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One Hundred Sixth Congress
U.S. House of Representatives
Office of the Democratic Whip

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Dear Democratic Colleague,

Attached is a letter signed by 43 scholars of constitutional law expressing the deepest concern about the Florida Legislature's impending action to appoint presidential electors.

The letter contains a cogent and brief explanation of why such a move would be unlawful, as well as "unprecedented and contrary to the United States Constitution, federal law, and the laws of Florida."

I strongly urge you to read this explanation, and I hope it helps you formulate your arguments in the coming days.

Sincerely,

David E. Bonior

David E. Bonior
Democratic Whip

To the Members of the Florida Legislature
Tallahassee, Florida
December 5, 2000

We, the undersigned scholars of constitutional law, wish to express our serious concern that the proposed special session of the Florida Legislature to appoint presidential electors is unlawful. Any bill or resolution adopted to mandate the appointment of presidential electors unconditionally would be unprecedented and contrary to the United States Constitution, federal law, and the laws of Florida.

We make four basic points in the discussion below:

First, the power granted by the U.S. Constitution to state legislatures to appoint presidential electors is *not* "plenary" in the sense of being unconditional and absolute.

Second, there is no lawful way to appoint presidential electors with respect to an election that has already taken place.

Third, the people of Florida did not fail to make a choice of presidential electors on Election Day and thus the provisions of 3 U.S.C. §2 do not apply.

Fourth, the prospect of a legislative designation of presidential electors after the people of Florida have exercised their right to vote is inconsistent with the constitutional values exemplified in the Fourteenth Amendment.

We begin with a preliminary point concerning the interpretation of the relevant provisions of the United States Constitution. Article II, §1, clause 2 specifies that presidential electors be appointed by each state "in such Manner as the Legislature thereof may direct." This power has been called "plenary," but the use of this term in the current public debate is misleading. The power given by this clause is not plenary in the sense that the Florida Legislature may appoint presidential electors

unconditionally. To the contrary, this power must be exercised in a way that is consistent, in the first instance, with the other provisions of the Constitution. For example, clause 4 of the same section of Article II states, "The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States." This means that if Congress exercises its power of determining the time of choosing electors, which it has in Title 3 of the U.S. Code, §1, no state legislature may direct a different day of appointment. This simple example shows that whatever "plenary" means in this context, it does not imply an absolute power of the state legislature to appoint presidential electors in any manner they deem appropriate. The manner of appointing presidential electors must be consistent with the U.S. Constitution and applicable provisions of federal law.

Pursuant to the power granted by the U.S. Constitution in Article II, the Florida Legislature chose, consistent with the tradition followed by the vast majority of states since the 1830s, a process that uses a popular election to appoint presidential electors. As Florida Statute §103.011 clearly states: "Votes cast for the actual candidates for President and Vice President shall be counted as votes cast for the presidential electors supporting such candidates." Florida law thus makes the appointment of presidential electors contingent on a vote of the people for candidates for President.

This year the vote of the people of Florida for presidential candidates (and their presidential electors) took place on November 7, in accordance with 3 U.S.C. §1. That vote was certified on November 26 by the Elections Canvassing Commission in favor of Texas Governor George W. Bush and a certificate of ascertainment of the electors was communicated by the Governor of Florida to the Archivist of the United States pursuant to 3 U.S.C. §6.

These are the essential background circumstances to understanding the lawfulness of the Select Committee's recommendation that the Florida Legislature hold a special session "to determine the manner in which the electors of this state shall be appointed and to consider, and if necessary, take such other action to ensure that Florida's 25 electoral votes for President and Vice President in the 2000 Presidential Election are counted."

Initially, the Committee's statement fails to distinguish between two presidential elections: the already held election of 2000 and the election to be held in 2004. The Legislature may certainly change the manner of appointing electors for the presidential election of 2004, although we doubt the people of Florida will support any manner of appointment other than a popular vote. However, there is no lawful way to repeal the provisions of Fla. Stat. §103.011 *retroactively*, *nullify* the popular

vote that occurred on November 7, and adopt a *new* method of appointing electors for an election that has already taken place. Yet this is exactly what is contemplated in the special session.

