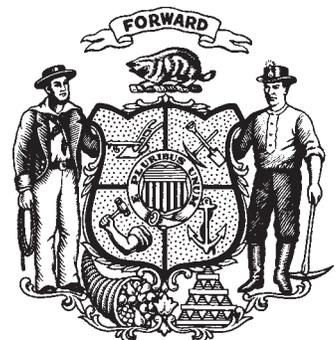


# Wisconsin's Role in Electing the President

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## Table of Contents

I.	INTRODUCTION .....	1
	Key Wisconsin Dates in the 2008 Presidential Election .....	2
II.	SELECTION OF DELEGATES TO THE NOMINATING CONVENTION .....	3
III.	THE NATIONAL NOMINATING CONVENTIONS .....	5
IV.	THE ROLE OF THE ELECTORAL COLLEGE .....	8
	2008 Allocation of Presidential Electors .....	8
V.	PROPOSALS TO ABOLISH THE ELECTORAL COLLEGE .....	12
VI.	APPENDIX .....	14
VII.	SOURCES .....	15

# WISCONSIN'S ROLE IN ELECTING THE PRESIDENT

## SUMMARY

On November 4, 2008, over 4 million Wisconsin voters will have the opportunity to participate in electing our nation's president. If the 2004 race is an indication, around 3 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 election of a new president is arguably the greatest civic event America has to offer. Indeed, it is the only national election on America's political calendar. The present election offers the added feature of being the first in over half a century in which neither an incumbent president nor a vice president is seeking the presidency, giving the race a wide-open feel lacking when those already holding national office are running.

The two most recent presidential elections in 2000 and 2004 were both notable for being among the closest in history. The 2000 election in particular was so closely decided that it caused a general reexamination of election procedures at the national, state, and local levels. Nationally, the Help America Vote Act (HAVA), Public Law 107-252, created the United States Election Assistance Commission, which offers consultation and voluntary guidelines for election administration to state and local governments. HAVA also established certain federal standards for voting. Most notably for Wisconsin, the act requires each state to maintain a statewide voter registration list, which Wisconsin has never had. The statewide system is currently under development under the direction of the Wisconsin Government Accountability Board.

One distinguishing feature of the 2008 campaign has been the rush by some states to move their convention delegate selection procedures to the earliest possible point in the process. Although Wisconsin has chosen to allow its primary to remain at its February date mandated by 2003 Wisconsin Act 24, enough states have moved forward that a majority of delegates will have already been selected before Wisconsin's February 19 primary.

Because of the idiosyncrasies of the United States' Electoral College system, George W. Bush won the presidency in 2000 with a minority of the popular vote. His opponent in 2004, John F. Kerry, came within 120,000 Ohio votes of duplicating that feat. The Electoral College remains controversial, but, in a new twist, reform advocates offer a way to "work around" the old system without clearing the seemingly insurmountable hurdle of amending the U.S. Constitution. In the meantime, we head into the 2008 campaign with essentially the same electoral system as last time.

**The Election Process.** The selection of a U.S. President involves a complicated and lengthy process, covering almost a full year. 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 as many states as possible in the November election, and thereby 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 2008 PRESIDENTIAL ELECTION**

