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Stephen M. Sheppard

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# A CASE FOR THE ELECTORAL COLLEGE AND FOR ITS FAITHLESS ELECTOR

STEPHEN M. SHEPPARD\*

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Every four years, the cry goes up to destroy the Electoral College. That cry is especially loud in years when a candidate is elected president who receives a minority of the votes. The election of a “minority president” happened with the election of 2000, but it had happened before.<sup>1</sup>

The Electoral College has elected three presidents whom a majority of the voters voted against: Rutherford B. Hayes in 1876,<sup>2</sup> Benjamin Harrison in 1888,<sup>3</sup> and George W. Bush in 2000.<sup>4</sup> (A fourth president was also elected with a minority of the popular vote—John Quincy Adams in 1824—though that election was by the House of Representatives, the Electoral College not having produced a majority of electors.<sup>5</sup>)

Against these recurrent cries are occasional voices of dissent, arguing for one reason or another that majority rule is not the highest value of a republic. So does this Essay, arguing to keep the Electoral

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\* Dean and Charles E. Cantú Distinguished Professor of Law, St. Mary’s University School of Law. The arguments below were significantly enhanced by the able research assistance of Mary Christian Barr. I am grateful to Howard Schweber and the *Wisconsin Law Review* for their invitation to attend this symposium.

1. See *infra* note 4 and accompanying text.

2. On the election of Hayes over Samuel Tilden, see WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876 (2004).

3. On the election of Harrison over Grover Cleveland, see CHARLES W. CALHOUN, MINORITY VICTORY: GILDED AGE POLITICS AND THE FRONT PORCH CAMPAIGN OF 1888 (2008).

4. Among the comment on the election, or selection, of President Bush over Al Gore and judicial intervention in the Florida election, see A BADLY FLAWED ELECTION: DEBATING *BUSH V. GORE*, THE SUPREME COURT, AND AMERICAN DEMOCRACY (Ronald Dworkin ed., 2002).

5. For 1824 race, see LYNN HUDSON PARSONS, THE BIRTH OF MODERN POLITICS: ANDREW JACKSON, JOHN QUINCY ADAMS, AND THE ELECTION OF 1828, at 69–108 (2009).

College, even were the rest of the Constitution subject to wholesale revision.

That said, there is room for improvement. The Electoral College should function nearer to its original design by restoring elector independence through a reduction in the power of the political parties over the electors and by a reduction of the silliest aspects of federal election law. Though the election law generally is beyond the argument here, it has to be said that unlimited money corrupts the ballot and foolishly bounded districts corrupt the Congress, and reforming both would likely diminish the risks before and after resort to the Electoral College.

### I. THE ELECTORAL COLLEGE

In the name given in the United States Code, the President of the United States is chosen by a College of Electors.<sup>6</sup> Each state has as many electors as it has members in Congress—with three electors from the District of Columbia—totaling 538 electors.<sup>7</sup> The electors are chosen by whatever manner their jurisdiction selects on the day of the popular vote, which, in the language of the Constitution, is the “Time of choosing the Electors.”<sup>8</sup> The electors meet in their home jurisdiction in mid-December to cast their votes, which are tallied in Washington, D.C., early in January.<sup>9</sup> Whoever wins a majority of this vote is elected President of the United States.<sup>10</sup>

Given the later complaints against a system that limits democracy, some understanding of how it arose is helpful. Delegates to the Constitutional Convention in Philadelphia intended the Electoral College to balance the interests of small states and large states, to give the chief executive independence from the Congress, and most of all, to insure the chief magistrate should be selected by highly informed voters of excellent judgment and independence, who represent the diverse interests

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6. 3 U.S.C. §§ 1–17 (2012 & Supp. 2013).

7. Article II, Section 1 provides:

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.

U.S. CONST. art. I, § 1, cl. 2. The District of Columbia was given three Electoral votes in the Twenty-Third Amendment, ratified in 1961. U.S. CONST. amend. XXIII.

8. U.S. CONST. art. II, § 1, cl. 3.

9. 3 U.S.C. §§ 7, 15.

