UNIFORM FAITHFUL PRESIDENTIAL ELECTORS ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
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WITH PREFATORY NOTE AND COMMENTS

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Prefatory Note

Introduction

From the very beginning, the formalities of presidential (and vice-presidential) selection under the United States Constitution have revolved around what has come to be known as the "electoral college." Despite this formal constancy, the realities of the selection process have changed dramatically over the years, to the point that the electoral college actually functions in a way that could hardly have been imagined by those who promulgated the constitutional provisions. The dissonance between formality and reality has opened room for what are called "faithless electors," members of the electoral college who vote for candidates for president or vice president (or both) other than those for whom the popular electoral majority (or plurality) assumed it was casting its votes. Faithless electors hold the potential for serious damage to our democratic processes, making advisable a uniform law to minimize the dangers posed.

The Formal Constitutional Process

Under the Constitution, each state is entitled to a number of electors equal to its total representation in the two houses of Congress. Originally the District of Columbia had no electoral votes, but the Twenty-Third Amendment now assigns to the District a number of electors equal to that of the least populous state. Electors are chosen "is such manner as [each state] . . . legislature [or Congress in the case of the District] may direct" and every four years they meet in separate state (and DC) meetings on a date chosen by Congress. That date is constitutionally required to be uniform throughout the country. *See* U.S. CONST., Art. II, § 1, cls. 2 & 3, Am. XXIII. Under current law, the date that Congress has designated for those meetings comes about forty days after what is uniformly thought of as "election day," formally the day, also designated by Congress, on which those electors are chosen. *See* 3 U.S.C. §§ 7 & 1 ("the first Monday after the second Wednesday in December" and "the Tuesday next after the first Monday in November" respectively). At those disparate state meetings the electors choose the nation's president and vice president.

State-Centered Decisions about the "Manner" of Elector Selection

The District and every state has opted for popular election as its "manner" of choosing electors. Maine and Nebraska select two of their electors by the statewide popular vote count, and their remaining electors through the tally in each of the state's congressional districts. *See, e.g.,* NEB. REV. STAT. § 32-1038. The remaining forty-eight states and the District use what is called "winner-take-all," with the choice among complete slates of electors that have qualified under state law turning on the popular vote count in the state as a whole. *See, e.g.*, COLO. REV. STAT. § 1-5-403.

This does not, however, exhaust the possibilities for the "manner" of elector choice. In the early presidential elections, for instance, some state legislatures chose their electors directly. And in recent years there has been a movement to have a state's electors determined by the

nationwide popular vote count, rather than the statewide count. To date six states (Maryland, Massachusetts, Hawaii, Illinois, New Jersey and Washington) have signed on to that nationwide popular vote plan, though even in those six states, the plan would not become effective until states with a majority of the total number of electors throughout the country (270) sign on. *See* John R. Koza *et. al*., *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote* (2d ed. National Popular Vote Press 2008).

State Law and the Election-Day Ballot

In virtually all states, however, the part played by electors is not transparent under state law, including the way states structure the ballot. In many states, for instance, the ballot makes no mention at all of electors, instructing the voter instead to vote for one or another set of paired candidates for president and vice president. Even in states that include some reference to electors on the ballot (or in a few, even list the elector candidates, *see, e.g.,* ARIZ. REV. STAT. § 16-507), the names of presidential and vice-presidential candidates—and their political parties—are given considerably greater prominence. State law then dictates that the electors associated with the popular vote winners become the state's electors entitled to vote at those later elector meetings. *See, e.g.,* ALA CODE § 17-14-32; ARIZ. REV. STAT. § 16-507.

Some Early Assumptions about the Process

When the office of elector was created in the original Constitution, it surely was assumed that in their state-by-state meetings electors would vote not based on some decision in an earlier vote, but rather after genuine debate and deliberation at the meetings about who in the nation would be best suited for the presidency. A majority of the country-wide total of "appointed" electors was required to prevail in the electoral college, but with the vote taken in unconnected meetings, it would not have been surprising if no candidate commanded the required nationwide majority. Thus a backup procedure was provided in which the House of Representatives would choose the president and the Senate the vice president if the electoral college balloting was indecisive. *See* U.S. CONST., Art. II, § 1, cl. 3.

