

To Whom Does the President Belong: the States or the People?

by Miles Hamby, *PhD*

January 2017

Copyright©2017Miles M. Hamby

The Problem. In the recent Presidential election of 2016, Trump’s win of 305 electoral votes to Clinton’s 233 inspired at least one Trump supporter to call it a “landslide” and “mandate”, invoking Trump opponents to respond it is hardly a “landslide” or “mandate” when Trump lost the popular vote by over 2,864,974 out of 136,628,459 total votes cast, a difference of 2.097% (48.1925% Clinton minus 46.0955% Trump, statistically significant at the .0004 level). The result was apparently so egregious as to provoke U.S. Representative Steve Cohen (Democrat from 9th Congressional District of Tennessee and senior Democrat on the House Judiciary Subcommittee on the Constitution and Civil Justice) to file a proposal on January 5, 2017, for a constitutional amendment to eliminate the electoral college and allow the direct election of the president and vice president by nationwide popular vote. (ref/Congressman Cohen proposes elimination of Electoral College". WREG-TV. Retrieved January 7, 2017.) Rep. Cohen stated “For the second time in recent memory [George W. Bush 2000, Donald Trump 2016], and for the fifth time in our history [John Q. Adams 1824, Rutherford B. Hayes 1876, Benjamin Harrison 1888], we have a President-elect, who lost the popular vote.” (Retrieved Jan 22, 2017, from <http://www.factcheck.org/2008/03/presidents-winning-without-popular-vote/>)

In 1968, after Republican Richard Nixon won the Presidential election against Democrat Hubert Humphrey by 301 electoral votes to Humphrey’s 191 votes which represented only 511,944 popular votes nationwide, U.S. Representative Emanuel Celler (D – New York), Chairman of the House Judiciary Committee, responded to public concerns over the disparity between the popular vote and electoral vote by introducing House Joint Resolution 681, proposing a Constitutional amendment to replace the Electoral College with a plurality of nationwide popular votes, that is, the candidate with the most votes wins, providing that candidate won at least 40% of the popular vote. The bill did not pass. (1968 Electoral College Results, National Archives and Records Administration)

The 2016 Election. The table below, 2016 Presidential Vote Tally Scenarios, depicts five ways of tallying the vote for President of the United States – by a plurality of the total votes cast in the United States (i.e., popular vote), by a proportionate share of the electoral votes assigned to each state, by a proportionate share of electoral votes of each state rounded to the nearest whole number, by 1 vote per state (in accordance with the 12th Amendment), and by “winner take all” electoral votes within each state. As depicted, Clinton would win the nationwide popular vote, the proportionate electoral votes (calculated to the third decimal), and the proportionate of the electoral votes rounded to the nearest integer. Trump won the 1 electoral

vote per state and the winner-take-all electoral votes. As the current official system is “winner-take-all”, Trump officially won the 2016 Presidential election.

2016 Presidential Election Vote Tally Scenarios

* denotes the winner under the respective scenario

Candidate	Nationwide Popular Vote	Proportionate Electoral Vote	Proportionate Electoral Vote Rounded	1 Electoral Vote per State	Winner Take All Electoral Votes
Clinton	*65,844,610	*256.232	*259	21	233
Trump	62,979,636	249.86	252	*30	*305
Others	7,804,213	31.925	29	0	0

Source: Miles Hamby’s calculations in MS Excel based on published election data. Excel spreadsheet is available upon request from Miles Hamby.

Regards the nationwide popular vote, if one must insist on using the term “landslide”, I would argue that it could be applied to Clinton in that the margin of error based on a critical Z-score of 1.96 was 0.04381%, that is, the true proportion of Clinton’s share after over 128 million votes lies between 49.96% and 50.04% and the true proportion of Trump’s share lies between 49.95625% and 50.04375%. Notice that Trump’s true proportion could be as high as 50.04% and Clinton’s true proportion could be as low as 49.95%, giving trump the popular vote. However, for those of you who understand statistics and Z-scores, the Z-score for Clinton is 252 meaning that the probability of that occurring (say, if a lot of missing votes were found and counted) is less than 5.0×10^{-6} or .000005. No qualified statistician would argue that Clinton did not win the popular vote. Even with the allegation of votes being fraudulently ascribed to a candidate, the likelihood of an average of 46,000 votes in each of the 50 states being ascribed to only the one candidate and not to the other as well is so small as to be absurd in its consideration.

