THE SMALL MARGINS PROBLEM: HOW ABOLISHING THE ELECTORAL COLLEGE COULD CREATE A FUTURE ELECTION CRISIS

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I. INTRODUCTION

This essay examines a potential unintended consequence of abolishing the Electoral College: the difficulty of identifying a national popular vote winner in the event of a close election. Under the Electoral College, the precise margin of victory is irrelevant in all but a handful of swing states decided by a small number of votes. The vast majority of states award all of their electoral votes to the candidate who finishes in first place, regardless of the candidate's margin of victory.[1] But if the United States elected the president through a nationwide popular vote, the precise vote totals in all 50 states would become crucially important.

As recent elections have demonstrated, however, the quality of election administration in many states is sorely lacking. In a close presidential election, it might take several weeks for the states to produce an accurate and final vote total. California is a case in point. In 2016, California did not ascertain its official vote tabulation until mid-December, one month after election day.[2] California's slow vote-counting process would plunge the country into limbo in the event of a close nationwide popular vote. Recounts and litigation would likely further delay a conclusive determination of the popular vote. In such a scenario, the nation might not be able to ascertain an election winner before the January 20 inauguration date.

Consequently, this essay concludes that a nationwide popular vote for president should not be adopted until Congress and the states establish uniform standards for tabulating presidential votes in a timely and accurate manner.

II. THE CASE AGAINST THE ELECTORAL COLLEGE

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1. *The Electoral College*, NAT'L CONF. ST. LEGISLATURES (Jan. 6, 2020), https://www.ncsl.org/research/elections-and-campaigns/the-electoral-college.aspx.

2. Press Release, Alex Padilla, Cal. Sec'y of State, Secretary of State Padilla Certifies November General Election Results (Dec. 16, 2016) https://admin.cdn.sos.ca.gov/press-releases/2016/pdf/ap16-164.pdf.

The Electoral College is one of the most unpopular features of the American election system. Recent polls revealed that a majority of Americans support replacing the Electoral College with a nationwide popular vote.[3] Although a Constitutional amendment appears unlikely in the near future,[4] fifteen states and the District of Columbia have joined the National Popular Vote Interstate Compact ("NPVIC").[5] The states that join the compact agree that they will award their electoral votes to the national popular vote winner once states with a combined total of 270 electoral votes—the amount needed to win the presidency under the Electoral College—join the NPVIC.[6] The compact is getting closer to becoming a reality. At present, jurisdictions with 196 combined electoral votes have thus far joined the NPVIC.[7] Moreover, the Virginia House of Delegates recently voted to join the compact as well.[8]

The Electoral College's unpopularity arises from its undemocratic character.[9] Five times in history—and twice in the last twenty years—a presidential candidate has prevailed in the Electoral College despite losing the popular vote.[10] In 2016, for example, Hillary Clinton won the popular vote over Donald Trump by over 2.8 million votes, but Trump nevertheless managed to secure a majority in the Electoral College.[11] The 2016 election demonstrated why critics oppose the Electoral College. As Jesse Wegman explains, the Electoral College "violates the core democratic principles of political equality and majority rule. We may all be eligible to vote for president now, yet all of our votes do not count the same, and the candidate who gets the most votes can lose."[12]

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3. Steven Shepard, *Poll: Voters Prefer Popular Vote over Electoral College*, POLITICO (Feb. 25, 2020, 5:56 AM), https://www.politico.com/story/2019/03/27/poll-popular-vote-electoral-college-1238346; Jonathan Easley, *Poll: Most Voters Support Abolishing Electoral College*, HILL (May 6, 2019, 11:00 AM), https://thehill.com/homenews/campaign/442276-poll-most-voters-support-abolishing-electoral-college.

4. Miles Park, *Abolishing The Electoral College Would Be More Complicated Than It May Seem*, NPR (Mar. 22, 2019, 3:32 PM), https://www.npr.org/2019/03/22/705627996/abolishing-the-electoral-college-would-be-more-complicated-than-it-may-seem.

5. *National Popular Vote*, NAT'L CONF. ST. LEGISLATURES (Jan. 27, 2020), https://www.ncsl.org/research/elections-and-campaigns/national-popular-vote.aspx; *Agreement Among the States to Elect the President by National Popular Vote*, NAT'L POPULAR VOTE, https://www.nationalpopularvote.com/written-explanation (last visited May 20, 2020).

