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OP-ED

BY: CHUCK THOMPSON
IMLA Executive Director and General Counsel

On the Electoral College and the Wisdom of Our Founding Fathers

In his Editor's Letter to our last issue, Erich Eiselt touched on some of the arguments for a direct popular vote in lieu of the Electoral College system for electing our President. Obviously, a significant percentage of Americans hold that position. But there are fundamental contrary views, just as there were in 1789. In fact, with all the hoopla over "Hamilton" during the past few years, it might make sense to elevate his ideas over his current popularity to study our Constitutional history and understand its underpinnings.

Surprising as it may seem to most Americans, the federal government is not and has never been a direct democracy. Rather, it is a republican form of government, protected as such in the Constitution, and designed in its bicameral legislature to throttle factions, whether subject matter specific or arising locally. Madison discusses this in *Federalist 10* in which he distinguishes the benefits of a republic from those of direct democracy. Pertinent to this discussion, Madison writes:

> . . . Hence it is, that such democracies [pure democracies] have ever been spectacles of turbulence and contention; have been found incompatible with personal security, or the rights of property; and have, in general been as short in their lives, as they have been violent in their deaths. Theoretic politicians, who have patronised this species of government, have erroneously supposed, that, by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions, A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking.

Turning back to the Electoral College and our friend Hamilton, he writes in *Federalist 68* about the "mode of appointment" of the President. In discussing this "mode of appointment" in the Constitution, he argues that unlike many of the other provisions in the Constitution being debated, few argued in opposition to this form of "election." Indeed, he describes it as if "not perfect, it is at least excellent. It unites in an eminent degree all the advantages, the union of which was to be wished for."

So, why did the Constitution provide for popular vote for the President only to have others choose the person to be appointed. Hamilton writes "It was desirable, that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided." He then describes the original concept for a body of electors who would inquire into the candidates for the office after having gained the sense of the people to determine who among those candidates was fit for the office and then cast their votes accordingly. According to Hamilton:

> This process of election affords a moral certainty, that the office of president will seldom fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications. Talents for low intrigue, and the little arts of popularity, may alone suffice to elevate a man to the first honours of a single state; but it will require other talents, and a different kind of merit, to establish him in the esteem and confidence of the whole union, or of so considerable a portion of it, as would be necessary to make him a successful candidate for the distinguished office of President of the United States.

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Clearly, those plans and ambitions for the country did not stand the test of time, nor did the idea that the next most qualified person in the minds of the electors should become vice president last long. But the division of votes among the states within this body of electors remains. as does the unifying basis found in the compromise between the large and small states.

In a previous article *Federalist 62*, Madison discussed the compromise that brought large states and small states together in forming a union, while discussing the proposal for a senate:

> A government founded on principles more consonant to the wishes of the larger States, is not likely to be obtained from the smaller States. The only option then for the former, lies between the proposed government, and a government still more objectionable. Under this alternative, the advice of prudence must be, to embrace the lesser evil; and, instead of indulging a fruitless anticipation of the possible mischiefs which may ensue, to contemplate rather the advantageous consequences, which may qualify the sacrifice.
>
> In this spirit . . .the equal vote allowed to each State, is at once a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty. So far the equality ought to be no less acceptable to the large than to the small States: since they are not less solicitous to guard, by every possible expedient, against an improper consolidation of the States into one simple republic.

The decision to amend the Constitution and allow senators to be elected by popular vote under the 17th Amendment eroded the concept of reserved sovereignty that informed Madison's arguments in *Federalist 62*. Nevertheless, the equal votes accorded each state in the senate that helped define the compromise between large states and small remained. Those concepts of reserved sovereignty and balancing the interests of large states and small remains evident in the Electoral College.

Rather than ignore Hamilton's view that a popular election would likely lead to a person elected to the presidency who might be ill suited to the position due to "the little arts of popularity" or "talents for low intrigue," returning to the original, albeit elitist, design for selecting the president would honor the original design of the Founders and also reap the benefits of good governance. But restoring the original plan would be like putting spilt milk back in the carton. So, are we smarter today than in 1789 that we ignore the cautions expressed by the Founders or renege on the compromise that gained the assent of both the large states and small back in 1789?

Madison and Hamilton presciently envisioned majorities exercising direct democracy in ways that adversely affected minority groups, property rights and personal security. Regardless of which side of the political divide one is on today, a person might end up on the other side tomorrow. The Constitution continues to protect through the Electoral College the interests of people in small states and must continue to do so regardless of shifting demographics, migration of people from one state to another, or popular sentiment. ML

Federal *cont'd from page 23*

pricing scales overseen by the Rate Court.

Thus, each offers blanket licensing prices for localities up to 50,000 in population for $364 per year (2020 pricing).[25] BMI further represents that it has the right to license the properties in its repertoire and indemnifies licensees for claims of infringement with respect to those works.[26]

The absence of DOJ oversight is evident in the other PROs' dealings. GMR, for example, provides a sharp contrast to ASCAP and BMI. GMR is not party to any standardized database and, as noted earlier, licenses only its "share" of musical works. It makes no express representations about rights to the titles in its catalogue and, instead of indemnifying licensees against claims of infringement, GMR requires that licensees indemnify it, and its (unnamed) parent company. Other GMR contractual provisions include the unilateral right to terminate the agreement in the event of any act, law or decree by any entity, federal, state or local, that results in "any substantial increase" in its cost of doing business. And, evidencing the pricing muscle objected to by the RMLC, GMR prices its blanket licenses for municipalities up to 50,000 in population at more than twice the price charged by BMI and ASCAP, to provide a miniscule fraction of the works they license. SESAC also charges significantly higher rates to the under-50,000 localities than do ASCAP and BMI. For the roughly 18,000 American local governments in that small town category, the pricing differential is significant, particularly given the fact that in many cases only minor fractions of the work are being licensed.

Regardless of the PRO, there are material limitations on the scope of the performance license granted. Coupling the musical work