The Unanticipated Role of Political Parties and the Twelfth Amendment

The entry of political parties into the process utterly confounded assumptions underlying this scheme. Parties are nowhere mentioned in the Constitution, and indeed were thought by many of the most important constitutional draftsmen to be potentially mischievous "factions," which might have to be tolerated but which were to play no real role in presidential selection. *See, e.g.,* Federalist 10 (Madison). Starting quite early, however, political parties moved to center stage in the presidential selection process, nominating presidential and vice-presidential candidates and also slates of electors who, it soon came to be taken for granted, would vote for the parties' executive office candidates were they "chosen" as the states' electors.

This political party loyalty was on stark display in the 1800 election. Two parties had quickly emerged, the Federalists and a competitor associated with Thomas Jefferson which went under various names, but which we can call the "Jeffersonians." Under the original constitutional scheme, each elector cast two votes for president, and once the presidency had been determined,

the candidate with the next highest number of electoral votes became vice president. There was no separation of the two votes, and the vice president did not even require a majority in the electoral college. *See* U.S. CONST., Art. II, § 1, cl. 3. But in the 1800 election, all the electors nominated by the Jeffersonians cast both their votes "faithfully" for the party's presidential "candidate," Thomas Jefferson, and also for the party's vice-presidential candidate, Aaron Burr. The result was a tie, throwing the selection into the backup procedure in the House—albeit through the unanticipated mechanism of political party coordination.

A majority of state delegations was (and is) required for House selection, *see* U.S. CONST., Art. II, § 1, cl. 3, and it took thirty-six House votes before Jefferson emerged victorious. This unsettling drama prompted passage of the Twelfth Amendment, separating the votes for president and vice president, requiring electoral college majorities for both offices, and designating the Senate to conduct any required backup procedure for selecting the vice president.

Despite the fact that the 1800 election had shown how important political parties had become in the process, the Twelfth Amendment continued to ignore their role. The Supreme Court has suggested that states are constitutionally required to hold open the possibility of presidential and vice-presidential candidates not associated with any political party. *See Storer v. Brown*, 415 U.S. 724, 745-46 (1974). In fact, however, most of the candidates today—for the nation's executive offices and for the office of elector--are nominees of political parties. Indeed, since Washington's presidency, all prevailing candidates have been readily associated with a political party. And the role of parties in the process has set the stage for elector faithlessness.

The Problem of "Faithless" Electors

Over the years almost all electors have in fact voted for their parties' candidates, but for a variety of reasons, an occasional elector has not. These latter "faithless" electors have never changed the outcome of a presidential election, but that is in good part because with the winner-take-all approach of almost all states, the electoral college outcome is seldom very close. Still, close counts are certainly possible—evidenced by the 2000 election—and there is ample reason to believe that presidential campaigns make plans to court faithless votes if the nationwide electoral college count promises to be close. After the 1976 election, for instance, Robert Dole, the Republican vice-presidential candidate, testified about Republican plans to court faithlessness had the outcome been closer. And in the run-up to the 1968 election, several electors made contingency plans for their own faithlessness. *See* Robert Bennett, Taming the Electoral College 231 n.31 (Stanford University Press 2006); *see also id*. at 231-32 n.32. Should the apparent outcome of an election appear to turn on whether faithless votes are counted as cast or as previously committed, however, an extraordinarily rancorous dispute would be in prospect.