6. NAT'L CONF. ST. LEGISLATURES, *supra* note 5 ("These bills will take effect only when states with a majority of the electoral votes have passed similar legislation and joined the compact. States with electoral votes totaling 270 of the 538 electoral votes would have to pass NPV bills before the compact kicks in and any state's bill could take effect.").

7. *Id.*

8. Zach Armstrong, *Bill Giving Electoral Votes to Popular Vote Winner Passes*, ASSOCIATED PRESS (Feb. 12, 2020), https://apnews.com/965f2cbe4e2a4f4b97b623908f11a75f.

9. For an analysis of the various arguments against the Electoral College, see generally ROBERT M. ALEXANDER, REPRESENTATION AND THE ELECTORAL COLLEGE (2019); GEORGE C. EDWARDS, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA (3rd ed. 2019); and JESSE WEGMAN, LET THE PEOPLE PICK THE PRESIDENT: THE CASE FOR ABOLISHING THE ELECTORAL COLLEGE (2020).

10. Drew Desilver, *Trump's Victory Another Example of How Electoral College Wins Are Bigger Than Popular Vote Ones*, PEW RES. CTR. (Dec. 20, 2016), https://www.pewresearch.org/fact-tank/2016/12/20/why-electoral-college-landslides-are-easier-to-win-than-popular-vote-ones/.

11. Gregory Krieg, *It's Official: Clinton Swamps Trump in Popular Vote*, CNN (Dec. 22, 2016), https://www.cnn.com/2016/12/21/politics/donald-trump-hillary-clinton-popular-vote-final-count/index.html.

12. WEGMAN, *supra* note 9, at 19.

A nationwide popular vote thus has obvious appeal. Every other elected official in the federal system must win the popular vote. Why not apply the same rule to the president? The philosophical arguments in favor of a national popular vote are clear. But the practical effects of abandoning the Electoral College should temper enthusiasm for a nationwide popular vote. The country's current election system is not designed to adjudicate small margins between presidential candidates.

III. THE PROBLEM OF SMALL MARGINS

The principal reason for adopting a nationwide popular vote for president is to eliminate the possibility of a split between the Electoral College and the nationwide popular vote. Close elections give rise to such split decisions. For example, in the 1888 presidential election, President Grover Cleveland won the popular vote by 90,000 votes—a margin of 1%—while losing in the Electoral College to Indiana Senator Benjamin Harrison.[13] The same phenomenon played out in 2000. Vice President Al Gore carried the nationwide popular vote over Texas Governor George Bush by 543,000 votes, a margin of 0.5%.[14] But Bush won the presidency because he secured a razor-thin victory in the Electoral College.[15]

Small margins test the quality and accuracy of election administration systems. The 2000 election was a case in point. Bush prevailed in the Electoral College because he carried Florida's twenty-five electoral votes.[16] His victory in Florida—which only came after a bitter United States Supreme Court battle—was extraordinarily close: only 537 votes separated Bush and Gore.[17] The Bush-Gore race revealed systemic problems in Florida's administration of elections, including poorly designed ballots, unclear recount procedures, contradictory election statutes, and partisan election officials.[18] The dispute generated lasting partisan bitterness and undermined public confidence in the fairness of the election system.[19]

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13. CHARLES W. CALHOUN, MINORITY VICTORY: GILDED AGE POLITICS AND THE FRONT PORCH CAMPAIGN OF 1888 (2008).

14. FED. ELECTION COMM'N, *2000 presidential popular vote summary for all candidates listed on at least one state ballot* (last updated Dec. 2001), https://transition.fec.gov/pubrec/fe2000/prespop.htm.

15. Andrew Glass, *Bush Declared Electoral Victor Over Gore, Dec. 12, 2000*, POLITICO (Dec. 12, 2000), https://www.politico.com/story/2018/12/12/scotus-declares-bush-electoral-victor-dec-12-2000-1054202.

