Wisconsin's Role in Electing the President

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WISCONSIN'S ROLE IN ELECTING THE PRESIDENT

SUMMARY

On November 2, 2004, over 4 million Wisconsin voters will have the opportunity to participate in electing our nation's president. If past races are an indication, well over 2 million Wisconsinites will vote in the presidential election. This bulletin discusses the various steps in the selection of the U.S. President, including the presidential preference primaries and party caucuses, nomination of the candidates at the national party conventions, the November elections, and the Electoral College balloting. It specifically focuses on Wisconsin's role in electing the President.

I. INTRODUCTION

The presidential election of 2000 was one of the most controversial in American history. The improbable chain of events surrounding that election − the on-again off-again projections by television commentators, the drama of the recounts in Florida, the decisions of the Supreme Courts of Florida and the United States, and the possibility of faithless electors or the House of Representatives deciding the election − have created a renewed interest in the mechanics of presidential elections. How does the United States elect its President? And what is Wisconsin's role in that process?

Reform Efforts Since 2000. The unease caused by the close finish in the 2000 election caused many commentators to anticipate major reforms in the election process, such as the abolition or modification of the electoral college. For the most part, this has not occurred. Most reforms during the last four years have been accomplished at the state or local level, and have involved more technical issues, such as the elimination of the much-maligned "butterfly" and "punch-card" ballots. The only notable reform at the federal level has been the passage of Public Law 107-252, the Help America Vote Act, which provided funds for local governments to eliminate punch-card ballots and lever-operated voting machines. The act also created an election assistance commission to help states comply with the provisions of the act. The commission has been appointed, but is not yet fully staffed. The act also made provisions for voting system standards and required each state to create and maintain a statewide voter registration system for federal elections.

In Wisconsin, the major reform took place in November 2000, before the disputed election was resolved. The Elections Board banned the use of punch-card ballots, which were the source of the controversy in Florida, and were still being used in three Wisconsin counties. 2001 Wisconsin Act 16, the budget act for 2001-02, implemented that ruling by repealing laws referring to punch-card voting and providing transitional aids for municipalities replacing the punch-card system. 2003 Wisconsin Act 24 advanced the date of Wisconsin's presidential preference primary from the first Tuesday in April to the 3rd Tuesday in February. Beyond these

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changes, the system for electing the president, both at the national level and in Wisconsin, is essentially the same as it was in 2000.

The Election Process. The selection of a U.S. President involves a complicated and lengthy process, covering almost a full year of voting hurdles. The steps a successful candidate must complete can be summarized briefly: 1) win delegates to the nominating convention through the state primaries and party caucuses, 2) win the party's nomination through a majority vote of the delegates at the convention, 3) win the most Electoral College votes in as many states as possible in the November election, and 4) win 270 or more votes in the Electoral College. A successful candidate is not required to receive a majority of the popular votes cast. However, as this bulletin describes, the process is not as straightforward as it appears to be.

KEY WISCONSIN DATES IN THE 2004 PRESIDENTIAL ELECTION

Dates	Event	How Dates Set	Process
November 17, 2003	Certification for Primary	Wis. Stats., Sec. 8.12	Recognized Wisconsin parties certify their intention to participate in presidential preference primary.
December 9, 2003	Ballot Selection	Wis. Stats., Sec. 8.12	Representatives of participating parties select names to appear on primary ballot.
February 17, 2004	Presidential Preference Primary	Wis. Stats., Secs. 5.02 (22), 8.12	All Wisconsin voters eligible to vote in open primary to express presidential preference.
July 26-29, 2004	Democratic National Convention	By Party (variable)	Party nominates its candidates for President and Vice President.
August 30-September 2, 2004	Republican National Convention	By Party (variable)	Party nominates its candidates for President and Vice President.
September 7, 2004	Nomination of Minor Party and Independent Candidates and Elector Selection	Wis. Stats., Sec. 8.20	Minor party and independent candidates for President and Vice President file nomination papers and slates of electors.
October 5, 2004	Elector Selection for Recognized Wisconsin Parties	Wis. Stats., Sec. 8.18	Recognized Wisconsin parties nominate slates for Wisconsin presidential electors.
November 2, 2004	Election of Presidential Electors	U.S. Code, Title 3, Secs. 1, 3	Wisconsin voters elect 10 presidential electors as part of national election.
December 13, 2004	Electoral College Vote	U.S. Code, Title 3, Sec. 7	Wisconsin electors meet at State Capitol to vote separately for President and Vice President.
January 6, 2005	Official Count of Electoral Votes	U.S. Code, Title 3, Sec. 15	Electoral votes counted and announced before joint session of U.S. Congress.
January 20, 2005	Inauguration	U.S. Constitution, Twentieth Amendment	Newly elected President and Vice President take office.

