

Essay Read to  
Kit Kat  
Tuesday, February 20, 2001  
By: John J. Chester, Sr.

An old  
subject  
Revisited

Yesterday was President's Day, the day our nation celebrates our past Presidents, particularly our most revered ones – George Washington and Abraham Lincoln. Today in Columbus, it is also President's Day. President Bush and his wife, Laura, came to Columbus to promote his educational program. His great-grandfather lived in Columbus for many years. The Buckeye Steel Casting Company is one of his legacies. Tonight I am going to talk about presidents – about how they are elected. When Jim Luck called me almost a year ago, he asked me to read again the paper I gave on Richard Nixon. I agreed. Hence the title of my speech that has been announced. My experience and observations of the recent presidential election caused me to change. I am going to talk to you first about my early political life and, secondly, tell you about the Electoral College.

I am a Republican. I am a fiscal conservative, a social moderate, pragmatic, a centrist, if you will. I am general counsel to the Franklin County Republican Central and Executive Committee. I have had this position since 1980 when I was appointed to it by Michael Colley. He reappoints me every two years. I do not get paid. I do keep track of my time, however, and send a bill to the Franklin County Republican Party. Then I write the bill off as an in-kind contribution.

I have been interested in politics since I was six years old. My dad was then a police prosecutor for the City of Columbus. He ran for prosecuting attorney of Franklin County. I campaigned with him. I carried signs that said "Chester for Prosecutor" on my bicycle. He won. He won reelection in 1928. In 1930 my dad lost. I didn't understand why he lost. He had been a vigorous police prosecutor for the City of Columbus. While County Prosecutor, he had achieved national prominence particularly because of his prosecution of Dr. Snook. It made my dad famous, but he still lost the election. I don't think he ever understood why he lost. We didn't understand why he lost, but we did know that in 1931 my dad was out of a job, the depression was upon us and we didn't have any money. This was my first lesson about politics. I have been active in politics ever since, as were my grandfather and my father. They were, and I am, a lawyer. We participate politically because we believe government is too important to leave to the politicians. If lawyers don't participate in government and politics, who will?

In 1988, George H. W. Bush was Vice President. He was running for president on the Republican ticket. I had met him several times. He was very personable. He had held many government positions and seemed to be very well qualified. But no sitting Vice President had been elected President since Martin VanBuren in 1836. Mike Colley asked me if I would like to be an elector and I, of course, said yes. I didn't know much about the Electoral College. I received a letter explaining that I should appear at the statehouse on such and such a date to cast my vote. Vice President Bush had carried Ohio. He had won the popular vote nationally. He had a majority of the votes in the Electoral College. I went to the statehouse. I was handed the ballots, signed them, got a nice letter thanking me. The job was completed. It proved to be very perfunctory. It didn't take me more than a couple of hours.

I was not asked to be an elector in 1992 or 1996. It was just as well. Clinton carried Ohio in both elections, so the Democrat electors were chosen.

When George W. Bush, the Governor of Texas, announced for the presidency in 2000, he looked like a winner. Mike Colley again asked me to be an elector for the Fifteenth Congressional District, the district in which I live. John McConnell and JoAnn Davidson, the Speaker of the House, both from Columbus were also named. I of course accepted. It looked like Governor Bush would certainly carry Ohio and I would get to vote. The election came. Governor Bush carried Ohio. I knew then that I had become an elector. I would vote in the Electoral College for Governor Bush. I then and there decided I needed to know more about the Electoral College.

We are indebted to James Madison for his Notes of Debates in the Federal Convention of 1787 for our knowledge of what took place. Max Ferron in his Framing of the Constitution of the United States is helpful in his analysis. Also see *Federalist Letter No. 68* written by Alexander Hamilton.

The members of the Constitutional Convention had just been through the Revolutionary War and lived under the Articles of Confederation. They knew they needed a stronger central government, they wanted to preserve state government. They wanted a Federation. They were determined that there would be no monarch in the United States. They were greatly fearful of foreign influence. They were concerned that intrigues and conspiracies involving the Congress could lead to the selection of a Chief Executive who would be poorly equipped to hold the office or that the President would be dominated and controlled by the Congress. They were concerned about cabals and corruption of those who might elect the president. Four times they voted in favor of the Chief Executive being elected by the Congress. Then they changed. Twice the proposition was put before them to have the Chief Executive elected by popular vote. These were turned down by an overwhelming majority.