State Responses

It is thus not surprising that approximately half of the states have taken some action to discourage or forbid faithless electoral votes. Some employ pledges of faithfulness, administered in some cases by political parties and in other cases as part of the ballot qualification process. *See, e.g.,* ALA. CODE § 17-14-31; FLA. STAT. Title IX, § 103.021. In 1952, the Supreme Court upheld a political party-administered pledge against a constitutional challenge. *See Ray v. Blair*,

343 U.S. 214 (1952). Others forbid faithlessness, some with civil, or even criminal penalties. S*ee*, *e.g.*, CAL. ELEC. CODE § 6906 (no apparent penalty); N.M. STAT. ANN. § 1-15-9(B) (fourth degree felony). And some provide that faithless voting constitutes resignation from the office of elector. *See, e.g.,* MICH. COMP. LAWS Ann. § 168.47. Some of these measures raise questions of whether any faithless votes might nonetheless be counted, while others raise the different question of whether a disqualified vote was nonetheless that of an "appointed" elector for purposes of determining whether the required "majority of whole number of electors appointed" was obtained. U.S. CONST. Art. II, § 1, cl.2; Am. XII.

The Approach of the Uniform Law

The Conference has decided that a uniform law is advisable, in order to foreclose the possibility of faithlessness, and simultaneously to help assure that all states attempting to appoint a complete complement of electors will succeed. The uniform law proposes a state-administered pledge of faithfulness (sections 4 and 6(c)), with any attempt by an elector to submit a vote in violation of that pledge effectively constituting resignation from the office of elector (section 7(c)). The draft Act provides a mechanism for filling a vacancy created for that reason or any other, with the substituted elector taking a similar pledge (sections 6(b) & (c)). After a full set of faithful elector votes is obtained, the uniform law further provides that the official notification of the identity of the state's electors that is required under federal law (through a document called a "certificate of ascertainment," *see* 3 U.S.C. § 6) be officially amended by the Governor, so that the state's official list of electors contains the names of only faithful electors (section 8).

The Twentieth Amendment deals with the problem of death of a president-elect after the elector meetings and before inauguration day, as well as with the possibility that the selection process will not have produced a decisive choice for president by the time for inauguration. In both situations, the Amendment turns to the vice-president-elect to fill in, unless, of course, the vice-president elect has also not been chosen. The Amendment authorizes the Congress to pass legislation to designate an acting president where neither a president-elect nor a vice-president-elect has been chosen. For these purposes, a candidate presumably becomes president-elect (and vice-president elect) after the electoral college voting, if that voting has produced a definitive result.

The Constitution is silent on a variety of other problems caused by deaths or, indeed, other sorts of arguably disqualifying developments. This is particularly notable in the period after election day but before the electors have met and voted. Some state statutes deal with problems in that earlier period, but they differ in their guidance for the electors. *Compare* TENN. CODE ANN. § 2-15-104 (elector discretion), *with* MONT. CODE ANN. § 13-25-101 (political party substitution). This Act does not deal with the with the possibilities of death, disability or disqualification of a presidential or vice-presidential candidate before the electoral college meetings.

Conclusion

The goal of this Act is admittedly to address a problem that may be unlikely to arise. If it does arise, however, the potential is great for harm to our democracy caused by faithless electors

whose votes, if counted, would prove decisive. The solution of the Act is to prevent the problem from arising by binding electors to the pledge they made as a condition of being chosen as an elector. Uniform adoption of the Act will assure that the solution is consistent among the states, foreclosing attempts to "peel off" electors and helping states to secure their full complements of electoral votes. Widespread adoption will also strengthen the Act against any claim that the remedy is unconstitutional.

UNIFORM FAITHFUL PRESIDENTIAL ELECTORS ACT

SECTION 1. SHORT TITLE. This [act] may be cited as the Uniform Faithful Presidential Electors Act.

SECTION 2. DEFINITIONS. In this [act]:

(1) "Cast" means accepted by the [Secretary of State] in accordance with Section 7(b).

(2) "Elector" means an individual selected as a presidential elector under [applicable state statute] and this [act].

(3) "President" means President of the United States.

(4) ["Unaffiliated presidential candidate" means a candidate for President who qualifies for the general election ballot in this state by means other than nomination by a political party.]

[(5)] "Vice President" means Vice President of the United States.