II. SELECTION OF DELEGATES TO THE NOMINATING CONVENTION

The presidential nomination process begins with the selection of delegates to the national party conventions through state presidential primary elections, party caucuses, or party conventions. The specific method varies from state to state according to national and state party rules and state laws. Dates for the primaries are usually determined by the state legislatures, whereas caucuses and conventions are scheduled by the parties. In recent years, the presidential primary has become the predominant vehicle by which the parties select their convention delegates. In 2004, 36 states will hold presidential preference primary elections and those elections will select over 75% of the delegates. (See the accompanying appendix for a state-by-state description.)

Wisconsin's Presidential Preference Primary. Wisconsin pioneered the presidential primary for selecting delegates to national party conventions in the early 1900s. The Wisconsin Legislature enacted the nation's first primary law in 1903, requiring that all candidates for partisan office be nominated by voters, not handpicked in political conventions. However, Florida became the first state to use the presidential primary in 1904, because Wisconsin's law required approval in a statutory referendum in November 1904 before it took effect.

Wisconsin was the first state to mandate a presidential primary. Chapter 369, Laws of 1905, specifically required that Wisconsin delegates to the national political party conventions be elected in primaries. Under this law, prospective delegates stated no preference for a presidential candidate, either on their nomination papers or the ballot. Thus, the voter cast a ballot for the individual delegate, not for a preferred presidential candidate. Chapter 300, Laws of 1911 provided that the names of candidates be listed along with delegates to give voters a chance to express their preference. Many legislative changes have been made to the primary law since its initial adoption, including Chapter 90, Laws of 1967, which eliminated the names of proposed convention delegates from the primary ballots. Current procedure is to list only the names of prospective presidential candidates.

Official preparation for the Wisconsin presidential preference primary begins when an eligible recognized political party certifies to the state Elections Board that it plans to participate in the election. (The deadline for certification is the third Tuesday in November preceding the presidential election.) Eligibility depends on demonstrated polling strength in the most recent gubernatorial election. The party's candidate for governor must have received at least 10% of the vote in that election in order for the party to appear on the primary ballot. Each of the political parties eligible − the Democratic, the Republican and the Libertarian Parties − have certified they will participate in the February 2004 balloting. (Smaller parties may also petition to appear on the printed ballot for the presidential primary, but none has petitioned for the 2004 ballot.)

On the second Tuesday in December, officials of those parties certified for the presidential primary meet as a committee at the State Capitol to determine and certify to the Elections Board which of their presidential contenders will appear on the printed ballot.

Section 8.12 (1) (b), Wisconsin Statutes, states:

> The committee shall place the names of all candidates of political parties whose candidacy is generally advocated or recognized in the national news media throughout the United States on the ballot, and may, in addition, place the names of other candidates on the ballot. The committee shall have sole discretion to determine that a candidacy

is generally advocated or recognized in the national news media throughout the United States.

Section 8.12 (1) (c) does provide, however, that a person or committee acting on behalf of the person "may submit to the [elections] board a formal petition to have the person's name appear on the presidential preference ballot." Lyndon LaRouche, Jr., has been certified by the board under this process to appear on the 2004 ballot, as he was in 2000. Wisconsin's presidential primary election will take place on February 17, 2004. The candidates certified to appear on Wisconsin's 2004 presidential primary ballot are:

Democrats – Lyndon H. LaRouche, Jr.**, John Edwards, Howard Dean, John F. Kerry, Wesley K. Clark*, Al Sharpton, Dick Gephardt*, Carol Moseley Braun*, Dennis Kucinich, Joe Lieberman*;

Republicans – George W. Bush;

Libertarians – Michael Badnarik, Gary Nolan

* Indicates candidate has publicly withdrawn but has not filed an official disclaimer to date.

** Certified by the Elections Board on petition of the candidate.

In 1996, Wisconsin's primary was moved from its traditional April date, coinciding with the nonpartisan general election for local offices, to the middle of March to participate in "Big Ten Tuesday" in which Illinois, Michigan, Ohio, and Wisconsin held their primaries on the same day. In 2000, the primary moved back to its traditional April date. 2003 Wisconsin Act 24 moved the primary once again, this time to mid-February, to coincide with the nonpartisan primary election for local offices.

