

MEMORANDUM

To: NCCUSL Drafting Committee on Presidential Electors Act
From: Robert Bennett, Reporter

Attached hereto are two versions of a uniform law on the problem of faithless presidential electors—electors who vote for presidential or vice-presidential candidates other than the candidates for those offices of the political party that nominated the electors. The first version (“Version One”) addresses the problem frontally, prohibiting faithless votes and then directing the relevant state officers to submit a full complement of faithful votes, even if one or more electors have attempted to vote faithlessly in violation of the state prohibition. The second (“Version Two”) addresses the problem somewhat more indirectly, requiring electors to sign a pledge to vote faithfully, and then, should any electors attempt to violate the pledge they have taken, providing for substitute electors who in turn are required to sign a pledge and vote accordingly until a full set of compliant votes is obtained. After an Introduction that explains the emergence and nature of the problem of faithless electors, this Memorandum discusses various issues that one or both versions addresses. It also seeks to draw attention to some issues not addressed in the two versions.

A. Introduction: Situating the Problem of Faithless Electors.

Each state is entitled to a number of presidential electors equal to its total representation in the United States House of Representatives and in the Senate. (Under the Twenty-Third Amendment, the District of Columbia is entitled to a number of electors basically equal to that of the least populous state, and unless indicated otherwise, references to “states” hereafter will include the District.) Each state legislature (the Congress in the case of the District) is charged under the Constitution with determining the “manner” of choosing the state’s electors.¹ In the early years under the Constitution, states employed a variety of choice mechanisms, including direct selection by the legislature itself, but for many years now all states have employed popular elections as their chosen “manner.” Maine and Nebraska each chooses two electors through a statewide vote (“at large”), and the rest through separate vote counts in each congressional district. In all other states the choice is at large from entire slates of electors nominated by political parties, or in some cases by independent candidates for president and vice president. This is colloquially called “winner-take-all.” There is also the seemingly remote possibility that a state will provide for unpledged electors and that a slate of such unpledged electors would win. I will discuss that possibility as well.

Under the Constitution, the Congress has the authority to set the time for this selection process, and it has designated what we all know as “election day” in early November. As a formal matter the president and vice-president are then chosen by votes

¹ The basic constitutional provisions are now found in Article II, § 1, cls. 2 & 4, and in the Twelfth Amendment.

of these electors conducted separately in each state on a date also designated by Congress and which is constitutionally required to be “the same throughout the United States.” These meetings are statutorily set for mid-December. The electoral votes are then counted in a joint meeting of the (newly installed) House and Senate in early January, presided over by the president of the Senate, who is the outgoing vice-president of the United States.

These formalities can easily escape attention, however, since in most states the names of the candidates for elector do not even appear on the election day ballot.² Indeed, in many states the ballot contains no mention of a role for electors at all.³ Instead, the names of candidates for president and vice president appear on the ballots, accompanied by political party designation. Votes for these candidates are then turned by state law into votes for electors.⁴ Even where ballots do make some mention of electors, the names of presidential and vice-presidential candidates appear and are typically given greater prominence. To all appearances voters are thus casting ballots directly for presidential and vice-presidential candidates. That is surely the working assumption of the overwhelming preponderance of the voters in the country, even if some of them—perhaps even many—appreciate that the eventual winner is determined by the electoral vote count, which they easily come to appreciate is determined on a state-by-state basis by the popular vote for presidential and vice-presidential candidates (or district-by-district for some of the electors from Maine and Nebraska).

The reason for this dissonance between appearances and formalities is that presidential electors were originally conceived of as independent decisionmakers who would come to the state meetings to engage in genuine discussion and debate about who in the nation would make the best president. It was widely assumed that George Washington would be chosen as the first holder of the office, and that thereafter the electors would exercise discretion in debating and voting in the disconnected state meetings, quite often scattering votes among a variety of candidates. If this had not been the working assumption, there would have been no apparent reason to create the office of elector in the first place. Indeed, there was focused concern that after the easy Washington choice, electors might be parochial in casting their votes, so the Constitution does not allow a state’s electors to cast both of their votes for inhabitants of their own state.⁵

This vision was confounded quite early by the emergence of two nationwide political parties, the designation by those parties of presidential and vice-presidential candidates, and the parties’ nomination of presidential electors in each state who it was

² See, e.g., Mass. Gen. Laws, ch. 54, § 43.

