Memorandum (Via E-mail)

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North Carolina Department of Justice
and
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Uniform Faithful Presidential Electors Act

From: William Josephson

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Thanks to Susan for sending me the draft Faithful Presidential Electors Act and Bob Bennett's Background Memorandum and inviting me to attend the drafting committee's meeting in Chicago on December 4. Also, I have just received the revised materials sent on November 20.

Unfortunately, I doubt if I will be able to attend the December 5 meeting. I originally understood it was December 4. I was, and am, scheduled to be in Washington on December 4. Had I known that the working meeting was December 5, I could have attended. Now, I have made a breakfast commitment in Washington on December 5.

If these pre-existing commitments change, I will let you know. In the meantime, perhaps the following comments will be useful to the drafting committee.

In Repairing the Electoral College,[1] we urged the Commissioners "to take the lead" on the fourteen recommendations for state action we made in that article. We communicated our recommendations at that time and are very pleased to have an opportunity to provide comments now, even if only on the faithless elector issues.

1. Sections 2(2) and 3 of the Draft Act as revised raises an issue, because it is not necessarily so that political parties will nominate electors. This comment also applies to sections 5 and 8.[2]

2. Section 3 uses the formulation "winning." In the case of ties, there is no winning candidate which was surely not intended. Why not use the Constitution's and the Twelfth Amendment's formulations, "having the greatest number of popular votes"?

Just as the Reporter has wisely decided to provide an alternate version for states that decide to deal with the death or disability contingency, the Committee could provide alternatives to deal with ties. In Repairing at 161-62 we said as of 1996:

> A tie in a state's popular vote also raises issues about the allocation of popular votes to elector candidates. Only thirteen states plus the District of Columbia have provisions dictating how to select electors if presidential candidates tie in the popular vote. Most of these states provide for decision by lottery.[106] If a state holds separate lotteries for each elector, as does Nevada,[107] then the state may have an electoral vote split. Two states require the legislature to decide by joint vote.[108] One state, Alabama, allows the governor to decide.[109] This places the governor in an awkward position if the state's popular vote does not coincide with her own party affiliation.

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[1] William Josephson & Beverly J. Ross, 22 J. Legis 145, 190 & n.330 (1996) (hereinafter "Repairing").

[2] Section 2(4) hyphenates Vice President. In accordance with the Constitution and its amendments, "Vice President" should not be hyphenated. U.S. Const. art. II, § 1 (passim) & art. I, § 3; U.S. Const. amends. XX (passim), XXIII, XXIV & XXV. Only the Twelfth Amendment hyphenates.

> In general, the electoral college and unit rule provide decisive majorities that lend stability to our presidential election system. Likewise, the use of a lottery to select a slate of electors in the event of a popular vote "tie" may provide greater electoral vote majorities. Even though popular vote ties are exceedingly rare, if the electoral votes of a state with a popular vote tie were to provide the margin of victory in a close presidential election, the political effect almost certainly would be destabilizing. Accordingly, we recommend that all states revise their laws to provide that in the event of a popular vote tie, their electoral votes should be divided equally among the tied candidates with the largest number of popular votes. If the number of tied candidates does not divide evenly into the number of electors, the number of elector votes remaining after an equal division should not be certified to Congress, and that number of electors should not cast their ballots.[110]

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[106] ARK. CODE ANN. § 7-8-304 (Michie 1993); D.C. CODE ANN. § 1-1314(a)(2), (c) (1992 & Supp. 1995); FLA. STAT. ANN. § 103.062 (West 1995); IDAHO CODE § 34-1505 (1995); LA. REV. STAT. ANN. § 18:1261 (West 1979); MINN. STAT. ANN. § 208.06 (West 1992) (by coin flip); N.D. CENT. CODE § 16.1-14-01 (1991) (by coin flip); S.D. CODIFIED LAWS ANN. § 12-24-2 (1995); UTAH CODE ANN. § 20A-1-304 (1995); WIS. STAT. 5.01(4) (1986).

[107] NEV. REV. STAT. ANN. § 293.400 (Michie 1995 & Supp. 1996).