Wisconsin conducts an "open primary", which means that, unlike most other states, Wisconsin voters do not have to declare a party affiliation in order to participate in the primary election. The voter is given the ballots of all parties and must decide which ballot to cast in the secrecy of the voting booth. There are safeguards to prevent the voter from marking more than one ballot.

After the balloting, state party organizations may decide whether and how they want to translate the results of the open primary into delegate selection for the national nominating conventions.

Primary Scheduling. The process for selecting presidential nominees is not only complex, in that each state sets its own rules for choosing its delegates to the national convention, but the process has caused contention between the states because of scheduling. More and more states are trying to schedule their primaries in the first month or two of the election year, a phenomenon known as "frontloading". This has raised barriers for almost all individuals except the well-financed or best-connected candidates. Wisconsin has become a player in the frontloading game by moving its primary from April to February. Because of frontloading, in 2004 over 75% of the delegates to the Republican and Democratic convention would be chosen by the Wisconsin primary's traditional date of April 6. Because Wisconsin moved its primary to February 17, the state's voters will face a situation in which fewer than 20% of the major party delegates will have been committed to a presidential candidate. In addition, Wisconsin's primary is the only one scheduled on that date, which may focus more national interest on the outcome than usual.

Numerous suggestions have been made to improve the nomination system, including: 1) holding a national primary; 2) having four regional primaries – East, West, North, and South

− beginning in March and ending in June of the election year with the order rotated every four years; and 3) conducting primaries and caucuses on five Tuesdays at 2-week intervals in May and June with each state being assigned a given Tuesday according to population.

III. THE NATIONAL NOMINATING CONVENTIONS

The first stage of the presidential election concludes when the delegates from each party meet at their respective national conventions to nominate the candidates for President and Vice President. In 2004, the Democrats will convene July 26-29 in Boston, and the Republicans will meet August 30 to September 2 in New York.

The 2004 Democratic National Convention will have 4,322 delegates (compared to 4,366 in 2000), and the Republican National Convention will have 2,509 (compared to 2,066 in 2000). Both conventions include delegations from each state, the District of Columbia, Puerto Rico, the U.S. territories, and some miscellaneous slots.

The two parties differ in the method of allocating delegates to the states. The Democrats determine the number of delegates a state may send on the basis of a state's showing in the past three presidential elections and the state's representation in the Electoral College. They also award delegates to states that have a Democratic governor, U.S. Senators and Representatives. The Republicans allow each state 10 delegates plus 3 for each seat the state has in the U.S. House of Representatives. More delegates are awarded to states that supported the GOP candidate for president in 2000, and to states with Republican governors, U.S. Senators, at least half the U.S. House delegation, and GOP control of the state legislature.

Wisconsin's Democratic Delegates. A total of 87 Wisconsin Democratic delegates are slated to attend the national convention, along with eight district alternates and 5 at-large alternates. The Wisconsin delegation is selected, in part, through congressional district caucuses following the presidential primary. Delegates from the eight congressional districts and statewide at-large delegates are chosen on the basis of proportional representation, related to the popular vote received in the district or statewide in the presidential preference primary. By rule of the state and national parties, no candidate who receives less than 15% of the vote in a congressional district may be awarded any delegates in that district. Similarly, no candidate receiving less than 15% statewide may be awarded any at-large delegates. Other delegates, such as elected officials, are chosen by the party. The delegation will include 47 district delegates pledged to candidates based on their performance in the presidential preference primary in each district, and 16 at-large delegates pledged to candidates based on their performance in the whole state. Nine delegates are state party leaders and elected officials pledged to candidates in proportion to their performance in the primary statewide. The remaining 15 delegates are state party leaders and elected officials not pledged to any presidential candidate. National party rules require "equal division" of the delegation between men and women. The party also recommends that diversity goals for the state delegation of 6 African Americans, 2 Asians or Pacific Islanders, 4 Hispanics and 1 Native American be reflected in the makeup of the delegation.

Wisconsin's Republican Delegates. The Wisconsin Republicans will choose 40 delegates to the 2004 national convention. The GOP uses a winner-take-all rather than a proportional system. The candidate receiving a plurality in any congressional district is entitled to all the delegates from that district. Similarly, the statewide winner is entitled to all the at-large

delegates. The Wisconsin Republican convention delegation consists of 24 district delegates (three from each district), thirteen at-large delegates, and three at-large bonus delegates awarded on the following criteria: GOP controlling at least one-half of the state's U.S. House delegation (1); GOP controlling any house of the state legislature (1); and GOP controlling both houses of the state legislature (1). In 2004, the Republicans are providing a substantial delegate bonus to states carried by George W. Bush in 2000 based on a percentage of the electoral votes provided by the state. Wisconsin does not qualify for this bonus. In addition, the Wisconsin delegation includes 37 alternates. National party rules encourage, but do not require, gender balance in the makeup of the delegation. The GOP has no guidelines on the racial or ethnic makeup of the delegation.