Towards the end of the summer of 1787, the Delegates were tiring of their work and eager to return to their homes. In order to expedite matters on the last day of August 1787 the Convention referred all parts of the Constitution that had not been completed to a committee made up of one member from each state. This committee reported back to the Convention on September 4<sup>th</sup>. They proposed that the President be elected by an Electoral College. The electors were to be chosen in each state as its legislature might direct. Each state would have a number of electors equal to the number of representatives to the Congress plus its two senators. This tended to equalize the representation in the Electoral College between the large states and the small states. The electors were to vote for two persons – the one who got the most votes would be President. The only who got the next highest number of votes would be Vice President. It was believed that electors would choose candidates who were from their own state since they would have little knowledge of candidates from other states. The Committee provided that in voting for two persons, one intended to be President and one intended to be Vice President, the electors could vote for one resident of their state but the other person must be from another state. Some thought that the electors should come to Washington to cast their votes. One objection to this was the expense of bringing all of them to Washington when all they had to do was cast one vote. Also, if all the electors gathered in Washington they would be subject to undue influences, corruption, conspiracies and cabals. They would be subjected to foreign influence. It was better to keep them in their own state where they would not be subject to such influences. It was provided that a President could be elected by the College only by a majority vote of all of the electors.

The proposal put forth by the committee was that if a candidate did not have majority of the Electoral College, then the Senate was to pick the President. Each state had two senators. This tended to equalize the large states and the small states. There were many delegates; however, who thought the senate was too powerful. It was, therefore, suggested that the House of Representatives pick the President. To preserve voting by states, each state delegation in the House, no matter how many, would have one vote. The five highest candidates voted for by the Electoral College, none receiving a majority, were to be submitted to the House. It was believed that under this system the large states would nominate the candidates and the election would be decided by the small states.

In the event of a tie for Vice President, the Vice-President would be chosen by the Senate. He was to be the presiding officer of the Senate without vote except in case of a tie.

By September 6<sup>th</sup> the Committee report was adopted. The delegates did not consider popular election of the President. They had no confidence in the people. They believed the large states would dominate the elections. No thought was given to the possible rise of political parties.

The Electoral College is set forth in Article II of the Constitution. Article II, Clause 2 provides that each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the number of senators and representatives. No person holding an office of trust or profit under the United States may be appointed.

Clause three provides that the electors shall meet in their respective states and vote by ballot for two persons one of who shall not be an inhabitant of the same state. Their votes are sent to the president of the Senate. The president of the senate opens the certificates and counts them. The person having the highest number of votes, if the number is a majority of the whole number of electors appointed, is chosen president. If no one has a majority of the votes, then the House of Representatives must immediately choose one to be President. The House must vote by states and the one chosen must have a majority of the states. Clause four provides that the Congress may determine the time of choosing the electors and the day on which they shall vote, which day shall be the same throughout the United States.

Alexander Hamilton's essay *Federalist No. 68* addressed the people of the State of New York on the subject of the Electoral College. He stated that it was the sense of the people that should influence the choice of the person to be President. This could be achieved by committing the right of making the choice not to a pre-established body such as the Congress but to men chosen by the people for this special purpose. These men should be those most capable of analyzing the qualities of the best candidate and who would act under circumstances favorable to deliberation. He stated that a small number selected by their fellow citizens from the general mass will be most likely to possess the information and discernment requisite to such complicated investigations. It was desirable to afford as little opportunity as possible for tumult and disorder. An Electoral College election would be much less apt to convulse the community with any extraordinary or violent movements. The fact that the electors would vote in the state in which they were chosen will expose them much less to the heat and ferments which might be communicated from people in Washington. Every provision of an election should be opposed to cabal, intrigue and corruption. These undesirable influences might come chiefly from the desire of foreign powers to gain an improper ascendance in our councils. Thus, the appointment of the President would not depend on any pre-existing bodies of men who might be tampered with beforehand to prostitute their votes. No senator, representative or other person holding a place of trust or profit in the United States could be an elector. The electors would be free from any sinister bias. Likewise he said that it was no less important that the executive should be independent for his continuance in the office on all but the people themselves. He might otherwise be tempted to sacrifice his duty to his compliance for those whose favor was necessary to the duration of his official term. He stated that this process of election affords a moral certainty that the office of the President will

never fall to the lot of any man who is not in an imminent degree endowed with the requisite qualifications.

