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HOW MAY PRESIDENTIAL ELECTORS BE APPOINTED?

PROF. B. M. THOMPSON.

For more than half a century presidential electors have been chosen upon a general ticket in all the states. This was not the uniform practice at first. Judge Cooley in the last number of the JOURNAL makes it clear that at least four different methods were at first adopted, one of them, the "district system," being that selected by the last legislature of Michigan. Following Judge Cooley's article is one by Gen. B. M. Cutcheon attacking this system on two grounds: *First*, that it is in conflict with the Constitution of the United States; and, *secondly*, that it is mischievous in its effects.

Gen. Cutcheon assumes as the basis of his argument that the power to appoint electors is a delegated power. He says: "The power of a state to appoint presidential electors is a delegated power, and delegated only. It is not among the natural or inherent rights of states. It is delegated by the people of the United States through the Constitution, and cannot be re-delegated to districts or minor municipalities." This proposition has the merit of perspicuity. The people of a state have no natural or inherent right to have a voice in the selection of their chief magistrate. The state is a mere tool, doing this work, not for itself, but for another, an agent with special and limited powers, whose acts, to be valid, must be within the power conferred, and when valid are the acts of the principal and not of the agent. Gen. Cutcheon has not deemed it necessary to support by any argument his assertion that the power to appoint electors is a delegated power, and consequently we are not informed by what process of reasoning he comes to the conclusion that the Constitution in this instance must be regarded as a sort of governmental filter into which the people have poured a solution of crude powers, that percolating through have descended upon the state in the form of a gentle and fructifying constitutional dew.

This assumption finds no support in the letter of the Constitution. Article 10 of the amendments, provides that "the powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively or to the people." There is no intimation here that there is an important class of powers, wholly outside of the reserved powers, which belong to the people of the states not as "natural or inherent rights" but delegated by the people to the people, "through the Constitution." Without the Constitution as a medium of transmission it would have been impossible for the people themselves to

have delegated these powers to themselves, and they would not then be delegated powers, but would have remained natural and inherent.

It is only upon the assumption that the power to appoint electors is a delegated power that Gen. Cutcheon's argument has any force. If, on the other hand, it is a power incident to the right of self-government, belonging to the state or the people of a state as a political unit, then the Constitution is to be construed, not as delegating to the states the power to appoint electors, but as limiting and regulating the exercise of a power reserved by the states. This distinction is an important one. If this is a power delegated by the Constitution it must be exercised by the person to whom it is delegated and in the manner prescribed. If, on the other hand, the Constitution merely limits and regulates a general power reserved by the people of a state, it may be exercised in any manner not in conflict with the terms of such limitation and regulation.

Let us examine Gen. Cutcheon's argument, assuming for the purpose, that the power to appoint electors is a power delegated to the state. As he points out, there are several definitions of a state, one of them being "all the people of one state." This power, therefore, which is delegated to the state is delegated to the people of the state, and they may consequently exercise the power. The electors, as Gen. Cutcheon says, may be appointed "by the people of the state at large by general ticket." "But," he continues "the legislature cannot delegate or remit the power or jurisdiction of appointing to certain congressional districts and vulgar fractions of a state, as has been attempted in Michigan. The state shall appoint the electors. It must appoint them all, and the act of a district is not the act of a state." If the power to elect the president, the executive branch of the general government, is delegated by the people "through the Constitution," it follows that the power to elect the members of the house of representatives, a part of the legislative branch of the government, is, in like manner, delegated. The Constitution provides, "delegates." Article 1, Section 2: "The house of representatives shall be composed of members chosen every second year *by the people of the several states.*" Here we have a power to choose members of the house of representatives delegated to the people of each state, or, since "all the people of one state" are the state, to the state. It follows, if Gen. Cutcheon's position is correct, since the power to choose representatives is delegated to the people, that "the people cannot delegate or remit the power or jurisdiction of choosing to certain congressional districts and vulgar fractions of a state," or, of the people. For more than half a century, however, members of the house of representatives have been chosen by these "vulgar fractions" in all of the states. And many of those states have not "held to the constitutionality of nullification and secession" and in that manner obscured this constitutional question.

Since the state as a body corporate may act through the people at large, the people of a state may act through the state in its corporate capacity. It is immaterial, therefore, whether a power is delegated to the

state or to the people of the state. The "delegated" power to appoint electors has been exercised by the state through the legislature, by the people at large and by the people in the several congressional districts, and the "delegated" power to choose members of the house of representatives has been exercised in the same manner, by the legislature, by the people at large and by districts. By no process of reasoning can it be shown that a given method of electing members of the house of representatives is constitutional and that a like method of appointing electors is unconstitutional.

Gen. Cutcheon recalls the fact that in 1800, while John Jay was governor of New York, the then Democratic party of that state attempted to introduce the district system, and that the Federalists declared it would be unconstitutional. He infers that John Jay, being a Federalist, must have so held. Had he read the paragraph immediately following his quotation from Pellow's Life of Jay, he would have saved himself this inference. Mr. Pellow goes on to say that the elections of that year, having gone against the Federalists, Alex. Hamilton, Philip Schuyler and others wrote to Mr. Jay urging him to call an extra session of the legislature for the purpose of adopting the district system, and that Jay refused. The letter from Hamilton to Jay referred to by Mr. Pellow is found in the sixth volume of Hamilton's works, page 438, and contains a very significant sentence. He is endeavoring to persuade Jay that he ought not to hesitate to call the legislature together on account of any personal scruples as to the propriety of the act, and says: "They ought not to hinder the taking of a *legal* and *constitutional* step to prevent an atheist in religion, and a fanatic in politics, from getting possession of the helm of state." The italics are Hamilton's. He evidently took it for granted that Jay believed the proposed act was constitutional, and Hamilton and Jay were close personal and political friends. The endorsement of Jay upon this letter assumes as much: "Proposing a measure for party purposes which I think it would not become me to adopt."