10. U.S. CONST. amend. XII.

of the various states, free from the influence of foreign nations or special interests.<sup>11</sup> Indirect election of the executive was one of the great compromises of the convention.<sup>12</sup>

This method of indirect election was the object of much discussion during the Constitutional Convention. Some delegates, such as Roger Sherman, desired the president to be selected by the Congress<sup>13</sup> or, like John Rutledge at one point, only by the Senate.<sup>14</sup> Some believed the president should be chosen by the states, such as, per Elbridge Gerry, selection by their governors.<sup>15</sup> What seemingly only James Wilson early hoped to see would be direct election by the people, a hope he realized was shared by few other delegates.<sup>16</sup> Thus, on June 2, he proposed a moderated form of election so that a popular vote would elect presidential electors in each state.<sup>17</sup> Wilson's moderated proposal was taken up a month later by Oliver Ellsworth, who recommended state electors chosen by legislators.<sup>18</sup> James Madison, a few days later, forayed into the debate, inventorying the problems with both direct election of the president by the people and direct election by the Congress or the various officers of the states.<sup>19</sup> He approved of the system of electors, though he, with Wilson, remained in the minority who preferred a system of direct election.<sup>20</sup>

The arguments, then, against a direct election were and remain significant. One of these stands against election of the president by the people was raised by Elbridge Gerry, who thought a popular election was “radically vicious;” the popular voters not knowing the candidates would be too easily swayed by influential members of a national organization.<sup>21</sup> Such arguments succeeded only intermittently, and in May, the proposal for Article II, Section One was based initially on congressional

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11. Gary L. Gregg II, *The Origins and Meaning of the Electoral College*, in *SECURING DEMOCRACY: WHY WE HAVE AN ELECTORAL COLLEGE* 1, 8 (Gary L. Gregg II ed., 2001).

12. See TARA ROSS, *ENLIGHTENED DEMOCRACY: THE CASE FOR THE ELECTORAL COLLEGE* 45–59 (2004).

13. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 68 (Max Farrand ed., rev. ed. 1966) [hereinafter 1 FEDERAL CONVENTION] (remarks of Madison).

14. *Id.* at 69.

15. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 109 (Max Farrand ed., rev. ed. 1966) [hereinafter 2 FEDERAL CONVENTION] (remarks of Madison).

16. Gregg II, *supra* note 11, at 5.

17. 1 FEDERAL CONVENTION, *supra* note 13, at 80 (remarks of Madison).

18. 2 FEDERAL CONVENTION, *supra* note 15, at 57 (remarks of Madison).

19. *Id.* at 109–11, 114 (remarks of Madison).

20. *Id.* at 109. (remarks of Madison). For the views of Wilson, see *id.* at 106.

21. *Id.* at 114. (remarks of Madison).

selection.<sup>22</sup> The proposal for electors was revived, however, by Governor Morris and Charles Carroll.<sup>23</sup> That proposal failed, but it was then referred to the Committee of Eleven, who drafted the article with the electors from states selected in the manner state legislatures determine.<sup>24</sup> Defended by Morris, Wilson, Gerry, and with numerous nips and tucks, the proposal emerged from the Committee of Style in nearly its final form.<sup>25</sup>

The office of elector was seen as a role of great responsibility. In arguing for ratification, Alexander Hamilton described the electors as people of discernment, capable of investigating the qualities of the candidates and deliberating among themselves to determine the person best fit for office.<sup>26</sup> Describing their role, Justice Story wrote a generation later that any one of these “small number of persons, selected by their fellow citizens from the general mass for this special object, would be most likely to possess the information, and discernment, and independence, essential for the proper discharge of the duty.”<sup>27</sup>

## II. A FEW ARGUMENTS CON AND PRO

There are both principled and pragmatic arguments against the Electoral College. It limits majoritarian democracy.<sup>28</sup> It is contrary to the idea that each person’s vote weighs equally in a fair election, the principle of “one person, one vote.”<sup>29</sup> It does not help minority interest groups.<sup>30</sup> It diminishes the sense of connection between voters and the

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22. See 1 FEDERAL CONVENTION, *supra* note 13, at 21 (remarks of Madison); TARA ROSS, ENLIGHTENED DEMOCRACY: THE CASE FOR THE ELECTORAL COLLEGE 31–34 (2d 2012) (discussing the compromise of the Electoral College after deadlock between choice by Congress and direct election).

23. 2 FEDERAL CONVENTION, *supra* note 15, at 402–04. (remarks of Madison).

24. *Id.* at 497 (remarks of Madison).

25. See *id.* at 572–73. Various changes would be made, not the least being the adoption of the Twelfth Amendment, ratified just in time for the 1804 election and correcting the danger of a confused vote between candidates for president and vice president. ROBERT M. HARDAWAY, THE ELECTORAL COLLEGE AND THE CONSTITUTION: THE CASE FOR PRESERVING FEDERALISM 92 (1994).