The Question. The heated controversy in this past election beckons the underlying question – To whom does the President of the United States belong: the states or the people of the United States?

In my Public Administration classes, I always began with the question “what is the difference between a Federal government and a national government? I got a lot of answers and all missed the point. The answer is that a national government legislates EVERYTHING for EVERYONE in the country. (For a more exact distinction, refer to Federalist Paper no. 39.) A Federal government, such as ours, must defer, in compliance with the Constitution, to the states in most things. In 1789, we were 13 individual, “sovereign” states, as many states regarded themselves. Indeed, the notion of sovereignty is implied in the term “state”. It was in this context in 1789 that our Constitution was framed and adopted.

The Constitution and the President. Article II, Executive, Section 1, of the United States Constitution as adopted in 1789 provided for election of the President, thus: *“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: ... The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves”*

The Federalist Papers. Writing under the pseudonym “Publius”, the Constitution’s premier advocates John Jay, Alexander Hamilton, and James Madison wrote a series of papers promoting the adoption of the Constitution. In defense of the electoral system, paper no. 68 and in his letter published in the New York Packet “To the People of the State of New York” regarding The Mode of Electing the President [of the united States], March 14, 1788, Alexander Hamilton wrote:

“It was desirable that the sense of the people should operate in the choice of the person to whom so important a trust [i.e., the President of the United States] was to be confided. This end will be answered by committing the right of making it, not to any pre-established body, but to men chosen by the people for the special purpose, and at the particular conjuncture. It was equally desirable, that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice. A small number of persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to such complicated investigations. . . The choice of SEVERAL, to form an intermediate body of electors, will be much less apt to convulse the community with any extraordinary or violent movements, than the choice of ONE who was himself to be the final object of the public wishes. And as the electors, chosen in each State, are to assemble and vote in the State in which they are chosen, this detached and divided situation will expose them much less to heats and ferments, which might be communicated from them to the people, than if they were all to be convened at one time, in one place.”

Hamilton, almost presciently, even foretold the recent interference by Russia in U.S. election affairs by writing:

“Nothing was more to be desired than that every practicable obstacle should be opposed to cabal, intrigue, and corruption. These most deadly adversaries of republican government might naturally have been expected to make their approaches from more than one quarter, but chiefly from the desire in foreign powers to gain an improper ascendant in our councils.”

How could they better gratify this, than by raising a creature of their own to the chief magistracy [Presidency] of the Union? . . . They [the Constitutional Convention] have not made the appointment of the President to depend on any preexisting bodies of men, who might be tampered with beforehand to prostitute their votes; but they have referred it in the first instance to an immediate act of the people of America, to be exerted in the choice of persons for the temporary and sole purpose of making the appointment.”

Hamilton went on in his letter to present several reasons that a “body of men” (to be later known as the electoral college) would not be corrupted. Little could the founders foresee how technology over the decades has facilitated corruption and influence in national politics.

Echoed, at times vehemently, in the election of 2016, Hamilton further stated:

“The process of election affords a moral certainty, that the office of President will never fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications. Talents for low intrigue, and the little arts of popularity, may alone suffice to elevate a man to the first honors in a single State; but it will require other talents, and a different kind of merit, to establish him in the esteem and confidence of the whole Union . . .”

By Hamilton’s reasoning, then, the states should at least allow the electors to vote as they prefer and not mandate they represent the popular vote within their respective states. I would argue even further that, by Hamilton’s reasoning and the original Constitution, that there should be no vote by the people for the President of the United States but only for electors within their respective states. Even further, I would argue, in the context of Hamilton total faith in the electors, that the electors NOT be influenced by any official vote by the people within that state.

This last point is probably where most would object, if not already. If you insist on having a say by voting for the President, either in nationwide ballot or within the state only, then what is the point of restricting the vote to the state, and thus, appointing an elector to “decide” for you?

The issue is: what was the intent of the founders of the Constitution – to expedite a popular election of the President by the people of the United States or to allow the individual states to maintain control over the Executive branch? The “founding fathers” appear to give mixed signals.