16. Ron Elving, *The Florida Recount Of 2000: A Nightmare That Goes on Haunting*, NPR (Nov. 15, 2018), https://www.npr.org/2018/11/12/666812854/the-florida-recount-of-2000-a-nightmare-that-goes-on-haunting.

17. EDWARD B. FOLEY, BALLOT BATTLES 280 (2016).

18. *Id.* at 287, 293, 304–05.

19. AMY SEMET, NATHANIEL PERSILY & STEPHEN ANSOLABEHERE, BUSH V. GORE IN THE AMERICAN MIND: REFLECTIONS AND SURVEY RESULTS ON THE TENTH ANNIVERSARY OF THE DECISION ENDING THE 2000 ELECTION CONTROVERSY, IN ELECTION ADMINISTRATION IN THE UNITED STATES: THE STATE OF REFORM AFTER BUSH V. GORE 48, 68–69 (R. Michael Alvarez & Bernard M. Grofman eds., 2014).

For all of its shortcomings, the Electoral College has the virtue of making episodes like the Florida controversy in 2000 quite rare. Under the Electoral College, the results in only a handful of states are closely scrutinized. In 1888, for example, only two close races—Harrison's narrow victories in New York and Indiana—impacted the Electoral College outcome.[20] Likewise, in the 2000 election the controversy turned on a single state, Florida.[21] Most recent of all, Donald Trump's Electoral College victory in 2016 resulted from a 79,646 vote margin in just 3 states: Michigan, Wisconsin, and Pennsylvania.[22] Thus, in all 3 elections—1888, 2000, and 2016—only an exceedingly small number of states had margins close enough to generate controversy and recounts.

The reason is because of the winner-take-all nature of the Electoral College.[23] Under the winner-take-all system, which is followed by every state other than Nebraska and Maine,[24] it is not important that the states determine with absolute precision how many votes separated the winning candidate from the losing candidate. They simply need to confirm that a particular candidate finished with more votes than any other. Once it becomes clear that a presidential candidate has an insurmountable lead in a state, the exact margin of victory is irrelevant. Losing candidates have no incentive to pursue litigation and recounts in a state in which they have no hope of overturning the outcome.

But in a nationwide popular vote, it would be absolutely critical that every state produce a precisely accurate vote total. Indeed, in stark contrast to the Electoral College, a nationwide popular vote would render irrelevant each state's certification that a particular candidate won the state. All that would matter would be the precise vote totals that each candidate received in each state. The election administration system in all 50 states would thus be tested like never before. Since every vote would count even in heavily blue or red states, the chaos that Florida experienced in 2000 could potentially be replayed in every state during an election that came down to a small popular vote margin between the candidates.

Many jurisdictions across the country are not prepared for the intense scrutiny that a national popular vote for president would entail. In 2016, for example, an Iowa county auditor's office failed to report 5,842 votes in the presidential election.[25] The problem was not discovered until February 1, 2017, 12 days after the presidential inauguration on January 20.[26] Donald Trump won Iowa

20. Calhoun, *supra* note 13, at 174–79.

21. Thomas E. Mann, *Reflections on the 2000 U.S. Presidential Election*, BROOKINGS (Jan. 1, 2001), https://www.brookings.edu/articles/reflections-on-the-2000-u-s-presidential-election/ ("He won a bare majority in the electoral college, and only because of his contested victory in Florida, where the best evidence suggests that flawed ballot designs, confused voters, and antiquated voting equipment kept the plurality of citizens who intended to support Gore from having their verdict reflected in the official count.").

22. Philip Bump, *Donald Trump will be President Thanks to 80,000 People in Three States*, WASH. POST (Dec. 1, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/12/01/donald-trump-will-be-president-thanks-to-80000-people-in-three-states/.

23. NAT'L CONF. ST. LEGISLATURES, *supra* note 1.

24. *Id.*

25. Jason Noble, *Dallas County Failed to Report 5,842 Votes Cast in 2016 Election*, DES MOINES REG., (Feb. 8, 2017, 5:38 PM), https://www.desmoinesregister.com/story/news/politics/2017/02/08/dallas-county-failed-report-5842-votes-cast-2016-election/97665238/.