Dates	Event	How Dates Set	Process
November 20, 2007	Certification for Primary	Wis. Stats., Sec. 8.12	Recognized Wisconsin parties certify their intention to participate in presidential preference primary.
December 11, 2007	Ballot Selection	Wis. Stats., Sec. 8.12	Representatives of participating parties select names to appear on primary ballot.
February 19, 2008	Presidential Preference Primary	Wis. Stats., Secs. 5.02 (22), 8.12	All Wisconsin voters eligible to vote in open primary to express presidential preference.
August 25-28, 2008	Democratic National Convention (Denver)	By Party	Party nominates its candidates for president and vice president.
September 1-4, 2008	Republican National Convention (Minneapolis-St. Paul)	By Party	Party nominates its candidates for president and vice president.
September 2, 2008	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 7, 2008	Elector Selection for Recognized Wisconsin Parties	Wis. Stats., Sec. 8.18	Recognized Wisconsin parties nominate slates for Wisconsin presidential electors.
November 4, 2008	Election of Presidential Electors	U.S. Code, Title 3, Secs. 1, 3	Wisconsin voters elect 10 presidential electors as part of national election.
December 15, 2008	Electoral College Vote	U.S. Code, Title 3, Sec. 7 Wis. Stats., Sec. 7.75	Wisconsin electors meet at state capitol to vote separately for president and vice president.
January 6, 2009	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, 2009	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 2008, 41 states will hold presidential preference primary elections and those elections will select over 80% 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 Government Accountability Board (previously, the 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. Both of the political parties eligible – the Democratic and Republican Parties – have certified they will participate in the February 2008 balloting.

On the second Tuesday in December, officials of those parties certified for the presidential primary meet jointly as a committee at the state capitol to determine and certify to the Government Accountability 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 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 [government accountability] board a formal petition to have the person’s name appear on the presidential preference ballot.” The petition must contain the signature of a specified number of electors. No person or committee has so petitioned for the 2008 ballot. Wisconsin’s presidential primary election will take place on February 19, 2008. The candidates certified to appear on Wisconsin’s 2008 presidential primary ballot are:

For the Democratic Party	For the Republican Party
Joe Biden*	Rudy Giuliani*
Hillary Clinton	Mike Huckabee
Chris Dodd*	Duncan Hunter*
John Edwards*	John McCain
Mike Gravel	Ron Paul
Dennis Kucinich*	Mitt Romney*
Barack Obama	Tom Tancredo*
Bill Richardson*	Fred Thompson*

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

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 state and local offices.

Wisconsin conducts an “open primary,” which means that, unlike many 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 scheduling presidential primaries has become increasingly contentious in recent presidential contests. Each state is responsible for scheduling presidential primaries and caucuses in conjunction with the state organizations of the two major political parties. Two states are noteworthy for their role in this process. Iowa, with its early caucuses, and New Hampshire, with its first in the nation primary, have usually received a great deal of attention from presidential candidates at a point in the process when few if any candidates have dropped out of the running. Because of this, those two states have come to cherish their early placement in the primary parade.

More and more in the last 20 years, other states have responded to the attention paid to early events by moving up the dates of their own primaries and caucuses. This practice, sometimes known as “frontloading,” has accelerated in the last two or three presidential cycles. Iowa and New Hampshire have responded by moving their own events even earlier.

New Hampshire has gone to the extreme of directing its secretary of state to schedule its primary "7 days preceding the date on which any other state shall hold a similar election."

Frontloading has not only pitted state against state, but state parties against national parties. States have scheduled primaries and caucuses with a cautious eye on the actions of other states. National parties, in an effort to stem the rush to the front, have placed delegate sanctions on states that move their primaries forward in violation of party rules. In 2008, the Republican Party has sanctioned Florida, Michigan, New Hampshire, South Carolina, and Wyoming for scheduling early events. The Democrats have similarly sanctioned Florida and Michigan. In the past, both political parties have levied delegate penalties similar to those used in 2008, only to have them forgiven by the party's presidential nominee in the interest of party unity at the national convention. Presidential candidates in 2008 have come to a variety of informal agreements on whether or not to contest primaries and caucuses scheduled in violation of party rules. If no candidate controls a majority of the delegates going into a party convention, the struggle over whether or not to seat those delegates could be pivotal in determining control of the convention and the eventual presidential nominee.

As things stand, Wisconsin, despite moving its primary from April to February in 2003, will not vote until nearly two-thirds of the convention delegates have been selected.

Numerous suggestions have been made to alleviate the problem of frontloading, including: 1) holding a national primary; 2) having a series of rotating regional primaries from March to June; 3) population-based primaries, with groups of states voting in a series of primaries, with small states going first; and 4) providing supplemental delegates to those states that voluntarily move their primaries toward the end of the process.

