

## The Uniform Faithful Presidential Electors Act

BY ROBERT W. BENNETT



*A constitutional law scholar, Robert Bennett has been a member of the Northwestern Law faculty since 1969, serving as the school's dean from 1985 to 1995. Since 2002 he has been the Nathaniel L. Nathanson Professor of Law. He teaches courses in contracts, legislation, constitutional law, and constitutional theory, as well as a seminar in the law of American democracy. Professor Bennett is the author of numerous books and articles, including Constitutional Originalism: A Debate (Cornell University Press, 2011) (with Lawrence B. Solum), Taming the Electoral College (Stanford University Press, 2006), and Talking It Through: Puzzles of American Democracy (Cornell University Press, 2003).*

The hyperpartisanship that characterizes contemporary American politics can help alert us to perils in our presidential selection process that are seldom appreciated or even much noted. I have in mind the possibility of an indecisive outcome in what is called the “electoral college,” and in particular the role that “faithless electors” might play in our struggle to determine just who our new president is to be. An organization called the Uniform Laws Commission (ULC) has urged all states to adopt a law that would prevent faithless presidential elector voting. I am the reporter for this ULC effort, and hence not disinterested, but I have no hesitation in urging that universal, or even widespread, adoption of what is called “The Uniform Faithful Presidential Electors Act” could avert a disaster in a close presidential contest.

Faithless presidential electors are ones who vote contrary to the popular vote that put them into that office. To appreciate both the possibility of faithlessness and the dangers it poses, it is important to understand that our presidential selection process is a good deal more complex than often appears. Those who pay attention likely appreciate that the president and vice president are chosen through the accumulation of electoral votes on a state-by-state basis. But most Americans likely also assume that those electoral votes are awarded in early November on what is routinely referred to as “election day,” and that the award is based on a popular voting process in each state cast as a choice between slates of paired presidential and vice-presidential candidates. Thus, the media typically make it seem that, absent a close and contested popular vote in one or more states, the final electoral vote tally—and hence the presidential and vice-presidential winners—are known definitively not too long after the polls close on that early November day.

But it's not really so. State law actually turns those popular votes into ones for electors rather than for presidential and vice-presidential candidates. And there is then an actual voting process that takes place some 40 days later in which the

winning electors cast those electoral votes in 51 separate meetings, one in each state and another in the District of Columbia. And the authoritative counting of those electoral college votes takes place later still, in early January in a joint meeting of the Senate and the House of Representatives at which the (outgoing) vice president of the United States presides.

When those electors do vote, they typically do so “faithfully,” that is, cast their votes for the nominees of the political party that nominated both them (for the office of elector) and the paired candidates for the nation's executive offices. But not always. Over the years there have been a number of faithless electoral votes. The most recent was that of a Minnesota elector in 2004. And even more frequently there have been suggestions by electors that they might vote faithlessly. In 2012, for instance, the Associated Press reported that three Republican nominees for elector might not vote for Mitt Romney, the Republican nominee, if he “won” in their states on that “election day.”

Each state is entitled to a number of electors equal to its total representation in the House of Representatives and the Senate. In addition, on account of the 23rd Amendment, the District of Columbia is essentially entitled to a number of electors equal to that of the least populous state. For a number of years now this has yielded a nationwide total of 538 electors. The constitutional requirement for electoral college victory is “a majority of the whole number of electors appointed.” So, assuming each jurisdiction has effectively appointed its quotient, the required electoral college majority is 270 votes. Even apart from faithlessness, there might be no candidate who obtains that majority.

There could, for instance, be a tie between two candidates. Or there could be more than two candidates who garner electoral votes. In both the 1948 and 1968 elections, for instance, sectional divisions in the country led to challenges to the two major parties that won significant

clusters of electoral votes. And even in a two-party race, there could be disputes about outcomes in one or more states. We saw that in the 2000 election, but even more chillingly in the 1876 election, with federal troops still in Southern states as a part of post-Civil War Reconstruction. Competing claims of victory were submitted from three Southern states, and in addition a dispute over one elector developed in Oregon. After those problems were (painfully) resolved, a federal statute was passed to encourage orderly state resolution of disputes and then bring some order to the January counting process. That statute relies heavily on a certification by the “executive of each state” of just who were the state’s victorious electors. But if those disputes could not satisfactorily be resolved and electors were nonetheless deemed to have been “appointed” in those contentious races, there might be no candidate who commanded the required majority.

If there is no electoral college majority winner, the selection of the president is sent to the House of Representatives, where each state—not each representative—gets one vote, and a majority of states (i.e., 26) is necessary for victory. If three (or more) candidates commanded electoral votes, the House choice is to be among the top three, and that could lead to an indecisive outcome in the House. But even if there are only two candidates from whom the House must choose, some state delegations might have to abstain on account of a tie in the votes of their delegations. That—as well as the possibility of a 25-25 state tie—further raises the specter of House indecisiveness.

If the (separate) electoral college vote for vice president also comes up short, that choice is relegated to the Senate (from the top two), with each senator getting one vote. A majority of the Senate (i.e., 51 at the present time) is required for that choice, with the constitutional language seemingly precluding the presiding officer—the (outgoing) vice president—from breaking ties. While a Senate failure to make a choice can thus not be precluded, that seems much less likely than House indecisiveness. And if the new vice president, but not the new president, has been chosen by the time the new president’s term is to begin in late January, pursuant to

the Twentieth Amendment the new vice president is to “act as president until a president shall have qualified.”