Comment

As mentioned in the prefatory note, the Supreme Court has suggested that states are required to hold open the possibility of presidential candidates unaffiliated with any political party. *See Storer v. Brown*, 415 U.S. 724, 745-46 (1974). Most states do not, however, deal explicitly with that possibility. For states that want to make the possibility explicit, a bracketed definition of "unaffiliated presidential candidate" is provided in Section 2, and then bracketed substantive provision for such candidates is included in Sections 3, 4 and 6.

No definition of a "faithful" presidential elector is provided in Section 2, but the idea is captured by the pledge requirements of Sections 4 and 6(c), and then the provision of Section 6 that attempted violations of the pledge causes the violating elector to vacate the office of elector, creating a vacant position to be filled under Section 6.

SECTION 3. DESIGNATION OF STATE'S ELECTORS. For each elector position in this state, a political party contesting the position [, or an unaffiliated presidential candidate,] shall submit to the [Secretary of State] the names of two qualified individuals. One of the

individuals must be designated "elector nominee" and the other "alternate elector nominee". Except as otherwise provided in Sections 5 through 8, this state's electors are the winning elector nominees under the laws of this state.

Legislative Note: *For a state wishing to accommodate unpledged electors, the following three sentences could be substituted for the first two sentences of Section 3: "Any political party [or unaffiliated presidential candidate] advancing candidates for elector positions in this state shall submit to the [Secretary of State] the names of two qualified individuals for each elector position to be contested. One of the individuals must be designated "elector nominee" and the other "alternate elector nominee". Any unpledged candidate for the position of elector who is not nominated by a political party or unaffiliated presidential candidate shall submit to the [Secretary of State], in addition to the individual's own name as "elector nominee", the name of another qualified individual designated as "alternate elector nominee"."*

Comment

Section 3 uses the device of elected alternates as a convenient vehicle for facilitating the filling of elector vacancies, which is then dealt with under Section 6. But alternates are not essential for the filling of vacancies, nor does the designation of alternates for each elector position absolutely guarantee that the alternates will suffice for the filling of all vacancies that conceivably might arise. Thus most states do not at the present time provide for the initial selection of alternate electors, relying instead on persons who happen to be available should there be a vacancy that has to be filled. For examples of states that do employ designated alternates, see HAW. REV. STAT. ANN. §§ 14-21, 14-23; MINN. STAT. ANN. §§ 208.03, 208.05. Note, however, that Minnesota does not designate an alternate for each elector position. In any event, if a state preferred not to employ the device of alternates, adjustment of this section and of Section 6 would be necessary.

It may be that a state would provide for the possibility of slates of electors not committed to any political party or to particular presidential or vice-presidential candidates. The Mississippi statute explicitly adverts to the possibility of an unpledged elector. *See* MISS. CODE ANN. § 23-15-785 (4). Adjustment of Section 3 is required for any such states, as is adjustment of Sections 4 and 6. The legislative note to Section 3 provides language that could be used if an adjustment were undertaken.

SECTION 4. PLEDGE. Each elector nominee and alternate elector nominee of a political party shall execute the following pledge: "If selected for the position of elector, I agree to serve and to mark my ballots for President and Vice President for the nominees for those offices of the party that nominated me." [Each elector nominee and alternate elector nominee of

an unaffiliated presidential candidate shall execute the following pledge: "If selected for the position of elector as a nominee of an unaffiliated presidential candidate, I agree to serve and to mark my ballots for that candidate and for that candidate's vice-presidential running mate."] The executed pledges must accompany the submission of the corresponding names to the [Secretary of State].

Legislative Note: *This act does not deal with the possibility of death of a presidential or vice-presidential candidate before the electoral college meetings, or with any other disabling condition or the discovery of disqualifying information. A state may choose to deal separately with one or another of these possibilities.*

Comment

To accommodate a nominee unable physically to sign a pledge, "execution" of the pledge may be accomplished in the nominee's presence by another individual directed by the elector to sign the pledge.