### 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 2008, the Democrats will convene August 25-28 in Denver, and the Republicans will meet September 1-4 in Minneapolis-St. Paul.

The 2008 Democratic National Convention will have 4,393 delegates (compared to 4,322 in 2004), and the Republican National Convention will have 2,380 (compared to 2,509 in 2004). 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 three 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 2004, 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 92 Wisconsin Democratic delegates are slated to attend the national convention, along with 12 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 48 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. Ten delegates are state party leaders and elected officials pledged to candidates in proportion to their performance in the primary statewide. The remaining 18 delegates are state party leaders and elected officials not pledged to any presidential candidate, sometimes known as superdelegates. National party rules require “equal division” of the delegation between men and women. The party also recommends that diversity goals for the state delegation be reflected in the makeup of the delegation, including: 11 African Americans; 2 Asians or Pacific Islanders; 7 Hispanics; 2 Native Americans; 10 lesbian, gay, bisexual, or transgendered people; 9 people with disabilities; and 20 young people.

**Wisconsin’s Republican Delegates.** The Wisconsin Republicans will choose 40 delegates to the 2008 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), 13 at-large delegates, and three at-large bonus delegates awarded if the following criteria were met at any time after the 2004 presidential election: 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). The Republicans also provide a substantial delegate bonus to states carried by the GOP in the last presidential election based on a percentage of the state’s electoral votes. 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 Democratic 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 presidential 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, when the Democrats nominated Adlai Stevenson on the third ballot, 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 closeness of the 2004 election underscores the importance of 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.

**2008 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
				<b>TOTAL</b>	<b>538</b>

There are a total of 538 electors nationwide, 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 10 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 stipulates 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 7, 2008), 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 Government Accountability 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 2, 2008). The nomination papers must contain no fewer than 2,000 and no more than 4,000 signatures collected since August 1 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” in each election reporting unit unless the candidate receiving the votes has filed a list of presidential electors with the Government Accountability Board

at least 14 days before the election or the candidate receives more than 10% of the total vote cast in that 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 4, 2008) – is set forth in federal law and has been the day on which states must select their presidential electors since the 1840s.

Once the Government Accountability Board has certified the statewide results of the November presidential balloting, the board prepares copies of certificates 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 December of each presidential year (December 15, 2008), the presidential electors chosen when their candidate 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 29 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 11 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. A bill currently before the Wisconsin Legislature, 2007 Assembly Bill 589, would adopt this scheme for Wisconsin. 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 but 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 a 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," 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 6 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 Florida's 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 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 elections 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; 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; and 4) the Electoral College gives disproportionate weight to the votes of voters in states (like Wisconsin) that are often closely contested.

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.

A fifth alternative, known as the National Popular Vote, or NPV, has recently emerged. NPV takes the novel approach of circumventing the Electoral College by means of an interstate compact. NPV provides that every state adopting the compact would require its electoral votes to be awarded to a slate of electors committed to the presidential and vice presidential ticket receiving the greatest popular vote nationwide, without regard to which ticket carried the state. The compact would provide that its terms would not come into effect until states representing 270 electoral votes had passed laws adopting its provisions. This must occur by July 20, 2008, in order for the compact to apply to the 2008 election. Since every state adopting the compact would cast its electoral votes together, this would insure that the national popular vote winner would be elected president. Forty-four state legislatures are considering legislation to adopt the compact. In two states, Maryland and New Jersey, the NPV compact has been enacted into law. A proposal to apply the compact to Wisconsin, 2007 Assembly Bill 313, was introduced on May 8, 2007, and is in the Assembly Committee on Elections and Constitutional Law.