³ See, e.g., Ala. Code, ch. 17, § 14-32..

⁴ *Id.*

⁵ See U.S. Const. Article II, § 1, cl. 3, Am. XII.

assumed would vote for the parties' presidential and vice-presidential candidates. With party fealty rather than debate and discretionary voting the governing norm at the presidential elector meetings, there could be coordination across state lines—before the meetings—in the voting for candidates for president and vice-president. This was a very different process from what was originally envisaged. And with this different process at work, over time most states concluded that there was no good reason to include the names of elector candidates on the ballots. Indeed including those names might be suggestive of the process of genuine debate and discussion that had become anachronistic. On rare occasion, however, presidential electors broke ranks, casting votes for presidential or vice-presidential candidates other than those associated with the political party that had advanced them for the office of elector. As the process evolved, the phenomenon of “faithless electors” thus came into focus. There has been a scattering of faithless votes over the years, including one in 2000 and one in 2004.

In the contemporary electoral context, faithless votes hold the potential for great mischief, producing a president or vice-president (or both) other than those for whom voters were led to believe they were casting their votes. To date these worst fears have not been realized. Faithless votes have never changed the apparent outcome of the electoral college process. But that may in part be due to the fact that the electoral college outcome is typically not very close. This in turn is due in good part to the prevalence of winner-take-all. State use of winner-take-all means that many electoral votes come in sizeable chunks—at the present time all the way up to 55 for California. And in an environment of sizeable electoral college margins, it would take faithlessness on a large scale to reverse an apparent outcome. The emphasis on party fealty in elector nomination makes that extremely unlikely.

Despite the “chunkiness” of electoral votes, however, there certainly can be close counts. The electoral vote margin in 1876 was one vote, and the margin in 2000 was five votes (four if the faithless District of Columbia elector who had abstained had voted faithfully). In many other elections, entirely plausible reversals of one or a few close states (in popular vote terms) would have led to close—or even tied—electoral vote counts. And close votes might well start coming with greater frequency as technology and increasing campaign sophistication heighten the competitiveness of presidential elections. If there are close electoral college counts, there is ample reason to think that parties and candidates will be tempted to court faithlessness. Indeed, some campaigns have owned up to making such plans. In any given election, the success of such an effort is unlikely, but it would hardly be surprising to find a ferocious dispute some day over the validity of a small number of faithless electoral votes on which an election outcome would turn.

In this setting, a majority of states have passed laws to discourage or forbid faithless electoral college voting.⁶ These laws vary in important ways, however, and the

⁶ A list of thirty states (as of 2004) can be found at the website of the National Conference of State Legislatures. See *The Electoral College, An Overview*, <http://www.ncs.org/programs/legman/elect/ElectoralCollege.htm> (Oct. 27, 2004).

variation could itself be mischievous. To prevail in the electoral college, a candidate must receive a majority of the votes of “appointed” electors. Some states require a pledge of faithfulness, but prescribe no penalty for breaking that pledge;⁷ some forbid faithlessness outright, but again without prescribing a penalty;⁸ some include a penalty, or even make faithlessness criminal;⁹ and still others provide that faithlessness constitutes resignation from the office of elector, with the resulting vacancy to be filled by a designated process, usually by the remaining electors.¹⁰ This variation opens up the possibility for disputes about whether a faithless, but in an important sense “illegitimate,” vote is to be counted, and also whether a faithful vote might be substituted for it. Different conclusions might be reached under different state laws, and there might be further dispute about the consequences of one resolution or another for the number of “appointed” electors—the base across the country for determining the required majority. These various potential sources of discord and confusion argue strongly in favor of a uniform law adopted by every state that would forbid or nullify elector faithlessness and assure that each state submits an electoral vote count that reflects faithful voting.