[108] ME. REV. STAT. ANN. tit. 21-A, § 732(2)(A) (West 1993); MO. REV. STAT. § 128.080 (1980).

[109] ALA. CODE § 17-19-6 (1995).

[110] The selection of electors who would vote could be based on the order in which the electors' names were originally submitted by the political parties or could be made alphabetically within each political party's state.

With the states so divided in their treatment and non-treatment of this potentially explosive issue, the Commissioners clearly could play a constructive role. If the Committee did not want to take a position between lottery/unit rule or dividing the electors, it could (as the Commissioners have done in the past, for example, the Uniform Prudent Management of Institutional Funds Act) present alternatives to the states, as the Reporter is doing with respect to death.

3. Consistent with 3 U.S.C. § 6 and other applicable United States laws, suggest "[executive]" instead of [Secretary of State], as Bob's Background Memorandum indicates in Section C, whenever a federal law duty is being discharged.

4. Should an elector oath[3] or representation be added to the pledge that she or he does not have the constitutional disqualifications? Article II, section 1, clause 2 of the Constitution says, "no Senator or Representative or person holding an Office of Trust or Profit under the United States shall be appointed an elector."[4]

5. New section 8 discusses death but not disability (presumably as finally adjudicated) to which one might add resignation, unavailability and final adjudication of lack of qualifications. A provision freeing electors from their pledge in such cases, but perhaps only if the national party, if any, has not exercised its asserted authority to designate substitutes[5], would be useful, especially in close elections.

6. I have a few comments on Bob's discussion of Ray v. Blair, 343 U.S. 214 (1952).[6]

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[3] Vasan Kesavan, The Very Faithless Elector, 104 W. Va. L. Rev. 123, 128-31 (2002), has pointed out that the electors are the only constitutional actors who are not now required by law to take an oath, at the least implying or perhaps even suggesting, that they should. I do not have a view on this but note that an academic debate on oaths is ongoing in the journals. See Steve Sheppard, What Oaths Meant to the Framer Generation: A Preliminary Sketch, 2009 Cardozo L. Rev. De Novo 273, and articles cited in notes 9 and 10.

[4] See cases and discussion in Repairing at 171.

[5] See The Democratic National Committee, The Charter and Bylaws of the Democratic Party of the United States art. 3 § 1(c) (Feb. 3, 2007) (making the Democratic National Committee responsible for "filling vacancies in the nominations for the office of President and Vice President"); Republican National Convention, The Rules of the Republican Party Rule No. 9 (Sept. 1, 2008) (Republican National Committee may fill such vacancies or reconvene the Republican National Convention to do so). The Democratic National Committee nominated Sargent Shriver as its vice presidential candidate in 1972 in place of Senator Thomas Eagleton.

[6] Bob's footnote 17 is not correct. We did not take the position in Beverly J. Ross & William Josephson, The Electoral College and the Popular Vote, 12 J.L. & Pol. 665, 745 (1996) (hereinafter "Popular Vote") that "elector discretion ... must be honored today":

> Absent state binding legislation, duly appointed and qualified electors retain their constitutional discretion to vote for any person constitutionally qualified to be President or Vice President. We conclude that state statute-based direct or party pledge binding legislation is valid and should be enforceable. Accordingly, the legislatures of those states that have not already chosen to bind their presidential electors should initiate public consideration of whether or not to do so and if so how, culminating either in a binding statute or a record of legislative consideration and rejection of such proposals. By giving clear directives on state policy to courts that might be asked to decide whether electors are bound under theories of contract or public officer duties, state legislatures can

We should state that Justice Reed wrote the 5-2 decision and that, in addition to the dissents of Justices Jackson and Douglas, Justices Black and Frankfurter did not participate.

In Popular Vote we extensively discussed that case and its myriad state and federal constitutional and statutory law implications, including the extensive congressional debates in 1969 whether or not to count a North Carolina faithless elector's vote. In 1969 the Senate voted 58 to 33 and the House 228 to 170, very substantial majorities, to count the North Carolina faithless elector vote, as such votes have always been counted. Especially troubling, in terms of congressional precedents, is the counting in 1956 of an Alabama faithless elector vote which violated the party pledge sustained in Ray v. Blair. These congressional precedents cast doubt on Congress's acceptance of Ray v. Blair.

