THE ELECTORAL COLLEGE AND DIRECT ELECTION

FRIDAY, JULY 22, 1977

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:10 a.m. in room 235, Russell Senate Office Building, Senator Birch Bayh (chairman of the subcommittee) presiding.

Present: Senator Hatch.

Staff present: Nels Ackerson, chief counsel and executive director; Marcia Atcheson, counsel; Kenneth L. Foran, minority counsel; and Linda Rogers-Kingsbury, chief clerk.

Senator BAYH. The hearing will come to order.

Our first witness this morning is Prof. Herbert J. Storing, Robert Kent Gooch professor of government and director of the Program on the Presidency at the University of Virginia.

We appreciate your being with us this morning. Please proceed.

TESTIMONY OF HERBERT J. STORING, ROBERT KENT GOOCH PROFESSOR OF GOVERNMENT AND DIRECTOR, PROGRAM ON THE PRESIDENCY; WHITE BURKETT MILLER, CENTER OF PUBLIC AFFAIRS, UNIVERSITY OF VIRGINIA, CHARLOTTESVILLE, VA.

Mr. STORING. Thank you, Senator.

I have prepared a statement which I would like to request be put into the record.

Senator BAYH. It is so ordered.

Mr. STORING. I want, basically, to make three points. I will communicate what those are and then try to elaborate on them briefly and then give way to others or to questions.

In the first place, it seems to me that the case for direct popular election of the President, which is the form of the amendment that I am principally concerned with, rests on a simplistic notion of American democracy—a notion that is contrary to our tradition, that is unsound, and that is dangerous.

Second, I think that the present constitutional system of electing the President supports a mode of Federal politics characterized by our two great State-based political parties that secures, to a very great extent, the benefits we want in an electoral system.

And, third, the alleged danger to democratic legitimacy arising from the present electoral college system and the alleged superiority of direct popular election in fostering legitimacy are, I think, false.

Regarding the first of these points, in some ways I, at least, am more worried about the reasons given for direct popular election of the President than about the proposals themselves.

These reasons, it seems to me, are rooted in what I would call simplistic democracy.

I think for our purposes that simplistic democracy has two elements. First, it assumes that government is good just so far as it is responsive to public wishes. The business of government, in this view, is simply to do what the people want.

The second element of simplistic democracy is that so far as elections are concerned, the only thing that counts is that the individual wanted by most of the people should be elected. For any other consideration to enter in is regarded as unfair and improper.

This view, as I've said, I think is wrong and harmful.

The proposal for direct popular election of the President seems to me to grow out of this simplistic democracy, to a very large extent; and its adoption would, I think, strengthen it.

Now the question is not whether responsiveness is important and necessary. Everyone agrees that it is. But the great architectural principle of our Government, as it was understood by its framers, is that popular responsiveness is necessary but not sufficient. There are other qualities we want in government, such as competence, stability, and sensitivity to individual and minority rights which may sometimes be at odds with responsiveness.

The great genius of the American Government is the way it seeks to achieve these other qualities in a government that is, at the same time, basically democratic or responsive.

One of the most powerful results of the adoption of direct popular election of the President, it seems to me, would be to tend to strengthen this notion of simplistic democracy—this notion that responsiveness is all that counts.

It is perfectly true that one could grant all I've said so far and still say, correctly, that that doesn't settle the question of electoral reform. It does, however, dispose of what has in fact been the main argument or assumption of the advocates of direct popular election; namely, that any incidence of nonresponsiveness, such as, for example, the election of a President who did not have a popular plurality, is necessarily bad.

But is there a positive case for the present constitutional system? I come now to my second point. I think there is a positive case, although it's a complex one. It is, therefore, a case that those who seek simple answers to our political problems tend to be impatient with.

I know you've had much testimony on this whole question. I cannot, and will not, try to cover this whole ground; but I want to emphasize a couple of points in defense of the present constitutional system for electing the President.

The first one is a rather theoretical point, but I think it's terribly important. It is this: To see the value of the present system, it is necessary to shift one's perspective from the question of electoral input to the question of electoral output.

Most of this discussion, I think it's fair to say—especially from the proponents of direct popular election—has been concerned with the question of input: who votes, the way to vote, and matters of that kind.

I know that our framers did—and I think that we ought also to—concern ourselves with the question of the product of any electoral system. An electoral system is a means to serve the ends. In order to judge the electoral system, then, we have to try to think of what are the ends we want to accomplish and whether this or that given electoral system is likely to accomplish it.

One of the main ways to strengthen this whole discussion of proposals for reform would be more focus on results and more focus on output, rather than merely a focus on input.

If we ask the questions, then, what is it we want out of an electoral system for electing the President? What kinds of things do we want to achieve? Our framers provide us with some very useful guidance.

I would summarize the ends of the system of electing the President, as the framers generally saw them, as something like the following. Remember, what I am now trying to establish is a set of ends against which this or that proposal for electing the President might need to be judged. Here is what I think the framers would have thought were appropriate ends. They seem to me to be altogether pertinent and appropriate today.

First, it should provide for significant participation by the people at large.

Second, it should foster political stability and avoid the excesses of partisanship and factionalism that tend to form around important elections.

Third, it should give some special place of influence to some individuals who are especially informed of, and committed to, the process of government.

Fourth, it should recognize that this is a Nation of States and should give some weight to the interests of States as such.

Fifth, it should leave the President independent of any other institution of government, so far as his election is concerned.

Sixth, it should, of course, tend to produce Presidents of respectable character and intelligence.

It is very hard to say precisely how a change to the direct popular election would effect these ends.

In particular, it's hard to say how a change in the constitutional system for electing the President would affect the way our present two-party system works. It is that two-party system through which most of these benefits are achieved—the extent that they are achieved—today. My own feeling is that that very difficulty is a good reason for being cautious about introducing changes—the consequences of which are difficult to foresee.

Without claiming that this is by any means the last word on this matter, my own judgment would be that the probable effect of changing to a direct popular election of the President would be in the direction of weakening, or further weakening, our traditional two-party system.

The tendency of minority groups to go directly into Presidential politics, either in hopes of influencing a runoff election or with the intention of bargaining for other advantages or even to provide an organizational focus for interest group activities of a fundamentally nonelectoral kind, seems to me very likely to increase under direct popular election.

Similarly, the role of the States—and specifically the State party organizations, already weakened in various respects—seems likely to be further undermined.

Direct popular election of the president would, I think, foster a more open, volatile system of national politics, less rooted in State political organizations, less influenced by professionals or quasi-professionals, dominated by shifting personal alliances of nationally oriented personalities, by ideologies, by interest group spokesmen, and by media specialists.

We could anticipate, I think, a political system pulled in one direction toward fragmentation and public, rather than intraparty, factionalism. And pulled, in the other direction, toward plebiscitory unity—rooted not in party organizations but in an individual President's personality and personal standing.

The present system, as it works, does, it seems to me, provide us with the kinds of benefits that we want out of an electoral system reasonably satisfactorily. Nobody is going to claim that it's perfect. In all probability, it is better than a direct popular election would be.

Finally, however, to come to what I think is the trump card of the proponents of direct popular election—and my third point—there is the question of legitimacy.

Wouldn't it be an intolerable strain to the American political system, giving rise to popular outrage and contempt, if it should happen, as it doubtless will happen, that sometime again a man with fewer popular votes than his opponent is the electoral winner? I doubt it. I would expect, under such a situation, for business to proceed in American politics pretty much as usual, unless there was some other reason for loss of confidence in the Government or in the persons in charge of the Government.

The idea that election of a President with less than a plurality of popular votes would be shocking and deeply disturbing to our system rests, I think, on a shallow notion of what political legitimacy is all about.

Legitimacy depends on much more than mere numerical preponderance. Legitimacy depends, for one thing, on tradition. For all the criticisms that are leveled against it, the electoral college system is very much a part of the American political tradition.

Legitimacy depends also on the possession by Government of those other qualities that the framers sought to provide for: competence, stability, diverse representation, and equity. I think the doctrine of simplistic democracy tends to endanger that.

The present constitutional system for electing the President can be explained and popularly understood for what it is: a method of election that secures rather well the variety of benefits that the American Government is designed to secure—federalism, social diversity, governmental competence, stability, and fairness to individuals and to minorities.

Moreover—and this is my final point—reliance on numerical preponderance will turn out to be much more problematical, I suspect, than it seems to be on its face.

Factional victory is likely to be more open and more harsh. Elections are almost certain to be much closer. They will certainly seem

much closer than the present system, with its tendency to inflate the margin of victory.

Whatever combination of plurality and runoff elections might finally be agreed upon, there would nevertheless be a fairly good probability that popular participation in the ultimate choice would decline.

The very emphasis, moreover, on numerical preponderance would highlight the probable fact that most victors would be individuals who were not preferred by most voters.

The present system for electing the President does have what could be called legitimacy problems, though part of the reason for that is that it has, on the whole, been so poorly defended by those who ought to defend it. But these difficulties are likely to seem minor compared to the legitimacy problems that would arise out of a series of very close elections, bitterly fought by numerous narrowly based parties contending for the prize of numerical majority, which would be the only real claim to legitimacy and which would yet be forever out of reach.

The case against the present constitutional system for electing the President remains, I think, what it has always been—superficially plausible and appealing, but fundamentally unsound and unpersuasive.

Thank you very much.