In considering issues that may arise in fashioning a law forbidding faithless electoral votes, it is also important to recognize some of the contours of existing laws. After the contentious election of 1876, Congress passed the Electoral Count Act, which governs the counting process in the joint meeting of the two houses of Congress. There had also been earlier federal law, and the federal provisions are now gathered in 3 U.S.C. §§ 1-18. In addition to providing the date for choice of electors (section 7), some important federal provisions are the following: section 4 allows states to “provide for the filling of . . . [elector] vacancies” at the meeting where electoral votes are cast; section 6 imposes a “duty” on “the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such state . . . to communicate by registered mail to [various officials, including the electors] . . . a certificate of . . . ascertainment of the electors appointed,” which is also to include popular vote counts, from which nationwide popular vote totals for presidential and vice-presidential candidates are calculated; section 6 also enjoins the state executive to notify officials with a “certificate of . . . determination” after a final state resolution of any “controversy or contest concerning the appointment of all or any of the electors”; section 9 instructs the electors to prepare and sign “certificates of all the votes given by them,” (known as “certificates of vote”) and to “annex to each of the certificates one of the lists of the electors which shall have been furnished to them by direction of the executive” (the “certificates of ascertainment”); sections 9, 10 and 11 instruct the electors to sign and

⁷ See, e.g., Mass. Gen. Laws, ch. 54, § 78A.

⁸ See, e.g., Colo. Rev. Stat. Title I, § 4-304(5).

⁹ See, e.g., New Mexico Stat., Title I, § 15-9B.

¹⁰ See, e.g., N.C. Gen. Stat., ch. 163, § 212. North Carolina also provides criminal penalties for faithlessness. See *id.*

send off those certificates of vote; and a long and tortured section 15 provides for disqualifying electoral votes and then crucially for choosing among competing slates, providing that when the two houses voting separately cannot agree “the votes of the electors whose appointment shall have been certified by the executive of the State . . . shall be counted.”

In addition to these federal provisions state laws govern important parts of the process, albeit in varying ways. In addition to the winner-take-all provisions and the Maine and Nebraska variants, these state laws provide for the slating of electors by political parties, for the election process that yields the presidential electors, for processes to resolve controversies about winners, for the meetings of electors, and for a variety of other things like compensation for electors. Among the provisions that might touch fairly directly on the faithless elector problem (in addition to those that forbid or discourage faithless voting) are those providing for secret or open balloting at the elector meeting,¹¹ for filling vacancies in the office of elector,¹² for dealing with death or disability of presidential or vice-presidential candidates,¹³ for gubernatorial fulfillment of duties to communicate about winning electors, and about resolution of controversies about those winners (sometimes simply incorporating the requirements of federal law),¹⁴ for elector certification and communication about their votes,¹⁵ and for the assignment of communication and other duties to specified state officers (like the Secretary of State).¹⁶

With this background, I turn to discussion of issues that are posed in fashioning a uniform law.

B. *Constitutionality.*

¹¹ Colorado, for instance, provides for an “open ballot,” Colo. Rev. Stat., Title I, § 4-304(1), while California and Wisconsin in contrast say simply that electors are to “vote by ballot,” tracking the constitutional language, and suggesting secrecy. California Elections Code, § 6906; Wisc. Statutes, § 7.75(2); U.S. Const., Am. XII. It appears that the elector voting in 2004 in Minnesota was secret, *see* Robert W. Bennett, *Taming the Electoral College* 224 n.38 (Stanford University Press 2006), though the Minnesota statute now provides for a “written public ballot.” Minn. Stat. § 208.08.

¹² *See, e.g.*, Colo. Rev. Stat., Title I, § 4-304(1); Ill. Election Code, § 21-1(e).

¹³ *See, e.g.*, Wisc. Statutes, § 7.75(2).

¹⁴ *See, e.g.*, Me. Rev. Stat., Tit. 21-A, § 803.

¹⁵ *See, e.g.*, Me. Rev. Stat., Tit. 21-A, § 805(3).

¹⁶ *See, e.g.*, Colo. Rev. Stat., Title I, § 4-304(2) & (3); N.C. Gen. Stat., ch. 163, § 210.

The most fundamental question is whether a uniform law would be constitutional. A number of commentators argue that elector discretion was originally taken for granted and for that reason must be honored today.¹⁷ This argument, however, ignores the sea change in the presidential selection process that has taken place over the years, and that makes the issue today different from any that was given consideration back then. The present form of presidential ballots gives little—or most often no—hint of a role for electors. If elector discretion is to be protected—and is then exercised—then the vast majority of voters will have been misled by the ballots they confronted, as well as by near-universal working assumptions around the country about the nature of the presidential “election” process. Indeed, the inclusion on the ballot of presidential and vice-presidential candidate names, and of associated political parties, would also be misleading, since they are indicative of commitment of electors, rather than of discretionary choice. Were we to take seriously the argument that elector free choice is constitutionally protected, political party coordination of the entire process before the elector meetings would be called into question. But there is no way that the central political role played by political parties could be reined in to any serious degree, at least no way that would not risk wreaking havoc with the political system as it functions in today’s world. And if courts were somehow to rework the system to capture some long lost vision, the resulting confusion and likely voter disenchantment would risk destabilizing American democracy. Given that context a uniform law on elector discretion would be very likely to survive a constitutional challenge.