26. *Id.*

by more than 5,842 votes, which meant that the county auditor's failure to report the votes did not change the Electoral College outcome.[27] But in a close election determined by a nationwide popular vote, the failure to count 5,842 votes could be a disastrous blunder. Equally concerning is the fact that Iowa was not the only state to experience vote counting and reporting problems during the 2016 election. A state audit in Michigan found that 136 precincts in Detroit could not be recounted because of mistakes by election authorities.[28] A nationwide recount of all 10,000 voting jurisdictions in the United States[29] would likely expose similar shortcomings in states across the country.

In the years since 2016, vote counting problems have continued to plague American elections. For example, in the 2018 Florida midterm races, nearly 3,000 votes disappeared between the original statewide tally and a subsequent recount.[30] In Georgia's 2018 election, the state's electronic voting system failed to record over 100,000 votes for lieutenant governor, an abnormally high rate that experts warned could have been caused by faulty machines.[31] Likewise, during a Pennsylvania judicial election in November 2019, electronic voting machines in Northampton County failed to record nearly 26,000 votes for one candidate, Abe Kassis.[32] A hand-recount revealed the missing votes, and Kassis narrowly won the election.[33]

Compounding the problem is the fact that states report their final vote totals at different times, in some cases many weeks after the election. California—a state

27. *Id.*

28. Kathleen Gray, *State Audit: No Evidence of Fraud in Detroit Vote*, DETROIT FREE PRESS (Feb. 9, 2017, 12:06 PM), https://www.freep.com/story/news/politics/2017/02/09/detroit-vote-problems-election-audit/97690514/.

29. On the extraordinarily decentralized nature of American election jurisdictions, see *Election Administration at State and Local Levels*, NAT'L CONF. ST. LEGISLATURES (Feb. 3, 2020), https://www.ncsl.org/research/elections-and-campaigns/election-administration-at-state-and-local-levels.aspx ("Elections are usually administered at the county level, though in some New England and Midwestern states it falls to cities or townships to run elections. In all, this means that there are more than 10,000 election administration jurisdictions in the U.S. The size of these jurisdictions varies dramatically, with the smallest towns having only a few hundred registered voters and the largest jurisdiction in the country, Los Angeles County, with more than 4.7 million.").

30. Frances Robles, *Nearly 3,000 Votes Disappeared From Florida's Recount. That's Not Supposed to Happen*, N.Y. TIMES (Nov. 16, 2018), https://www.nytimes.com/2018/11/16/us/voting-machines-florida.html ("Nearly 3,000 votes effectively disappeared during the machine recount of Florida's midterm races, according to election records, calling into question whether officials relied on a flawed process to settle the outcome of three statewide contests.").

31. Kim Zetter, *Georgia Voting Irregularities Raise More Troubling Questions About the State's Elections*, POLITICO (Feb. 12, 2019, 12:06 PM), https://www.politico.com/story/2019/02/12/georgia-voting-states-elections-1162134.

32. Nick Corasaniti, *A Pennsylvania County's Election Day Nightmare Underscores Voting Machine Concerns*, N.Y. TIMES (Nov. 30, 2019), https://www.nytimes.com/2019/11/30/us/politics/pennsylvania-voting-machines.html.

33. *Id.*

in which 14.6 million people voted in 2016[34]—is a case in point. Under California law, counties have 30 days to report their final vote tabulations.[35] The long reporting period is a consequence of California's highly permissive voting laws, which impose on the counties the time-consuming task of assessing the validity of hundreds of thousands of provisional ballots.[36] In 2016, for example, Californians cast 1.3 million provisional ballots, the largest amount of any state by far.[37] In addition, California accepts mail-in ballots that arrive up to three days after election day,[38] and it gives mail-in voters a chance to cure signature mismatches as late as two days before state certification of the election.[39] The result is a month-long process of vote counting.

The 2016 election dramatically demonstrated the painfully slow nature of California's vote tabulation. On election night 2016, the Associated Press called California for Clinton at 11 p.m. Eastern Time.[40] But the scale of Clinton's California victory would not be clear until a month later. Seven days after the election, Clinton's popular vote lead in California stood at 1 million votes,[41] but her margin of victory grew steadily in the weeks that followed. Only on December 16, after the counties completed the counting process and California's Secretary of State certified the results, did the full extent of Hillary Clinton's victory become clear.[42] In the final tabulation, she carried California by over 4.2 million votes,[43] which meant she won the national popular vote by 2.8 million votes.[44]

The glacial pace of California's vote-counting process contrasted sharply with other states. For instance, Florida law directed that its county canvassing boards

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34. Jeff Horseman, *November's Presidential Election Broke Records in California*, MERCURY NEWS (Dec. 22, 2016, 6:45 AM), https://www.mercurynews.com/2016/12/22/novembers-presidential-election-broke-records-in-california/.

