointment of President and Vice President.

This situation actually occurred when Horace Greeley, the Democratic candidate died in 1872. Most of the Electors scattered their votes among the other candidates; the Georgia Electors voted for Greeley; but the Two Houses in Congress refused to receive these Georgia votes.

If a similar thing should occur again, the Electors might again act as in 1872. I am not a political prophet, but I am inclined to believe that the Electors would act differently now. Any number of possibilities might occur. They might just vote for the Vice President; they might consult the National Committee of their party, and follow its suggestions; or they might severally vote for some "favorite son". Perhaps it is safer to say that it is all a matter of speculation as to what they would do, and anyone is entitled to his own prediction.

As we shall see below, at the Convention of each party it is customary for those meetings to pass resolutions
authorizing the National Committee of the party to fill vacancies among the nominees. I doubt very much if the authority conferred by these resolutions continues after an election has been held.

D. Death of the Presidential Candidate Before the Popular Election. As we have seen above, just how the Presidential Electors shall be appointed is a matter in which each State shall function as its Legislature may direct. At the present time the States have varying methods of handling the situation, all of which, however, amount to a popular election of the President. In Maryland and in the greatest number of the States, the names of the Electors do not appear on the ballot at all. These contain only the names of the President and the Vice President. Persons voting on such tickets, however, while intending to vote for the Presidential and Vice Presidential candidates named, are in reality voting for the Presidential Electors who, as we have said above, are under no constitutional restraint to vote for the candidates selected by the popular vote. It is highly improbable, however, that the Electors would vote for anybody else.

A large number of other states provide that both the names of the Presidential and Vice Presidential candidates as well as the names of the Electors shall appear on the ballot. In other states only the names of the Electors appear, and in one State44 there are no statutes prescribing any particular form of ballot. Also the use of voting machines requires a special arrangement. But in all of these cases no matter what may be the particular form of ballot used in the State the machinery of the election now is such as to indicate the popular choice for President and Vice President, which the Electors will undoubtedly follow.

If, therefore, a vacancy should occur by reason of death of the candidates nominated by the political conventions of the different parties held in the summer time, much would depend upon just when the death occurred. In the first place, it is customary that both the Democratic and Republican Conventions through the delegates assembled

44 South Carolina.
pass resolutions authorizing the National Committee to fill any vacancies among the candidates which may occur before election. The Republican resolution used in this connection goes further than the Democratic one. It authorizes the National Committee to call a new Convention if it should so decide.

If, therefore, any Presidential or Vice Presidential candidate should die before the popular election and the death should occur in sufficient time for the National Committees to act, under the power given them by the Conventions just referred to, they doubtless would take some action in the premises, but if a Presidential or Vice Presidential candidate should die on the eve of the election leaving no time within which the National Committee might act to fill the vacancies, I see nothing that could be done except to proceed with the election on the day fixed by Congress. Then, as the Electors under the Federal Constitution have the power to vote for anyone whom they please, they would probably respect the mandates of the party to which they belong and choose, in lieu of the deceased President the Vice Presidential candidate.

If both candidates on the same ticket should die before the election and too late for the National Committee to act, it is highly probable that the electors in the time intervening between the date fixed for their assembly (which is about a month) would desire some advisory suggestion from the National Committees of the party to which the deceased candidates belonged.

But in view of the great freedom of choice allowed by the Constitution to the Presidential Electors, no one could predict with entire accuracy, what they would do. The Horace Greeley incident, referred to above, suggests many possibilities.

In one respect, there is no difference between the two situations last referred to, (1) in which the candidate dies before the popular election in November, and (2) in which the candidate dies after the popular election in November, but before the meeting of the Electors in December; in
both cases, under the Federal Constitution the Electors may vote for whom they choose.

There is, however, some difference between them from the point of view of the Electors, who, after all, are always selected from the ranks of the political party for which they are designated on the ballots used in the popular election. In case number (1), when the candidate dies before the popular election, if there is time before the date of the popular election, the National Committee of the particular party concerned will step in and will fill the vacancy, either by their own action, or by calling a new convention. But if the candidate dies on the eve of the popular election too late for the National Committee of the party to function, as I have said above, I believe the election must be held nevertheless, and I think the Electors would feel that to vote for the Vice President of this party for President would mean that they are merely honoring the suffrages of the people who “appointed” them.

In case (2), however, when a candidate dies after the popular election but before the Electors meet, there is greater room for doubt in the minds of the Electors, because the popular vote was not based on a situation which had occurred when the people cast their ballots. Here the Electors of that party might be in doubt about what to do, an example of which appeared in the Greeley incident referred to above.

It should be observed, further, however, that in some few States, there are either State constitutional or statutory directions controlling the actions of the Electors. While I think it doubtful that either a State Constitution or Statute, can control the freedom of choice of candidates which the Federal Constitution leaves to the Electors, what I have said above should be qualified in these few States, because in them, undoubtedly, their Electors would feel themselves constrained to act in accordance with the control of their vote which their State Constitution or statute imposes upon them, despite the freedom of choice which the Federal Constitution leaves to them.
APPENDICES

Appendix A.

Article II, Section 1, of the Constitution as changed by the 12th Amendment:

"ARTICLE II.

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

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: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[TWELFTH AMENDMENT.]

[The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall con-
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The Electors consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. . . . The person having the greatest number of votes as Vice President, shall be the Vice President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice President of the United States.

The Congress may determine the Time of choosing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

Appendix B.

"TWENTIETH AMENDMENT.

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3rd day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Sec. 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3rd day of January, unless they shall by law appoint a different day.

Sec. 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Sec. 4. The Congress may by law provide for the case of the death of any of the persons from whom the House
of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.”