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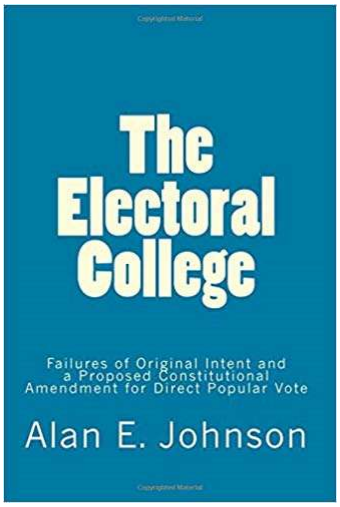

The Electoral College: Failures of Original Intent and a Proposed Constitutional Amendment for Direct Popular Vote

Alan E. Johnson

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"It is necessary that the Executive Magistrate should be the guardian of the people, even of the lower classes, against Legislative tyranny, against the Great & wealthy who in the course of things will necessarily compose the Legislative body. Wealth tends to corrupt the mind and to nourish its love of power, and to stimulate it to oppression. History proves this to be the spirit of the opulent... The Executive therefore ought to be so constituted as to be the great protector of the mass of the people."

Governeur Morris, Constitutional Convention, July 1787

In his newest book, *The Electoral College: Failures of Original Intent and a Proposed Constitutional Amendment for Direct Popular Vote*, Alan Johnson takes a bold and thought- provoking look at the origin and history of the Electoral College – the early beginnings of what we have accepted heretofore as the Founders' best system for electing the nation's Chief Executive.

As Alan Johnson disclosed in his Preface to *The Electoral College*, he had, like many Americans at the time, "shrugged off" the controversial outcome of the 2000 Presidential election between the then Vice President, Al Gore, and his challenger, Texas governor George W. Bush (ix). However, four election cycles later, in the 2016 presidential election, Johnson found an undisputable reason to take a closer look at the system – although long entrenched in our national psyche – that had given a result for the highest office in the land that was leaving much unanswered and even less understood.

Johnson tells us that his inquiry "turned out to be quite fascinating," and also revealed that "the origins of the Electoral College were more complicated than what is often represented today" (x). Ultimately, his investigation, research, and analysis led to this timely book; and his exploration has culminated with the proposal to re-visit the Constitution of the United States. As Thomas Jefferson suggested, as "new discoveries are made" and circumstances change, "institutions must advance also, and keep pace with the times" (front sheet).

Johnson's Preface points out that the first piece written for *The Electoral College* was a "lengthy Appendix entitled 'A Detailed Narrative of the Debates on the Selection of the President in the 1787 Constitutional Convention,'" a "chrono-
logical discussion" (xi) of the many debates surrounding the "various [and] competing methods for selecting the president" of the new United States (1). That no one came out of the Constitutional Convention

of 1787 completely satisfied with the results is well expressed by the delegate from Pennsylvania, James Wilson, who stated that: "This subject has greatly divided the House, and will also divide people out of doors [the public]. It is in truth the most difficult of all on which we have had to decide" (1).

Johnson provides a brief overview of each chapter, explaining that Chapter 1 will "treat some of the same material" as did the Appendix, only topically while the Appendix handled the "Narrative of the Debates…" chronologically (xi). The next five chapters go on to cover the Ratification process for the new Constitution, through the early years of the Electoral College, to the "current operation" of today's "winner-take-all" system, which Johnson points out is "essentially different from [that] conceived of by the… Founders." He then concludes with "the legal text of a proposed constitutional amendment for direct popular vote with instant run-off voting" in Chapter 6 (xi).

The Appendix, along with Chapter 1, gives not only the factual steps involved in establishing our particular system for electing the nation's president, but also provides us with the various protestations against it and possible alternatives to it presented by several of the delegates in attendance. That the Electoral College decision was a given was by no means certain at the time. Varied and numerous opinions pervaded the Convention in 1787, but, despite arguments and ideas to the contrary, the system now in place was the one which prevailed. Chapter 2 then describes the process that took the Electoral College from a proposal to a Constitutional Amendment as it was brought before ratifying conventions in each of the States. And as Johnson points out, there was no shortage of disagreements and debates as the proposed Constitution made its way through the several States comprising the new Union (50, 82).