SECTION 5. CERTIFICATION OF ELECTORS. In submitting this state's certificate of ascertainment as required by 3 U.S.C. Section 6, the [Governor] shall certify this state's electors and state in the certificate that:

(1) the electors will serve as electors unless a vacancy occurs in the office of elector before the end of the meeting at which elector votes are cast, in which case a substitute elector will fill the vacancy; and

(2) if a substitute elector is appointed to fill a vacancy, the [Governor] will submit an amended certificate of ascertainment stating the names on the final list of this state's electors.

Comment

3 U.S.C. § 6 instructs "the executive of each state" to inform relevant federal officials as well as prevailing elector candidates about the identity of the state's electors. The document containing this information is called a 'certificate of ascertainment," and it is also to include the names and number of popular votes obtained by all elector candidates in the state. This is to be done "as soon as practicable" after the decisions have been made, but this is surely not intended to prevent later substitution of electors, and many states already make provision for such

substitutions. *See, e.g.*, NEV. REV. STAT. ANN. § 298.040. The possibility of later substitution is central to the Uniform Act's approach to the problem of elector faithlessness, and for that reason Section 5 of the Act instructs the state executive to make explicit in the certificate of ascertainment that later substitution is possible and that where it has proved necessary a later amended certificate of ascertainment will be provided with a revised list of the state's electors. Section 8 then provides for submission of any amended certificate of ascertainment that proves necessary. Under the Constitution electoral votes are counted at a joint meeting of the House and Senate, U.S. Const., Am. XII, and at times in the past at those sessions, faithless elector votes have been counted as cast. *See* Robert Bennett, Taming the Electoral College 38-39, 96 (Stanford University Press 2006). Those appear to have been situations where the certificate of ascertainment named the eventually faithless electors as those of the state, and provision in this act for an amended certificate should assure that the votes that are counted are only those of the electors on the amended list, all of whom would have cast faithful votes.

Most state statutes specify that the Governor is to carry out this duty assigned to "the executive of each state." *See, e.g.*, 10 ILL. COMP. STAT. 5/21-3. States could presumably opt for a different executive officer, both in Section 5 and Section 8.

SECTION 6. PRESIDING OFFICER; ELECTOR VACANCY.

(a) The [Secretary of State] shall preside at the meeting of electors described in Section 7.

(b) The position of an elector not present to vote is vacant. The [Secretary of State] shall appoint an individual as a substitute elector to fill a vacancy as follows:

(1) if the alternate elector is present to vote, by appointing the alternate elector for the vacant position;

(2) if the alternate elector for the vacant position is not present to vote, by appointing an elector chosen by lot from among the alternate electors present to vote who were nominated by the same political party [or unaffiliated presidential candidate];

(3) if the number of alternate electors present to vote is insufficient to fill any vacant position pursuant to paragraphs (1) and (2), by appointing any immediately available individual who is qualified to serve as an elector and chosen through nomination by and plurality vote of the remaining electors, including nomination and vote by a single elector if only one remains;

(4) if there is a tie between at least two nominees for substitute elector in a vote conducted under paragraph (3), by appointing an elector chosen by lot from among those nominees; or

(5) if all elector positions are vacant and cannot be filled pursuant to paragraphs (1) through (4), by appointing a single presidential elector, with remaining vacant positions to be filled under paragraph (3) and, if necessary, paragraph (4).

(c) To qualify as a substitute elector under subsection (b), an individual who has not executed the pledge required under Section 4 shall execute the following pledge: "I agree to serve and to mark my ballots for President and Vice President consistent with the pledge of the individual to whose elector position I have succeeded.".

***Legislative Note**: As with Sections 3 and 4, adjustment of this Section is required for any state where unpledged electors are permissible. For a state wishing to accommodate unpledged electors, the language of subsections (b)(2), (b)(3), and (c) could be changed to the following:*

(b)(2): "if the alternate elector for the vacant position is not present to vote but other alternate electors who were nominated by the same political party [or unaffiliated presidential candidate] are present, by appointing an elector chosen by lot from among those alternate electors of the same political party [or of the same unaffiliated presidential candidate]."