VI. APPENDIX

2008 PRESIDENTIAL PRIMARIES AND CAUCUSES BY DATE

State	Party	Method	Date	Democratic Delegates	Republican Delegates
Iowa	Both	Caucus	January 3	56	40
Wyoming	Republicans	Caucus	January 5	---	28*
New Hampshire	Both	Primary	January 8	30	24*
Michigan	Both	Primary	January 15	157*	60*
Nevada	Both	Caucus	January 19	33	34
South Carolina	Republicans	Primary	January 19	---	47*
South Carolina	Democrats	Primary	January 26	54	---
Florida	Both	Primary	January 29	210*	114*
Maine	Republicans	Caucus	February 1	---	21
Alabama	Both	Primary	February 5	60	48
Alaska	Both	Caucus	February 5	18	29
American Samoa	Democrats	Caucus	February 5	9	---
Arizona	Both	Primary	February 5	67	53
Arkansas	Both	Primary	February 5	47	34
California	Both	Primary	February 5	441	173
Colorado	Both	Caucus	February 5	71	46
Connecticut	Both	Primary	February 5	61	30
Delaware	Both	Primary	February 5	23	18
Georgia	Both	Primary	February 5	104	72
Idaho	Democrats	Caucus	February 5	23	---
Illinois	Both	Primary	February 5	185	70
Kansas	Democrats	Caucus	February 5	40	---
Massachusetts	Both	Primary	February 5	121	43
Minnesota	Both	Caucus	February 5	88	41
Missouri	Both	Primary	February 5	88	58
New Jersey	Both	Primary	February 5	127	52
New Mexico	Democrats	Caucus	February 5	38	---
New York	Both	Primary	February 5	280	101
North Dakota	Both	Caucus	February 5	21	26
Oklahoma	Both	Primary	February 5	47	41
Tennessee	Both	Primary	February 5	85	55
Utah	Both	Primary	February 5	29	36
Hawaii	Republicans	Caucus	February 7	---	20
Guam	Republicans	Caucus	February 9	---	9
Kansas	Republicans	Caucus	February 9	---	39
Louisiana	Both	Primary	February 9	68	47
Nebraska	Democrats	Caucus	February 9	31	---
Virgin Islands	Democrats	Caucus	February 9	9	---
Maine	Democrats	Caucus	February 10	34	---
District of Columbia	Both	Primary	February 12	37	19
Maryland	Both	Primary	February 12	99	37
Virginia	Both	Primary	February 12	103	63
Hawaii	Democrats	Caucus	February 19	29	---
Washington	Both	Primary	February 19	97	40
WISCONSIN	Both	Primary	February 19	92	40
American Samoa	Republicans	Caucus	February 23	---	9
Virgin Islands	Republicans	Caucus	February 23	---	9
Puerto Rico	Republicans	Primary	February 24	---	23
Ohio	Both	Primary	March 4	161	88
Rhode Island	Both	Primary	March 4	32	20
Texas	Both	Primary	March 4	228	140
Vermont	Both	Primary	March 4	23	17
Wyoming	Democrats	Caucus	March 8	18	---
Mississippi	Both	Primary	March 11	40	39
Pennsylvania	Both	Primary	April 22	181	74
Washington	Democrats	Caucus	April 28	97	---
Guam	Democrats	Caucus	May 3	8	---
Indiana	Both	Primary	May 6	79	57
North Carolina	Both	Primary	May 6	110	69
Nebraska	Both	Primary	May 13	31	33
West Virginia	Both	Primary	May 13	37	30
Kentucky	Both	Primary	May 20	55	45
Oregon	Both	Primary	May 20	62	30
Idaho	Both	Primary	May 27	23	32
Puerto Rico	Democrats	Primary	June 1	58	---
Montana	Both	Primary	June 3	23	25
South Dakota	Both	Primary	June 3	22	27
New Mexico	Republicans	Primary	June 3	---	32

\*Subject to penalties for violating national party scheduling rules.

State totals include super and bonus delegates not pledged to any candidate.

Caucus states often finalize delegation makeup at later county or district caucuses or state conventions.

Source: 2008 Presidential Primary Dates in Chronological Order, at: <http://www.fec.gov/general/library.shtml>. Call for the 2008 Democratic National Convention; Call for the 2008 Republican National Convention.

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