Gen. Cutcheon claims to find support for his view in facts *aliunde*. He says:

"1.—In the constitutional convention it was moved by Wilson, of Pennsylvania, that electors be appointed by the people, by districts, but the motion was rejected, eight States to two.

"2.—In case no candidate for President receives a majority of all the votes in the electoral college, the election goes to the House of Representatives, and there the election is not by districts but by States, each State having one vote.

"3.—The uniform and unbroken practice of all the States for sixty years shows the consensus of opinion of States and statesmen as to the proper and constitutional method of appointing electors, and appreciation of the evils arising from a departure from it."

The proposed amendment of Mr. Wilson was to limit the appointment to one particular method. That was rejected, and no limit was

imposed. It does not follow that the method rejected as a sole method is thus prohibited altogether. If that was the effect, it is fortunate that every conceivable system of appointing electors was not presented as a sole method and rejected, for in that event the appointment of electors would have been made impossible.

We do not see what bearing the second proposition has upon the *appointment* of electors. It is true that in the house of representatives each state has one vote. In the electoral college each state casts as many votes as it has electors and these votes may be thrown for as many different candidates. Does it follow therefore, that the electors cannot be chosen by districts? Or again, are we to infer, since in the house of representatives the vote of the state is cast by her representatives, who are elected by districts, and in the electoral college the vote of the state is given by her electors, therefore the electors may not be appointed by districts?

Why, in making an appeal to historical precedent, does Gen. Cutcheon summon the last sixty years and challenge the first forty of our constitutional history? Why ignore the plain language and the plain and significant practice of the framers of the Constitution? Upon this phase of the question we can add nothing to the luminous statement of Judge Cooley.

The state may have the power to appoint presidential electors by the action of the congressional districts and still its exercise may be unwise and inexpedient. This is purely a political question and one which the limits of this article do not permit us to discuss at length. Undoubtedly objections to the district system exist. Like any and all systems and devices of government, it may be abused. That, however, is not necessarily an argument against the system. Danger of abuse is incident to all independent governmental power in every form of government and especially in a republican government. To one who does not believe that the people are capable of self-government it is a very serious, if not an unanswerable objection. Gen. Cutcheon does not belong to that class of political thinkers or to any offshoot of that class. He claims, however, that the district system is fraught with serious evils both to the state and to the nation, as compared with the present system. He says that, "it introduces confusion and uncertainty; it fritters away and destroys the power and dignity of the states which adopt it." The "confusion and uncertainty" which he has in mind is that confusion and uncertainty, now attendant upon every congressional election. The framers of the Constitution intended to create a greater confusion and uncertainty. They did not anticipate that the appointment of electors would unerringly indicate the subsequent election of a particular person. They made deliberate choice of this greater uncertainty and confusion. To them the appointment of electors upon the ticket at large or by separate districts was a matter of no concern. They anticipated that all the confusion and uncertainty would be due to the subsequent untrammelled and independent action of the elec-

tors. They did not foresee that by the action of conventions, bodies of men unknown to the Constitution, the work of the electors would be purely perfunctory, legalizing the void action of party conventions. It is true that now all the confusion and uncertainty of a presidential election centers on the general result in a few doubtful states, some half a dozen, more or less, and that under the district system the general result in those doubtful states would lose its importance and the result would depend upon the result of the district elections considered as a unit. Would this be a deplorable evil? It must be conceded that the district system would destroy "the power and dignity" of the states, as states, in the electoral college. It would substitute instead thereof, however, the power and dignity of the people. To a person whose views of state rights lead him to regard the power and dignity of the state as of paramount importance, this objection is certainly serious, but we are surprised that it should be urged with such prayerful consideration by Gen. Cutcheon.

The principal objection against the district system is that it promotes "gerrymandering." This is the objection urged by the president in his recent message to Congress and is the one strongly dwelt upon by Gen. Cutcheon.

A "gerrymander" cannot be defended. Its sole purpose and object is to give one class, or, division of voters an unfair advantage over another class or division. It may be made in the interest of the majority of the people or of a minority. It is always in favor of the class of voters having control for the time being of the legislature and consequently, is usually in the interest of the political majority and to the injury of the minority, who are thus deprived wholly, or partially, of their just representation. Its success measures the objection to any particular "gerrymander," that one being the most objectionable which is most successful. Now the system of appointing electors upon a general ticket is a "gerrymander" perfected and glorified. It deprives the minority in a state of all representation whatever in the electoral college. This is the very object and purpose of the system. It is favored in every state by the majority and has therefore been adopted by the majority in every state as the most perfect "gerrymander" that could be devised. Take for instance the state of Michigan, and, at the coming election for the first time since her admission into the Union, will the minority of her voters be represented in the electoral college. It will be the fourteenth time she has voted for president, and on three-fourths of those occasions the minority have known before the election was held, that casting their votes would be a mere matter of form; that the only right they had in that presidential election was the right to stand up and be counted—out. There may be objections to the district as compared to the present system of appointing presidential electors, but that it promotes "gerrymandering" is, assuredly, not one of them.