James Kent in his *Commentaries on American Law* published in 1826 stated the mode of electing the president appears to be well calculated to secure a discreet choice and to avoid all those evils which the experience of other nations in past ages have too clearly shown to be the consequence of popular elections. Popular elections would be trying an experiment on too extended a scale for the public virtue, tranquility and happiness. Such would have destroyed the balance of the Union and reduced the weight of the slave holding states to a degree which they would have deemed altogether inadmissible. All elections by a representative body are peculiarly liable to intrigues and coalitions for sinister purposes. The Constitution has avoided all these objections by confiding the power of election to a small number of select individuals in each state chosen only a few days before the election and solely for that purpose.

At first, only Pennsylvania, Maryland, Virginia, Massachusetts and New Hampshire decided to hold popular elections to choose electors. At the first election the New York legislature failed agree on their electors and hence took no part in the election of George Washington as the first President. Legislatures can provide for the selection of electors by a concurrent vote of both the houses of the legislature, by vote of the people of the state, by a vote of the people in congressional or other districts, by vote partly by the people voting and partly by the legislature, by choice by the legislature from candidates voted for by the people whether in districts or at large. James Madison considered selecting the electors by congressional districts to be the most equitable and that which was contemplated by the framers of the Constitution. Most states, however, decided that doing so by congressional districts would place their state at a disadvantage by a division of their strength in the Electoral College and that therefore voting in the whole state was preferable.

By the time of the election in 1800 political parties had begun to form. The views of George Washington and John Adams were opposed by Thomas Jefferson and James Madison. In the Electoral College, Vice President Thomas Jefferson and Aaron Burr, the candidates for President, tied with equal number of votes with neither having a majority. This put the election of president in the House of Representatives where each state delegation had one vote. On the 35<sup>th</sup> ballot Vice President Thomas Jefferson was chosen President. Alexander Hamilton persuaded Federalist electors to vote for Jefferson. Aaron Burr, the Federalist, became Vice President. The twelfth amendment to the Constitution was then enacted which provides that the electors shall vote for a candidate for President and vote separately for a candidate for Vice President. Still only one of these could be from the same state as the elector.

In 1824 Andrew Jackson received a majority of the popular vote. Neither he, John Adams nor Henry Clay received a majority of the Electoral College vote. In the vote in the House of Representatives Henry Clay persuaded his supporters to support Adams. John Quincy Adams was chosen to be President. Adams then appointed Henry Clay his Secretary of State. The Jefferson and J.Q. Adams elections are the only elections where no candidate received a majority vote in the Electoral College and the House of Representatives then chose the President.

In 1876 the two principle candidates for President were Governor Hayes of Ohio and Governor Tilden of New York. Governor Tilden got the most popular votes. Three states, South Carolina, Florida and Louisiana had contested delegations. The Congress established a commission to decide who would be their electors. The commission decided by one vote on electors favorable to Governor Hayes. That one voter was a Hayes supporter. When the Electoral College voted, Hayes had a majority of one. He served one term and was succeeded by James A. Garfield, also from Ohio and a member of the House of Representatives. Garfield was given immortality by being assassinated. In 1888 Benjamin Harrison contested President Grover Cleveland's run for re-election. President Cleveland won the popular vote. Benjamin Harrison won a majority of the electoral vote. He served one term as President and was defeated by Cleveland in 1892. Until Governor Bush's election in 2000, these two elections were the only ones in which the Electoral College selected as President the candidate who did not get the most votes.

After the Civil War, the Fourteenth Amendment extended the Fifth Amendment's provisions providing for equal protection and due process to the states. The Twentieth Amendment provided the terms of office of President and Vice President should start on the 20<sup>th</sup> day of January. The term for Congress was to begin January 3<sup>rd</sup>.

The Twenty-third Amendment increased the Electoral College by giving to the District of Columbia the number of electors equal to the whole number of senators and representatives in Congress to which the District would be entitled if it were a state, but in no event more than the least populous state. The least populous state has one representative and two senators.