The commentators have always been divided about the vitality of Ray v. Blair, and as Bob says, they continue to be.[7] Tribe does not even cite the case.[8] To Bob's citations could be added several other recent ones.[9]

> limit the damage to public confidence that would result from litigation of these issues. Such clarity also would facilitate Congress' role in determining whether an elector's vote has been "regularly given" under the Electoral Count Act.

We were, and are, supportive of the goals of the proposed uniform law.

[7] See Robert W. Bennett, The Problem of the Faithless Elector: Trouble Aplenty Brewing Just Beneath the Surface in Choosing the President, 100 N.W.L. Rev. 121, 122 n.10 (2006).

[8] Laurence H. Tribe, American Constitutional Law (2d ed. 1988). Volume one of the third edition does not cover these issues, and Larry announced in 2005 that, there will be no volume two because "... no treatise, in my sense of the term, can be true to this moment in our constitutional history...."

[9] John A. Zadrozny, The Myth of Discretion: Why Presidential Electors Do Not Receive First Amendment Protection, 11 CommLaw Conspectus 165, 178 n.159 (2003) and Vasan Kesavan, The Very Faithless Elector, 104 W. Va. L. Rev. 123, 125 & n.10 (2002), who describes the ambivalence of prominent legal scholars:

> . . . The principal argument against the constitutionality of Elector-binding laws is that such laws are plainly inconsistent with the original understanding. *See, e.g.*, THE FEDERALIST NO. 68, at 412 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("It was equally desirable that the immediate election should be made by men most capable of analyzing the qualities adapted to the station and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice. A small number of

Ray has not been much cited substantively in cases recently, but it was cited and followed in Kucinich v. Texas Democratic Party,[10] but not without qualifications.

Finally, the Supreme Court's complex vicissitudes on federal and state interventions in political party processes,[11] also discussed in Kucinich, leave me also uncertain as to the continuing vitality of Ray v. Blair.

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persons, selected by their fellow-citizens from the general mass, will be most likely to possess the information and discernment requisite to so complicated an investigation."); *Ray*, 343 U.S., at 232 (Jackson, J., dissenting) (describing original understanding that Electors "would be free agents, to exercise an independent and nonpartisan judgment as to the men best qualified for the Nation's highest offices"). It is at least somewhat of an open question whether the original understanding of 1787 is the correct original understanding for the purpose of evaluating the constitutionality of Elector-binding laws. The Twelfth Amendment, which replaced Article II, § 1, clause 3, was apparently adopted in part to vindicate majoritarian popular will. *See* Lolabel House, Twelfth Amendment of the Constitution of the United States 20-40 (1901) (unpublished Ph.D. dissertation, University of Pennsylvania).

Scholars remain split on the difficult question whether Elector-binding laws are constitutional. Professor Akhil Reed Amar once thought that *Ray v. Blair* "strongly suggests that states can bind electoral collegians any way they choose." Amar & Amar, *supra* note 8, at 943 n.86. He has since revised his position and now thinks that "the constitutionality of such [Elector-binding] laws seems highly dubious if we consult constitutional text, history, and structure." Akhil Reed Amar, *Presidents, Vice Presidents, and Death: Closing the Constitution's Succession Gap*, 48 Ark. L. Rev. 215, 219 (1994). *See also id.* at 230 ("The Constitution plainly contemplates that, at least formally, the electors must themselves decide upon their votes."). Professor Vikram David Amar, his brother and sometimes coauthor, is more agnostic, describing the question as an "open one." See Vikram David Amar, *The People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?*, 41 Wm. & Mary L. Rev. 1037, 1089 n.233 (2000) [hereinafter Amar, *The People Made Me Do It*] ("[T]he electors of the so-called electoral college may be free agents. I say 'may' here because, on the one hand, the electoral college, like Congress and an Article V proposing convention, is truly a national group whose existence owes entirely to the Constitution. On the other hand, the electoral college does not 'meet' and deliberate like Congress or an Article V proposing convention. The question of whether electors can be 'bound' and be punished for breaking pledges is therefore an open one."). I agree. Even if Electors are properly federal officers or agents (as I claim in Part III *infra*), it does not necessarily follow that they may not be bound by their respective States to vote in accordance with the popular vote.