26. See THE FEDERALIST NO. 68 (Alexander Hamilton).

27. JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 315 § 1451 (1833).

28. See Norman R. Williams, *Why the National Popular Vote Compact Is Unconstitutional*, 2012 BYU L. REV. 1523, 1534.

29. See Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526, 2544–45 (2001) [hereinafter *Rethinking the Electoral College*].

30. See GEORGE C. EDWARDS III, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA 92–121 (2004).

chief executive and the legitimacy of the government as a whole.<sup>31</sup> More interesting, perhaps, is the idea that the Electoral College wrongly perpetuates a national role for states in a system of government that has become increasingly centralized and in which states are relegated to genuinely local matters. Thus, the system of indirect voting places extraordinary significance on the outcome of every state's election, even when a significant national majority favors one candidate, leading a problem in a single state to produce a nationally doubtful outcome, even when there was a clear preference by the national polity that would otherwise have made the state issue irrelevant.

There are largely pragmatic reasons to keep the Electoral College. It often acts to create a clear mandate even in a close race.<sup>32</sup> Abraham Lincoln, Woodrow Wilson, and Bill Clinton all won decisively in the Electoral College, despite failing to gather a convincing majority of popular votes, owing either to a close popular vote or the effect of third-party candidates.<sup>33</sup> Thus, the legitimacy of a presidency, or the government of a whole, can be enhanced by the "moderating" influence of the indirect election.<sup>34</sup> The effect on states has been not to diminish but to enhance direct access by voters to the process.<sup>35</sup> And, most obviously, the need to acquire electoral votes requires candidates to win some of their support nationally rather than seeking overwhelming support in just a single state or region of the country that happens to have an outsized population or merely a high voter turnout.<sup>36</sup>

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31. See, e.g., Christopher Anglim, *A Selective, Annotated Bibliography on the Electoral College: Its Creation, History, and Prospects for Reform*, 85 LAW LIBR. J. 297, 313 (1993).

32. See Walter Berns, *Outputs: The Electoral College Produces Presidents*, in SECURING DEMOCRACY: WHY WE HAVE AN ELECTORAL COLLEGE, *supra* note 11, at 115.

33. Cynthia R. Farnia, *Faith, Hope, and Rationality or Public Choice and the Perils of Occam's Razor*, 28 FLA. ST. U. L. REV. 109, 128 & nn.63–64 (2000). The potential for the Electoral College to create the appearance of a clear mandate following a close election is seen by some as an advantage. Yet in 1968, Richard Nixon's overwhelming electoral victory following his narrow defeat of Hubert Humphrey led Congressman Emanuel Celler and Senator Birch Bayh, with Nixon's blessing, nearly to end the Electoral College and replace it with election by plurality of the popular vote. See LAWRENCE D. LONGLEY & ALAN G. BRAUN, *THE POLITICS OF ELECTORAL COLLEGE REFORM* 129–78 (1972).

34. See Paul A. Rahe, *Moderating the Political Impulse*, in SECURING DEMOCRACY: WHY WE HAVE AN ELECTORAL COLLEGE, *supra* note 11, at 55, 55.

35. See James R. Stoner Jr., *Federalism, the States, and the Electoral College*, in SECURING DEMOCRACY: WHY WE HAVE AN ELECTORAL COLLEGE, *supra* note 11, at 43, 43.

36. See *Rethinking the Electoral College*, *supra* note 29, at 2543–44.

## III. A FLY IN THE OINTMENT

Many conditions of national politics were unforeseen by the Framers: the sheer size of the country and its population being perhaps the most obvious. Yet the unforeseen condition that has most affected presidential elections may be the rise of political parties.<sup>37</sup>

The influence of the parties in the state process of elector selection is profound. States have delegated the process of elector selection to political parties, who select the electors to represent the parties' candidates.<sup>38</sup> In these states, voters have little impetus to choose the elector except as a commitment to the candidate for whom the elector is designated on the ballot. Indeed in many states, the voter never even knows the name of the electors for whom the voter casts a ballot.<sup>39</sup> Thus, every elector is ostensibly committed to vote for the candidate of the party that has designated that elector.