(b)(3): "if the vacant position is that of an unpledged elector and the alternate elector for that vacant position is not present to vote, or if there otherwise are no alternate electors eligible for the vacant position under paragraphs (1) and (2), by appointing any immediately available individual who is qualified to serve as an elector and has been chosen through nomination by and plurality vote of the remaining electors, including nomination and vote by a single elector if only one remains."

(c): "To qualify as a substitute elector for a vacant position associated with an elector who had executed a pledge, an individual who has not executed the pledge required under Section 4 shall execute the following pledge: "I agree to serve and to mark my ballots for President and Vice President consistent with the pledge of the individual to whose elector position I have succeeded."."

Comment

A number of states name the Secretary of State to preside at the meeting of electors, but states might opt for a different official. *See, e.g.*, TEX. ELEC. CODE ANN. § 192.006. For that

reason, Section 6 brackets the designation of the Secretary of State as the presiding officer.

SECTION 7. ELECTOR VOTING.

(a) At the time designated for elector voting and after all vacant positions have been filled under Section 6, the [Secretary of State] shall provide each elector with a presidential and a vice-presidential ballot. The elector shall mark the elector's presidential and vice-presidential ballots with the elector's votes for the offices of President and Vice President, respectively, along with the elector's signature and the elector's legibly printed name.

(b) Except as otherwise provided by law of this state other than this [act], each elector shall present both completed ballots to the [Secretary of State], who shall examine the ballots and accept as cast all ballots of electors whose votes are consistent with their pledges executed under Section 4 or 6(c). Except as otherwise provided by law of this state other than this [act], the [Secretary of State] may not accept and may not count either an elector's presidential or vice-presidential ballot if the elector has not marked both ballots or has marked a ballot in violation of the elector's pledge.

(c) An elector who refuses to present a ballot, presents an unmarked ballot, or presents a ballot marked in violation of the elector's pledge executed under Section 4 or 6(c) vacates the office of elector, creating a vacant position to be filled under Section 6.

(d) The [Secretary of State] shall distribute ballots to and collect ballots from a substitute elector and repeat the process under this section of examining ballots, declaring and filling vacant positions as required, and recording appropriately completed ballots from the substituted electors, until all of this state's electoral votes have been cast and recorded.

Comment

To accommodate an elector unable to physically mark a ballot or sign and print his or her name, those steps can be done in the elector's presence by another individual directed by the

elector to mark a ballot or sign and print the elector's name.

For the reasons discussed in the Legislative Note for Section 6, references to the Secretary of State are bracketed in Section 7.

SECTION 8. ELECTOR REPLACEMENT; ASSOCIATED CERTIFICATES.

(a) After the vote of this state's electors is completed, if the final list of electors differs from any list that the [Governor] previously included on a certificate of ascertainment prepared and transmitted under 3 U.S.C. Section 6, the [Secretary of State] immediately shall prepare an amended certificate of ascertainment and transmit it to the [Governor] for the [Governor's] signature.

(b) The [Governor] immediately shall deliver the signed amended certificate of ascertainment to the [Secretary of State] and a signed duplicate original of the amended certificate of ascertainment to all individuals entitled to receive this state's certificate of ascertainment, indicating that the amended certificate of ascertainment is to be substituted for the certificate of ascertainment previously submitted.

(c) The [Secretary of State] shall prepare a certificate of vote. The electors on the final list shall sign the certificate. The [Secretary of State] shall process and transmit the signed certificate with the amended certificate of ascertainment under 3 U.S.C. Sections 9, 10, and 11.

Comment

For the reasons discussed in the Legislative Notes for Sections 5 and 6, references to the Governor and the Secretary of State are bracketed in Section 8.

SECTION 9. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 10. REPEALS. The following are repealed:

(1) ….

(2) ….

(3) ….

SECTION 11. EFFECTIVE DATE. This [act] takes effect….