[10] 563 F.3d 161, 167 (2009) ("Consequently, until the Supreme Court modifies Ray we cannot hold that a prospective candidate has a right to compel a political party to place him on its ballot when he refuses to agree [by oath] to support its candidates.... Or, since the oath is legally unenforceable, he may repudiate it...."), stay denied of prior District Court denial of preliminary injunction, 552 U.S. 1161 (2008).

[11] See Laurence H. Tribe, American Constitutional Law §§ 12-26, 13-22, 13-23 & 13-24 (2d ed. 1988).

It seems to me that the Commissioners need clearly to disclose to the states these uncertainties about a state action-enforceable pledge.

7. Especially given the aforesaid doubts about Ray v. Blair, faithfulness would be enhanced if the proposed uniform law provided that an elector vote that violates the pledge for which provision is made therein should not be considered by Congress as "regularly given" for purposes of 3 United States Code section 15, as it may be amended, or any comparable provision of any successor law.

8. To Section 6 should be added a Comment like the following: "The authorities overwhelmingly conclude that constitutionally "ballot" means secret ballot. But if faithfulness is to be enforced, secrecy must give way."

9. The uniform law could use a savings clause to acknowledge the supremacy of any future inconsistent changes in federal law as it pertains to the elector process.

In Repairing at 190-91, we made some 14 recommendations for state action as follows:

1. Alternates for presidential electors should be nominated by the political parties when they select elector candidates and be elected by popular vote on election day.

2. A designated state officer should give notice to elector nominees and alternates of their nomination and of any statements they must file with the state.

3. A designated state officer should give advance written notice to the electors and alternates of the date, time and specific place of the electors' meeting.

4. Each elector and alternate should be required to provide, on the day before the electors' meeting, written notice to the designated state officer that he or she will attend the meeting.

5. The electors' meeting should be subject to each state's open meetings law, and if no such law exists, the meeting should be made open to the public by specific statute.

6. A presiding officer and secretary should be elected by the electors with statutory duties, including filing minutes of the electors' meeting with the state archivist or other appropriate officer.

7. A roll call of the electors and alternates present at the electors' meeting should be taken either by the secretary or presiding officer.

8. All states should have vacancy provisions, including mechanisms for filling vacancies before and at the electors' meeting, and for the certification of those chosen to fill the vacancies. Should the vacancy occur prior to the electors' meeting, the vacancy should be filled by the alternates in the order named on the ballot. If the vacancy occurs at the electors' meeting, the vacancy should be filled from the alternates present, either in the order named on the ballot or alphabetically by last name. As soon as a vacancy is filled, the governor should certify the new elector(s) as provided by federal law.

9. A "vacancy" should result from an elector's resignation, absence at the electors' meeting, or inability at any time to perform the elector's duties for any cause.

10. If the presidential candidates with the largest number of popular votes tie, the electoral vote should be split between the tied candidates. If the number of tied candidates does not divide evenly into the number of electors, the number of elector votes remaining after an equal division among the tied candidates should not be certified or counted.

11. Where state law is inconsistent with Title 3 of the United States Code, state law should be amended to conform with Title 3.

12. At the least, states that choose to bind their electors to follow the popular vote should adopt uniform times for the casting of their ballots. Having a uniform time would, to some degree, remove the danger of a "ripple" effect of elector defections.

13. States that choose to bind their electors should release them in the event the presidential or vice presidential candidate to whom they are committed dies, resigns, becomes disabled, or is otherwise judged unfit for the office between election day and the time the electors vote.

14. States that choose not to bind their electors should ensure the secrecy of their electors' ballots.

Especially if the foregoing suggestions are accepted, the proposed uniform law accounts, one way or another, for all but recommendations 6, 7, 10 and 13. Hopefully, they will also be considered by the Committee.

Again, I regret very much that the probability is that I will not be able to attend the meeting.