The closest Supreme Court precedent is at least suggestive of the constitutionality of a uniform law. In the 1952 decision in *Ray v. Blair*,¹⁸ the State of Alabama allowed political parties to extract pledges of faithfulness from elector candidates. Electors for the Democratic Party were chosen in a primary, and the party refused to certify a candidate for inclusion on the primary ballot who would not take a pledge to be faithful to the party’s national candidates if the elector won a place on the Democratic slate. The recalcitrant candidate challenged the party on the pledge requirement, and won in the Supreme Court of Alabama, on “the sole ground,”—as the United States Supreme Court put it in its decision reversing the Alabama court—that “the . . . requirement restricted the freedom of a federal elector to vote in his Electoral College for his choice of President.”¹⁹ The Supreme Court held that the pledge was constitutionally permissible.

The Court noted that pledge requirements were “not unusual,” and that “political parties in the modern sense were not born with the Republic,” but rather “were created by necessity, by the need to organize the rapidly increasing population, scattered over our Land.” In a footnote, the Court characterized the pledge requirement as “reasonably related to a legitimate legislative objective—namely to protect the party system by

¹⁷ See, e.g., Beverly J. Ross & William Josephson, *The Electoral College and the Popular Vote*, XII J.L. & Pol. 665 (1996).

¹⁸ 343 U.S. 214 (1952).

¹⁹ 343 U.S. at 215.

protecting a party from a fraudulent invasion by candidates who will not support the party.” It invoked the lesson of history “that the electors were expected to support the party nominees,” and that doing so was “the longstanding practice.” It saw a “state’s or a political party’s exclusion of candidates from a party primary because they will not pledge . . . as an exercise of the state’s right to appoint electors in such manner, subject to possible constitutional limitations, as it may choose.” It mentioned the large number of states (though there are even more now!) that “do not print the names of the candidates for electors on the general election ballot,” allowing instead “a vote for the presidential candidate of the national conventions to be counted as a vote for his party’s nominees for the electoral college.” As the Court put it, “[t]his long-continued practical interpretation of the constitutional propriety of an implied or oral pledge of his ballot by a candidate for elector as to his vote in the electoral college weighs heavily in considering the constitutionality of a pledge, such as the one required here . . .” Reiterating the point, the Court saw no inconsistency between the Twelfth Amendment’s provision for elector voting by “ballot” and “an elector’s announcing his choice beforehand, pledging himself.” And in a footnote, the Court approvingly quoted this pointed analysis:

Electors . . . have not answered the design of their institution. They are not the independent body and superior characters which they were intended to be. They are not left to the exercise of their own judgment: on the contrary, they give their vote, or bind themselves to give it, according to the will of their constituents. They have degenerated into mere agents, in a case which requires no agency, and where the agent must be useless, if he is faithful, and dangerous, if he is not.²⁰

All this language provides strong arguing points for the constitutionality of a flat prohibition of faithless electoral voting.

Toward the end of its opinion, however, the Court did leave open the possibility that the pledge would be “legally unenforceable, because violative of an assumed constitutional freedom of the elector.”²¹ And there was a dissent by Justice Jackson for himself and Justice Douglas, which, while acknowledging that the original scheme for the electoral college “miscarried,” insisted that “[a] political practice which has its origin in custom must rely upon custom for its sanction.” Notably, however, the dissent seems to have believed that the pledge at least purportedly brought with it “a legal obligation,” presumably to vote as pledged, a step that the majority held back from expressing quite so explicitly.²²

²⁰ See 343 U.S. at 220-21, 226-28.

²¹ 343 U.S. at 230.