Senator BAYH. Thank you, Professor Storing.

None of us really knows how a direct election of the President would work, do we?

Mr. STORING. I think that's fair to say.

Senator BAYH. You made some rather dramatic, assertive statements in offering your opinion on how direct election will work.

What reason do you have to suggest participation is apt to decline?

Mr. STORING. My guess would be——

Senator BAYH. We need more than a guess, professor.

Mr. STORING. We may not be able to have anything more.

Senator BAYH. Is there any evidence that participation in the State elections declined when we started choosing Senators by popular vote?

Mr. STORING. I think there's evidence that when we get into runoff elections, there's a decline in participation. The likelihood is that we're going to have runoff elections.

Senator BAYH. How many times in history would we have had a runoff if the procedures espoused in Senate Joint Resolution 1 had been in effect?

Mr. STORING. Obviously, not a single time.

Senator BAYH. One time, technically, in 1860 when Lincoln had 39.76 percent of the popular vote.

Mr. STORING. That was a different procedure than the one proposed here.

Senator BAYH. Yes. I assume then that your original answer that runoffs would be likely and therefore that participation would decline was inaccurate.

I'm sure you've studied the process and talked to people who have actually participated in it.

The former Vice-Presidential candidate on the Republican ticket

and former national party chairman, Senator Dole, testified for direct election. He expressed concern about something I actually witnessed out in the field.

One of the most damaging things, as far as participation in the Presidential process is concerned is under the electoral college system where we have the decision made in Washington—or wherever party headquarters is—that my State doesn't matter. Its electoral votes can be predicted to go for the Democrats or for the Republicans regardless what either party does, so we can't afford to send in our candidate. We can't afford to buy television time. We can't afford to be concerned with the issues of that State or to do some of the things with the money that would make the political process more energetic there.

Mr. STORING. I don't quite understand the issue you are presenting. The argument is that since the decision is made ultimately in Washington people aren't as likely to participate in the process?

Senator BAYH. No. The decision is made with limited time and limited resources, concentrating on those areas where the presence of the candidate or the resources makes a difference.

So you consider a State like Indiana or like Wyoming or Massachusetts, and you're going to lose by 200,000 votes. There's no incentive to cut the loss down to 25,000 votes.

Mr. STORING. I see your point.

Senator BAYH. I have talked to Senator Dole and Senator Humphrey and some of the people who have participated in how these decisions are made and with Vice President Mondale. The candidates and their campaign managers have to make pretty tough and difficult and hard decisions. In the process, the decisions disenchant a lot of people out there.

Mr. STORING. That's absolutely true. It's also true, as I'm sure you will agree, that a change in the system would involve shifting resources from one place to another. Therefore, you are going to have similar kinds of problems arising—perhaps not so much in Indiana but in Illinois, for example, where the party might well say we haven't got much to gain by putting additional resources into Illinois because we know it's going to be very close anyway, so we put our money and time into Indiana instead.

I agree there is going to be a shift, and I could talk about the question of whether that shift is a good or bad thing for individuals or for the political system as a whole. But I doubt if that shift would have much of an effect on basic opinions about the legitimacy of the whole system.

I think what you're going to win there in one way you are going to lose in another.

Senator BAYH. Professor, you shifted from participation to legitimacy.

I'm trying to find evidence to support one contention or another concerning participation, recognizing it is not absolute.

I think you're absolutely right that if you elect a nonplurality President under one system or another, business will proceed as usual. This is basically because people in this country have an inherent respect for the law. If that's what the law says, they will accept it. They may not like it, and they may be disenchanted and it

may decrease their interest in the political process, but we're not suggesting they are going to take to the streets.

After what we've been through the last 3 or 4 years, if we can survive that and go on and do business as usual, then I think we can survive almost anything.

The process of government is constantly improved. For us to suggest that the Founding Fathers had infinite wisdom belies the fact that in this very part of the Constitution, before the ink was dry, they recognized they had made a mistake and came along with the 12th amendment.

Mr. STORING. Absolutely. I would no more claim that the Founding Fathers had infinite wisdom than I would accept the implication that we have necessarily made progress in every respect. As I know you would agree, we have to keep our judgmental feet under us and neither assume that change is good nor that the founders were better.

But I do think that they had, in fact, some very intelligent and helpful things to say about that question that we have sometimes forgotten.

Senator BAYH. One of the things they admitted early on was that they made a mistake in this part of the process.

There have been so many changes in our Nation, our communications, transportation, knowledge of the electorate and our expectations. The situation is different now. Some of the things that made sense to them then probably wouldn't make sense to them now.

I don't suggest, by pointing out their imperfections, that what are imperfections now at the moment might not have made a lot of sense. But, in retrospect, our evaluation changes.

There have been a lot of changes in our voting practices, and many of them have been directed at how we make the franchise more equitable and more available. That relates to the issue before us here.

Before leaving that point, I want to make certain I have expressed myself because I don't think the impact of direct elections would result in very many changes in the percentage of voter participation or an overall campaign methodology. There is still going to be emphasis on——

Mr. STORING. Changes in strategy or politics you mean?

Senator BAYH. Yes; in political and campaign strategy.

This relates to the participation factor. Now if you have a community of 500,000 people in a State that is a traditional one-party State and the polls tell you you are going to lose or win it by a large margin, you write it off.

In that 500,000 voting population as part of the entire State population, there is no incentive to win by more than one vote. If you had a direct popular vote, you could not write off a community like that. The incentive would be, if you were going to lose, to cut down the margin of loss, or if you were going to win, to increase the margin of victory. You couldn't totally write off a community because it was in the middle of a State that theoretically you knew you were going to win or lose.

I think that aspect of the electoral college system has a devastating impact on participation.

Mr. STORING. That's what I am very uncertain about. I am not sure it has a devastating impact upon participation.

Senator BAYH. I wish you would talk to some of the people who

have made these decisions. Even they don't know what it is like sitting in Huntington, Ind., on the telephone trying to get people involved in an election when you call party headquarters and they say: Sorry, Birch, we can't come in, because we know we're going to lose or because we know we'll win anyway in the State.

I understand it is a political necessity of the present system. But the hundreds of thousands of people who are the nuts and bolts of the political process of this country don't understand it.

Mr. STORING. We agree on the broad questions, but I'm inclined to think that the real question is not so much whether that would increase or decrease participation but how it would affect the allocation of political resources in a campaign.

Broadly speaking, it appears that the broad effect would be to shift some resources in a campaign from the present large, urban, closely divided States to the kinds of States that you're talking about. I think that would be the probable result.

Senator BAYH. Do you think there would be a shift of resources from the big cities into the smaller areas?

Mr. STORING. I think there would. In my judgment, there would be more tendency then not to write off States that are sure to go one way or another as for example, to write off minorities in a big urban State on the theory that it's not worth the cost under a direct popular election of trying to appeal to those votes.

Senator BAYH. Whenever you write off a section or a given block of people, either by sending a message or getting out the vote or other mechanisms which we are all familiar with, you have a way of determining pretty well what the impact is going to be in a unit rule kind of situation.

If you're going to lose or win by a landslide, you can write it off. But if you had a system where each one of those votes count under direct election, then all votes would be important.

As the system works now someone votes for President Carter and his share of the electoral vote is cast instead for Ford and someone in another State votes for Ford and it's cast for Carter.

Mr. STORING. The same way somebody votes for you or votes against you. Nevertheless, you're the man elected.

Senator BAYH. It's not the same, because there is only one election there. Each one of those votes counts for me or against me by one.

But in Indiana, those people who vote for the Presidential candidate who loses the State don't have their votes counted for that candidate. They not only don't have their votes counted, but they are counted for the other guy in the national electoral vote count.

Mr. STORING. I have a hunch that the person who voted against you might find that a rather fine distinction and not be terribly persuaded by it.

I agree there is a difference, but I think there is some similarity.

Senator BAYH. There is absolutely no comparison with a system where when you add up the votes, take the votes of people who voted against you and count them for you.

Mr. STORING. You're not, strictly speaking, doing that, of course.

What you're voting for is a slate of electors going one way or the other. So I think it's a little misleading to say that your votes are used for somebody or for your opponent.

Senator BAYH. You cast that vote for a slate of electors. That slate of electors loses and, in essence, the mathematical scheme that creates a certain number of electors in your State takes the portion that should be attributed to those who supported your position and casts them for the other guy.

Mr. STORING. We disagree about what the essence of that system is.

Senator BAYH. I don't know how you can make any comparison at all.

In the Senate race or for Governor or State legislature, there is only one election. Everybody's vote counts. In the Presidential election that is not the case.

Mr. STORING. Many people have argued for a system of proportional representation, as you know, rather than our present one, on arguments very similar to the ones you are making against the electoral college.

I agree there are differences. I don't for a minute claim that they are identical situations, but I do suggest that the principle you're putting forward is a principle that does point to the direction of some form of proportional nonsingle member district election.

I think that the person who votes for your opponent, in a single member district election, and consistently finds himself on the losing side, can make an argument similar to the one you make for the electoral college: That his vote doesn't "count" because he can never affect the outcome of the election if he's in a permanent minority.

Senator BAYH. His vote does count, sir.

Mr. STORING. So does the vote of the person who votes in the Presidential election.

Senator BAYH. It counts for the fellow he voted against.

Mr. STORING. That's not formally true.

Senator BAYH. It is absolutely true.

