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Electoral College Wins a Victory in Federal Court

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Texas, like 47 other states, uses a winner-take-all system in awarding all of its Electoral College votes. That process is constitutional, the Fifth Circuit Court of Appeals said in its decision in a case announced on Wednesday.



The League of United Latin American Citizens (LULAC) had filed lawsuits across the country, arguing that the present system used in 48 states is unconstitutional, as it violates the concept of one-person, one-vote. But the three judges in the Fifth Circuit disagreed with the plaintiffs' reasoning, which they described as "flawed."

Judge Jerry Smith wrote, "Democratic elections necessarily result in winners and losers. The frustration of losing, however, does not violate the Constitution." Smith was appointed by President Ronald Reagan, as was Judge W. Eugene Davis, but the third member of the appellate court that made a unanimous ruling, Judge Carl E. Stewart, was tapped by President Bill Clinton.

The Constitution, in Article II, gives plenary, or full, power to each state's legislature to determine the method in how their presidential electors are selected. "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the Congress," reads Article II, Section 1 of the Constitution.

In other words, were a state legislature to decide to simply appoint their presidential electors, instead of following the popular vote in their state, they could just name the electors themselves. That is exactly what some states did in the early years of the Republic. But as the years passed and a more "democratic" spirit prevailed, state legislatures began to pass laws that stipulated that the winner of the popular vote in their state would get all of its electoral votes. Whereupon, political parties began to run candidates for presidential-electoral positions pledged to support the party's nominee. Technically, then, voters were voting for the electors pledged to support the nominee of a political party, and not for the candidate themselves.

Today, Texas law awards all of its electoral votes to the party whose candidate has won the popular vote — or at least a plurality (more votes than any other single candidate). Only two states have opted to allocate their electoral votes in a different way — Maine and Nebraska. In those two states, the winner of each congressional district gets one electoral vote, and the winner of the state gets two votes (because each state gets two senators, and thus, each state gets an electoral vote for each of those two senators).

In 2016, when Republican nominee Donald Trump won the presidential election, Democratic nominee Hillary Clinton won Maine's overall popular vote, but lost one of the two congressional districts.



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Because Trump won the other district, he picked up one electoral vote. Clinton got an electoral vote for carrying the other district, and two more votes for taking the whole state.

LULAC has also sued California, Massachusetts, and South Carolina, arguing that the present electoral vote system dilutes the clout of Hispanic and other minority voters. They want a state's electoral votes to be awarded *proportionally*, according to a state's overall vote percentage for each candidate. For example, if a Democrat took 60 percent of the vote in California, the Democrat would get 60 percent of the electoral votes in that state, not 100 percent, as is now the case. Obviously, this would help Republicans in California, but in other states, proportionally chosen electoral votes would help Democrats.

Domingo Garcia, president of LULAC, said in response to the court's decision, "We plan to consider appealing to the full court panel or to the U.S. Supreme Court where we believe this case will ultimately be decided. Winner-take-all electoral politics is a rigged system that dilutes the votes of Latinos and other minorities in states like Texas, California, Massachusetts, and South Carolina."

LULAC was represented by David Boies, the same lawyer who represented Vice President Al Gore when he attempted to win the electoral votes of Florida in the aftermath of the 2000 presidential election.

Of course, the unanimous Fifth Circuit judges disagreed. They rejected the argument that the present winner-take-all system causes national candidates to skip Texas, and focus on "swing" or "purple" states such as Florida, Ohio, and Iowa. But the judges countered, citing previous court decisions (precedents) that held that each citizen in each state is given the opportunity to vote and no one is deprived of the right to vote by a winner-take-all system.

Judge Smith said that there is a "critical distinction between a system that diminishes voters' motivation to participate and one that burdens their ability to do so." Smith admitted that the winner-take-all system "may indirectly decrease the incentive of members of perennially losing political parties to vote," but "it does not hinder their actual ability to vote."

Some suspect that the lawsuit was simply a back-door effort to improve the election chances of Democratic candidates, since their candidate, Hillary Clinton, ran first in the popular vote in 2016, but lost by a substantial margin in the Electoral College. But the Electoral College system makes it more difficult for "regional candidates" to win by "running up the vote" in particular parts of the country. For example, Democrat Grover Cleveland ran up huge popular vote totals in the Deep South in 1888, but because his support lagged in more competitive states such as New York and Pennsylvania, he lost to Republican Benjamin Harrison in the Electoral College. The Electoral College forces candidates, in other words, to care about what the coastal elites snobbishly refer to as "fly-over country," found in the center of the nation, and not just the huge population centers such as New York City, Los Angeles, and Houston.

One change that liberals consistently fight against is the plan used in Maine and Nebraska, which awards electoral votes to the popular vote winner in each congressional district. Had that plan been in effect in all states in 2016 and 2012, not only would Donald Trump's victory over Hillary Clinton have been greater than it was, *Mitt Romney* would have beaten Barack Obama in 2012! Trump carried 230 congressional districts in 2016 to 205 for Clinton, but Romney actually won 224 congressional districts in 2012 against Obama, who wound up with 219. (Both Trump and Romney carried more states than their Democratic opponents, which have given each man two more electoral votes for each state thus carried).



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Another proposal that is being pushed to help the Democrats have a better chance of winning a presidential election is the so-called National Popular Vote. Under it, states would agree to award *all* of their electoral votes to the winner of the *national* popular vote, instead of their state's popular vote. Under this scheme, Trump could carry 70 percent of the vote in, say, Idaho, but if Idaho were part of the National Popular Vote compact, they might give the state's electoral vote to the other party's candidate! The Constitution explicitly forbids the states from entering into multi-state compacts without the permission of Congress. As such permission has not even been sought, much less granted, any such pact should be declared unconstitutional.

Of course, we do not know what a federal court might rule. If they had ruled according to the clear wording of the Constitution in the past, we would not have some of the problems we do today.

If other federal courts follow the reasoning of this ruling by the Fifth Circuit, it decreases the chances that any such scheme as the National Popular Vote would be viewed favorably.

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