SAVE OUR STATES

POLICY MEMORANDUM

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Improving & Modernizing the Electoral College: A Guide for Legislators

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The Electoral College has existed for nearly 240 years, anchoring a state-based process for electing the President of the United States. Throughout its history the Electoral College has undergone substantial changes, both at the federal level and in the states. To cite just three major changes:

- Passage of the 12th Amendment to specify that presidential electors cast distinct ballots for the offices of president and vice president.
- The rapid and widespread acceptance of slates of elector candidates associated with political parties and pledged to support their party's nominee.
- The common adoption of both direct election of presidential electors and the use of "winner take all" to allocate a state's presidential electors.

Today many activists and scholars from a variety of perspectives urge more changes, some bold and controversial and others mundane and unexceptional. This memo explains several options that state legislators should consider to improve and modernize the presidential election process.

This memo does not discuss efforts to either abolish the Electoral College through a Constitutional Amendment or nullify its state-based process through adoption of the National Popular Vote interstate compact. It does assume that such efforts are unlikely to be successful in the foreseeable future, and invites supporters of such efforts to consider improving the operation of the Electoral College so long as it continues to exist and operate as a state-based process.

Reforms to consider: *Dealing with late nominations and withdrawals*

In the Summer of 2024 the Democratic Party faced the possibility that its nominees would not appear on the ballot in two states, Alabama and Ohio, due to the timing of the Democratic National Convention. Both major parties officially nominate presidential and vice-presidential candidates at their national conventions. Prior to the convention, the parties typically have a "presumptive nominee" for president, that is, a candidate with enough publicly pledged delegates to win the nomination when the roll call vote of state delegations is taken.[1] But prior to that roll call there is no officially designated nominee, and the

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presumptive vice-presidential nominee of a non-incumbent ticket is typically announced shortly before or even during the convention.

The names of the officially nominated candidates are then submitted to each state. Typically, a state party certifies to state election officials the names of the presidential and vice-presidential candidates nominated at their national convention, as well as the names of the party's individual nominees for presidential elector. Every state has a specific date by which the names of the presidential, vice-presidential, and presidential elector nominees must be submitted.

A problem arises if the date by which the candidate names must be submitted is *before* the national convention votes on its nominees. In 2024, Ohio required parties to certify their nominees by August 7, and Alabama's deadline was August 15. The Democratic National Convention was not scheduled to begin until August 19 (both the Alabama and Ohio deadlines were known well in advance of the DNC's decision to schedule its convention). The same issue has cropped up in previous cycles when parties have held conventions in late August or even early September. Many people believe that a later convention gives a party's candidates an advantage, making it likely that parties will continue to push for later conventions.

Fortunately the issue was resolved in past cases by states extending their deadlines for certifying the nominees. But without cooperative and forgiving state legislatures, it remains a real possibility that a major party presidential ticket might be excluded from some state's ballot due to a late convention (or at least that litigation would be required to deal with the problem).

It's worth noting that a similar scenario could occur in the event of a late withdrawal or incapacity *after* someone is nominated. Senator Thomas Eagleton of Missouri received the 1972 Democratic Party nomination for vice-president at the party's convention in mid-July but withdrew later that month after it was revealed that he had spent time in a psychiatric facility. The party's nominee for president, George McGovern, announced several days later that Sargent Shriver would be his running mate, but the Democratic National Committee did not convene and officially nominate him until August 8. More recently, in July 2024, the presumptive Democratic nominee for president withdrew his candidacy following a poor debate performance and concerns about his cognitive abilities. While these events occurred before any state's current deadline, it's easy to see the problem if either had occurred just a month or two later and left a party without an officially-nominated candidate for president or vice president before state deadlines.

States should enact legislation to avoid a situation where a party with automatic ballot access is unable to certify its nominees by the statutory deadline. Here the Electoral College's two-step process, where voters are actually voting for presidential electors pledged to their party's nominees, facilitates the easiest solution. A simple legislative fix is to allow a ballot line labeled "<_____ Party> Nominees for Presidential Elector." This or similar language would ensure that, although the name of one or both of a party's nominees don't appear on the ballot, voters still have the opportunity to vote for elector candidates pledged to the ticket of their preferred party with minimal impact on the election itself.

Reforms to consider: ***Alternatives to 'winner-take-all'***

Under the 'Winner-Take-All' (WTA) method of allocating presidential electors, the candidate winning the most votes in a state (whether a majority or plurality) receives all of the state's electoral vote.[2] At present, 48 states and the District of Columbia use WTA, while Maine and Nebraska use what is commonly known as the Congressional District method.