Mr. STORING. No. He loses in the vote for the electors. Those electors, then——

Senator BAYH. Professor, How can you say when I vote for a man and the State goes 100 percent the other way in electoral votes that my vote isn't cast for the opponent?

Mr. STORING. Because you lost the vote. The principle is the same as if I vote against you for Senator and you vote some way in the Congress. You can say my vote, then, was contrary to what I intended. But that isn't true in the case of a Senator, and I don't think it's true in the case of the elector.

Senator BAYH. In the case of a Senator, everybody who votes for a Senator has the same proportional opportunity to affect the outcome.

Mr. STORING. That's not true in fact. It may be true in some theory, but it isn't true in fact.

Senator BAYH. Why isn't it true in fact?

Mr. STORING. If I'm a Republican in Chicago, for example, I simply don't have the same chance or likelihood of affecting the outcome.

Senator BAYH. Why?

Mr. STORING. Because there are so many——

Senator BAYH. Are we talking about Senators?

Mr. STORING. I'm sorry; I did shift my ground there.

If I'm a member of the minority party in a one-party State, my

chances of affecting the outcome are very low—my actual, practical, concrete chance of affecting the outcome.

You can say that legally you can affect the outcome, but my actual, practical chances of affecting the outcome in a situation like that are naught.

Senator BAYH. When your vote is counted, it is counted for the candidate you cast it for.

If you're going to come up with the philosophy that minorities ought to win elections, then I think we should go to a different country.

Mr. STORING. I'm not, as you know.

Senator BAYH. I think neither one of us is going to convince the other completely of our wise or our unwise thoughts.

You made the conclusion, in the closing part of your statement, that most victors were not the preference of most voters. How can you reach a conclusion like that?

Mr. STORING. That's true of any system—any case in which an individual has a mere plurality. I put it negatively, you will notice. That is to say, the person who wins in the case of a mere plurality, was not preferred by a majority of the voters. That isn't to say that a majority of the voters preferred somebody else, but they didn't positively prefer him.

Now don't misunderstand me. I don't think that that's fatal to legitimacy or to a sensible democratic government. But I do think it's a problem for somebody who puts a lot of weight on numerical preponderance.

What you have in the situation of a plurality election is one in which the man who was elected was not preferred by most of the people who voted.

Senator BAYH. You can say that about Richard Nixon under this system in the first election.

Mr. STORING. Absolutely. In fact, in most elections—or a very high percentage of elections.

What I'm objecting to is not that fact, because I think that's in the nature of the case. But what I'm objecting to is that emphasizing numerical preponderance makes that fact much more problematical and disputable than it is under the present system.

Senator BAYH. I look at electoral systems on the whole like I look at a house. I look at everything about the house and not at just the roof or the front door or one particular thing.

It seems to me that one ingredient of an electoral system should be the people's participation and maximizing the possibility that their preference, over another candidate, will be taken into consideration.

There you could not say that in popular votes most victors are not the preference of most voters. That was not the case in the Carter victory or the LBJ victory or the second Nixon victory.

Mr. STORING. That's correct.

Senator BAYH. Most voters may not have preferred Harry Truman or John Kennedy or Richard Nixon, but at least more voters preferred them than anybody else who was running. When we ask a voter for his opinion of a candidate, what we're after is to say: compared to whom.

Mr. STORING. Correct. I absolutely agree with you about looking at the whole house and not just part of it. I would say that the whole house of our present constitutional system has, in fact, with rare exceptions, emphatically reflected the wishes of the people. At the same time, it does some other things which seem to me to be worthwhile doing.

Senator BAYH. I notice in your criteria, you say in point three: It should give some special place of influence to some individuals who are especially informed and committed to the process of government. That is rather like the old Hamiltonian theory.

Mr. STORING. Hamilton, Madison, James Wilson. I don't know of any of the framers who didn't accept that.

It is part of the same notion that suggests we should elect good men as Senators—better than ordinary men as Senators—so that they can see issues more clearly than the ordinary people will see them. So their commitment to the political process is more substantial than the commitment of just ordinary citizens.

Senator BAYH. But we're talking about some special place of influence in the election of a President. In the present system, how is this provided?

Mr. STORING. One of the approximations for that, I think, in the present system is the influence that is exercised by what I call party professionals—or people who are committed to political parties.

That means not only representatives and people serving the legislatures and elsewhere, but also the people who work and serve in offices and see themselves as fundamentally wrapped up in the party organization. They are surely not exactly the kind of people the framers thought the electors would be. On the other hand, they have some of those qualities. They have a kind of long-range view of politics—at least in the sense that they are committed to a political organization. They have political savvy of a valuable kind.

The question would be whether the influence of people like that—not ultimate influence but significant influence—isn't a good thing, first of all; and, second, whether it would be weakened under a system of direct popular election of the President.

Senator BAYH. I agree with what you've said in your statement that the two parties are State based. I think the political parties are more State based than national based. If that's the case, it's hard for me to see the demise or weakening of the parties by direct popular vote.

Mr. STORING. I think that the electoral college system is one of the things that strengthens and maintains that State based system.

Senator BAYH. How is that?

Mr. STORING. Precisely because what is being fought for in the Presidential election is those electoral votes.

The other side of the sort of unfairness that you were arguing about before—seems to me to be the present point: The electoral college system does tend to strengthen the State organizations, precisely because of the terribly great importance of securing the State's vote.

Senator BAYH. To suggest that the electoral college does that, professor, is unfounded speculation I don't see that you have any evidence of that at all.

How is it possible for Republicans to carry Indiana by a landslide and for Birch Bayh to be elected Senator and for John Kennedy to lose it and for a Governor of the same party to win. Or how was it possible for Nixon to carry the whole South and the county sheriff in every county in the State be a Democrat.

That goes to prove that parties are put together to win elections. They are based on very personal reasons. In each community and each State, there is a lot of concern about what's going on right there in their own community and their own State as well as what is going on nationally.

Mr. STORING. I agree that's hard to predict. I don't deny that at all. But the kind of thing I have in mind would arise very clearly in Illinois, for example, I think. The need for a Democratic candidate to rely on the Democratic Party in Illinois, assuming that it can turn enough votes to swing the electoral vote of Illinois, is one that would be considerably less in a direct popular election system than under the electoral college.

Senator BAYH. You talk about simplistic democracy, and you emphasize traditions. It seems to me that some of the principles of those of us who are suggesting direct election are based on tradition.

The person who wins an election should be the person who gets the most votes. That is sort of traditional in this country isn't it?

Mr. STORING. As a general rule, it sure is. But there are different ways of setting up elections.

Senator BAYH. Do you know of any other office in the whole country which is decided on a different basis?

Mr. STORING. The basis that anybody——

Senator BAYH. To win elections you get more votes than the opposition.

Mr. STORING. That is, in fact, what happens in the Presidential election.

Senator BAYH. You say it is simplistic that that should be a major factor?

Mr. STORING. No; not a major factor. I agree that that ought to be a major factor. What I disagree with is the view of Government that says that that is the whole story.

Senator BAYH. That isn't what we said. We said it should be a major factor. Another factor is that everybody's vote should count the same.

Mr. STORING. If it is a major factor, my argument would be that it has been the major factor in almost every Presidential election we've had.

Senator BAYH. You don't really think it's simplistic, then, to suggest that that ought to be a major factor?

Mr. STORING. I think it is simplistic only to suggest that that is a sufficient, as well as a necessary, component. I agree that it's necessary that this have a major effect. I don't think it's a sufficient consideration. That's where I think the simplistic business comes in.

Senator BAYH. Do you think it may be simplistic to suggest everybody's vote should count the same and have the same weight in the outcome?

Mr. STORING. I think it does tend to be simplistic, Senator; because I think the question of what one means by "count" is a lot more complicated than it seems to be on the surface.

I think everybody's vote does "count" equally in the electoral college system in the sense that everyone can vote and no one can, legally, vote more than once.

But if you're talking about "count" as influence on the ultimate result, then you open up a lot of other complications—even about our ordinary single-member district system.

Senator BAYH. I think your argument is extremely theoretical, and I don't know whether theoretical or simplistic is the greatest indictment. Perhaps they are equal.

Have you ever talked to people who have been in the process of putting together minor parties in a national campaign?

Mr. STORING. Minor parties in a national campaign?

Senator BAYH. You were concerned about the splintering effect.

Mr. STORING. Right.

Not except on a casual basis. I have done a certain amount of work on black politics, and my guess would be there would be a stronger tendency or temptation for black groups to go into Presidential politics under a direct popular election.

Senator BAYH. Have you talked to anybody who has been involved in thinking in terms of putting together a black national slate?

Mr. STORING. As I say, only casually.

But notice that I'm not thinking that this would necessarily be for the purpose of winning the election. There are lots of other reasons—there might be lots of other reasons—for going into electoral politics besides that of winning elections.

Senator BAYH. The people I have talked to in the black party area have been actually involved. There are a lot of other reasons, but when it got right down to whether they would attempt to create a new party or not they decided not to do it because they would increase the chance of a party less favorable to their interests winning the election.

Mr. STORING. That's the whole story of third parties.

Senator BAYH. We're talking about how these things happen in fact rather than theory. I suppose there is a possibility of party proliferation under any system. But then how and why?

