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Islamic Fanaticism, Presidential Power, the Electoral College, and the Myth of the Entrepreneurial State - Robert Hardaway

Larry Bernstein:

Sweet. Okay. Robert Hardaway from the University of Denver Law School, take it away.

Robert Hardaway:

Well, thanks. I can think of no better six-minute defense of our Federalist institutions than that set forth by Senator John F. Kennedy in 1956. At that time, Republicans were convinced that the electoral college favored Democrats, so they were trying to, quote, 'abolish it'. And it was JFK, a very famous and valiant defense in the US Senate. And he said, quote, "Abolishing the electoral college would greatly increase the likelihood of a president elected by a minority of the people." I'll explain more of what he meant by that in a moment. "It would break down the federal system under which the States enter the union," I will make some comments on that, "which provides a system of checks and balances which ensures that no area or group shall obtain too much power."

There's an old saying to the effect that one should not take down a fence until one knows why it was put up. So, let me address each of those three important points. The first was why do we have it in the first place? And in order to understand that you have to understand the context of what the state of the colonies was back in 1787. The largest colonies, New York and Pennsylvania were in the process of forming their own separate nation state, imposing tariffs, custom barriers on their hapless neighbors. And the smaller colonies were considering their own amalgamation of a separate nation and defense of that. George Washington very reluctantly even participated in the constitutional convention because he said, "There's no way you can have one nation when there's just... you have on the one hand the large States that insist on a legislature that's based purely on population, and the small States that insist on equal suffrage in the Senate", a right they had under the articles of Confederation. So, he was not inclined to think that there'll be any favorable outcome.

And the smaller state, Rhode Island even refused to send a delegate. They were so outraged and were intent on forming their own separate nation with the other smaller states. So, it didn't look like there was much prospects for success of creating a united nation, a united country. And they did the easy stuff first in the first months, the first weeks of the constitutional convention. But then they got to what I think was the most critical question, which is related, as Jack pointed out, is related to the presidential election. But it was really, the bedrock question was how would a legislature be constructed? Would it be based on population or would each state have equal representation?
And the convention was on the verge of being dissolved and everyone's going to go their own way, form their own separate nations, at least three, possibly as many as five. When in the hours, it was Benjamin Franklin who... I think this was his most important contribution to the body politic and the creation of the United States. He said, "Let me give you this compromise. Let me propose it. We'll do both. We'll have a House that's based purely on population, and a Senate. Well, neither party really liked that, And the smaller states said, "No, we want a guarantee. How do we know that as soon as we adopt this constitution, the big states won't get a constitutional convention or propose a constitutional amendment and take away our equal suffrage in the Senate, and will take away the weight that the small states have in the election of a president?"

And the only way that the compromise was eventually adopted... by one vote, I should say, we came within one vote of not having a United States of America, was to say, "Okay, we'll give you a guarantee." And that's in the last sentence of Article V, says you can't aggregate or take away the right of each state's representation in the Senate, upon which, by the way, every state's weight in the presidential election is based unless every state agrees. And it was only but adding this Article V guarantee against future demagogues trying to take away the equal suffrage in the Senate, upon which every state's weight in the electoral college was going to be based in presidential elections, that it passed by a single vote. That's how close we came to not having a United States of America.

Now the grand compromise, which JFK referred to, was first the compromise based on the House and the Senate. Second, that each state would also be able to have a weight in presidential elections based on in significant part that equal representation of each state in the Senate. And most important of all, I think, was the last sentence of Article V, which guaranteed that no future demagogues could take away their equal suffrage in the Senate, upon which their weight in presidential elections was based. And that's pretty much why President Kennedy noted that, look, this is a whole solar system of government power we're talking about. If you're going to mess with one like the electoral college, then you really have to consider the others. They're all inextricably intertwined. And he said, "You can't do that unless you reexamine the Senate. They're both so closely related."

Now his second point, which may be counterintuitive, but he was right on the numbers, he says, "If we adopt the Russians type system or French system, a so-called popular vote system, you're not going to get a president elected who is supported by the majority of the people." That's why he said that abolishing the electoral college would greatly increase the likelihood of a president elected by a minority of the people. And he gave him a number of examples. I'll just give you one more recent one that really vindicates JFK's concerns.

In the latest French election, there were two major parties, just like our country has two major parties. But the electorate can be a little fickle sometimes, and in the summer of 2017, in the first round of a so-called popular vote, a right-wing extremist got 23%, a renegade candidate, Macron got 21%, thereby presenting the hapless voters in France with the runoff between the two, these two unpalatable, non-popular candidates. So, a candidate opposed by almost two thirds of the voters was elected. And they're so disgusted, the French voters, with what passed as democracy that they actually cast several million ballots with a blank ballot. Said, "This is not democracy."
Now, many of the criticisms of the electoral college is that it creates so-called battleground states due to the unit vote rule, but this is the choice of each individual state, the drafters of the constitution, one in every state to determine how it was going to throw its presidential weight around. And every state has adopted it with the exception of Maine and Nebraska. However, it's up to the states that created the unit vote, and any state is free to abolish it. California and Colorado, the voters there were asked in a referendum would you like to get rid of it? Because it creates battleground states, isn't that terrible? But the voters resoundingly rejected that in both California. And in California, they don't want to share their electoral votes with the Republicans. They don't like the idea.

And if you had a Russian style popular vote system, candidates would doubtless spend most of their time campaigning in the big cities such as New York and Los Angeles. And one of the purposes of the creation of the electoral college was that support for a candidate should be broad, as well as deep. They didn't want a particular region, say in the South in the 1950s, segregationist candidates that get 90% of the popular votes and thereby get a president elected against the will of the rest of the country. They wanted a system which would ensure broad support, and not just concentrated support in a particular region, like the South or in the coasts or anything of that nature. And I think in that way, they very much succeeded.