The possibility that this commitment will not be honored has been of long-standing concern. Indeed it has occurred sufficiently often that there is an accepted and quite derogatory label for the "faithless electors" who refuse to follow their orders.<sup>40</sup> The potential for electors to break faith with their parties has led a majority of states to enact pledge statutes, requiring an elector to pledge to vote for a candidate in order to be placed on the ballot.<sup>41</sup> The U.S. Supreme Court has upheld these laws, at least as to party primaries in the presidential election.<sup>42</sup> Even so, it is not clear that pledge statutes would be enforceable or upheld in a general election.<sup>43</sup>

The influence of political parties in the state process—and the resulting state reliance on those parties in elector selection and enculturation—has degraded the Electoral College from a deliberation among leading public citizens into a mechanistic ritual of political operatives. Though the elector's partisan commitment contributes to the *democratic* nature of the process, it also diminishes the significance of

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37. See A. JAMES REICHLEY, *THE LIFE OF THE PARTIES: A HISTORY OF AMERICAN POLITICAL PARTIES* (1992).

38. *Who are the Electors?*, U.S. ELECTORAL COLLEGE, <http://www.archives.gov/federal-register/electoral-college/electors.html> (last visited Jan. 5, 2014).

39. See *id.*

40. See Robert W. Bennett, *The Problem of the Faithless Elector: Trouble Aplenty Brewing Just Below the Surface in Choosing the President*, 100 NW. U. L. REV. 121 (2006).

41. As of November 2000, 27 states had such laws. *Who are the Electors?*, *supra* note 38.

42. *Ray v. Blair*, 343 U.S. 214 (1952).

43. *Id.* at 230–31.

the role and the apparent independence of the elector, the defining aspect of the office in the *republic*. This conversion of the elector's commitment from fidelity to the nation to fidelity to a political party, if successful, destroys a system created not only as a check on the potentially misled polity but also as a check on a potentially corrupted process.

#### IV. THE MORAL ELECTOR AND THE DECEMBER SURPRISE

An elector for the President of the United States of America has a particular, moral obligation to safeguard the democratic process in the republic which cannot be performed without any discretion at all.<sup>44</sup> Regardless of the general presumptions that arise owing to a generally successful electoral process of popular election, the Framers saw a variety of reasons to maintain an independent agency that moderated the indirect process of election. Among these were concern against interference by foreign powers, fraud by candidates, and—perhaps most presciently—the corrupting influence of large, national organizations that might deceive local voters.<sup>45</sup> Those concerns have hardly diminished over time.

This is not to suggest that there should not be a presumption that electors will perform their now customary roles. As Justice Reed noted in *Ray v. Blair*,<sup>46</sup> there is a “long-continued practical interpretation of the constitutional propriety of an implied or oral pledge” by an elector to cast the ballot for that elector's party's candidate.<sup>47</sup>

For elections within the rough parameters of a reasonable elector's expectations, the implication is this: an elector will commit to represent a given candidate because the elector believes that candidate is the finest available candidate for president.<sup>48</sup> That commitment is offered to voters in primaries and the general election, and the elector knows that voters rely on the commitment, creating a strong presumption that the elector will vote for the designated candidate as the elector had committed to do. How that presumption might be enforced is a different issue, but it is presently both a moral and vaguely legal presumption that deserves respect and potentially deserves enforcement, so long as it is not rebutted.

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44. See, e.g., Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, 12 J. L. & POL. 665, 675–89 (1996).

45. 2 FEDERAL CONVENTION, *supra* note 15, at 108–15 (remarks of Madison).

46. 343 U.S. 214.

47. *Id.* at 229–30.

48. For ease of discussion, we can leave aside, for now, the complication of votes for the vice president.



Yet, there will be elections that do not satisfy a reasonable elector's expectations. There genuinely are circumstances in which an elector's hopes prior to the election are dashed thereafter, leading to a moral consequence that places fidelity to the republic in conflict with fidelity to the party, or at least in conflict with fidelity to the party's nominee for office.