To make such an assertion, we should base it on fact. In talking with these people, you can't deny the fact that in the present system we had a guy who had slightly more than 1 percent of the national vote this time who almost determined who the President was going to be under the electoral college system. That was the result of Eugene McCarthy's margin in a few key electoral vote States.

So to suggest that this system is fail-safe, as far as splinter parties are concerned, seems to me to deny what has happened.

Mr. STORING. I have never heard anybody suggest it was fail-safe.

Senator BAYH. Mr. Foran, minority counsel, has some questions.

Mr. FORAN. I would like to welcome you here, Professor Storing.

A lot of people are concerned, as Senator Bayh is, about the input of minorities and small or rural areas. Have you given any thought to the possibility that if these areas don't have input directly, in terms of votes, to the possibility that their input might be felt in platforms—in the brokering of a national platform?

Mr. STORING. I think that is certainly true.

I think the thing that makes this whole prediction business so

hard to grasp is that obviously we're going to face the same basic political shape of the country, regardless of which electoral system we have.

It's a question, rather, of what effect the formal system will have.

It seems that the effect of our present form of government including the electoral college, is to encourage minority groups to try to make the best deal they can within the major parties and to encourage the major parties to spread their net as widely as they can. That seems to be the characteristic of our politics that the present system encourages.

Under such a system, the rural interest will be working within the larger parties. It will still be working for its interest in any other system, but under direct popular election it would be working more publicly.

Mr. FORAN. Senator Bayh mentioned that county sheriffs are all elected directly.

Can you think of any other official, besides the President or Vice-President, who is elected by the entire Nation?

Mr. STORING. Those are the only ones.

Your question does remind us that there are officials of the Government that aren't elected at all. If there's a justification for that, there may also be a justification for election by some other special method.

Mr. FORAN. Having had the pleasure of teaching local government law, I can recall, teaching that in this country sovereignty is shared between the State and Federal Governments.

If we went to a system of direct election of the President, wouldn't that change the basic nature of our Government, taking away some sovereignty from the States and causing a dramatic shift in our Federal-State system of Government?

Mr. STORING. It may be a little too strong to say we'll take the sovereignty away from the States. But it certainly has one clear impact on the States. That is to say, it deprives the States, as such, of a certain role they have had in a Presidential election, formally and constitutionally. That seems to have some symbolic and constitutional significance.

Second, as I tried to suggest in response to Senator Bayh, it seems to me very likely that direct popular election would weaken the role of the State political parties and, therefore, the States in our federal system.

Mr. FORAN. It was suggested this morning that electors represent themselves and not the voters. Don't we have this in all representative governments? Senators and Congressmen represent—as the electors do—rather than simply reflect the will of the voters.

Mr. STORING. Yes; I think so, although it is certainly true, as Senator Bayh says, that the electoral system today is not really a representative system in the way it was originally designed to be. It is a method of counting the votes.

In that sense, it is unlike a conventional representative system. But it does involve introducing into the electoral process other considerations than mere responsiveness.

Mr. FORAN. In previous testimony before the subcommittee, Prof. Judith Best made the point that the proposal for the direct election of the President was based on a misconception of American democracy.

Would you care to comment?

Mr. STORING. That's fundamentally my major concern.

The proposal seems to me to be based finally on the assumption that the business of American democracy is simply to be responsive to popular opinion; and that strikes me as wrong, contrary to our tradition, and dangerous. Because I think the result of that would likely be either a foolishness or some kind of——

Mr. FORAN. There was a book by Joe McGinnis that came out in 1969 called "The Selling of the President, 1968." Under the direct election system, do you see the danger of a media President, where emphasis is placed on sales technique and presentation to the media by purchasing television time in large urban areas as opposed to going out and appealing to groups on a more personal basis?

Mr. STORING. I think it would be likely to have that effect, although you would have to say that there are a lot of other things that are influencing the character of politics—in addition to the electoral college system. It may be that the electoral college system is not the chief one of those.

But I do think it is likely to have the effect of fostering the tendency towards a personalized media-oriented politics.

Under the direct system of election, a Presidential candidate is going to be less dependent on somebody like Richard Daly in Illinois than he is in an electoral college system.

That has its good, as well as its bad, side; but its broad character, it seems to me, will be to weaken the role of those State institutions.

Senator BAYH. What system of electing the President were we using in 1968?

Mr. STORING. As I said, there were a lot of other considerations that go into characterizing the way our politics is conducted. I said I think the direct popular election would tend to foster and encourage those tendencies.

Senator BAYH. That are happening already?

Mr. STORING. That are happening already, but that haven't gone as far as they could conceivably go I think we would all agree.

Senator BAYH. In response to one of my questions, you suggested that direct election would change the emphasis as far as the selling job for candidates in areas of the country not now being covered.

Mr. STORING. Rather than in some of the others where they are.

Senator BAYH. So it would be done more equitably.

Mr. STORING. I think if I were from——

Is that more equitable on the theory that we did it one way for 200 years and the next 200 years we ought to give the benefit to another?

Senator BAYH. I don't think because it has been done in the past it is necessarily equitable. That's why we had the 19th amendment to let women vote, and why we're letting younger people and black people vote and why we reapportioned our legislatures to make it more equitable.

Mr. STORING. I'm not sure that shifting the focus from Illinois to Indiana is necessarily equitable either.

Senator BAYH. The fact of the matter is, as we will find when we get some expert testimony from people who actually buy television time in national campaigns, that there are certain parts of the country now that they totally ignore.

You suggest that would not be possible and that it would not likely happen under direct election.

Mr. STORING. Under direct popular election?

Senator BAYH. Yes.

Mr. STORING. I think you're right.

I think totally ignoring any section of the country would be less likely.

Senator BAYH. Thank you, Professor.

Mr. STORING. Senator, may I add just one comment very briefly.

Senator BAYH. Sure.

Mr. STORING. It is simply to say this:

We have talked a lot and disagreed about the consequences of direct popular election as against the present system. I agree, and indeed want to emphasize, that predicting those consequences is extremely difficult. There is a great deal of uncertainty and darkness in that matter.

That seems to me, as I said in my opening statement, to be a very solid reason for being very sure before we jump that we're going to a situation of something better—rather than worse.

Thank you very much.

Senator BAYH. I appreciate your being here.

We're talking about a very nebulous area here. One of the things that you emphasized was the importance of electing better-qualified people. In essence, in your statement, you came very close to saying by inference that some of us who are pushing direct popular vote aren't concerned about that.

Mr. STORING. One doesn't see much about that in the writings and talk in favor of direct popular election.

Senator BAYH. We've had a lot of witnesses here, and you're the first person in 10 years while I've heard hearings who suggests that direct election is going to elect lesser-qualified candidates than the present system, and that those of us who are trying to change the system aren't concerned about it. Now that's going a little far.

Mr. STORING. The former I did not say; the latter I did.

On the whole, the proponents of direct popular election have not talked very much about improved successful candidates. I think that's a fact. If I'm wrong, obviously I'll correct myself.

Senator BAYH. I think it's like saying that B comes after A. All of us are trying to do that.

Mr. STORING. I'm just afraid it's been forgotten in the heat of a kind of commitment to numerical preponderance.

Senaor BAYH. You are not, then, suggesting that there are apt to be less-qualified people under one system or the other?

Mr. STORING. I think there will be some differences. I think those differences are hard to predict.

Senator BAYH. Thank you very much.

[The prepared statement of Herbert J. Storing follows:]

PREPARED STATEMENT OF HERBERT J. STORING

The most worrisome aspect of the movement to adopt some form of direct popular election of the President of the United States is, in my view, the erroneous understanding of American government on which it is based. That erroneous understanding, which I shall call "simplistic democracy," has for our present purposes two main elements. Simplistic democracy assumes, first, that

government is good so far as it is responsive to popular wishes: the business of democratic government is simply to do whatever the people want it to do. Not all advocates of direct popular election of the President hold this view in all its starkness, but it is the underlying premise. (I should also say that it is the premise of many opponents of direct popular election, which is one of the reasons why many of these opponents have had a hard time explaining their opposition.) The second element of simplistic democracy, and the one directly involved here, is the notion that in a democratic election the only thing that counts is that the person wanted by the most people should be elected to office. For any other consideration to affect the outcome is unfair, irrational, undemocratic.

Clearly there is a great deal to be said for these principles. Government should be responsive. And elections do rest on an assumption that the electors should choose whom they want for their representatives. Any gross departure from either of these principles would surely and properly be resisted by all Americans. The question, however, is not whether there is truth in these principles but whether they are sufficient. And in fact the great architectural principle of the American government as it was conceived by its framers is precisely that responsiveness to public opinion is a necessary but not a sufficent condition of good government. The chief danger of the movement for direct popular election of the President is its tendecy to further weaken our already loose grasp on this vital principle.

To say that democratic responsiveness is necessary but not sufficient implies that government ought to be responsive to public opinion in general and over time but that it need not be—indeed that it should not be—merely responsive. A merely responsive government is likely to tend toward instability, ignorance, and indifference to individual and minority rights. The government the American framers built was erected on public opinion, but that opinion was to be checked, guided, and channeled when appropriate by the constitutional system and the officers serving under it. The aim was to provide for a government that would be competent, stable, and just, as well as responsive.

