

Memorandum

To: ULC Commissioners

From: Susan Nichols, Chair, Uniform Faithful Presidential Electors Act Drafting Committee

Robert Bennett, Reporter, Uniform Faithful Presidential Electors Act Drafting Committee

Re: Constitutional and Related Issues Posed by the Act

The prefatory note highlights major issues posed by the proposed Uniform Faithful Presidential Electors Act, but one overarching issue deserves separate treatment. Some commentators have raised constitutional concerns about the Act. They question whether it is true to the original vision of the way the electoral college would operate, with electors meeting in unconnected and uncoordinated state-by-state meetings to engage in genuine debate and discussion about who in the country should be chosen as president (and vice president). To be true to this vision, it might seem that faithless elector voting must be permissible, because it is simply the modern version of elector discretion.

In the Committee's view, the decisive answer to this constitutional concern is that the American political system has undergone such fundamental change since the electoral college provisions were first adopted, that there is simply no way to recapture that original vision. This is true *with or without adoption of the proposed Act*. Given the context of the modern presidential selection process, the peril for American democracy posed by elector faithlessness that threatened to change an election outcome is so great there is an overwhelming case for state action to head off that possibility.

Indeed, a majority of states have already acted to forbid or discourage elector faithlessness. And this raises yet another concern. The states that have taken action have approached the problem in different ways. Some forbid faithlessness, while others employ oaths of faithfulness without explicit prohibition of faithless voting. Some that forbid faithlessness announce penalties, while others are silent on punishment. And states vary as well on the consequences of faithless votes for the counting process. Adoption of the proposed act will thus assure that the large danger of faithlessness is contained, while also bringing order to the electoral college vote counting process in the case of a faithless elector.

Several of the provisions of the proposed Act are designed to dampen any constitutional doubts that might remain. The Act employs a state-required oath of faithfulness, building on the Supreme Court's permissive stance toward a party-administered oath in *Ray v. Blair*, 343 U.S. 214 (1952). The Act also employs the device found in some existing state laws of declaring the position vacant when an elector violates that oath, and then providing for a substitute elector—who must also take the oath. To help assure that attempted faithlessness will not be embraced by partisans in the counting process, the Act instructs relevant state officers to communicate any required substitution of electors to the appropriate officials. While we have not located existing state laws that provide for such official notification of substituted electors,

many states explicitly provide for substitution, and there appears to be no legal obstacle to requiring notification once that has been done.

To make these mechanisms effective, elector voting cannot be secret. That might be thought to raise a separate constitutional question, as some commentators have found secret voting required by the constitutional provision that the electors “vote by ballot.” A number of states have long abandoned secrecy in elector voting, however, and the word “ballot” does not so clearly imply secrecy that a court would be likely to forbid open voting. Indeed, quite apart from the problem of faithlessness, a public voting process helps protect against mistakes. In the 2004 election, for instance, a Minnesota elector must have cast both presidential and vice-presidential ballots for vice-presidential candidate John Edwards, because Edwards received one Minnesota electoral vote for President. No elector has come forward to lay claim to that vote, and it seems overwhelmingly likely that the secret Edwards’ presidential vote was cast in error.

Finally, the committee believes it is critical for the states to address uniformly ahead of time the problem of a “game-changer” elector who seeks to vote inconsistently with the wishes of the voters of the state the elector represents. Uniform adoption of the Act by the states will itself support a conclusion by a court reviewing the Act that its approach to the problem of the faithless elector is constitutional.