There is a provision in Title 3 that allows a state legislature to appoint presidential electors on a day subsequent to November 7, but only if that vote "failed to make a choice." 3 U.S.C. §2. Like §1, this provision was passed as part of an 1845 statute entitled: "An act to establish a uniform time for holding elections." There is no doubt that §§1 and 2 are constitutional, since they were both approved by Congress as necessary and proper for executing Article II, §1, clause 4 respecting the time of choosing electors.

As Professor Bruce Ackerman pointed out in his testimony before the Select Committee, 3 U.S.C. §2 does not apply to the 2000 presidential election in Florida. If Florida had failed to make a choice, it would have been impossible for the Elections Canvassing Commission to certify a vote and for the Governor to communicate a certificate of ascertainment to the Archivist, as has already occurred. Since Florida has not "failed" to choose, this federal law does not authorize the state legislature to intervene. If the Florida courts ultimately find that Vice President Al Gore won the state's electoral votes, Florida will again not "fail" to choose in the sense required by 3 U.S.C. §2. Instead, it will simply replace one choice with another. The federal law still does not authorize legislative intervention.

Indeed, because a vote was held for presidential electors on November 7 that was lawful under the U.S. Constitution, federal law, and Florida law, there is no realistic circumstance under which Florida has or will "fail" to make a choice under the provisions of 3 U.S.C. §2. There is therefore no lawful warrant for intervention by the Florida Legislature. Furthermore, the proposed intervention would set a very unfortunate precedent for the election of future Presidents. If the Florida Legislature intervenes after an election has occurred, it will set a precedent for state legislatures to intervene in every close election. This is a formula for unending instability in presidential elections. Such a precedent would gravely undermine the legitimacy of the office on a permanent basis, and severely damage the entire constitutional structure.

The proposed special session creates additional constitutional problems. It has been widely noted that the Constitution does not provide explicitly for any right to vote for presidential electors (although §2 of the Fourteenth Amendment does refer to such a right). In general terms, however, the right to vote has a more secure status in the constitutional law of today than was the case when the Constitution was originally written in 1787. The ratification of the Fourteenth Amendment, with its guarantees

of national and state citizenship, privileges or immunities, due process, and equal protection was instrumental in this respect, as well as the concern for the right to vote shown by the ratification of the Fifteenth, Seventeenth, Nineteenth, Twenty-third, Twenty-fourth, and Twenty-sixth Amendments. The greater contemporary status of the right to vote has also been confirmed in a number of decisions of the U.S. Supreme Court. Americans today accord an almost sacred status to the right to vote.

In light of this history, a legislative designation of electors made after the citizens of Florida have exercised their right to vote is inconsistent with our constitutional values. In particular, it is inconsistent with the constitutional guarantee of due process for the Florida Legislature to deprive the citizens of Florida of their right to vote for presidential candidates and their electors retroactively. As Governor George W. Bush stated in his brief in *Bush v. Palm Beach County Canvassing Board*: "[C]onstitutional principles of due process and fundamental fairness preclude the States from adopting a 'post-election departure from previous practice' and applying that post-election rule retroactively to determine the outcome of an election." Bush Brief at 28.

In recommending the special session, the Select Committee was influenced by the brief filed on behalf of the Florida Senate and House of Representatives in *Bush v. Palm Beach County Canvassing Board*. This brief relies heavily on the assertions of plenary power we have criticized above. The brief advances the proposition that "[w]hen the electoral process has failed to make a choice that is timely and conforms to pre-existing rules, then under 3 U.S.C. [section] 2 the State Legislature must appoint Electors to assure that the State's Electors are counted by Congress when exercising its counting authority." Senate and House Brief at 1. In light of the preceding discussion, the deficiencies of this argument should be apparent.

In conclusion, we strongly urge the Members of the Florida Legislature not to set a dangerous constitutional precedent by designating presidential electors and nullifying the presidential election held on November 7.

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