

Memorandum:

To: Faithful Presidential Electors Act drafting committee

From: Robert Bennett, Faithful Reporter

This Memorandum attempts to address fresh issues that were raised at the Conference Session or subsequently, by Commissioners, and by observers and other commentators. It does not reiterate discussion of issues addressed in my earlier memorandum (even if raised in the conference deliberations) such as the constitutionality of requiring faithful electoral voting.

I. The Title of the Act.

Alternative titles were suggested by a number of people. Here are the possibilities made explicit: (1) Responsible Presidential Electors Act; (2) Presidential Elector Integrity Act; (3) Fidelity of Presidential Electors Act; (4) Presidential Electors Act; (5) Uniform Presidential Electors Act; (6) Presidential Electors Performance Act; (7) Duties of Presidential Electors Act; and (8) Uniform Presidential Electors Pledge Act.

In the revised draft I have retained the original title, though not because of strong feelings on the matter. It should be noted, however, that some of the dissatisfaction with the original title seems to be attached to the failure of the original draft to define “faithful” elector. If that is the concern, it has now been addressed in the definitional section 2. But I supplied that definition when the draft act used the word “faithful” in its substantive provisions. At Susan’s suggestion, I have now cut the word “faithful” from the substantive provisions. If we leave the Act that way, then the definition should be eliminated, leaving the title question without that support.

II. Winner-Take-All.

The original draft proceeded on the assumption that states chose their presidential electors on a winner-take-all basis, *i.e.*, that a state’s electors would be an entire slate associated with the winner of the state-wide popular vote. That is the approach at present of all but two states—Maine and Nebraska—and the notes acknowledged that the draft would have to be adapted to deal with those two states.

This approach was criticized by the National Popular Vote movement (hereinafter “NPV”), which is urging states to adopt through legislation an interstate compact through which, once states with 270 electoral votes had signed on, participating states would award their electors to the winner of the nationwide popular vote. While not quite articulated this way, NPV was understandably concerned that our Act as drafted left no room for the NPV approach to awarding electors.

The revised Act attempts to address this concern. I did this for a variety of reasons. At the present time, five states (Maryland, New Jersey, Illinois, Hawaii, and Washington) have passed the NPV legislation. We could expect opposition—perhaps from those five states, and certainly from the NPV movement—to an apparent endorsement of winner-take-all, perhaps in the Conference itself, but even more likely in the adoption phase of our work. In addition, the adjustments eliminate the need for different legislation in Maine and Nebraska, or, for that matter, in other states that might opt for a non-winner-take-all approach other than NPV. In 2004, for instance, there was an initiative on the Colorado

ballot (ultimately defeated) that would have substituted proportional assignment of electors for the state's present winner-take-all approach.

Finally, there is no reason in principle to embrace winner-take-all. It is a controversial approach to elector assignment, and its popularity is more a product of political considerations than of theoretical attractiveness (though it certainly does have proponents who advance principled arguments). Be that as it may, the committee's mission does not rest on embrace of winner-take-all.

This being said, there are costs associated with the changes I have made to avoid apparent endorsement of winner-take-all. They revolve around the use of alternate electors, to which I will now turn as a separate issue.

III. Use of Alternate Electors.

The Committee's earlier draft uses the device of elected alternate electors as a means for providing a pool of substitute electors in case of any vacancies. Only a small number of states provide for selection of alternates at the present time, but the possibility of elector vacancies due to faithlessness is pivotal in our approach, and the use of alternates seemed to provide a degree of solidity to a process of filling vacancies. The device of alternates aroused no controversy—indeed elicited no comments—at the Conference meeting, or subsequently. The use of alternates is, however, complicated by the abandonment of winner-take-all.

With winner-take-all, an entire slate of alternates was selected, and that provided a pool for filling vacancies. Without winner-take-all, there is no clean way to vote for a slate of alternates, and the new draft separately attaches a single alternate to each elector. That in turn might dampen the incentives of all alternates to attend the elector meeting, thus compromising the usefulness of the alternates for the filling of any vacancies. In addition, if some but not all alternates do attend, there will be a pool of them available to fill vacancies, but without winner-take-all the pool will not necessarily be associated with the political party of the elector who created the vacancy. To be sure, the revised Act requires the substitute to take an oath of faithfulness keyed to the party of the original elector. But a substitute from a different party might still be inclined to create a fuss.

Weighing these considerations, I opted to retain the use of alternates, as posing no serious jeopardy to the project, and as at least marginally useful in addressing the vacancy problem.

IV. Death of Presidential or Vice-Presidential Candidate Before Meeting of Electors.

At the conference meeting, a number of comments raised concerns about the death before the elector meeting of a presidential or vice-presidential candidate to whom an elector was committed. Some of the comments associated this problem with other possible bases for disqualification, such as disability or new information about the candidate. The Committee had discussed these problems and had opted not to address them in its earlier draft, mostly out of concern that any solution might prove controversial and jeopardize the elector faithfulness thrust of the Committee's charge.

In response to the comments I have drafted a separate section (not formally incorporated into the new draft) dealing with the death of a candidate. I did not address other possibilities for concern about a candidate, on the ground that death was the only uncontroversial basis for relieving an elector of candidate commitment. Other bases would usually prove contentious, and trying to deal with them in our Act would quite possibly impede enactment.

I have basically dealt with the death problem by substituting the vice-presidential candidate if only the presidential candidate dies, and leaving the choice of substitute(s) up to the political party if the vice-presidential candidate dies, or both candidates die. Some comments suggested that the death problem was an occasion for the exercise of discretion by electors (including one suggestion that a 2/3 vote of the electors—presumably in any given state—could relieve electors of their pledges). I have serious doubts about that approach on a variety of grounds. Electors are not chosen because of their good judgment. Indeed, the vast majority of voters have no idea whom they are choosing as electors. In addition, short of the use of parties, there is no obvious way that electors in the various states can coordinate their deliberations. To be sure, party processes may be no more transparent, but parties are at least ongoing institutions that can coordinate across state lines, and also can in some sense be held accountable.

It might be argued that the death of a winning candidate might be the occasion for choice of a runner-up. Party choice would presumably not lead to that result, while elector discretion just might. I considered this possibility too remote to justify the otherwise mischievous device of elector discretion.