Court Decisions About Delegate Selection. In recent years, questions have been raised about the authority of individual states to legislate delegate selection procedures. In *Cousins v. Wigoda*, 419 U.S. 477 (1975), the U.S. Supreme Court declared: "The States themselves have no constitutionally mandated role in the great task of the selection of Presidential and Vice-Presidential candidates." Under this ruling, party rules would preempt and supersede state laws governing the selection and apportionment of party delegates in case of any conflicts.

Several years later, Wisconsin was the focus of another U.S. Supreme Court case concerning the role of the state versus the national party in determining delegates to the national political party conventions. In *Democratic Party of United States of America et al. v. Wisconsin ex rel. Bronson C. La Follette et al.*, 450 U.S. 107 (1981), the Democratic National Committee (DNC) challenged the Wisconsin state law that mandated the Wisconsin delegation must be bound by the results of the April open primary. The DNC was concerned that persons voting the Democratic ballot were not required to publicly declare their party affiliation, as required by national party rules. As a result, members of other political parties (or voters with no political affiliation) could, and did, "cross over" to affect the Democratic outcome. The party claimed that its right to freedom of association, as protected by the First and Fourteenth Amendments to the U.S. Constitution, would be violated if it had to accept delegates forced on it by "outsiders". The Court ruled that it was permissible for the Democratic Party of the United States to refuse to seat delegates from the State of Wisconsin because they were elected in an open primary, a procedure that violated national party rules. The Court stated:

> . . . a State, or a court, may not constitutionally substitute its own judgment for that of the Party. A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution. (123-124)
>
> The State has a substantial interest in the manner in which its elections are conducted, and the National Party has a substantial interest in the manner in which the delegates to its National Convention are selected. But these interests are not incompatible and to the limited extent they clash in this case, both interests can be preserved. The National Party rules do not forbid Wisconsin to conduct an open primary. But if Wisconsin does open its primary, it cannot require that Wisconsin delegates to the National Party Convention vote there in accordance with the primary results, if to do so would violate Party rules. (126)

The result of this 1981 case and the imposition of the national party rules was that, although the Wisconsin presidential primary was held on April 3, 1984, the Wisconsin Demo-

cratic Party used a party caucus system to select its delegates to the 1984 national convention. (The Republican Party used the primary results to allocate its delegates as usual.)

In March 1986, the DNC changed its position and allowed Wisconsin Democrats to select their national convention delegates based on an open primary rather than a party caucus system. Thus, Wisconsin Democratic delegates in 1988 and the following conventions have tended to reflect the results of the presidential preference vote.

The Wisconsin Legislature accommodated the U.S. Supreme Court's decision by passing 1985 Wisconsin Act 304, effective July 1, 1986, which repealed the statutory provisions requiring that delegate selection for the national conventions reflect the results of the April primary. Although Wisconsin law still provides for an open presidential preference vote, the statutes no longer dictate how delegates to the national party conventions are selected. The primary serves only an advisory function for the subsequent party caucuses, which actually select the convention delegates.

Convention Procedure. In their national conventions, the parties nominate their presidential and vice presidential candidates and adopt a national party platform. Second only to the elections themselves, these mass meetings are the highlight of party politics in the United States, and they receive full media attention. The hopes and future success of a party are often tied to the success of its standard bearer in the November election, and the enthusiasm expressed by the many delegates in fulfilling their convention duties serves as a unifying force that strengthens and preserves the party.

National party conventions are not regulated by federal or state law. Each party sets its own rules and regulations, but the operating procedures for the two major conventions are actually quite similar. At the opening of each convention, a temporary chairperson is chosen to conduct proceedings while the credentials committee checks the state delegates and seats those approved. When the official delegates have been seated, the convention elects its permanent chairperson and votes on the national party platform, which has been prepared by the platform committee.

With the advent of television coverage, the conventions have tended to schedule their major events for prime time, and presidential nominations usually begin by the third evening of the convention. Each state is polled in alphabetical order. States that do not wish to nominate a candidate yield to the next state. A nomination by one state is seconded by another state, and it is customary that, when a name is submitted, there is a nominating and a seconding speech.