²² 343 U.S. at 231-33. In the *Steel Seizure* case decided the same year, Justice Jackson struck a rather different note that might be thought to be instructive here. He cautioned that “[j]ust what our forefathers did envision, or would have envisioned had they foreseen

Neither the *Blair* decision nor the powerful functional arguments in favor of forbidding faithless electoral votes eliminates all constitutional doubt about such laws. And it should be noted that faithless votes have always been counted as cast in the joint meeting of the two houses of Congress that is charged with conducting the count. The Electoral Count Act’s provisions for resolving disputes about electoral votes at the joint meeting counting session put emphasis on whether the votes were “regularly given.”²³ In 1969, a challenge was made on the ground of irregularity to a faithless vote transmitted to the counting session from North Carolina. In counting the vote (albeit over the dissenting votes of substantial minorities in each house—the two houses vote separately), the meeting could be said to have found that the faithless vote was “regularly given.” In addition, at least one other faithless vote (from Oklahoma in the 1960 election) that was counted was cast in the face of a state law that required faithfulness (though without announced penalty).²⁴ None of the faithless votes that were counted, however, held the potential to change an apparent electoral college outcome. And what was counted in those cases were votes that had been forwarded by the state, presumably with the governor’s imprimatur. For those reasons, the counting session’s prior decisions to count faithless votes would not necessarily tell us whether a counting session today would count them if they would be decisive for an election outcome. Perhaps even more importantly, the counting session precedents tell us little about how faithful votes that are sent in would be treated, when state law requires the substitution of those faithful votes for any faithless ones. The counting session history should, however, serve to alert us to some other parts of the process that require attention.

C. *Communication About the Identity of A State’s Electors.*

In different ways the federal statute—sometimes reinforced by explicit state requirements—puts pressure on the state’s governor to send a list of the state’s electors before the electors communicate the outcome of their balloting. In addition to the “as soon as practicable” language of 3 U.S.C. §6, some pressure is produced by the so-called “safe harbor” provision of 3 U.S.C. § 5 that played a role in the litigation surrounding the 2000 election. Under Section 5, a “final determination of any controversy or contest concerning the appointment . . . of . . . electors” is to be “conclusive so far as the ascertainment of . . . electors” is concerned, if that determination has been “made at least six days before the time fixed for the meeting of the electors.” At the same time, both federal and state statutes recognize the possibility of vacancies in the post of elector and for the designation of substitutes to fill those vacancies. These vacancies can occur for a

modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.” And he acknowledged that the Court had to “indulge some latitude of interpretation for changing times.” *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 634, 640 (1952) (Jackson, J., concurring),

²³ 3 U.S.C. § 15.

²⁴ See Bennett, *supra* note 11, at 229 n.17.

variety of reasons, including in some states provisions that attempted faithless voting constitutes resignation from the office of elector. But no provision that I have located provides for gubernatorial correction of any list of the state's electors that had been sent in earlier. This seems to be an unfortunate omission under existing state laws, which, as suggested above, may have made it easier for the joint meeting counting session to have concluded that the faithless 1960 Oklahoma vote was appropriately counted.

For that reason, I have included provisions in both Version One and Version Two for gubernatorial correction of the list of the state's electors when vacancies have been filled for any reason, as well as for inclusion in an initial certificate of ascertainment of an indication that amendment may be necessary if vacancies do occur. For faithless elector purposes, these provisions seem particularly important for Version Two, since it employs the device of resignation and consequent vacancy on account of faithlessness. I do not see any particular reason that states could not provide for such amendment of their certificates of ascertainment.²⁵

C. Filling Vacancies in the Office of Elector.

The existing provisions for filling vacancies in the office of elector usually rely on the remaining electors, though at least one state provides for the initial designation of alternates.²⁶ In the states that rely on the remaining electors, some do it without any specification of procedures, while a number explicitly provide for a majority vote of the electors.²⁷ Again, particularly for Version Two, it seemed advisable to regularize the process. A number of states have as few as three electors, for instance, suggesting the possibility of a 1-1 stalemate if there is a single vacancy. Of course, the identity of any

²⁵ It should perhaps be noted that these provisions for corrected identification of a state's electors may also bear on a choice at the joint meeting counting session between competing claims by slates of electors to have won at the state level. We saw that in Section 15 the Electoral Count Act attaches significance in resolving such disputes to the governor's certification. This does not bear directly on the faithless elector problem, and I see no particular reason to believe that the provisions suggested here would be controversial, if they are presented apart from any particular election dispute. After the 1960 election, Hawaii did submit two different gubernatorially certified designations of electors ("certificates of ascertainment"), although in that case it was two different "governors," the first an acting governor and the second a newly elected one, and a state recount had interceded. This never erupted into a big problem, however, since the electoral vote count across the nation was not close, so that the competition held no potential to change an election outcome. For what it is worth, however, the second—corrected—set of votes was the one that was counted.