I want to make two points about this great design of the American framers, one a broad and very important background consideration, and the other directly pertinent to the question of the method of Presidential election. The background point is that this notion of a "mitigated" popular government, as James Madison called it, is itself altogether consistent with democracy: it is not something foisted on the people from outside. Just as any one of us is likely to arrange his own affairs so that circumstances will help him resist his own vices or deficiencies (like most of you, I suppose, I deliberately accept specific deadlines as ways of anticipating and dealing with my probable future laziness and procrastination), so a people, as Madison explained, might anticipate its own probable future flightiness or foolishness and try to build into its constitution institutions to counteract those tendencies. The "anti-democratic" or non-democratic devices in our Consitution are democracy's own inventions of prudence to deal with its own harmful tendencies. These ideas are not very familiar to us today, so influenced are we all by doctrines of simplistic democracy. Yet my own experience (teaching undergraduates in a large state university for example) is that their good sense is obvious once they are explained.

Of course these broad considerations do not settle the question of direct popular election of the President. They do suggest, however, that an institution or a procedure of government should not be judged merely in terms of its responsiveness or non-responsiveness to public opinion. That is a very important point in the present context, because the beginning and the end of the case for direct popular election is the fact that under the present system a man might be elected President even though he had fewer popular votes than his opponent. The fact in itself is widely thought to demonstrate the evils of the present system. (This is precisely the initial assumption of my undergraduates until they begin to think through the question and see that it is a good deal more complicated than that.) Such a possibility should surely be carefully watched, especially if it seems likely to occur with some frequency (which it does not); it is not, however, the end of the story but the bare beginning.

The case for direct popular election of the President collapses, it seems to me, once the dangerous shallowness of the doctrine of simplistic democracy is exposed and understood. That in itself is reason enough to leave a working and

reasonably satisfactory system in place; but is there really a case to be made for the electoral college system? There is, indeed; but it is a complex case, and for that reason alone it is distasteful to those who seek to solve our political problems with a single stroke of reform.

To see the case for the present constitutional system of electing the President requires a shift in point of view from that usually taken by the critics of the present system. They tend to view elections in terms of input—in terms of the right to vote, equal weight of votes, who in fact votes, etc. The framers thought it at least as important to consider the output of any given electoral system. What kind of men does it bring to office? How will it affect the working of the political system? What is its bearing on the political character of the whole country?

There is much room for disagreement and uncertainty about the results for our political system of a change to direct popular election of the President. I would surely not pretend that my very brief sketch is comprehensive or conclusive. What I want to stress, however, is that no proposal for electoral reform can be intelligently considered by looking at only one end of the electoral process. Elections are means to some ends, and some attempt has to be made to establish what the ends are and to compare different methods of election in the light of those ends. The output of any given method of election is at least as important as the input.

The paradox of the constitutional system for electing the President is that while it does not work as the framers intended it to work, it nevertheless achieves to a remarkable extent the ends the framers wanted to achieve. Despite the framers' pride in their invention of the electoral college system—and it was one of the least criticized parts of the Constitution—it may have been a bit too clever and the first stage too loosely tied to popular elections. (If the state legislatures today were to start choosing electors themselves, or assigning that task to, say, college professors, as they might constitutionally do, I would start agitating for constitutional amendment.) But the framers surely saw very clearly what such a system of elections should do; and the fact is that the system as it works today does those things rather well. It does them largely through our system of political parties; and it is another paradox that while the framers opposed parties as they knew them, the American party system today is one of their most remarkable achievements.

Once one turns to the question of output, to the ends that a method of election should aim for and that requires putting aside the blinders of simplistic democracy), there is likely to be fairly wide, though not universal, agreement. The ends of any system for electing the President, as the framers saw them, were something like the following: (1) it should provide for significant participation by the people at large; (2) it should foster political stability and avoid the excesses of partisanship and factionalism which tend to form around important elections; (3) it should give some special place of influence to some individuals who are specially informed about and committed to the process of government; (4) it should recognize that this is a nation of states and give some weight to the interests of states as such; (5) it should leave the Presiednt independent of any other institution of the government; (6) and, it should, of course tend to produce Presidents of respectable character and intelligence. It is striking how little concern there is among the proponents of direct popular elections with these objectives. There is little or no argument that the individuals chosen under a system of direct popular elections would be better Presidents; that policies would be more intelligent; that Presidential behavior would be more prudent or equitable; or that American politics as a whole would be improved in stability, moderation, competence, or justice.

And, on the other side, it is fairly obvious that our present system does secure these goals to a reasonable degree. This seems to be connected with our present two-party system, and it is generally agreed—even among advocates of direct popular election of the President—that the main elements of our present party system should be maintained. There are many issues here, but I pass them over to come to what seems to me to be the vital question, about which there is serious disagreement. That is whether the American two-party system, which underlies most of these benefits, is in any way dependent on the way we now elect our President.

This crucial question is by no means easy to answer. It would take more space than I have even to give an adequate sketch of the issue. On the one side the argument is that by giving the popular vote winner in any state all

the electoral votes of that state (which is of course not constitutionally required but is and is likely to remain the almost universal practice), the electoral college system tends to freeze out minority parties (who cannot hope to win a state's whole electoral vote) or, put differently, creates a very powerful incentive to drive all interests into one of two great parties, each of which can realistically hope to win in the "all or nothing" electoral vote game if it makes a good enough appeal. Without this, the argument goes, there would be much more incentive for minorities to strike out on their own and much less incentive for the two great parties to cast their nets very widely; and there would, in consequence, be a decay of the two-party system.

Proponents of direct popular election contend, on the other hand, that the basic shape of American politics is determined by forces far more fundamental than the way we elect the President. They refer to the long tradition of two-party politics. They point out that the fact that the Presidency is a single office itself tends to discourage the formation of minority parties in Presidential politics; minorities could no more hope to win the Presidency as independent parties under direct popular election than they can today—perhaps (remembering the Wallace phenomenon) even less so.

It is not only difficult to weigh these and similar arguments. It is also difficult to know how various modes of direct popular election would affect the pattern of American politics. Presumably, for example, a major reason for requiring a forty percent plurality of popular vote to win is to discourage minority parties. Yet it is not entirely clear whether this would in fact discourage minority parties (on the theory that they cannot hope to get forty percent of the vote) or encourage them (on the theory that by remaining independent they may be able to influence a probable run-off election). It should also be observed that there are many other forces in the electoral system, public financing for example, that may be as important or more important that the electoral college versus direct popular election in determining the basic character of American politics in the next decade.

Yet one thing seems reasonably clear. To the extent that direct popular election does have an effect, it is likely to be in the direction of weakening or further weakening our traditional two-party system. The tendency of minority groups to go directly into Presidential politics, either in hopes of influencing a run-off election, or with the intention of bargaining for other advantages, or even to provide an organizational focus for interest group activity of a fundamentally non-electoral kind seems very likely to increase. Similarly, the role of the states, and specifically state party organizations, aready weakened in various respects, seems likely to be further undermined. Direct popular election of the President would foster a more open, volatile system of national politics; less rooted in state political organizations; less influenced by the party professionals or quasi-professionals; dominated by shifting personal alliances of nationally oriented personalities, ideologues, interest group spokesmen, and media specialists. We could anticipate, I think, a political system pulled, in the one direction, toward fragmentation and public (rather than intra-party) factionalism and, in the other direction, toward plebiscitory unity rooted not in party organization, but in an individual President's personality and personal staff.

All of this seems to most proponents of direct popular election to be largely beside the point. What we are dealing with, they contend, is not so much a question of achieving certain political ends, but a question of legitimacy, a question of the principle that ties the people to their government and continues to persuade them that that government is entitled to obedience and support, if not affection.

The trump card in the hand of the proponents of direct popular election of the President is the possibility that a man might receive a majority of the electoral votes who had nevertheless received fewer popular votes than an opponent. This has never happened in this century (leaving aside the arguable case of 1960), but it could happen. If the United States survives, and her system for electing the President remains intact, it probably will again happen.

It is worth reiterating at this point that the constitutional system for electing the President, as it was conceived and as it works today, is basically a system of popular election, though mitigated in various ways for various purposes. While it is very hard to know what effect direct election of the President

would have had, or would have in the future, on the whole shape of American politics and on the candidates and the issues involved (itself a pretty good reason for being skeptical about the proposed amendments), there is no doubt that the broad result of our present system of electing the President has in fact been to choose the man desired by most of the voters. Any solid exceptions to this—as Harrison's choice over Cleveland in 1888; any probable exceptions to it—as Kennedy's choice over Nixon in 1960; any future exceptions to it—of the kind warned against by the proponents of direct election—can be only that, exceptions. Indeed, these have been rare and will surely continue to be rare exceptions to an electoral system that clearly has on the whole reflected and will continue to reflect the choice of the American people.

To the proponents of direct popular election, however, these exceptions are unacceptable. Part of the reason for this is the simplistic democrat's blindness to other electoral considerations than mere responsiveness. But another part is a fear that even a single occurrence of this exceptional result of the election of a President with fewer popular votes than his opponent would shake the whole system to its foundation or at least introduce a crack in popular confidence that would be deeply harmful. I doubt it. Unless there were other reasons for widespread loss of confidence, I think the system would weather such a tremor without much trouble. I would expect a flurry of newspaper editorials, some revival of doctrines of simplistic democracy, another push for the (1 trust) yet unpassed constitutional amendment for direct popular election of the President; but on the whole I think politics would continue pretty much as usual. I would be surprised if the defeated candidates were to make any serious attempt to undermine his opponent's constitutional authority; I would imagine instead that he would use his popular plurality as a major weapon in his next campaign. I think it is shallow and misleading to portray such an event as the probable downfall of governmental legitimacy in the United States. Legitimacy is, as wise politicians and political thinkers have always known, a complex and mysterious force, not necessarily determined by electoral success, as the recent cases of Richard Nixon and Gerald Ford remind us.