United States Code, Title 3 sets forth the federal law governing Electors. Section 1 provides that the Electors are to be chosen on the Tuesday after the first Monday in November in every presidential election year. In 2000, the date was December 18<sup>th</sup>. Whenever any state has held an election for this purpose and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such state may direct. The number of electors chosen shall be according to the then existing apportionment of Senators and Representatives. In this election, it was in accordance with the 1990 census.

Section 4 provided that if a vacancy occurs in the College of Electors, at such time as the college meets to vote, the state may provide for filling that vacancy. This was done in Ohio when one elector was too ill to attend. The Chairman of the State Republican Central Committee was chosen.

Section 5 provided for a safe harbor for electors chosen by each state protecting them from being challenged in the Congress. Section 5 of Title B, U.S.C., provides:

“If any state shall have provided by laws enacted prior to the day it fixes for the appointment of the electors for its final determination of any controversy or contest concerning all or any of the electors of such state by judicial or other methods or procedures and such determination shall have been made at least six days before the time fixed for the meeting of the electors then that determination shall be conclusive and shall and shall be binding on the Congress in the counting of electoral votes for that state and the ascertainment of the electors appointed by such state”

Section 6 provides that it is the duty of the Executive of each state to notify the Archivist of the United States who the Electors are who are appointed. In Ohio, this is the Governor.

Section 7 provides that the electors shall meet and vote on the first Monday after the second Wednesday in December and they shall meet at a place in the state that the Legislature of the state shall direct. This year the date was December 18<sup>th</sup>. The place was the Senate Chamber in the Statehouse in Columbus.

Section 9 provides that there shall be one list made for President and one list for Vice President. This certificate is signed by the electors. One must be forwarded to the President of the Senate. Two shall be delivered to the Secretary of State of the State. Two shall be delivered to the Archivist of the United States. One of these is subject to the order of the President of the Senate and the other shall be held by the Archivist for one year. The last certificate shall be delivered to the Federal Judge of the Judicial District in which the Electors have assembled. This is the Chief Judge of the District for Southern Ohio.

Sections 15 through 18 provide for the procedure for counting the votes in Congress.

Section 21 provides that in the United States Code where the word “state” is used it includes the District of Columbia.

Having looked at the Constitution and the Federal Statutes I then turned to see what the State of Ohio provided relative to the selection of Presidential Electors. Section 3513.11 of the Ohio Revised Code provides that when a major

political party holds a state convention in a presidential election year, it shall choose its presidential electors. There was no state political convention for the Republican Party this past year. Section 3513.111 provides that when there is no state convention, then the executive committee of the state central committee of the party shall nominate persons for Electors. These nominations must occur no later than 40 days prior to the general election. The state central committee of the Republican Party elected to support George W. Bush, the Governor of Texas, for President. I was chosen as an Elector pledged to George W. Bush by the executive committee of the Republican State central committee. The names of the proposed electors and the candidate to whom they are pledged are sent to the Ohio Secretary of State.

In Ohio there are nineteen representatives to Congress and two Senators. Ohio, therefore, had twenty-one members of the Electoral College. While formerly the electors were listed on the ballot to be voted for as pledged to a candidate, today only the candidate's name is on the ballot. When you voted at the voting booth for the presidential candidate of your choice, you were in fact voting for the electors pledged to that candidate. You were not voting directly for the President of the United States. The electors pledged to the candidate who gets the largest number of popular votes are elected members of the Electoral College. It is winner take all. If Governor Bush got the most popular votes in Ohio, I would become an elector. If Vice President Gore got the most popular votes in Ohio, I would not become an elector. At the election November 7<sup>th</sup> Governor Bush got 50% of the vote in an 8-candidate field. Vice President Gore got 46.4% of the vote. Vice President Gore got more votes in Franklin County than did Governor Bush. Governor Bush got more votes in the 15<sup>th</sup> Congressional District. While I was the elector for the 15<sup>th</sup> Congressional District, the outcome in the 15<sup>th</sup> Congressional District didn't matter. Only the statewide vote counted.