²⁶ Minn. Stat. § 208.03.

²⁷ See, e.g., Colo. Rev. Stat. Title I, § 4-304(1) (no mention of process); Me. Rev. Stat., Tit. 21-A, § 804 (majority vote).

substitute is of little substantive moment if faithfulness is required, but as discussed in sections B and C, *supra*, the names of official electors could conceivably become important. Again this is most important for Version Two, but I have included in both versions a process for filling vacancies and providing a final list.

D. Secrecy of Electoral College Voting.

An anonymous voting procedure for the elector balloting could similarly be troublesome for Version Two, where a faithless elector creates a vacancy that must be filled, necessitating the ability to identify the faithless elector. Version Two specifies a procedure for elector voting that is obviously open (though not necessarily to the public) and hence allows the required identification. The mechanisms of Version One do not depend on identification of a faithless elector, and I have not included in it any provision that would prevent a secret ballot.

E. Involvement of State Officials.

State laws are highly variable on the involvement in any parts of the process of state officials other than the governor (and electors). Even when no duties are explicitly assigned to state officers, however, it seems virtually certain that assistance is provided in various ways, perhaps most obviously with arrangements for the meeting and then the required communication of the results of the balloting. When duties are assigned to state officers, the favored state officer seems to be the Secretary of State,²⁸ though other officers are mentioned as well.²⁹ In both versions, I have made the Secretary of State the presiding officer at the elector meetings. Building on that role, I have insinuated the Secretary of State into the counting process in Version Two. There does not, however, seem to be any harm that would be worked by making the identification of the specific officer optional with the state. But the possibility that some requirements will have to be completed after the elector meeting has adjourned does make it advisable that someone other than the electors be charged with overseeing the counting, replacement, and communication provided for in Version Two.

F. Adjustment for States That Award Electors by Districts.

Both versions assume that the state awards its electors under a winner-take-all system. Adjustment will be required in the section characterizing winning electors for Maine and Nebraska, or, for that matter, any other state that might adopt districting in the future. The language to accomplish that should not be difficult to compose, but it would

²⁸ See, e.g., N.C. Gen. Stat., ch. 163, § 210 (notification to governor of those elected as electors, and arrangements for elector meeting); Colo. Rev. Stat. Title I, § 4-304(2) & (3) (assistance with meeting arrangements and balloting).

²⁹ See, e.g., Ill. Election Code, Ch. 10, § 5/21-2 (State Board of elections declares winner); Colo. Rev. Stat. Title I, § 4-304(4) (electors can seek advice of Attorney General).

make the provisions pretty turgid, so at this stage I omitted that language in both versions.

G. Unpledged Electors Possibility.

The Mississippi statute adverts to the possibility of unpledged electors, and that they be designated as such on the general election ballot.³⁰ The Mississippi law also specifies the number of signatures necessary for securing a place on the ballot for statewide office.³¹ For party nominees for elector, the statute provides that an entire slate must be nominated but that the names of the elector candidates will not appear on the ballot, while the names of unpledged electors will be listed on the ballot, along with an indication that they are unpledged.³² I do not, however, find any Mississippi requirement that an unpledged candidate for elector be associated with a full slate. Unless there is such a requirement, it is unclear how the winners for Mississippi's allotment of presidential electors would be fleshed out if unpledged electors numbering fewer than a full slate were to run and prevail. Perhaps for that reason, it may be implied that unpledged electors must run as part of a full slate.

In any event, Mississippi appears to be the only state that contemplates the possibility of unpledged electors. That may make it advisable to adjust both versions of the uniform law to deal with the possibility of a winning unpledged slate in Mississippi. To avoid undue complication, I have not at the present stage done that for the either Version One or Version Two.

H. Death or Unavailability of Presidential and Vice Presidential Candidates.

The Twentieth Amendment deals with the possibility of the death of a "president elect," providing that the vice-president elect becomes president. There is some disagreement in the electoral college literature about when a candidate becomes president-elect, but I assume that it happens when the electoral college voting has been completed, even though the votes have not yet been officially counted.³³ Other than the period between electoral college voting and inauguration, however, both state and federal laws basically ignore the possibility of the death of presidential or vice-presidential candidates.