Technology. For those who feel that the Constitution is not a living document and should be interpreted strictly as originally written, I argue that since 1789, a lot of things have changed that the founders could not have even imagined, let alone predicted. In 1789, the only practical way to count votes while keeping the voter anonymous was by paper ballot counted by hand. In the election of 2016, even with Russian interference (yes, it has been demonstrated, just as climate change has, if you are willing to do the research and not just listen to bias

confirmation media), over 99% of the ballots of over 136 million voters were counted electronically, whether by direct input from the voting machine or a scanned paper ballot, nonetheless, by technology. Allegations of fraudulent counting using technology have never been proven. Furthermore, today, within 24 hours, tallying by the nation's voting precincts has been sufficient to "call" the election victor with an accuracy that has never has proved contrary, even in the Gore v. Bush election of 2000 in which Bush's initial tallying by the state of Florida was challenged and subsequently upheld (retrieved Jan 22, 2017 from https://en.wikipedia.org/wiki/2000_United_States_presidential_election_recount_in_Florida).

The People or the States? This question asks how do you regard our country – as a nation or a federal republic? To whom does the government belong? As Federalist Paper No. 39 states, *“Were it [the Constitution] wholly national, the supreme and ultimate authority would reside in the majority of the people of the Union;. . . Were it wholly federal, on the other hand, the concurrence of each State in the Union would be essential to every alteration that would be binding on all.”*

In the context of Federalist Paper No. 39, I would argue that the Congress belongs to the states in that the Congress is a body of Representatives and Senators assembled to legislate in direct favor of their states, albeit with the consent of the people within their respective states. But, the President belongs to the people, for the Presidency is not a “body” of people, but a single person to provide a check on the influence of the Congress, in essence, the states.

When the Federalists were writing their promotion for the adoption of the Constitution, their primary concern was the preservation of the will of the people. They expressed this in every one of the 85 Federalist Papers generally stating that it is within the representatives in the legislative branch that are closest to the people. (See Federalist Paper 49). Though true, the primary purpose of the Representatives and Senators is still to promote the will of the people within their respective states which is often in contention with the other states as patently demonstrated by the 2016 election. The demographics of the states are sufficiently different as to grossly misrepresent the overall will of the American people, to wit, Ohio (18 EV for Republican), California (55 EV for Democrat), Florida (29 EV for Republican), Illinois (20 EV for Democrat), Texas (36 EV for Republican), etc., with no deference to what the actual proportion of Democrat v. Republican is. For example, California was 61.7% Clinton and 32.6% Trump but all 55 votes went to Clinton, but Florida was 47.8% Clinton and 49.0% Trump so all 29 electoral votes went to Trump. The list goes on. The point is, the Democrats were considerably more under-represented in Florida than they were in California giving kTrump a disproportionate advantage. The list goes on.

Further support for the President as belonging to the people is expressed in Federalist Paper No. 69 in which alexander Hamilton states “That magistrate [President] is to be elected for four years; and is to be re-eligible as often as the people of the United States shall think him worthy of their confidence.”

The powers of the President further imply the President as a direct servant of the people. As stated in the Constitution, Article II – executive, Section 2,

“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in Cases of Impeachment. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.”

These “powers” expressly assigned to the President and denied of the Congress are irrespective of individual states and are arguably oriented directly for the people of the nation at large.

In Federalist Paper No. 51, Hamilton writes

“In order to lay a due foundation for that separate and distinct exercise of the different powers of government, ... it is evident that each department should have a will of its own...; Were this principle rigorously adhered to, it would require that all the appointments for the supreme executive, legislative, and judiciary magistracies should be drawn from the same fountain of authority, the people, through channels having no communication whatever with one another. . . . A dependence on the people is, no doubt, the primary control on the government. . .”

Almost anticipating the controversy over the electoral system, Hamilton continues in No. 51 by saying *“Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure.”*

In Paper No. 48, Alexander Hamilton and James Madison write *“the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived . . .”* Madison continues in Federalist Paper No.49 by saying *“. . . it is evident that the legislative branch is most likely to seize power from the other two branches. The appeals of the people would, therefore, come from either the executive or the judicial branch . . . We have seen that the tendency of republican*

governments is to an aggrandizement of the legislative at the expense of the other departments. The appeals to the people, therefore, would usually be made by the executive and judiciary departments.”