Legitimacy is considerably more complex than numbers of votes. It depends on those qualities the Founders tried to build into the American system and which we have on the whole enjoyed: stability, adequate representation of our diversity, a recognition of our federal character, a capacity to govern well, as well as popular responsiveness. In no one of these respects is the present system of electing the President perfect; the main reason for that is that they are to some extent in tension. We are trying to have the best of several worlds—the world of political stability, the world of social diversity, the world of governmental confidence, as well as the world of democratic responsiveness. The proponents of direct popular election seem bent on resolving this complex set of worlds into the single one of numerical preponderance.

That world, the world of simplistic democracy, would be, I am confident, a good deal less satisfactory than what we have now. It would also turn out to be a good deal less simple than it seems to be on the surface. Would a series of extremely close popular votes, in contrast to our history of substantial electoral majorities, foster legitimacy?—Will we have to institute compulsory voting in order to secure numerical legitimacy? Does the doctrine of numerical legitimacy have any adequate answer to the complaint of the voter who is always on the losing side? And does the doctrine of numerical legitimacy not logically imply majoritarianism? Yet I know of no serious proposal for direct popular election of the President that would require a majority. Does not any form of election by mere plurality, however, leave open the possibility—indeed under our circumstances the probability—that the victor will be someone who was not preferred by most of the voters? How solid, on numerical grounds, would be the legitimacy of such a President? And what of the vast problems of the inevitable run-off elections? Would the close results, the public bickering and bargaining, the decline in participation in runoff elections be likely to reconcile all parts of the public to the final result and to the whole political system better than our present system of the electoral college managed by our great, aggregating political parties, I doubt it.

The case against the present constitutional system for electing the President rests upon a simplistic view of American democracy that is contrary to our traditions and dangerously shallow. It tends to ignore or to downgrade all characteristics other than popular responsiveness that our government needs.

When viewed in terms of results, as well as in terms of capacity to attract the respect and loyalty of the American people, the existing system, while surely imperfect, appears to be far superior to any form of direct popular election of the President.

Senator BAYH. Our next witness is Prof. Martin Diamond of Georgetown University.

TESTIMONY OF MARTIN DIAMOND, PROFESSOR OF GOVERNMENT, GEORGETOWN UNIVERSITY, WASHINGTON, D.C.

Mr. DIAMOND. Thank you.

I have written, and it has been recently published, a booklet on the issue we are discussing this morning. It is entitled "The Electoral College and the American Idea of Democracy."

I submit that as my prepared written statement to the committee and hope that it will be incorporated into the record.

Senator BAYH. It is so ordered.

Mr. DIAMOND. If I may, I will make a very brief summarizing oral statement to put forward the lead ideas which the committee may wish to have.

Senator BAYH. Professor, I went through your book with great style until I got to the last sentence. Then I had to find out what paradigm meant.

Mr. DIAMOND. And how did you make out? [Laughter.]

Senator BAYH. I had no reason to dispute Webster's definition.

Mr. DIAMOND. Did you find it a useful word in the context? I'm just trying to see if I got a passing grade.

Senator BAYH. It accurately describes your interpretation of the purpose of the electoral college.

Mr. DIAMOND. I thank you for the passing grade.

Senator BAYH. I am used to being the gradee instead of the grader.

Mr. DIAMOND. I've been sitting in the on-deck circle as the previous battle was going on watching you work the corners and I discovered that I'm going to be the gradee this morning myself.

Senator BAYH. I think the country will probably grade us both.

Mr. DIAMOND. It seems to me that it is something of a puzzle that the electoral college comes under so severe an attack. It has produced for us nearly 200 years of tranquil democratic elections. It has produced for us, in comparison with every other democratic political system, 200 years of effective political campaigning, of unambiguous outcomes—in comparison to those of any other system with which I'm familiar—of tranquilly, legitimately accepted outcomes.

Moreover, it has been a dynamically adaptive system during the course of that nearly two centuries of its use. It has adapted to the constant changes and developments as America emerged into modernity.

Having worked so well for so long, I find it puzzling that it should be the source of so strenuous an attack. Or the object, rather, of so strenuous an attack.

I have tried to understand what is the center and the gravamen and the weight of the attack. It seems to me that it comes down

to two related things, and I would like to deal with those two only in this oral presentation to the committee.

I suspect that part of what people have against the electoral college—not Senator Bayh, perhaps, or other Members of the Senate, but others around the country, others in the academic profession—part of what scholars have had against the electoral college—is the fact that it is so old. They suspect the old. It must be archaic. It must be outmoded. How can anything devised so long ago, for a simpler age—how can anything so old—still be good in this unprecedentedly modern time?

I find that prejudice against the electoral college characteristic of at least academic hostility to the electoral college—if not the political outcome.

Senator BAYH. Excuse me. You have read a lot more academic treatises on this subject than I suppose I have. Could you cite me one or two where that's the basic thrust of the argument?

Mr. DIAMOND. I don't know that I could do that at this instance, but I would be happy to supply that information to the Senator.

I believe you will find in James Burns' Deadlock of Democracy, perhaps, there is some indication——

Let me give you the analysis of it: It is that the electoral college was devised in an elitist, undemocratic time by elitist, undemocratic thinkers for purposes of a simpler, agrarian, premodern age and is outmoded.

I will give you one thinker, if I may be so bold.

Senator BAYH. Are you disputing the frame of reference of Professor Burns as far as the times in which the electoral college was proposed?

Mr. DIAMOND. Yes; I am. I make my dispute very clear, and I think I can do so very briefly.

Senator BAYH. I just have not heard anybody come before this committee and say the reason they want to get rid of it is because it's been around for 200 years. Period.

Mr. DIAMOND. Let me remind you of Herblock's cartoons on the subject.

Senator BAYH. What State does he represent? [Laughter.]

Mr. DIAMOND. He, like myself, represents his effort to think about the subject.

I didn't know that representing a constituency was relevant to the discussion of the merits. It is relevant to deciding.

You, sir, will decide. I will not. But I did not know that representing a constituency was relevant to the discussion.

Senator BAYH. It certinly isn't and, hopefully, never will be. The only reason I raised the point is that I have been studying this problem for about 10 years, and never have I had one witness—nor have I read any treatise—that says the reason he or she wants to get rid of the electoral college is that it's old and, therefore, per se, we should change it.

I would like to have any information that you have where there is a treatise that says that old, per se, is bad. If that's the case, I'm going to worry about the number of years I have left. I don't know how many there are, but I'm getting older instead of younger. And so, per se, I'm getting worse. That may be the case, but I——

Excuse me for interrupting.

Mr. DIAMOND. I don't propose to find support for that statement, because I didn't make it.

I didn't say anyone said old, per se, is bad. What I said was: In the academic literature on the subject, there seems to me to be a prejudice against the electoral college because of the progressivist assumption that anything so old cannot any longer still be adequate.

That I can support. I can show it to you in literally dozens of textbooks on American Government.

I repeat my use of Herblock as an example of that. Herblock is the cartoonist who was used to illustrate the obsolete, antiquated character of the electoral college. He appears, in his cartoons, as an old fuddy-duddy in colonial knee britches and powdered wig with an ear trumpet, saying: "Don't expect me to get this right, bub."

The image of antiquated, obsolete, and outmoded is crucial to the prejudice of people against the electoral college.

Senator BAYH. You're playing with words. If you want to say "old," that's one thing. If you want to say "archaic" or "outdated," those are entirely different words.

Mr. DIAMOND. May I supply you with a source that you are thoroughly familiar with—the American Bar Association Report of 1969.

Senator BAYH. The report uses the word "archaic" and not "old."

Mr. DIAMOND. Yes. And it says "outmoded."

Its argument is exactly as I gave it to you, Senator. Devised for an earlier time. No longer adequate.

Senator BAYH. I don't think we should beat this to death, and maybe we already have. That is different than saying that being old is prejudicial against it. I haven't heard any scholar who said that because it's old it's bad. They say times have changed and they're different now than they were, and you may argue that that's not the case and I might hear that argument if you believe that times and circumstances have not changed. But excuse me for interrupting in the first place.

Mr. DIAMOND. I believe there has been a tendency on the part of the scholars, and perhaps even of politicians, to regard the electoral college as the product of an old and archaic and outmoded and bygone era.

I will try, by encompassing all the terms, to get us over our difficulty.

And that prejudice has worked to the disadvantage of the electoral college.

I believe far from being an old and outmoded instrument it is, on the contrary, a very model—I hesitate to use the word "paradigm"—of a first-rate constitutional mechanism and provision; namely, one which is old to which the people are habituated. And that habituation is a major source of legitimacy and an invaluable ingredient to free government.

It is a model constitutional provision which is old and dynamically adaptive, which in every election has proven itself demographically responsive to changing conditions.

It's a new ball game, as you know better than I, in every Presidential election; because the electoral college adapts itself and historically has evolved in response to the growth and changing political, social, and economic characteristics of the country.