There is genuine value in using WTA – it allows a state to maximize its power in the Electoral College, ensuring that every electoral vote is cast for the candidate favored by at least a plurality of its voters. But there is also a downside – many states are uncompetitive in presidential (and other) elections and therefore receive less attention from campaigns. The WTA method may also not reflect the full range of views and communities within a state.

State legislators can consider alternatives to WTA that may better serve their own state. Among the options that could be studied and proposed:

- Congressional District – one elector is elected by the people of each congressional district, the remaining two electors go to the statewide winner, as is currently the law in Maine and Nebraska.
- Congressional District + Appointment – one elector is elected by the people of each congressional district, while the remaining two electors are appointed by some other official or body, such as the Governor or State Legislature.
- Elector Districts – the state is divided into as many districts as it has electors, and one elector is elected from each district.
- Proportional – electors are allocated according to each candidate's share of the statewide popular vote.
- Threshold – the statewide winner receives all electoral votes unless the candidate receiving the second-highest number of popular votes exceeds a specific threshold (such as the historical average of the second-place candidate over the last several elections), in which case the second-place candidate receives a set number of electoral votes.
- Mixed-Ballot – voters are allowed to vote for individual electors pledged to different candidates (this was common in many states through the 1960s).

As is the case with WTA, each of these methods comes with its own advantages and disadvantages, and some methods might be impractical or irrelevant in certain states. For example, the Congressional District method does not work in states with only a single member of the U.S. House of Representatives, and a proportional system is probably more suited to states with a large number of electors. But states that do not currently receive significant attention during presidential campaigns may consider these and other options that would incentivize candidates to devote resources to winning at least some of their electoral votes.

Reforms to consider: *Clarify 'faithless elector' laws*

Individuals elected to serve as presidential electors are generally expected to vote for their party's nominees, and overwhelmingly have done so throughout history. In some cases, and for a variety of reasons, electors have voted for someone else. In response, many states have passed "Faithless Elector" laws that ostensibly require presidential electors to vote for their party's nominee. In 2019, the U.S. Supreme Court upheld the constitutionality of Faithless Elector laws.

One problem with many of these state laws is that it is unclear what happens if a nominee for president or vice president dies or is incapacitated before the Electoral College meets. Twice in U.S. history a party's nominee for president or vice president has died either shortly prior to or after Election Day but before the meeting of the Electoral College.

In 1872, Horace Greeley was the nominee of the newly-formed Liberal Republican Party and ran against incumbent president Ulysses S. Grant. He was also endorsed by the Democratic Party, which feared

splitting the anti-Grant vote if it nominated its own candidate. Greeley lost to Grant, winning just six states worth sixty-six electors. Greeley subsequently died in late November, and when the Electoral College met, sixty-three electors pledged to Greeley split their votes between four alternatives (including Greeley's vice presidential running mate) while three still cast their vote for Greeley. When Congress met to count electoral votes and certify the outcome, the electoral votes for Greeley were rejected.

Forty years later President William Taft lost re-election in 1912, winning only eight electoral votes from two states. His running mate, incumbent vice president James Sherman, died less than a week before Election Day, too late to nominate a replacement or put a new name on the ballot. When the Electoral College met, all eight Taft/Sherman electors followed the directions of the Republican National Committee and cast their vice-presidential ballots for Nicholas Butler, the president of Columbia University.

In both cases the deceased nominee was not on the winning ticket and the votes of electors pledged to them did not have any effect on the outcome. But there is an obvious danger in having a Faithless Elector law that can be interpreted as requiring an elector to cast a vote for a person that has died or is otherwise unable to serve. States with Faithless Elector laws should ensure their law does not require electors to cast a vote for a deceased or otherwise incapacitated candidate, either by releasing them entirely from their pledge or by directing them to vote for a substitute candidate as determined by the national party that originally nominated the deceased candidate.

Reforms to consider: *Update recount laws*

The Electoral Count Reform Act of 2022 (ECRA) establishes a hard deadline six days before the Electoral College meets for states to determine their presidential electors. If there is a dispute or a state hasn't appointed electors by the deadline, ECRA also establishes a process with a special three-judge panel that ensures presidential electors can be appointed after the deadline but before the Electoral College meets.