One cannot discuss the American government without referring to Abraham Lincoln, the premier Republican (albeit the Republican and Democratic parties have changed substantially). In his inaugural address of 1861, Lincoln states *“The Chief Magistrate derives all his authority from the people,. . . His duty is to administer the present government, as it came to his hands, and to transmit it, unimpaired by him, to his successor. . . Why should there not be a patient confidence in the ultimate justice of the people? Is there any better or equal hope, in the world? In our present differences, is either party without faith of being in the right?”* Further, in his address dedicating the national cemetery at Gettysburg, Pennsylvania, on November 19, 1863, an address of 280 words, the word “state” does not appear but the word “nation” appears four times and concludes with *“. . . and that government of the people, by the people, for the people, shall not perish from the earth.”*

Even the highly controversial 45th President of the United States, Donald Trump, in his inaugural address on January 20, 2017, implied a Presidency representing the people-at-large and independent of the states (whether he believes it or not), “What truly matters is not which party controls our government, but whether our government is controlled by the people. . . We will no longer accept politicians who are all talk and no action . . .”

Thus, if you subscribe to the idea that, regarding the President, we are a nation and the President belongs to the people at large, that he or she is not to be beholden to any particular state, and, albeit partisan, that the President at least represents all members of his or her political party and not just those in any particular state, then the Electoral College is actually contrary to that idea. If the state is allowed to choose a slate of electors from which the people of that state must select, then what guarantee do the people have that the electors on the slate do not represent special interests outside their own? If the answer is to require by state law that the electors vote “winner-take-all”, then the people who voted for the “loser” are disenfranchised and the idea of an elector representing the people is very much in question. There is even less guarantee of unbiased representation of the people within the state if the electors are decided by some means other than popular vote for electors within that state. Thus, what are the electors doing that a direct vote by the people cannot do? Furthermore, the bias inherent in the electoral system is inextricable rendering it to be contrary to the original intent of the Constitution as expressed by Hamilton – *“It was desirable that the sense of the people should operate in the choice of the person to whom so important a trust [i.e., the President of the United States] was to be confided.”*

However, if you subscribe to the idea that the President belongs to the individual states and not the people of the nation at large, then, in the context of Hamilton’s Federalist Paper No. 68 *“. . . that the immediate election [of the President] should be made by men most capable of*

analyzing the qualities adapted to the station,” the electors in the state should be completely free to decide whom they want to represent the state as the President without deference to the preference of the people within that state. That is to say, the electors should not be influenced by knowing how the people of the state would vote but decide what they think is best for them, in which case the state should take all the names of the Presidential candidates off the ballots. If this is not acceptable, and the decision of the state electors is tied to the vote of the people within the state by ‘winner-take-all’, then it defeats the purpose of the electoral college in as much as the majority of the people has decided the outcome and not the “men most capable of analyzing the qualities” of the various candidates. By attempting to weight the influence of the various states by tying the number of electoral votes to population size in order to better represent the sentiment of the people at large (i.e., the current system), then “winner-take-all”, in effect, negates the purpose of the electoral vote in that it disproportionately weights the will of the people, as was seen in 2016, 1968 and others. Apportioning the number of electoral votes according to voter results would be more representative of the population within the state, but would, nonetheless, still eliminate the freedom of the elector to decide. The usefulness of electors, thus being mollified, the technology of vote counting could very easily be applied to automatically assigning the electoral votes. QED, the Electoral College is no longer relevant unless the electors are totally free to choose a candidate based on their own analysis free from the opinions of the people. If the President is first and foremost a representative of the states, but the state feels the opinions of the people are paramount, then eliminate the electors and automatically apportion the electoral votes.

Conclusion. So, to whom does the President belong? If you believe the President belongs wholly to the people, then amend the Constitution and eliminate the electoral system and replace it with a nationwide popular vote. If you believe the President belongs wholly to the states, then take all the candidates off the ballots and allow the electors complete freedom to choose as they like. If you believe that the President sometimes belongs to the people and sometimes to the states, then eliminate the electors and assign the electoral votes automatically by proportion.

~ *Miles*

Miles M. Hamby earned a Ph.D. in Education at the University of Maryland in 2001, a Master of Public Administration from North Carolina State University in 1986, and a Bachelor of Science from the U.S. Air Force Academy in 1971. He was a C-130 pilot in the U.S. Air Force and an airline pilot. For the past 15 years he has been a college professor of statistics, business, and research.