That much said on the problem of its archaicism. Let me proceed to what I think is the second point I wish to make and what I think is the most important objection made to the electoral college and the one that must be dealt with firmly.

It is the idea that the electoral college holds an undemocratic potential; that it is possible that a man would get elected under the electoral college system because he has more electoral votes but will have had fewer popular votes than those of one of his opponents.

This is the discrepancy that Senator Kefauver called the "loaded pistol to our heads." It is this discrepancy—the possibility that a candidate with fewer votes will win the Presidency because of having won the electoral college but not the popular vote.

That is the thing that must be dealt with if the electoral college is properly to be defendable.

Let me point out that that discrepancy between popular vote and winning seats, or winning elections, exists in every districted system of election.

Let me start further afield. It exists in England, which many scholars and many politicians admire for its parliamentary system.

Under the English districted system—that is to say, the prime ministry—a ministry chosen by the party and formed by the party that has won the majority of seats—in that British parliamentary system, the party with the minority of the popular vote has frequently formed the government. It is the inevitable consequence of there being a discrepancy between winning seats in a districted system, or electoral votes in an electoral system, and winning raw popular votes.

It happened as recently as 1974—the present Labor government having been a minority in the popular vote but having won a majority of the seats.

If one is to avoid the discrepancy between electoral votes or seat votes or district votes and popular votes, one must rid oneself of every vestige of districting or any other electoral device.

That is the cost of the system which is now being proposed in place of the existing electoral college system.

I believe that the districted basis of election—wards in cities, to permit responsiveness to minorities; counties in States; and States in the American Federal system—I believe that the preservation of that districted basis of election is invaluable to a free democracy such as ours and is by and large preserved in most of the Western democratic countries.

Now let me switch to a second aspect of this problem of the discrepancy between the popular vote and the electoral vote.

The amendment you propose, sir, is called direct election of the President. Perhaps you will permit me to say that that is a misnomer—certainly misnamed if I am right in my criticism, with the best of intentions and with the best of rhetorical effect—but a misnomer nonetheless.

The President is now elected directly, in my judgment. There is now in the election of the President under the electoral college system one-man one-vote. The man with the most votes wins. But it is federally democratic.

The only effect of the proposed amendment will be not to increase the democracy of the election or the directness of the election but the pure nationalness of the election.

The sole practical effect of the amendment will be to eliminate the States from their share in the political process.

We now have, in Indiana and Illinois and every State of the Union, one-person one-vote—winner take all. The pure direct democratic principle for winning in each State. The election of the American President cannot be made more directly democratic. It is being proposed to be made more directly national.

When the issue is put on national versus Federal. I believe the electoral college may be defended with comfortable conscience—not only good, but comfortable conscience.

It is a means of preserving Federal democracy, or a Federal element in the electoral process.

At the Federal convention, the Constitution makers, after thorough-going dispute, agreed—with the process of give and take and of compromise—to include the States in the process of selecting the President of the United States.

In my judgment, that has proven invaluable in this centralizing age. When all forces tend to homogenization and centralization, we have a saving remnant of decentralization in the Federal aspect of the election of the American President.

Regarding that Federal aspect, let me end with this comment .

It may be asked, and I have heard proponents of the so-called direct election of the President make the point, why the President of all the people should not be chosen in a straight, national vote by all the people. He is, after all, our chief, single, national executive officer.

I would answer in the language of the Constitution and of *The Federalist*. He is not our chief national executive officer. The President of the United States is our chief Federal officer. And that is what has been forgotten by some of the proponents of the so-called direct election of the President.

The President is a Federal and national officer. Like the Senate of the United States, he has Federal and national characteristics in his mode of composition and selection. Like the House of Representatives, he has Federal and national characteristics in his mode of choice and in operation.

The Constitution created a compoundly State and national system and built the States partly into the choice of national lawmakers and of the national executive.

The sole constitutional effect of the proposed amendment is to defederalize and nationalize the election of the President. I regard that in this age, when our decentralized Federal system has proved so manifestly of value to us, as a dangerous change and an unwarranted one.

That, when added to my written submission to the committee, suffices on my part for an opening statement, sir.

Senator BAYH. I appreciate your taking the time to be with us.

I found your book an interesting study which makes different assessments and reaches different conclusions than my own.

By no means does that lessen the importance of it and consideration of it.

Just to see where you are on this philosophically is interesting inasmuch as much of your booklet tends to believe that liberals are bad and conservatives are good, at least you believe the movement for direct election is a liberal movement—whatever liberal is in this day and age.

Do you think that we would be better off with a parliamentary system in this country, as far as districting is concerned, rather than federalism?

Mr. DIAMOND. No; I do not.

Senator BAYH. How far would you push the benefits of districting in the contribution of the States in the context of the electoral college? Does it concern you at all about the contingency plan in the present electoral college system where each district has the same weight in the final outcome?

Mr. DIAMOND. No. I believe the throwing of the vote to the House of Representatives where each delegation would vote as a single unit—as a State unit—that this is unwarranted. I regret that compromise that was made in 1787 and would prefer that the House and Senate, as a whole, would then be the contingency body.

However, there's one thing to be said for the present one. It's so horrible no one ever goes to it.

Under the run-off contingency provision of the Bayh amendment, it's my judgment that it would be gone to every time. The contingency, I believe, will become the real election. The second election will become the real election.

The nice thing about the prospect under the present electoral college about the House of Representatives is it is such a horror that we haven't gone to it since 1828. In my judgment, we are not likely to for many a good year to come.

Senator BAYH. We have come very close to it.

Mr. DIAMOND. I don't think so. Many of the scholars have shown that the mathematical chamber of horrors trotted out after many elections is only that—a mathematical chamber of horrors.

That a change of several hundred votes in Delaware, 6,000 votes in Hawaii, 20 or 30 in Oregon, would have done such and such.

Senator BAYH. Do you deny that fact?

Mr. DIAMOND. No; I didn't. But what I insist on——

Senator BAYH. Others have made this assertion just as you, but I haven't seen any evidence at all. Everybody is entitled to his own philosophy. We're trying to suggest that if you have empirical evidence to the contrary, let's have it.

Mr. DIAMOND. Let me offer some empirical evidence.

Had there been a change of 20 votes here and 30 votes there, there would have also been changes of 20 elsewhere and 30 elsewhere.

That is to say, focusing on each election and picking up two or three States and juggling the figures to show how it might have gone otherwise is to abstract a single set of data from a complicated interrelated whole.

That is to say, if the votes would have changed in Hawaii and Delaware, some would also have been switching around in Ohio and Indiana. And there is no way, suppositiously, to say that the contingency came close.

We have not, for 150 years, approached the contingency. That's a pretty powerful empirical record.

Empiricism, 150 years of experience, is on the side of the proponents of the electoral college. Supposition, guesswork, and unevidentiary speculation is the stock in trade of the proponents of the change.

Senator BAYH. You say we shouldn't have any change then.

Mr. DIAMOND. No; I don't see how you drew that inference. Because I'm against the change in one place where the dangers are wholly suppositious and the good wholly positive, I don't see how you can infer from that I would be against change on anything. I'm for all kinds of changes.

If the Senator will give me the opportunity, I have my chance to unburden myself before the American people.

Senator BAYH. They will be glad to hear what you have to say. I wish we had more time to do that.

Mr. DIAMOND. I am for lots of changes.

Senator BAYH. In reading the booklet, I probably have a pretty good idea of what some of those changes are.

I don't want to argue this point with you. I don't see how you can dispute the fact. You talk about changes here and changes there. If there had been a composite change of less than 11,000 votes, we'd have had different results. If there had been a composite change of around 70,000 votes in 1968, we'd have had an entirely different result. That's factual.

Mr. DIAMOND. I don't dispute that.

If I may quote my grandfather: If grandmother had wheels, she'd be a trolley car.

[Laughter.]

That is to say, that supposition has not, for 150 years, had the least shred of reality to it.

I heard you question the previous witness about unwarranted suppositions. I think 150 years is pretty strong grounds for saying that the constant speculation—"dear me it could have gone otherwise, and we could have had this horror"—is pure speculation about what might have been and has never occurred.

Senator BAYH. I think you'd probably have a lot of fun with Russian roulette. If you spun the chamber five times, and it hadn't gone off, you'd keep spinning.

Mr. DIAMOND. I like the Russian roulette example. May I deal with it for a moment?

In Russian roulette, if you fail, you get killed dead. In this one, if you fail or lose, all you have is the election of 1888, in which nobody got hurt.

There has been a great deal of speculation about the loaded pistol. I would like to offer some evidence.

We lost the game of Russian roulette in 1888. The loaded pistol went off in 1888 and nothing happened. Grover Cleveland and the Democrats lost, and the country didn't turn a hair. They just elected him the next time, and we had good, solid, stable, tranquil, and legitimate government.

If we had a President who had a few less votes than the fellow who got more than him, why would that be having played Russian roulette? Why would that have been a loaded pistol to our heads?

What would have happened is that someone would have squeaked

through by a fluke. The American people would grin and bear it and throw him out the next time if they didn't like what he did.

Flukes happen. In my judgment, that is as close to Russian roulette as a pimple is to cancer.

Senator BAYH. We're all entitled to our own assessment. Some people think the person elected President of the United States ought to be the choice of the largest number of the people. Obviously, you don't think that's necessarily going to be a problem. And I don't think I am going to change your mind; and at the rate we're going, I don't think you're going to change mine.