Being reasonably certain that I had now been elected a member of the Electoral College, pledged to Governor Bush, I still did not know whether or not I was going to vote for the next President of the United States. Nationally, in the unofficial count, Vice President Gore led by 251,424 votes. Oregon and Florida were in doubt. Without either Oregon or Florida the Vice President was leading in the Electoral College vote 260 to Governor Bush's 246. Governor Bush had to have Florida's 25 votes to win. Oregon alone was not enough. 270 was the required number for a majority. With Florida's 25 votes Bush would have 271, just one more vote than he needed.

Under the United States Constitution electors are free to cast their ballots for any person they wish. In 1968, a Republican Elector in North Carolina pledged to Richard M. Nixon, who won the state with a plurality, voted for George Wallace who had finished with the second greatest number of votes. The Congress counted his vote as cast. I found in Section 3505.40 of the Ohio Revised Code that a presidential elector, when voting, must cast his electoral vote for the



nominee for president and vice president of the political party which certified him to the secretary of state. Therefore, my only apparent alternative to not voting for Governor Bush was not to show up for the meeting of the Electoral College. There is a general statute of the Ohio Revised Code that says a violation of the election laws is a first degree misdemeanor. The question remains as to whether or not in view of the constitutional provision that electors are free to vote as they choose is this statute enforceable? In Re Blair v. United States Supreme Court upheld a requirement of the Democratic party of Alabama requiring candidates for the office of Presidential elector to take a pledge to support the nominees of the parties convention for president and vice president. The Alabama Supreme Court had held that the twelfth amendment required an elector be absolutely free to vote for anyone of their choice. United States Supreme Court took the case and reversed.

While the Florida recounting and court battles were going on, I received telephone calls asking me if I were going to change my vote. Regularly a reporter from *The Wall Street Journal* located in Washington would call me to see if anyone had approached me. Also Bush Ohio Headquarters kept calling. I received a letter signed by Governor Taft and Bob Bennett, Chairman of the Ohio Republican Party, reminding me that I was pledged to Governor Bush and further reminding me that it was state law that I could not change my vote.

On December 6<sup>th</sup> leaders of the Florida legislature had called a special session of the Florida legislature to appoint electors pledged to Gov. Bush. On December 12<sup>th</sup> the Florida House of Representatives voted to appoint the electors for Governor Bush. The Florida legislature was going to certify the electors by December 12<sup>th</sup> to take advantage of the safe harbor provision so that their choice could not be contested. This would frustrate the earlier decision of the Florida Supreme Court to continue the recount. The legislature took no further action after the U.S. Supreme Court's decision stopping the recount. My own thought is that once an election has already been had the legislature can not then deprive the people of Florida of voting for their electors. In *Bush vs. Gore*, the Supreme Court said that an individual does have a constitutional right to his vote once the legislature chooses a statewide election as a means to appoint members of the Electoral College and that election has been held. Of course the legislature could change the law before the next presidential election.

Generally speaking, the United States Supreme Court defers to State Supreme Courts for their interpretation of state laws. Many observers believed, as did some members of the court that the Supreme Court should not interfere with the Florida Supreme Court's interpretation of Florida law. Further, most Courts generally do not become involved in political decisions.

The United States Supreme Court has, in the past, however, recognized a federal interest in protecting the integrity of the process. It has asserted the power to protect the choice of electors from fraud or corruption. The Court has

stated that it must have the power to protect elections from violence and corruption. It has stated that if it did not have this power, it is helpless before the two great natural and historical enemies of all republics, open violence and insidious corruption. More recently the court struck down a complex state system which limited access to the ballot to the electors of the two major parties. The Court held that such limitation violated the equal protection clause of the 14<sup>th</sup> amendment because it favored some and disfavored others. It burdened both the right of individuals to associate together to advance political beliefs and the right of qualified voters to cast ballots for electors of their choice. The Court has upheld the power of Congress to reduce the voting age in presidential elections. While the Constitution gives state legislatures the power to prescribe the means of selecting electors, the court may override state practices which violate the 14<sup>th</sup> Amendment. The Court has recently held that electors are state officers who perform a federal function. Once they have performed their function, they are done.