Voting on the nominees begins after all nominations have been made and seconded. A voice vote is conducted alphabetically by state, and a simple majority is sufficient to select the party's presidential candidate. Since 1952, no major convention has required more than one ballot to determine its presidential candidate. Prior to the introduction of primary elections to narrow the field of candidates, and televised coverage, which encourages a show of unity before the general public, voting could run for many ballots with the "favorite sons" of many states in contention. The record number of presidential ballots occurred in 1924, when the Democratic National Convention needed 103 ballots to nominate John W. Davis. (Prior to 1936, the Democratic Convention required a two-thirds vote to nominate a presidential candidate).

Once the national convention has selected its presidential candidate, it begins the same process to choose the candidate for Vice President. While nominations may be made from the

floor, it is customary for the presidential candidates to name their own running mates. The convention usually nominates these choices and affirms them by acclamation.

IV. THE ROLE OF THE ELECTORAL COLLEGE

A great deal of light was shed on the formerly obscure electoral college by the controversial presidential election of 2000. The upcoming election of 2004 offers an opportunity to look more closely at the electoral college and the laws and customs that govern it. The framers of the Constitution had difficulty deciding how to select the President, and finally agreed upon the system of presidential electors as a compromise to offset fears about leaving such a critical decision to Congress or the voters at-large. As a result, the President of the United States is not elected directly by the people. At the November election, voters are actually voting for presidential electors who will cast their state's ballots for president and vice president.

2004 ALLOCATION OF PRESIDENTIAL ELECTORS

State	Electors	State	Electors	State	Electors
Alabama	9	Kentucky	8	North Dakota	3
Alaska	3	Louisiana	9	Ohio	20
Arizona	10	Maine	4	Oklahoma	7
Arkansas	6	Maryland	10	Oregon	7
California	55	Massachusetts	12	Pennsylvania	21
Colorado	9	Michigan	17	Rhode Island	4
Connecticut	7	Minnesota	10	South Carolina	8
Delaware	3	Mississippi	6	South Dakota	3
District of Columbia	3	Missouri	11	Tennessee	11
Florida	27	Montana	3	Texas	34
Georgia	15	Nebraska	5	Utah	5
Hawaii	4	Nevada	5	Vermont	3
Idaho	4	New Hampshire	4	Virginia	13
Illinois	21	New Jersey	15	Washington	11
Indiana	11	New Mexico	5	West Virginia	5
Iowa	7	New York	31	Wisconsin	10
Kansas	6	North Carolina	15	Wyoming	3
				TOTAL	538

There are a total of 538 electors nationwide, who are collectively called the "Electoral College." Each state has as many electors as its combined number of senators and representatives to Congress, so the state allocations range from 55 in California to a minimum of three in those states sending only one member to the U.S. House of Representatives. (The District of Columbia has three electors, based on the Twenty-Third Amendment to the Constitution, ratified in 1961). Wisconsin has ten electors, because its Congressional delegation includes two senators and eight representatives.

The U.S. Constitution, federal law, and state statutes govern the operation of the Electoral College. Curiously, although the U.S. Constitution created this electoral method, the popular term "electoral college" does not appear anywhere in the Constitution or any of its amendments. Nor is it used in any of the federal statutes passed in later years to define the process. Nevertheless, it has become the commonly used term to describe the electors collectively.

Article II, section 1 of the U.S. Constitution provides:

Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the

state may be entitled in the Congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

Initially, each presidential elector voted for two individuals; the person receiving the most votes (if receiving votes from the majority of electors) was elected president and the person receiving the second most votes was elected vice president. The development of political parties resulted in one party's designated candidates for president and vice president, Thomas Jefferson and Aaron Burr, receiving the same number of votes. The disputed election, which was decided by the House of Representatives, was the impetus for the Twelfth Amendment to the Constitution. Ratified in 1804, this amendment instituted the current practice of having electors cast separate ballots for president and vice president.

The Selection of Presidential Electors. Wisconsin law provides various requirements for the selection of the state's presidential electors. Under Section 8.18, Wisconsin Statutes, each party's state officers, holdover state senators, and the party's candidates nominated in the September primary for state and legislative offices, meet in the state capitol on the first Tuesday in October of a presidential election year (October 5, 2004), to nominate the party's slate of presidential electors. Each party's slate consists of one elector nominated from each of the state's eight congressional districts and two electors at large. Once the nominees are determined by vote, the chairperson of the party's state committee immediately certifies their names to the chairperson of the state elections board.