This is not to say that every cough in a campaign leads to disease at the election. To some degree, expectations are bound to be challenged in a U.S. election. This is the point of the exercise when candidates, campaigns, or their allies attempt suddenly to change the dynamic of a nearly completed election campaign by seizing on an event or revelation about the character or conduct of the candidates at the eleventh hour, controlling the narrative near Election Day. This is the so-called October surprise.<sup>49</sup>

Even so, an event may occur or a revelation may be reliably made such that an elector's reasonable expectations are in fact frustrated so considerably that the elector cannot in good conscience make good on the commitment to vote for a given candidate and still believe that the elector has performed the office for the good of the country. In such a case the elector cannot be morally bound to the commitment to a given candidate. If the elector cannot morally be bound to the commitment, then reliance on the customary expectation of a commitment would clearly be misplaced, and the fundamental basis by which the Supreme Court has upheld a state requirement of such a commitment would fail. Indeed, in the light of a moral challenge to an elector's prior commitment to a candidate, one must consider that the purpose for which the office of elector was created was for the elector to exercise discretion.<sup>50</sup> A state law that would thwart a federal elector's discretion at an extraordinary time when it reasonably must be exercised would clearly violate Article II and the Twelfth Amendment.

What types of events or revelations would meet such criteria? The most obvious one would be the death or incapacity of the candidate between the popular election and the electoral vote six weeks later.

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49. The "October surprise" is, of course, a revelation made in the final weeks of a campaign that alters voter perception of a candidate, usually for the worse. *See, e.g.*, JACK W. GERMOND & JULES WITCOVER, *BLUE SMOKE AND MIRRORS: HOW REAGAN WON AND WHY CARTER LOST THE ELECTION OF 1980*, at 1–22 (1981). The phrase entered the American policy lexicon in 1956: the original October surprise being the Russian intervention in Hungary in October 1956. *See* Walter Cronkite, *A Huge 'October Surprise,' 50 Years Later*, NPR (Oct. 23, 2006, 4:00PM), <http://www.npr.org/templates/story/story.php?storyId=6369922>.

50. Ross & Josephson, *supra* note 44, at 675. The moral exercise of discretion is the essence of legal office. *See* STEVE SHEPPARD, *I DO SOLEMNLY SWEAR: THE MORAL OBLIGATIONS OF LEGAL OFFICIALS* (2009).

Though one might think that a vice presidential nominee would be reasonably expected to be selected, this is not always clear. There certainly could be circumstances in which a reasonable elector would be unwilling to substitute the vice presidential candidate. Imagine, for instance, that Ross Perot had won the election in November 1992 but then had died the following week, leaving as his successor, Admiral James Stockdale, the vice presidential candidate on Perot's ticket. Admiral Stockdale was a brilliant and valiant sailor but an uninspiring candidate. Though he might well have made a better president than Mr. Perot, an elector confronted with him as a substitute nominee might reasonably have refused to elect him president.<sup>51</sup>

The death of a president just after the popular election might seem like a far-fetched concern. On the contrary, it has nearly happened before, as with the attempts to assassinate Abraham Lincoln before his inauguration or the death of William Henry Harrison after less than a month in office, likely from enteric fever he contracted before the election.<sup>52</sup>

A problem more difficult for the elector and the institution arises if there is a "December surprise." This would be an event or a revelation between the popular election and the casting of votes six weeks or so later that places the winner of the November election in a light that casts meaningful and well supported doubt on the winner's fitness for office.

This, too, might seem too exotic to be the basis for constitutional concern, yet a significant example has recently come to light. What would an elector have made of a credible, even compelling, revelation in late November 1968 of what was then suspected but only of late confirmed? No less an observer than President Lyndon B. Johnson become convinced that Richard Nixon had in fact acted to cause South Vietnam to reject the cease-fire treaty then being negotiated by the Johnson administration.<sup>53</sup> Nixon's private intervention to thwart the

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51. See PETER GOLDMAN ET AL., *QUEST FOR THE PRESIDENCY 1992*, at 566–67 (1994).

52. As to Lincoln, see DANIEL STASHOWER, *THE HOUR OF PERIL: THE SECRET PLOT TO MURDER LINCOLN BEFORE THE CIVIL WAR* (2013). As to Harrison, see Jane McHugh & Philip A. Mackowiak, *What Really Killed the President?*, N.Y. TIMES, Apr. 1, 2014, at D3, available at <http://www.nytimes.com/2014/04/01/science/what-really-killed-william-henry-harrison.html>.