Chapter 3 covers the Electoral College in practice from its beginning in 1789 "through the ratification of the 12th Amendment in 1804," including, as Johnson puts it, the frustration of "original intent" in its actual operation as part of our constitutional government (xi). Johnson argues that as the Electoral College procedure moved from a theoretical concept to a functioning feature of government, serious flaws became apparent (98) – flaws that were only partially dealt with in the 12th Amendment. Chapter 4 then picks up with the ratification of the 12th Amendment and discusses the "failures of 'original intent' from that point, through the "critical" and controversial elections of 2000 and 2016, to the present day (xi, 107).

In addition to evaluating the current Electoral College system, Chapter 5 also "analyzes and evaluates the major alternatives, other than direct popular vote, that have been proposed" to replace it (xi). Johnson opens the chapter by "examining and evaluating the standard defenses of today's Electoral College" (115). What many seemingly fail to understand, according to Johnson, is that today's Electoral College is not exactly the same Electoral College the founders had believed themselves to be establishing. Johnson points out that a number of those involved in designing the Electoral College system wanted the electors to be chosen by the people as a whole in each state; however the final result was that each state was free to choose its electors in whatever manner they saw fit, therefore allowing for some of the electors to be elected in that manner while others might be selected by the individual state legislatures. But as the proposed constitution made its way to the various ratifying conventions, a number of those in favor seemed to believe just that and argued accordingly (36, 82, 102). However, regardless of the exact method for obtaining the presidential electors, all were basically in agreement that the Electoral College was an adequate safeguard against the election of a demagogue or incompetent, or someone easily manipulated, to the highest office in the land because the belief was that the electors, while coming from the citizenry in general, would be members of good quality and an upstanding character, "capable of analyzing the qualities adapted to the station… possess[ing] information and discernment requisite to so complicated an investigation" regarding the suitability of the proposed presidential candidates (80, 117).

Chapter 5 also explores some possibilities for replacing the existing system with a new, more well-suited procedure for electing the president. Johnson points out that while some believe a solution to be a "return" to the idea of "independent electors" – those who would exercise their own individual or collective judgement to vote for the best candidate, rather than perhaps the candidate with the largest number of votes in a particular state – it would be impractical and likely impossible. He argues that "Americans value their

ability to vote… and have never accepted the idea (in *Federalist 68*) that electors should [use] independent judgement in choosing a president," and would be quite unlikely to do so now. He cites the recent election of 2016 where electors acting independently of their state's winner-takes-all stance could have swung the election away from Republican candidate Donald Trump and to Democratic candidate Hillary Clinton, thereby potentially causing an "armed insurrection" from the deprived side (130-32). Therefore, a new system is needed that would not leave voters feeling left out of the process and would lead to more engagement of the populace in our electoral system. He then discusses three potential possibilities: the "District Plan," "Proportional Plan," and the "National Popular Vote Interstate Plan" – a proposal by law professor Robert Bennett as a possible alternative to a constitutional amendment (132-38).

Chapter 6 is Johnson's "Proposed Constitutional Amendment for Election of the President and Vice President by Direct Popular Vote" (139). His chapter begins with "the text and an explanation of the proposed amendment." Following this, he discusses "both advantages and anticipated objections" to the proposal, along with some "specific references" to help avoid "abstractions" (140). Johnson believes that the amendment proposed could "solve the longtime problem of the Electoral College," but acknowledges that "such an amendment will not be adopted in the near future." However, he notes that as political scientist, Matthew Streb said, "American history is full of examples of reforms that at one time seemed impossible…" (155, 159).

Anyone with an interest in electoral politics will find *The Electoral College* an invaluable read. Alan Johnson has provided both the backdrop for our electoral system and the details making it understandable to the average reader. And it leaves us with a curiosity about what is next to play out on our electoral stage.

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