In addition to the participation of recognized political parties in the presidential elector process, Wisconsin also provides for the selection of electors in November on behalf of minor parties and independent candidates. According to Section 8.20, Wisconsin Statutes, minor party or independent candidates for President and Vice President must submit their nomination papers by 5 p.m. on the first Tuesday in September (September 5, 2000). The nomination papers must contain 2,000 to 4,000 signatures and must list one candidate for elector from each congressional district and two from the state at-large. Section 8.185, Wisconsin Statutes, allows voters to write in the names of candidates for President and Vice President in the November election. However, write-in votes are reported as merely "scattering" unless the candidate receiving the votes has filed a list of presidential electors with the state Elections Board at least 14 days before the election or the candidate receives more than 10% of the total vote cast in the smallest election reporting unit.

Section 5.10, Wisconsin Statutes, provides that although the names of electors do not appear on the ballot, a vote for a presidential candidate constitutes a vote for the whole slate of electors of that candidate's party. The effect of this is a winner-take-all system whereby the candidate receiving a plurality of votes statewide wins all of Wisconsin's electoral votes. Our common election day − the day following the first Monday in November (November 2, 2004) − is set forth in federal law and has been the day on which states must select their presidential electors since the 1840s.

Once the Elections Board has certified the statewide results of the November presidential balloting, the board prepares a certificate stating the results of the election and the names of the qualified electors. The governor signs them, affixes the Great Seal of the state, and mails one to the general services administration in Washington, D.C. and delivers six copies to one of the electors prior to the scheduled meeting date of the electoral college.

Voting by the Electors. On the first Monday after the second Wednesday in each presidential year (December 13, 2004), the presidential electors who were chosen when their candi-

date won the most popular votes in November, meet in the state capitol in Madison at noon to cast their ballots for President and Vice President. This meeting represents Wisconsin's portion of the Electoral College. To be elected president, a candidate must receive a majority (at least 270) of the possible national total of electoral votes for that office. The Vice President is chosen on a separate ballot and must also receive at least 270 votes. Theoretically, the president and vice president could be elected from different parties; but party loyalty on the part of the electors makes that outcome unlikely.

Section 7.75, Wisconsin Statutes, states that electors must cast a ballot for the presidential and vice presidential candidates they were chosen to elect. However, since there is no statutory penalty for being a "faithless elector" by voting for someone else, the only real constraints are custom, tradition, and loyalty to the candidate and the party. This feature in the electoral voting varies from state to state. Although 26 states, including Wisconsin, bind their electors to vote as pledged, only five have actual penalties for violations. Despite this, it appears that nationally, since the first Electoral College vote in 1789, only ten electors have violated their pledges.

The electors who convene at the state capitol on the appointed day are qualified to fill any vacancies in the electoral slate caused by death, refusal to act, or refusal to attend, by plurality vote. At least one of the votes cast by each elector for president and vice president must be for someone not from Wisconsin, as required by the Twelfth Amendment to the U.S. Constitution. (In 2000, some questioned the validity of Texas' 32 electoral votes since the Republican candidate for vice president, Dick Cheney, was said to be residing in Texas, the same state as the GOP presidential candidate, George W. Bush. It was generally accepted that Cheney had changed his residency to Wyoming prior to the election, and the 32 votes were counted without challenge.)

What If the Popular Vote and the Electoral Vote Are at Variance? The present method of electoral voting, as set by law in all but two states (Maine and Nebraska), allows the presidential candidate who wins a plurality (the highest number but not necessarily a majority) of each state's popular vote in November to receive all the state's electoral votes. This is often called a "winner take all" system. Only Maine and Nebraska provide that each elector who represents a congressional district must vote according to the district's plurality, rather than following the statewide vote. Because the margin of victory within each state (and in Maine and Nebraska, the margin of victory within each congressional district) is irrelevant, some popular votes count more than others and a candidate can win the presidency without receiving a plurality of the national popular vote, as occurred in 2000 when George W. Bush received fewer popular votes than Al Gore, but still received a majority of the electoral votes by winning the right combination of states. On three other occasions in U.S. history, the president won the White House through the electoral vote although he actually had fewer popular votes nationwide than his opponent: John Quincy Adams (1824), Rutherford Hayes (1876), and Benjamin Harrison (1888).

What Happens If There Is a Dispute Over a State's Electoral Votes? In view of the fact that the most recent presidential election was decided by only a few electoral votes, and that the electoral votes of one state were seriously contested, it may be useful to review some of the laws dealing with this situation.

