

Nov. 27, 2009

Supplemental Memorandum

To: Faithful Presidential Electors Act Drafting Committee

From: Robert Bennett, Faithful Reporter

We have received a number of comments in response to the revised draft Act (and accompanying memorandum) distributed in anticipation of our meeting scheduled for December 4-5, 2009. I thought it might be helpful in this supplemental memorandum to convey my thoughts on those comments, including some suggested changes in the draft Act.

I. Presidential (and Vice-Presidential) Candidates Not Affiliated With Political Parties (Including Death of One or Both of Those Candidates Between Election Day and the Elector Voting).

Richard Winger rightly points out that the draft Act ignores the possibility of presidential (and vice-presidential) candidates unaffiliated with any political party, even though some states make explicit mention of the possibility, and that such candidacies may even enjoy a measure of constitutional protection. *See Storer v. Brown*, 415 U.S. 724, 745-46 (1974). (Bill Josephson adverts more succinctly to the same problem with the draft Act.) For the most part the required changes are reasonably straightforward. On line 21 on page 1 of the draft (Section 3), for instance, I suggest the following insertion before “a political party”: “a candidate for President who has qualified to appear on the general election ballot of this state but who is unaffiliated with any political party, or”. In the same Section, the following could be inserted as a new sentence following the sentence that ends on line 2 of page 2: “Each nominee of an unaffiliated candidate shall execute and sign the following pledge: ‘If selected for the position of elector, I agree to serve and to cast my ballots for President and Vice-President for the unaffiliated candidates for those offices who nominated me for the position of elector or alternate elector.’” While the precise wording would vary from section to section, similar changes should be made in Section 5(a)(2) in line 24 on page 3, in Section 5(b) in line 13 on page 4, and, if the committee opts to deal with the death of candidates, the subject of Section 8, in Section 8(a)(1), line 15 on page 6 and Section 8(b)(2), lines 25 and 25 on page 6. [Note that the death Section 8 has now been incorporated into the statute by our style people, so that the earlier memorandum is wrong in characterizing it as provided separately.]

Other changes required on account of this possibility of unaffiliated candidates require more extended explanations. First, the definition of “faithful” in Section 2(2) on page 1 will require adjustment similar to those mentioned above, but only if the definition is retained. At the moment at least, the word appears only in the title. The committee will consider the title, and if the word “faithful” proves to be a fatality of that consideration—and the word makes no other appearance—the definition would be pointless. But the committee might also think that the definition could be even if the word is retained in the title.

More complicated still are additional issues posed by Section 8, if the committee opts to deal with the death problem. Most tricky is the possibility that both the presidential and vice-presidential candidates die before the elector votes, for it is hard to see how appropriate substitute candidates

would then be named. Some might think that elector discretion would be appropriate in that case, but I would dissent from that solution, for reasons dealt with in my earlier memorandum. My suggestion is that the electors be required to abstain (with the pledge, and elector replacement, providing the leverage for the requirement). To accomplish this, Section 8(c) would be revised as follows:

(c) If both the presidential and vice-presidential candidates for whom an elector pledges to vote pursuant to Section 3 or 5 die before the elector votes pursuant to Section 6,

(i) for electors nominated by political parties or succeeding to elector positions of electors nominated by political parties, the elector fulfills the pledge only if the elector marks the elector's presidential and vice-presidential ballots respectively for the substitute presidential and vice-presidential candidates designated by the political party, and

(ii) for electors nominated by unaffiliated candidates, or succeeding to elector positions of electors nominated by unaffiliated candidates, the elector fulfills the pledge only by abstaining from marking either the presidential or the vice-presidential ballot.

The abstention possibility does complicate the nationwide electoral vote counting, because the abstaining electors would nonetheless have been "appointed," and the constitutional requirement for a decisive electoral college victory is a majority of "appointed" electors. *See* U.S. Const., Am. XII. If the result were an indecisive electoral college, the House and Senate constitutional backup procedures (U.S. Const., Am. XII) would then be required. But in all likelihood the selfsame complication would already have been presented by the fact that unaffiliated candidates—who remained alive and kicking—had won in the state.

In addition, some of the state statutes that mention the possibility of an unaffiliated presidential candidate neglect (or at least make it difficult to locate) the subject of a vice-presidential running mate. Designation of a running mate seems important for a variety of reasons—most obviously, the provision of a substitute if the presidential candidate dies, as well as a person who can then name a substitute vice-presidential candidate. If there is no vice-presidential candidate, the Act would seemingly have to provide guidance for electors in that case, with abstention again being my preference. But it would be preferable for states to deal with this concern before it arises, and to put the burden of providing a vice-presidential candidate on the unaffiliated presidential candidate.

To deal with these problems, I suggest that a Legislative Note and a Comment, be provided as set forth below and that the following language be inserted at the end of Section 8(a)(2) on page 6, line 19: "or by the vice-presidential candidate associated with the deceased unaffiliated presidential candidate".

