

The wisdom of the electoral college

Since the recent Presidential election, the media have overflowed with rather rancorous debates about the legitimacy of the Electoral College, in contrast to a simple count of the overall national votes for the two major candidates, Donald Trump (who, it seems, has won a majority of the Electoral College) and Hillary Clinton (who, it appears, has won a majority of the popular vote). These debates have usually assumed the simplistic form of one side's contending that, as a supposed "democracy", America should elect the President by majority vote; while the other side counters that the United States is a "republic" in which majoritarianism is not always desirable, let alone controlling. Both of these arguments miss a crucial point which derives from the federal system in general, and the duties of the States and the powers of the President within that system in particular.

In The Federalist No. 39, James Madison explained that

[t]he executive power will be derived from a very compound source. The immediate election of the President is to be made by the States in their political characters. The votes allotted to them are in a compound ratio, which considers them partly as distinct and coequal societies, partly as unequal members of the same society.

Here, Madison recognized the importance of the States' continuing positions as semi-sovereignties within the Constitution's federal system. As such, although they do not retain all of the rights, powers, privileges, and immunities of full and independent sovereignties, they continue to enjoy many of those legal attributes as component parts of that system. See, e.g., U.S. Const. amend. X.

Arguably the most important of these rights, powers, privileges, and immunities—and under the Constitution a duty as well—is for each of the States to maintain an armed force suitable to the “Republican Form of Government” which the Constitution requires each of them to preserve, and all of them, acting in the capacity of the United States, to “guarantee” to one another. See U.S. Const. art. IV, § 4. For sovereignty is the quintessence of political power; and all “[p]olitical power grows out of the barrel of a gun”. Quotations From Chairman Mao Tse-tung (Peking, China: Foreign Languages Press, 1966), at 61. This armed force is what the Second Amendment identifies as “[a] well regulated Militia”, which it declares to be “necessary to the security of a free State”. Each of the States must maintain “[a] well regulated Militia” in order to remain “a free State”, and thus to preserve for herself (as well as for her sister States) “a Republican Form of Government”. Moreover, each of the States must maintain “[a] well regulated Militia” in order to secure for Congress the forces the Constitution empowers it “[t]o provide for calling forth * * * to execute the Laws of the Union, suppress Insurrections and repel Invasions”. U.S. Const. art. I, § 8, cl. 15.

Now, the Constitution invests the President with the status of “Commander in Chief * * * of the Militia of the several States, when called into the actual Service of the United States”. U.S. Const. art. II, § 2, cl. 1. Furthermore, except to “engage in War” when “actually invaded, or in such imminent Danger as will not admit of delay”, the States have at their own disposal no permanent armed forces other than their Militia; for they may not “keep Troops, or Ships of War in time of Peace” “without the Consent of Congress”.

U.S. Const. art. I, § 10, cl. 3. And today, through the mutual “Consent of Congress” and the States, those “Troops, or Ships of War” are organized in the National Guard and the so-called Naval Militia, which in certain circumstances can be brought under the President’s authority as “Commander in Chief of the

Army and Navy of the United States". Compare U.S. Const. art. II, § 2, cl. 1 with, e.g., 32 U.S.C. § 101(3) through (7). Thus it is entirely fitting—indeed, one would think compulsory—for the President to be elected by a process which to the greatest practical degree maximizes the influence of “the States in their political characters”, as opposed to a simple majority vote within the nation as a whole which more or less disregards or even negates that influence.

For the Constitution plainly contemplates situations in which the States’ “[p]olitical power [which] grows out of the barrel of a gun” will be exercised by the President directly. One may question whether the Electoral College is, in abstract theory, the very best means to this end imaginable; but, in practice, it is undoubtedly one efficacious means, and the means the Constitution specifies.

Thus, the arguments put forward by those in Mrs. Clinton’s camp against the political wisdom of the Electoral College and in favor of raw majoritarianism as the best way to select the President are basically at odds with federalism in theory and constitutionalism in practice—and should be rejected on that ground alone.

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