Some federal laws pertain to situations in which there is some doubt as to who has won a state's electoral votes. 3 U.S. Code §2 indicates that if any state has "failed to make a choice

[of electors] on the day prescribed by law," that the state legislature may provide for the appointment of electors at a later date. 3 U.S. Code § 5 specifically gives state legislatures the power to create provisions for settling controversies or contests relating to the appointment of any or all presidential electors, if it acts at least six days before the meeting of the electoral college in December.

Federal law also provides a role for Congress in resolving disputes involving the recognition and counting of states' electoral votes. It requires that the electoral vote be counted by state in alphabetical order by the president of the senate before a joint session of Congress on January 6th following the presidential election. Any objection to a state's electoral vote must be presented in writing and signed by both a member of the senate and the house of representatives. If a valid objection is received, the two houses of Congress return to their own chambers and consider the objection. If both houses agree, they may reject the vote or votes named in the objection if it is determined that the votes have not been regularly given by certified electors. If two sets of votes are received from the same state, Congress must defer to the process indicated by the state legislature under 3 U.S. Code § 5. If the legislature of the state in question has not created a procedure to settle the controversy, the two houses of Congress, acting concurrently, may decide which votes to count. If the two houses of Congress disagree, they must count the votes delivered under the seal of the governor of the state. This procedure was put into action in January 2001, when several members of the house of representatives objected to the Florida electoral votes. Since no member of the senate would sign the objections, they were never acted upon, and the slate of electors voting for George W. Bush and Dick Cheney was accepted.

What If the Electors Are Deadlocked? A strong bid by a third party candidate could result in the the failure of any candidate to win the required majority of 270 or more electoral votes. If the front-runner is denied a majority of the electoral votes, the election of the President must be conducted in the House of Representatives. The House makes its selection from the three candidates with the most electoral votes by voting on a state-by-state basis. The Twelfth Amendment to the U.S. Constitution provides:

> [T]he votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states [34], and a majority of all the states [26] shall be necessary to a choice.

The House of Representatives has been involved in electing a President on only two occasions, following the general elections of 1800 (Thomas Jefferson) and 1824 (John Quincy Adams).

The Twelfth Amendment provides that if no candidate receives a majority of the vice presidential electoral vote, the Vice President will be chosen by the Senate from the two candidates receiving the most votes. The senators vote individually, rather than by state. A quorum for this purpose is two-thirds of the senators (67), and a majority (51) is necessary to make a choice. The only occasion when the Senate was called upon to elect a Vice President occurred in 1837 when Richard Johnson, because of a personal scandal, did not receive a majority of the electoral votes. The Senate did, however, elect Johnson to the office.

V. PROPOSALS TO ABOLISH THE ELECTORAL COLLEGE

Should the Electoral College Be Continued? The Electoral College has had its supporters and opponents over the years, but opinions are strongest when close bipartisan elec-

tions or strong third party candidates threaten to overturn the results of the November popular election.

The major criticisms opponents level against the Electoral College include: 1) it is possible for a candidate with a majority of the popular vote to lose the election; 2) a voting deadlock in the Electoral College could throw the presidential selection process into the House of Representatives where deal-making could influence the outcome; and 3) only one-half of the states require electors to vote for the candidate who won the state's popular vote, while the electors from the other states are theoretically able to vote for whomever they please.

Supporters of the Electoral College point out that the present system has been used for many years and has served the country fairly well. Abolishing the Electoral College and replacing it with a direct election of the President, they claim, would encourage the rise of multiple political parties, which would be detrimental to the two-party system. Another fear is that abolishing the Electoral College would tend to reduce the importance of the states in the federal system. Under a direct election system, states with large populations could become overly important at the expense of the less populated states. Proponents also claim that the "winner-take-all" mechanism can have a positive effect because it magnifies the winner's margin and, thereby creates a sense of national support for the newly elected President, rather than exposing divisions in the national electorate.

Alternatives to the Current Electoral College. The proposals to alter the manner of electing the President fall into four principal categories:

1) *Direct popular election* would abolish the Electoral College and replace it with a direct, nationwide popular vote for President and Vice President. Most of the direct popular election proposals require that a winning candidate must receive at least 40% of the votes cast.

2) The *district system*, which is similar to the current systems in Maine and Nebraska, would retain the Electoral College, but abolish the "winner-take-all" tabulation of electoral votes within a state. This system would provide for the election of one elector from each of the nation's 435 congressional districts with two electors chosen at-large in each of the 50 states. The District of Columbia would continue to select three electors.

3) The *proportional system* would keep each state's electoral vote, but divide the votes in direct proportion to the popular vote in the state.