Legislative Note: *Some state statutes that make explicit note of the possibility of presidential candidates unaffiliated with a political party are not entirely explicit in requiring the presidential candidate to name a vice-presidential running mate. Sometimes the requirement might be thought to be implied, but it would be best if it were made explicit. States that do not explicitly address the possibility of unaffiliated candidates should do so, and, of course, make explicit the presidential candidate's responsibility for naming a running mate.*

Comment

In the exceedingly unlikely event that unaffiliated (running mate) candidates for president and vice-president were to win on election day and then both candidates were to die before the elector votes, this section requires that the electors associated with those unaffiliated candidates abstain. Since there is no clear way to provide substitute candidates, this seems to be the best solution to a problem with no good solution. It might mean that there were fewer elector votes cast than “electors appointed” across the entire nation. That might mean that no candidate receives a nationwide majority of “electors appointed” (the constitutional requirement for avoiding the House and Senate fallback procedures, U.S., Const., Am. XII), but this would already be in prospect without the problem of death on account of the unaffiliated candidates having won in the state.

II. Death Before Election Day.

Richard Winger also calls our attention to the increased possibility of candidate deaths after some absentee votes have been cast but before election day (on account of a new congressional requirement for early mailing of foreign absentee ballots). It was not my intention to deal with the problem of death before election day, on the ground that it would raise complex and potentially controversial issues that would divert attention from the problem of faithlessness that defines our mission. To make sure that there is no misunderstanding about the time period that our death section covers, I suggest explicit mention of the time period at two points in Section 8, line 15 on page 6 and line 21 on page 6. The same point is applicable to the bracketed introduction to the Comment about Section 8 at line 21 on page 2. The result would presumably be that political parties could make substitutions and would not necessarily be stuck with the vice-presidential nominee if it were the presidential nominee who had died. That seems to be the solution Winger would favor, and the time period clarification would make unnecessary any further specification in a uniform law of that (or any other) solution.

III. Elector and Alternate Elector Pairing.

Jack Davies objects to the elector and alternate elector pairing that I have provided, claiming that it is “unnecessary.” If by that Jack means that substitutes could be provided without the device of alternates, I am in agreement, and indeed the Legislative Note to Section 3 acknowledges that possibility. If, however, Jack means that the designation of alternates is advisable, but that the pairing is “unnecessary,” I am dubious. The pairing was included to deal with the possibility (now presented by Maine and Nebraska, but potentially presented in any state—or in all) that electors would come from different slates. The pairing was a device to assure that the alternates were committed to the same candidates as the electors with whom they are paired. Given the pledge and resignation devices that we employ, perhaps this would not strictly be “necessary,” but I still believe it is advisable to minimize the possibility of mischievous alternates under an obligation to vote for candidates not to their liking.

IV. Miscellaneous Suggestions.

William Josephson provides a laundry list of suggestions, some of which, as he acknowledges, the draft Act already covers. I’ll mention here the ones that might be thought to raise new issues.

Josephson correctly points out that one could cast doubt on the continued viability of the Supreme Court's decision in *Ray v. Blair*, upholding the validity of a political party pledge of faithfulness. This leads him to urge that "the Commissioners . . . clearly . . . disclose to the states . . . uncertainties about a state action-enforceable pledge." He then suggests that in order to fortify the disapproval of faithless votes, the uniform law assert that they are not "regularly given," which is the language of a requirement of federal law. The Committee might want to consider that possibility, which could probably be worked into the Act, and if so would do no harm. But I tend to think it is unnecessary. As structured now, the Act requires the Governor to inform the counting session of elector substitutions, with a listing of the final group of official electors. If that is done, I would think it very unlikely that the counting session would find that the votes of other pretenders to the office of elector were the ones that were "regularly given." The "regularly given" precedents where the counting session counted faithless votes in the past were ones where no such substitution was provided for by state law.

Josephson also suggests that we deal with the (admittedly very—very—remote) possibility of ties in the popular vote. He would add to our oath an assertion that the elector meeting the constitutional requirement of not holding an office of trust or profit under the United States. He suggests that a comment acknowledge that we are abandoning secrecy in the elector voting, despite the fact that "The authorities overwhelmingly conclude that . . . [the Constitution requires a] secret ballot." He wants a "savings clause" to assure that future changes in federal law are honored. He would have the electors (presumably required to) elect a presiding officer and a secretary." He would provide for a "roll call of the electors and alternates." And he would deal with problems of candidate disqualification beyond death.

I would recommend against adoption of any of these recommendations, not because they are unworthy in theory, but because they either seem unnecessary (the draft Act already clearly abandons secrecy—as a number of states have done already, with no particular backlash; federal law is "supreme" whether we include a savings clause or not; the election of elector officers when the Act provides that the Secretary of State is to preside); would add to the complexity of the Act without appreciably advancing our purpose (adding to the oath things already required by federal law —and no doubt lots of state law as well; a "roll call" requirement); or would raise issues that would divert attention from our mission (tie vote possibility; disqualification beyond death). We could, of course, call the attention of state legislatures to one or more of these concerns, through Comments. That might, for instance, be appropriate for the problem of a popular vote "tie," given that some state statutes apparently already deal with that possibility.