35. CAL. ELEC. CODE § 15372 (West 2020) ("The elections official shall prepare a certified statement of the results of the election and submit it to the governing body within 30 days of the election . . . .").

36. Ben Adler, *Why California Takes So Darn Long to Count Its Votes*, CAPRADIO (Nov. 21, 2016), http://www.capradio.org/articles/2016/11/21/why-california-takes-so-darn-long-to-count-its-votes/.

37. U.S. ELECTION ASSISTANCE COMM'N, EAVS DEEP DIVE: PROVISIONAL BALLOTS 4 (2018), https://www.eac.gov/sites/default/files/document_library/files/EAVSDeepDive_provisionalballot.pdf ("California alone had just over 1.3 million provisional ballots cast – 9 percent of all ballots cast in the state – more than all other states combined.").

38. *Vote by Mail – Nov., 3, 2020, General Election*, CAL. SECRETARY ST., https://www.sos.ca.gov/elections/voter-registration/vote-mail/vbm-nov2020-general-election/ (last visited May 20, 2020) ("Vote-by-mail ballots that are mailed must be postmarked on or before Election Day and received by your county elections office no later than 3 days after Election Day.").

39. CAL. ELEC. CODE § 3019(d)(1) (West 2020) ("A minimum of eight days prior to the certification of the election, the elections official shall provide notice to all voters identified pursuant to subdivision (c) of the opportunity to verify their signatures no later than 5 p.m. two days prior to the certification of the election.").

40. Lauren Easton, *Calling the Presidential Race State by State*, ASSOCIATED PRESS (Nov. 9, 2016), https://blog.ap.org/behind-the-news/calling-the-presidential-race-state-by-state.

41. Madeline Conway, *Clinton's Lead in the Popular Vote Passes 1 Million*, POLITICO, (Nov. 15, 2016, 3:31 PM), https://www.politico.com/story/2016/11/clinton-popular-vote-trump-2016-election-231434.

42. Padilla*, supra* note 2.

43. *California Presidential Race Results: Hillary Clinton Wins*, N.Y. TIMES (Aug. 1, 2017), https://www.nytimes.com/elections/2016/results/california-president-clinton-trump.

44. Sarah Begley, *Hillary Clinton Leads by 2.8 Million in Final Popular Vote Count*, TIME (Dec. 20, 2016), https://time.com/4608555/hillary-clinton-popular-vote-final/.

report their official returns by noon on November 20, 2016.[45] Two days later, Florida's Elections Canvassing Commission officially certified the state's presidential election returns.[46] California would not do the same until more than two weeks later. Nevertheless, California's cumbersome and slow-moving vote counting process was not a concern in 2016 because like forty-seven other states it awarded its fifty-five electoral votes on a winner-take-all basis.[47] Whether Clinton won California by 400,000 votes or 4 million did not really matter. Either way it was clear on election night that she had won the state.

But if the Electoral College were replaced by a national popular vote, every vote in California would take on immense importance, especially in the event of a close election. The slow trickle of California's voting results would make it impossible to definitively determine the presidential race's outcome until December. Moreover, in a close nationwide election, California would then need to conduct a recount, which would further delay the process. If a candidate filed a court challenge to California's final vote tabulation—as happened in Florida during the 2000 election controversy—it would be exceedingly difficult to get a president sworn in by the January 20 inauguration date mandated by the 20th Amendment.[48] California's lumbering vote-counting process is simply not designed to accommodate the recounts and litigation that would inevitably occur in a close nationwide popular vote for president.

The California example just scratches the surface of the problem. A nationwide popular vote for president would place the decentralized American election system under an unprecedented level of strain. The unfortunate reality therefore is the American election administration system is not up to the challenge of a nationwide popular vote for president.