Mr. DIAMOND. May I say——

Senaor BAYH. Let me go on to another element, so that we can get on with some of the other witnesses.

In the document printed by the American Enterprise Institute, is that your position or theirs?

Mr. DIAMOND. That's my position. I don't know much about theirs, but I know what mine is. The American Enterprise Institute itself takes no positions on public policy issues.

Senator BAYH. Another distinguished senior consultant of the American Enterprise Institute, a fellow named Gerald Ford who has had perhaps a little more experience than either you or I in this process, comes down on the opposite side of this issue. He thinks we ought to have direct election of the President. That's what makes the country what it is, I guess, and we ought to have differing opinions.

Let me ask you this, just to touch on one other point. First of all, I just can't let the assessment you made that primarily liberal thinkers are supporting the direct election amendment in order to do all the things you believe liberals have in mind.

I feel that our colleague, Senator Garn, would probably have a differing view of how you characterize him. He's an enthusiastic supporter of this amendment. Senators Bellmon and Bartlett also are enthusiastic supporters, and I doubt that they would like to be called political liberals. I don't think are a minority either. Senator Baker wouldn't like to be categorized as a liberal—whatever that means—nor would Senator Dole. And so you go down the list.

The remarkable thing about the support for this amendment is that we've had Republicans and Democrats, small States and big States, represented, and people seem to rise above their normal philosophic predilections because they think there's something rather basic here.

One of the issues that you raise that some of them have taken issue with is the emphasis you place on federalism, that the electoral college supports federalism.

I think when you have time that you might be interested to read Senator Dole's testimony. I'm sure he would not be at all comfortable being categorized in your assessment that this is part of the liberal movement, nor your assessment that federalism is protected by the electoral college.

Mr. DIAMOND. I don't remember when I did that, Senator. In my written pamphlet, I think I suggested something that you may be using.

I simply didn't in my oral statement.

What I have said in the written document, and not at all in the

oral, is that the initial attacks on the electoral college came from liberal and progressive thought. That's not bad. Lots of good things came from that.

I simply identified it, and I think with historical accuracy, as to its source.

Now, Senator Dirksen—Senator Baker's father-in-law—and others changed their minds. Some conservatives joined some liberals in the attack on the electoral college. But I don't remember stigmatizing this or categorizing this.

Senator BAYH. I think you have reached one who hasn't lived with every word, as I'm sure you have. But one gets the very strong inference that you feel this is some sort of a liberal effort, and I just want to point out that it is not. To suggest that the original emphasis comes this way denies the fact that the first effort to change the way we elect our President and have a direct popular vote for the President goes back to 1816. I can't tell you what the philosophy of that fellow was. I don't know if they had liberals and conservatives then. I know we had Whigs and Torries and Federalists and all sorts of others. This issue transcends normal philosophies.

With respect to Federalism, Sentor Dole felt that as far as his experience in the political process was concerned, the electoral college has an anti-federalism impact. I think the words he used were: Direct election would provide a common sense federalism.

Federalism is supposed to let the States have equal attention in the process. His experience with the electoral college was to the contrary. I won't repeat it, because he said it so graphically from personal experience.

Both he and Senator Humphrey testified together that the impact of the present system and the way in which the compartmentalism works with the unit rule interpretation causes the impact of many States to be totally lost in parts of this so-called "Federal" electoral college system.

Mr. DIAMOND. I find it difficult to go against so formidable a duo of practical wisdom as that of Senators Dole and Humphrey.

I most certainly have to agree with some of the facts. In any election, some States are scanted. They change from election to election, because this is a dynamic, flexible electoral college.

And in every election, some voting groups are scanted because this is a dynamic, adaptable, and flexible system. There is no fixed category of the neglected and ignored. They change.

Politicians, I understand from academic discovery—and I may, in a moment, suggest some practical experience with the matter—go where the votes are.

Now where are the votes? Not just where are the numbers of people, but where are the undecideds? Where the voters who can be brought out by effort are. Where the changeable of mind are.

This changes from day to day during the campaign and from election to election.

The electoral college does not, in a fixed way, favor one State over another. It changes dynamically. If Kansas and Minnesota did poorly last time, wait and they will do well again. They have been decisive in the past and will be decisive in the future.

The marvelous thing about the electoral college is its demographic responsiveness. It shifts and changes with the times and with the tides of public opinion.

May I, Senator, at my own instigation mention something from practical experience.

You asked the previous witness if he had ever spoken to minority parties about the electoral college. May I say I have some practical experience.

I had the honor to be a colleague of Norman Thomas for many years and was a member of the National Executive Committee of the Socialist Party for many years.

I remember those days with fondness. I believe I learned something from it, and I think some of the things I did along with my coassociates was of value to the United States.

One thing we all had in common was an absolute detestation of the electoral college. It was one of the chief barriers to the success of minority parties.

You will find that in Norman Thomas' marvelous book, "A Socialist's Faith." They were the words of a wise and reflective Socialist in his later years as he looked back on his long experience.

We knew that we didn't have a snowball's chance in the nether regions to get on the ballot and to win any States. Whereas, under the system you propose, we would have made hay while the Sun shined during the late autumn.

We started out always with 5 or 6 or 7 percent who said they were for Norman Thomas. And I'm now quoting Thomas: About the third week in October, it would be down to 2 percent; on the first day of November, it would be down to about 1 percent; and on the first Tuesday after the first Monday in November, it would be down to about 150,000 votes. Period. The reason was that there was no chance of victory in any State.

Your 40-percent provision, with the contingency runoff election, was precisely what we prayed for. Unfortunately, the manna came from Heaven too late for my use in the Socialist days.

Senator BAYH. It's interesting for me to see how you make a parallel of going from 5 percent to 1 percent and going from 5 percent to 20 percent or more which you have to do if everything else was mathematically equal in order to cause a run off.

Mr. DIAMOND. I can handle that one, sir, I believe.

You see the Socialists could go to 5 percent, but there's no reason under your proposed system, as I understand it, why 20 percent has to be garnered by one party.

I believe that the 20 percent would be garnered by 15 or 20 parties. I can name 4 or 5 of them: Wallacites, Henry and George; McCarthyites, Eugene and Joseph; Socialists, Trotskyites, Communists, black militants, yellow militants, green militants, purple militants——

Senator BAYH. Tell me this. Suppose we had had that this time. Give me the worst horror story you can think of. Let's go through that kind of an election. What do you suppose the results would have been? Put Norman Thomas out there in full force. Where would he have finished in this?

Mr. DIAMOND. In this last one had there been the system you propose as a substitute for the electoral college?

Senator BAYH. Yes.

Mr. DIAMOND. I certainly can't give firm numbers, but I would say George Wallace, Eugene McCarthy, Norman Thomas, and vegetarians, prohibitionists, and a dozen others whose names we don't know because they haven't yet been conjured into being by the prospect of garnering a share of the vote and a hunk of Federal financing. I see no difficulty in adding up to 20 or 30 percent for all of them together in the first election.

Senator BAYH. I'm not prepared to accept that, but for the sake of argument, neither will I say that it couldn't possibly happen.

My personal experience is that sitting out in the wings with a few votes doesn't do any good. You have to get where the action is, and that means you have to win.

Which of these 18 splinter parties would have gotten more votes than Gerald Ford or Jimmy Carter so that they would have been in a runoff? That's the key question.

Mr. DIAMOND. Yes and no, sir.

The key question is: How many elections do we have? How fragmented do you have your party system? How many parties do you give reason to come into being?

It is not hard to create the French Chamber of Deputies in a multiparty system. We've seen it happen everywhere. It can be done by fiddling with the constitutional structure that undergirds and constrains and channels the two-party system.

It wouldn't be the horror story of one election, but the horror story of two or three elections. What would happen is that every charismatic personality in one of the major parties, frustrated at its national convention, would be able to threaten to go it alone and would go it alone and reduce the votes of the major parties still further.

Every minority party would have no reason for the chastening constraint of the need to win elections in the first election. There would be a kind of victory for everybody. And then they'd stay in business, to get the Federal financing again in the next election.

We would simply create a multiparty system. Now I don't know; perhaps you would regard that with equanimity. I regard that with something of horror.

Senator BAYH. No. I think a multi-party system is bad. Having participated in one of the parties and having a lot of friends who have participated to a greater extent than I have in another, I must say that most practicing politicians I have talked with come to the absolute opposite conclusion than you do.

The same reasons voters didn't vote for Thomas would apply under any system: They realize they don't have a chance to win. They trot their horse out on the track and the race still ends up between the Republicans and the Democrats. As soon as it begins to look like the Democrats aren't going to get in the terrible runoff, which frankly I don't think we will have, then the Democrats are going to figure out how they can assimilate one of those other parties in it. That is what happened to most of Thomas' political philosophy. It was assimilated in the Democratic Party. The Eugene Debs ideas

which were so revolutionary were captured by Franklin Roosevelt. That would happen under a direct election system or an electoral college system because the idea is winning.

You have come to a different conclusion, and we're all entitled to that. I appreciate your taking the time to be with us. We have put your statement in the record.

Thank you, Professor, for being here.

Mr. DIAMOND. I appreciate the opportunity.

Thank you.

[The booklet "The Electoral College and the American Idea of Democracy," submitted by Professor Martin Diamond was marked "Exhibit No. 15" and is as follows:]