With the vote within a half percent in Florida, an automatic recount took place done by machine. Vice President Gore's strategy was to keep recounting particularly in the large counties of southern Florida. His legal strategy was to stress the intent of the voters. Governor Bush's strategy was to stop the counting or at least delay it as long as possible. His legal strategy was the deadline in the Florida statute for certification of the electors; the inapplicability of the Florida law to a presidential election and the lack of standards for recounting the votes. Therefore, there was violation of the equal protection and due process clauses of the Constitution. The Democrats wanted to be before the Florida Supreme Court while the Republicans wanted to be before the U.S. Supreme Court. Therefore the Democrats filed lawsuits to continue the counting in the Florida trial court. The Republicans filed suit to stop the counting in the Federal Court in Miami. The Florida Supreme Court said keep counting and set no standards. The U.S. Supreme Court, well aware of the problems being encountered with chads and dimples, warned the Florida Supreme Court about standards for counting and the Florida's statutes providing for a safe harbor for Florida's electors. Four of the seven members of the Florida court disregarded this warning. The Chief Justice, in a dissenting opinion, did not.

On appeal from the Florida Supreme Court's decision, the U.S. Supreme Court in most unusual action stopped the counting of votes in Florida. The decision was issued on December 12. This was the date that if Florida electors were to be in a safe harbor, they had to have been certified. The U.S. Supreme Court said that the Florida Supreme Court had provided no uniform standards, that this was a violation of the equal protection clause of the 5<sup>th</sup> and 14<sup>th</sup> Amendments. It further held that the Florida legislature had provided that the Florida electors would be provided the safe harbor set forth in Title III, Section 5, USC. See the *New York Times* today, February 20, for its analysis of the background of the Court's decision in Gore vs. Bush.

On December 13<sup>th</sup>, the Vice President conceded the election to Governor Bush. On the appointed day for the Electoral College to vote, December 18<sup>th</sup>, I went to the State House arriving there before the appointed hour of 12 o'clock Noon. We took our assigned seats in the Senate Chamber. One of the electors, a lady from the Dayton area, was unable to attend because of illness. After organizing ourselves by the selection of a chairman and a secretary we proceeded to fill the vacancy by electing the Chairman of the Ohio Republican Party Bob Bennett to take her place. He had been appointed an alternate. The ballots were circulated to the electors on which we marked our choice of Gov. Bush for President and Dick Cheney for Vice President. We all signed the six certificates. A large crowd was present. Parties were to take place. Bush people were hovering about to make sure every vote was counted and every elector was present. The media were interviewing. Camera's were flashing everywhere. Every vote was important for the election of Governor Bush. Each of us were electing the next President of the United States. It was announced that we had cast 21 votes for George Bush for President and 21 votes for Dick Cheney for Vice President of the United States. The certificates certifying our votes were delivered by our Secretary of State to Washington. On January 6<sup>th</sup> the President of the Senate, Vice President Gore counted the electoral votes. George W. Bush received 271 votes, just one more than the majority he needed to be elected. Vice President Gore received 269.

The Constitution says that the candidate who gets the most electoral votes, if they are a majority, is elected president of the United States. It was originally contemplated that the Electoral College would consist of men of property, of knowledge, of judgment who would select the President of the United States. It was believed that people had neither the intellect nor knowledge to make good choices. Today it is different. Political parties pick the electors who are pledged to vote for the party's candidate. They have no free choice. The campaign for the Presidency is conducted for two years. People have information from the media, the newspapers, magazines, radio, television so they are informed almost ad nauseum about the candidates. They have the opportunity to observe the candidate speak and debate.

Only twice has the Electoral College failed to pick a president resulting in the House of Representatives doing so. Three times the Electoral College has picked as the winner the candidate who was the loser in the popular vote. Twelve times the winner had only a plurality of the popular vote but the Electoral College picked by a majority vote the one with the most popular votes. The Electoral College favors the states of the West, the Rocky Mountains, the South, the Farm Belt and states with low voter turnout. It favors states with blocks of voters such as Blacks and Jews who for the most part live where they constitute higher percentages of population and thus have more direct effect on the outcomes of elections in their states.

Would you keep the Electoral College and modify it by requiring electors to be selected by congressional districts or providing for proportional allocation of electors in each state, in accordance with the popular vote? Would you prohibit the winner take all? Is the Electoral College obsolete? If the President were to be elected by direct popular vote, how would you provide for recount? Would direct election of the President destroy Federalism? You now have no constitutional right to vote for the President of the United States.

What is your vote? Retain the Electoral College or have direct election of the President?