If the apparent election day electoral college outcome is either indecisive or very close, a number of possibilities could encourage faithlessness, with real—and painful—bite. First, the apparent electoral college winner might have lost the nationwide popular vote. That happened as recently as the 2000 election. Second, the popular vote outcome in the elector’s own state might have been quite close. That too happened in a few states in the 2000 election, and indeed is not at all uncommon. So, an elector might see some political return from voting faithlessly. Third, an elector might well have disapproved of the party’s candidate for the presidency. That was the basis for the AP story in 2012. Fourth, some unfavorable news about the apparent victor might become public after election day (or even before). Fifth, the (apparent) loser’s campaign might make promises to court faithlessness (an ambassadorship, say, or embrace of a policy position favored by the

But most Americans likely also assume that those electoral votes are awarded in early November on what is routinely referred to as “election day,” and that the award is based on a popular voting process in each state cast as a choice between slates of paired presidential and vice-presidential candidates.

elector). An outright bargain would likely be illegal, but there surely are more subtle ways to get the point across.

And a campaign seeking faithlessness could urge an elector that the office makes no sense unless that elector exercises some judgment in deciding how to vote. As an historical matter, that argument is actually quite powerful. The people who devised the electoral college system would probably be astounded at the rote way in which most electors vote in modern times. At the time of our constitutional framing it was widely assumed that George Washington would be the nation’s first president, so no probing debate by electors would be required for the first (few) presidential elections. But those who gave thought to how the system would work after the Washington era must have assumed that electors would genuinely discuss the merits of presidential possibilities with their fellow (state) electors, for that is the only way to make much sense of the office of elector. But it did not take long for this vision of how the system

would work to become out of date, as political parties assumed major roles in the presidential selection process, including the coordination of elector voting within and across states. Still, the fact that the system now operates so differently from what was envisaged does not drain the rhetorical force from arguments urging electors to exercise the “discretion” they were intended to have.

For any given presidential selection, faithlessness that genuinely threatens an apparent outcome remains unlikely, if for no other reason than that apparently close elector college outcomes have been, and are likely

further doubt about the electoral college count. The stance of the joint meeting on these various questions might well depend upon the partisan makeup of the two houses of Congress and of the apparent pre- and post-faithlessness electoral college “winners.” In any event, the faithless votes would surely be challenged as illegitimate, and the legitimacy of the challenge would be challenged as well. Court intervention might be sought, and perhaps obtained, but the controversy surrounding any court intervention would likely make the controversy we saw after the 2000 election intervention seem quite tame. And that goes for any counting

session resolution as well, particularly if partisan considerations seemed to have played a role there.

Perhaps even worse would be a counting session stalemate. As mentioned, the governing federal statute gives preference to a slate of electors certified by the state’s chief executive, but it

The people who devised the electoral college system would probably be astounded at the rote way in which most electors vote in modern times. At the time of our constitutional framing it was widely assumed that George Washington would be the nation’s first president, so that no probing debate by electors would be required for the first (few) presidential elections.

to continue to be, unusual. But they do happen, as the 2000 election dramatically demonstrated with Bush taking 271 electoral votes to Gore’s 266 (or 267 if a DC abstention is counted as if it had been cast faithfully). And close (apparent) electoral college outcomes may well start coming more frequently as the computer age fosters ever more sophisticated campaigning. But there is also another part of the calculus in determining whether guarding against the possibility of faithlessness makes sense. That is the harm that might be caused by such consequential faithlessness. There is no way to be sure of the harm that would be done, but there are entirely plausible scenarios that conjure up frightening possibilities.

The federal statute mentioned above makes several references to electoral votes that are “regularly given,” and faithless votes could be challenged in the congressional counting session on the ground of “irregularity.” Over the years, the smattering of faithless votes have been counted as cast, but those would provide weak precedents for faithless votes that threatened to change a presidential outcome. Some state statutes now on the books turn attempted faithlessness into resignation from the office, but if the statute provides no mechanism for filling a resulting vacancy, that could create

doesn’t explicitly dictate whether the electors’ votes are to be counted as cast. So, an executive decision could be very contentious, or even held illegal in the state courts. And even if the presiding officer announced a counting session result, that would not guarantee that it would go down easily in the land.

The Uniform Faithful Presidential Electors Act corals these ominous possibilities by requiring pledges of faithfulness of all elector candidates. The act then turns attempted faithlessness into resignation and provides for a replacement who has also taken a pledge. To eliminate doubt about whose votes are legitimate, it requires the state’s executive to provide the counting session with an official up-to-date list of the state’s electors. No doubt one could conjure up troublesome scenarios even if the act is universally enacted. And there are problems in our presidential selection process that the act does not address, such as electoral college indecisiveness due to a tie or a failure of the required majority when more than two candidates command electoral votes. The backup procedure in the House of Representatives is fraught with its own problems. But the Uniform Act should at least give us a good chance to avoid some frightening problems posed by faithlessness of our presidential electors. ■