4) The *automatic plan* would keep the electoral system but abolish the individual electors by requiring that the electoral vote of each state be cast automatically for the winner of a plurality in that state.

Direct popular election or the abolition of the individual electors called for in the automatic plan would require abolishing the Electoral College and would necessitate amendment of the U.S. Constitution. The other two proposed changes in the Electoral College could be accomplished through amending legislation passed by the Congress.

VI. APPENDIX

2004 PRESIDENTIAL PRIMARIES AND CAUCUSES BY DATE

State	Method of Selection	Date	Democratic Delegates	Republican Delegates
Iowa	Caucus (D); Conv. Jun. 11 (R)	January 19	56	32
New Hampshire	Primary	January 27	27	32
Arizona	Primary	February 3	64	52
Delaware	Primary (D); Conv. May 13 (R)	February 3	23	18
Missouri	Primary	February 3	88	57
New Mexico	Caucus (D); Primary Jun. 1 (R)	February 3	37	24
North Dakota	Caucus (D)	February 3	22	26
Oklahoma	Primary	February 3	47	41
South Carolina	Primary; Caucus/Conv. Mar. 27 (R)	February 3	55	46
Michigan	Caucus (D); Caucus/Conv. May 21 (R)	February 7	154	61
Washington	Caucus (D); Conv. May 25 (R)	February 7	95	41
Maine	Caucus (D); Caucus/Conv. May 14 (R)	February 8	35	21
Tennessee	Primary; Mar. 2 (R)	February 10	85	55
Virginia	Primary (D); Caucus/Conv. Jun. 8 (R)	February 10	96	64
District of Columbia	Caucus (D); Feb. 10 (R)	February 14	39	19
Nevada	Caucus (D); Conv. Apr. 29 (R)	February 14	32	33
WISCONSIN	Primary	February 17	87	40
Hawaii	Caucus (D); Conv. Jun. 4 (R)	February 24	29	20
Idaho	Caucus (D); Primary May 25 (R)	February 24	23	32
Utah	Primary (D); Conv. May 8 (R)	February 24	29	36
California	Primary	March 2	440	173
Connecticut	Primary	March 2	62	30
Georgia	Primary	March 2	102	69
Maryland	Primary	March 2	99	39
Massachusetts	Primary	March 2	121	44
Minnesota	Caucus (D); Caucus/Conv. Jun. 5 (R)	March 2	86	41
New York	Primary	March 2	285	102
Ohio	Primary	March 2	159	91
Rhode Island	Primary	March 2	32	21
Vermont	Primary	March 2	22	18
Florida	Primary	March 9	201	112
Louisiana	Primary	March 9	72	45
Mississippi	Primary	March 9	41	38
Texas	Primary (D) Mar. 2 (R)	March 9	233	138
Kansas	Caucus (D); Conv. Mar. 1 (R)	March 13	41	39
Illinois	Primary	March 16	186	73
Alaska	Caucus (D); Conv. May 21 (R)	March 20	18	29
Wyoming	Caucus (D); Conv. May 8 (R)	March 20	19	28
Colorado	Caucus (D); Conv. Jun. 5 (R)	April 27	64	50
Pennsylvania	Primary	April 27	178	75
Indiana	Primary	May 4	81	55
North Carolina	Primary	May 4	107	67
Nebraska	Primary	May 11	31	35
West Virginia	Primary	May 11	39	30
Arkansas	Primary	May 18	47	35
Kentucky	Primary	May 18	56	46
Oregon	Primary	May 18	58	31
Alabama	Primary	June 1	62	48
South Dakota	Primary	June 1	21	27
Montana	Primary	June 8	21	28
New Jersey	Primary	June 8	129	52

Source: 2004 Preliminary Presidential and Congressional Primary Dates, Federal Elections Commission, http://www.fec.gov/pages/2004pdates.htm; 2004 Delegate Allocation; Republican National Committee Counsel's Office; State-by-State Summary of Delegate Selection Process for the Republican National Convention, Republican National Committee Draft; 2004 Democratic National Convention − Delegate/Alternate Allocation, Democratic National Committee, DNC's Office of Party Affairs and Delegate Selection. Delegate Selection Rules for the 2004 Democratic National Convention, Democratic Party of the United States.

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Note: Numbers in parentheses are catalog numbers for materials in the Dr. H. Rupert Theobald Legislative Library at the Legislative Reference Bureau. Readers are also referred to the clippings filed in the library under *Electoral College: History and Organization; Proposals to Abolish or Reform the Electoral System* (324.385 / Z) and *Form of Ballot* (324.32 / Z).