IV. CONCLUSION

Adopting a nationwide popular vote thus requires far more than simply abolishing the Electoral College. But nationwide standardization and improvement of election administration will not be easy because our federalist system emphasizes local control over election rules. As the scholar Nathaniel Persily has observed, "The first glaring institutional feature evident to even the most casual observer of the U.S. electoral system is the extreme decentralization of

45. FLA. STAT. ANN. § 102.112 (West 2020); *Florida Timeline for Reporting and Certification of 2016 General Election Results*, FLA. DEP'T ST. (Nov. 2, 2016), https://dos.myflorida.com/communications/press-releases/2016/florida-timeline-for-reporting-and-certification-of-2016-general-election-results/.

46. FLA. STAT. ANN. § 102.111 (West 2020); *Florida Timeline for Reporting and Certification of 2016 General Election Results*, *supra* note 45.

47. *Electoral College Information*, CAL. SECRETARY ST., https://www.sos.ca.gov/elections/electoral-college/ (last visited May 20, 2020); *Electoral College: Frequently Asked Questions*, U.S. NAT'L ARCHIVES & RECS. ADMIN., https://www.archives.gov/electoral-college/faq (last visited May 20, 2020).

48. *See* U.S. CONST. amend. XX ("The terms of the President and Vice President shall end at noon on the 20th day of January . . . ; and the terms of their successors shall then begin.").

administrative responsibilities and policymaking."[49] For example, under the Constitution, the states determine voter qualifications.[50] As the Supreme Court explained in a 2013 case, "the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them."[51] States will therefore continue to play a leading role in election administration with or without the Electoral College.

But successfully replacing the Electoral College with a national popular vote will require improving vote counting procedures in every state. Equally important, if timely reporting of presidential election results is not feasible for big states like California, then the Constitution may need to be amended to postpone the inauguration date. The 22nd Amendment established the modern inauguration date of January 20.[52] But prior to 1937, the inauguration date was March 4.[53] If the Electoral College is abolished, it may become necessary to push the inauguration date back to March 4 in order to accommodate the slow nature of voting counting in a nation of 325 million people.

To be sure, adopting a successful nationwide popular vote system for president is possible. In 1962, France adopted its current presidential election system, which involves a two-round nationwide popular vote.[54] The French system has successfully weathered close elections. For example, in the 1974 presidential election, Valery Giscard d'Estaing defeated Francois Mitterrand by 13,396,203 votes to 12,971,604—a margin of 1.6%.[55] Giscard was inaugurated nine days after the election.[56] As the French model shows, a nationwide popular vote system is capable of determining a clear winner in a close race if authorities administer the election in a competent, accurate, and sensible manner.

But the bottom line is the Electoral College should not be abolished until the states improve the quality and accuracy of their election systems. In the absence of such reforms, we adopt a national popular vote at our peril.

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49. Nathaniel Persily, *"Celebrating" the Tenth Anniversary of the 2000 Election Controversy: What the World Can Learn from the Recent History of Election Dysfunction in the United States*, 44 IND. L. REV. 85, 85 (2010).

50. Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 16 (2013).

51. *Inter Tribal Council of Ariz*., 570 U.S. at 16.

52. U.S. CONST. amend. XX.

53. *See* U.S. Const. amend. XII; *see also U.S. Presidential Inaugurations: Franklin Delano Roosevelt*, LIBR. CONGRESS, https://www.loc.gov/rr/program/bib/inaugurations/fdr/index.html (last visited Apr. 1, 2020) (listing the inauguration date of President Franklin D. Roosevelt as March 4, 1933).

54. Jon Henley, *French Elections: All You Need to Know*, GUARDIAN (Apr. 27, 2017, 6:53 AM), https://www.theguardian.com/world/2017/apr/04/french-elections-all-you-need-to-know.

55. Byron Criddle, *The French Presidential Election*, 30 WORLD TODAY 231, 237 (1974).

56. Flora Lewis, *Giscard Sets Simple Rite for Inauguration Today*, N.Y. TIMES (May 27, 1974), https://www.nytimes.com/1974/05/27/archives/giscard-sets-simple-rite-for-inauguration-today-public-is-confused.html.