53. See David Taylor, *The Lyndon Johnson Tapes: Richard Nixon's 'Treason,'* BBC NEWS MAGAZINE, <http://www.bbc.com/news/magazine-21768668> (last updated Mar. 22, 2013, 2:46PM). Nixon did this, and Johnson knew it in November of 1968, but the record only became known to the public in 2013 with the release of Johnson's official recordings. *Id.* Johnson remained quiet about Nixon's duplicity precisely because he feared the harm to the government from public acknowledgment of Nixon's duplicity and of the spying on diplomats by which the evidence had been accumulated. See *id.* The

diplomacy of the United States and prolong the war, which he ordered and was carried out by a campaign aide,<sup>54</sup> violated federal criminal law, lengthened the Vietnam War, and led to the unnecessary deaths of tens of thousands (including twenty-one thousand U.S. service members), strictly for Nixon's political benefit.<sup>55</sup>

Such an action, had it become known in the November or December before the electors voted, would quite likely have been considered treason. Johnson thought it was. In all events, it would have made clear that Nixon valued his election above his commitment to the nation. An elector confronted by such a shocking revelation would surely have been morally reasonable in refusing to vote for such a person and in choosing another person for whom to vote.

Granted, a presumption that an elector ought to abide by the commitment, limited so that the presumption could be overcome by timely circumstance, invites perverse incentives. A rival might delay a revelation in order to offer it a time that would cause electors to overturn a popular vote. A successful candidate might do anything to cover up such a revelation until after being finally elected in January. Neither potential, however, can overcome the more compelling danger of an elector who is constitutionally mandated to elect the president who lacks the discretion to refuse a candidate for the presidency whom the elector knows to be unfit. The elector's duty to act on such knowledge is all the more compelling when the elector knows that the voters who supported the eventual winner did not know of the event or of the knowledge that demonstrates the winner's unfitness for office.

It is worth noting here that I do not think that a revelation or event that is sufficiently well known to the polity prior to an election would as easily allow an elector to overcome the presumption of commitment. Even raising such a contrast illustrates the dangers of an elector departing from the elector's commitment to the party's candidate. Who should judge whether an elector would appropriately refuse to honor a prior commitment to the candidate or whether a revelation occurred sufficiently early or was sufficiently understood by the electorate? Would such a case be within the scope of judicial review? Would it be a

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irony, of course, is that Johnson's decision only forestalled the eventual demise of the Nixon administration.

54. See George F. Will, *Richard Nixon's Long Shadow*, WASH. POST (Aug. 6, 2014), [http://www.washingtonpost.com/opinions/george-f-will-nixons-long-shadow/2014/08/06/fad8c00c-1ccb-11e4-ae54-0cfe1f974f8a\\_story.html](http://www.washingtonpost.com/opinions/george-f-will-nixons-long-shadow/2014/08/06/fad8c00c-1ccb-11e4-ae54-0cfe1f974f8a_story.html).

55. As to casualties in 1969 and later, see Nat'l Archives, *Statistical Information about Fatal Casualties of the Vietnam War*, NAT'L ARCHIVES, <http://www.archives.gov/research/military/vietnam-war/casualty-statistics.html> (last updated Aug. 2013).

case for regulation, or juridical oversight, or left to Congress to consider later through impeachment?

The answer should be that legal inquiry is available for such questions even if it leads to much unloved delay in the final determination. An elector, or group of electors, who casts votes contrary to the prior commitment to a given candidate should justify their actions on the stage of American law (although their expenses should be borne at the taxpayer's expense). Judicial review is appropriate to determine that the reliance of voters on the elector's commitment, and the elector's own earlier commitment, is sufficient or insufficient to overcome the elector's reasonable, good faith belief that the elector must break the commitment. If the courts rule otherwise, there would likely still be no penalty beyond a declaration against the elector. Congress would have to enact new legislation, but these ambiguities in themselves are no reason not to do so.

#### V. SOME CONCLUSIONS

The Electoral College provides a constitutional check on democratic error, a mistake made by the polity even in its most solemn electoral task. Additionally, electoral voting requires a successful candidate for the presidency to carry the vote in at least two regions of the nation (though demographic change in future centuries may alter this condition, which is still true in the present).

More, the Electoral College places individuals with judgment and discretion in a position to exercise those talents. In some circumstances, the elector must have the discretion to choose best as that elector understands "the best." If a state or other government attempts to thwart such independence among the electors, judicial review should be available to assess the conditions of the vote.

Such an approach to presidential elections has the benefit of hewing more closely to the original intent of Article II. Yet its more compelling rationale is that this republican system protects the democratic process from unfit candidates whose masks slip before the election is final. Interestingly, this approach is compatible with the law as it is written in the text of Constitution and federal statutes. It is even compatible with the precedents of the Supreme Court, though not necessarily with state laws.

So understood, the Electoral College should be retained.