One of the scenarios in which a state might be at risk of missing the ECRA deadline would be a recount (or election challenge) that extends beyond the deadline. States facing this scenario would have a number of options:

- Submit their Certificate of Ascertainment by the deadline and appoint electors using the *initial* count, with the expectation that if the recount produces a different outcome the three-judge panel will order the appointment of electors in line with the recount results
- Submit their Certificate of Ascertainment by the deadline and appoint electors using any *updated* (but still incomplete or uncertified) numbers reported through the recount, again with the expectation that if the final recount numbers lead to a different outcome the three-judge panel will order the appointment of electors in line with the recount results
- Do not submit a Certificate of Ascertainment by the deadline, with the expectation that the three-judge panel will order the appointment of electors in line with the recount results once they are available and finalized (or based on some other determination, including initial or incomplete results, if the recount is not finished before the Electoral College meets)

Michigan, for example, has established by statute what it will do if a recount extends beyond the new deadline. If this happens, the Governor of Michigan is required to submit by the deadline a Certificate of Ascertainment appointing presidential electors based on the initial count. If the recount changes the outcome, candidates may petition the state Supreme Court to order the Governor to issue a new Certificate appointing electors according to the recount results, or the Governor may issue a new Certificate if

the Supreme Court doesn't act in time.

There is not a single correct solution, but states should determine ahead of time in statute what will happen. This ensures that, if a state does find itself conducting a recount that is likely to extend beyond the ECRA deadline, it is less likely that decisions about what to do will appear motivated by partisan or other illegitimate motives.

Reforms to consider: *Conforming to the Electoral Count Reform Act*

Recount laws are not the only thing that states should look at to ensure their statutes conform to the Electoral Count Reform Act (ECRA). Some of key changes made by Congress that may require state legislative attention are:

- Allowing states to extend voting beyond Election Day in response to "…force majeure events that are extraordinary and catastrophic…" such as a natural disaster.
- The date of the meeting of electors was moved back one day to the first Tuesday after the second Wednesday in December.
- The governor of each state (unless another officer is designated by state law) is required to certify the names of their appointed electors six days prior to the meeting of the electors.

After passage of ECRA as part of a larger legislative package in late 2022, several states revised their statutes to conform to these new provisions. For example, several states amended their statutes to move the day presidential electors meet from the first Monday to the first Tuesday after the second Wednesday of December.

States that have yet to update their statutes to conform to ECRA should conduct a thorough review and make the needed changes. In particular, legislators need to look at the following issues:

- Confirm that the governor is specified in statute as the "executive" responsible for certifying the appointment of electors, or that a different officer is explicitly named as the responsible person.
- Ensure that the statutory date for the meeting of electors is the first *Tuesday* after the second Wednesday in December.
- Ensure that any statutory provisions describing the Certificate of Ascertainment appointing presidential electors conforms to ECRA's requirements, in particular that it include the state seal and a security feature.
- Consider defining and specifying the legitimate responses to an "extraordinary and catastrophic" event that disrupts Election Day.
- Review timelines for counting, recounting, auditing, certifying, and challenging election results to ensure that the entire process of appointing presidential electors will be completed by, preferably, the deadline six days before the Electoral College meets, or at least by the day before the Electoral College meets.

Conclusion

The Electoral College has elected the President of the United States sixty times over the past 237 years. Over that time, states have made numerous changes, some modest and others significant, related to their appointment of electors. There is no reason states should not continue to adjust, experiment with, and improve the methods they use to voice their choice for president. This memo has identified several

areas where state lawmakers might consider updates or reforms.

Some of these areas are modest, such as making sure state laws align with federal law. Others are precautionary, trying to ensure that unusual situations, such as the death of a candidate shortly before or after election day, does not result in unnecessary confusion and chaos. Some are quite substantial, such as changing the method of electing presidential electors from Winner-Take-All to some other method.

This memo is intended as a starting point for considering changes states could make to update or improve their laws and processes around the election of presidential electors. The team at Save Our States is happy to be a resource for such discussions, as well as connecting legislators and staff with other experts that can provide in-depth information and analysis. Please feel free to reach out to either Trent England, our executive director (trent@saveourstates.com) or Sean Parnell, our senior fellow (sean@saveourstates.com) if you are interested in additional information or would like other assistance.

ENDNOTES

[1] For additional information on the role of delegates and the process by which parties officially nominate their presidential and vice presidential candidates, see: *Unbound: The Conscience of a Republican Delegate* by Curly Haugland and Sean Parnell.

[2] Setting aside the matter of "faithless electors."