I take the possibility of death before the election as outside the scope of the Committee's concern. But death between election day and the meeting of electors introduces an electoral college dilemma. (Candidates who commanded electoral votes

³⁰ Miss. Code Ann., Title 23, § 15-785.

³¹ Miss. Code Ann., Title 23, § 15-359.

³² Miss. Code Ann., Title 23 § 15-785 (4)..

³³ See Bennett, *supra* note 11, at 239 n.100.

have died in this period, but not ones who had won.³⁴) It might seem that a measure of elector discretion would be appropriate to deal with such a problem. That might be an acceptable approach if the discretion could be strictly confined to such situations, but it does court the possibility that electors might vote for different substitutes, creating confusion and contentiousness. For that reason I have adopted a different approach, reposing authority to provide a substitute candidate for president (or vice-president) in the national political party that had provided the nomination(s) in the first place. With authority assigned to the relevant political party, elector faithfulness to the party decisions can then be required, and that is the approach I have adopted.

A related problem is candidate disability short of death. The Twenty-Fifth Amendment deals with that problem for a sitting president, but I have omitted any provision for that possibility in the period between election day and elector voting on the ground that it would almost surely be highly contentious and get in the way of the faithless elector thrust of the Committee's project.

I. Conclusion.

The most serious concern justifying a uniform state law on elector faithlessness is the possibility that faithless electoral votes could either change a presidential election outcome or produce so much controversy that a decisive—and broadly accepted—outcome was long delayed, or even beyond reach. To foreclose those possibilities, the uniform law should disallow faithless voting *and* assure that faithful votes are substituted for faithless ones. While constitutional doubts about such a uniform law cannot be entirely dismissed, the constitutional emphasis on state authority, existing case law, and powerful functional arguments make it likely that such a law would be upheld. Indeed, the fact that a majority of states already statutorily disapprove of faithlessness fortifies the constitutional argument, as would action by the Commission to recommend a uniform law.

Version One directly requires submission of a complete slate of faithful votes on behalf of a state's electoral college delegation. Version Two builds instead on the Supreme Court's holding in *Blair* by requiring electors to take a state administered³⁵ oath of faithfulness and then uses any violation of that oath as the basis for substituting an elector who will vote faithfully. These differences are incorporated in Sections 2, 4, and 6. Sections 1, 3, and 5 are identical in the two versions.

No attempt is made closely to integrate these provisions into the processes prescribed for highly variable state election laws. Each of the versions assumes that the state laws elsewhere provide for the nomination of slates of electors associated with candidates for president and vice-president, and, if the state so chooses, for slates associated with independent candidates. The seemingly remote possibility of an

³⁴ See Bennett, *supra* note 11, at 118-19.

³⁵ Not party administered as in *Blair* itself.

unpledged slate of electors is simply adverted to in footnotes. Each also assumes that the state general election ballot for choosing the president and vice-president is constructed to allow voter choice among those slates, even if it is state law, rather than the wording on the ballot itself, that makes the vote into a choice of elector slates. No specific language is provided to deal with the practice in Maine and Nebraska at the present time of choosing some electors through a popular vote count in districts rather than in the state as a whole. The two versions also assume that state law elsewhere sets forth a procedure for collecting results, for challenging those results, and for resolving the challenges. They further assume that state statutes either require, or rely upon the Electoral Count Act to require, that the Governor of the state submit to relevant state and federal officials an initial certificate of ascertainment indicating the identity of the state's chosen electors. This would normally be done before the electors meet to cast their votes. And each version also assumes that the state election law elsewhere provides for a meeting of presidential electors, at which the votes of the electors are cast and recorded.

To assure that the uniform law hits its target, however, in addition to faithlessness itself, the following matters are addressed in both versions: i) the Governor reserves the possibility and then makes and transmits any corrections to the list of electors he may have previously submitted that is required by any subsequent vacancies in office of elector; and ii) a substitute for a political party candidate for president or vice--president who dies before the meeting of electors is to be made by the party of the candidate, and any oath or duty of an elector to vote for the candidate is turned into a commitment to vote for the substitute.