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ELECTING THE PRESIDENT: RULES AND LAWS



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The presidential election season has many people scratching their heads, even those who normally follow politics and we are not referring to the candidates' pronouncements or personalities. We are talking about the complicated and inconsistent set of laws and rules that govern how we nominate and elect the president of the United States.

Election

Let's start at the beginning. During the hot, humid summer of 1787, the Founders grappled with whether to have a chief executive, how long the term should be, whether he (all male at the time) should be term limited, and how to select him. We had just fought a long and grisly war against King George III, and the 13 colonies jealously guarded their boundaries, prerogatives and status. With that as context, the constitutional convention debated whether the President should be elected by the Congress—an option that was rejected as reducing the executive to a creature of the legislature—or by the citizens directly (or, more precisely, those permitted to vote).

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Reflecting competing interests, the Founders lodged the decision with the states, giving each a number of electors, who, collectively, actually select the president—the “electoral college.” The system provides that each state is allocated a number of electors equal to their representation in the House and Senate (but members of Congress are not eligible to serve as electors, thus maintaining the separation between the legislature and the executive).¹ So, for example, New York currently has 27 Representatives and two U.S. Senators—thus, 29 presidential electors.

Embedded in this constitutional procedure is a very significant element—a state’s legislature² enacts laws by which elections are run within their jurisdictions (unless Congress sees fit to enact national standards),³ thus resulting in a system whereby our presidential elections are state-driven.⁴ States have chosen presidential electors in a variety of ways during the life of our republic: appointment by the legislature or governor, or by direct election.⁵ Today, of course, on the Tuesday after the first Monday in November,⁶ all presidential electors are chosen by popular vote, and each state (except for Maine and Nebraska)⁷ awards its full slate of electors to the candidate who receives a plurality of the vote in their state. But, in that the states have different laws regarding voter eligibility, registration requirements, canvassing and re-counting procedures, and the like, each state’s election for presidential electors varies. That is why the arcane laws of Florida played such a decisive role in the presidential election of 2000.

These presidential electors were originally conceived as those citizens with great discernment who would choose a suitable chief executive. Two hundred and thirty years later, electors

1 U.S. Const. art. II § 1 cl. 2. Today’s electoral college has 538 members, consisting of the number of Representatives throughout the nation (435), the number of Senators (100), and, pursuant to the 23rd Amendment to the Constitution, three electors from Washington D.C.

2 The U.S. Supreme Court recently held that “legislature” includes voters acting through the initiative and referendum process. *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S.Ct. 2652 (2015).

3 U.S. Const. art. I, §4, cl.1. That is why we have different laws relating to voter eligibility requirements, absentee ballot rules, registration time limits, and the like. However, Congress has the authority to supersede state law. See, e.g., The Voting Rights Act (1965); the Voting Accessibility for the Elderly and Handicapped Act (1984); the Uniformed and Overseas Citizens Absentee Voting Act (1986); the National Voter Registration Act (“Motor Voter”)(1993); the Help America Vote Act (“HAVA”)(2002); the Military and Overseas Voter Empowerment Act (2009).

4 U.S. Const. art. II §1 cl. 2.

5 In our first presidential election in 1789, New York cast no electoral votes because it had not yet resolved how to select electors.

6 3 U.S.C. § 1 (“The electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.”).

7 These states award an electoral vote to the highest vote getter in each of its congressional districts (Nebraska has three congressional districts; Maine, two); and the winner in the state gets an additional two.

generally rubber-stamp the popular vote in their respective states.⁸ So, this year, when electors pledged to the various presidential candidates are elected on Nov. 8, 2016, they will, if tradition holds, cast their ballots according to their state’s popular vote when they meet in their respective state capitals on Dec. 19, 2016—the nation’s actual election day.⁹ True to the Founders’ original intent, however, electors in 24 states, including New York, are not constitutionally or legally bound to vote for their state’s winning candidate.¹⁰ Thus, there remains an opportunity for a near-majority of presidential electors to disregard the popular will, or, if you prefer, serve as a constitutional safety-valve to override a “bad choice” by the voters.

Nomination Process

The nomination process is less straightforward. In the early 1800s, members of Congress from the parties chose their candidates; in the mid-19th century, nominating conventions became the norm, attended by delegates mainly chosen by party leaders from the various states; by the mid-20th century the conventions increasingly consisted of delegates selected in state primaries or caucuses.¹¹ The parties determine how many convention delegates there are (this year; the Democrats have 4,766 and the Republicans have 2,472), and each state’s share is generally determined by its past support for the party’s respective nominee. Until 1936, a presidential candidate on the Democratic side needed two-thirds of the delegates to become the nominee; now a simple majority is needed in both parties.

With this as context, a few preliminary points must be made. First of all, as a result of the “White Primary” cases in the 1940s and 1950s, which challenged laws and party rules that banned or limited African American participation, the U.S. Supreme Court held that nomination procedures that select delegates constitute “state action” and may not abridge voters’ due process or equal protection rights.¹² Second, the national and local parties impose rules as to how convention delegates are selected.¹³ And, finally, each state’s election laws also shape

8 There have been about a dozen instances when electors did not cast their votes for the candidates to whom they were pledged—to no effect on the outcome. See J. Fortier, *AFTER THE PEOPLE VOTE* (AEI Press, Third Ed. 2004), Appendix G.

9 3 U.S.C. § 7 (“The electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct.”).

10 Unbound electors from these states total 257 votes, just 13 shy of a majority. See <http://www.archives.gov/federal-register/electoral-college/electors.html>

11 See generally K.Davis, “The Top 10 Political Conventions that Mattered the Most,” *Smithsonian.com*, Aug. 26, 2012.

12 See, e.g., *Terry v. Adams*, 345 U.S. 461 (1953).

13 See, e.g., *Wisconsin Democratic Party v. LaFollette*, 450 U.S. 107 (1981) (national party rules vs. state law as to how delegates are elected). See also Rule 40(b) of the current Rules of the Republican National Committee (a nominee must have won a majority of delegates in at least eight states).

how these delegates are chosen. Thus, a crazy-quilt of state laws and party rules figure in the nomination process.

For example, both parties have their first primary in New Hampshire,¹⁴ and state law permits unaffiliated voters to cast a ballot in the primary. Some states, like New York,¹⁵ have closed primaries, allowing only Republicans or Democrats to vote in their respective contests, and some, like Wisconsin,¹⁶ allow independents to vote in either primary.¹⁷ Thus, state laws vary, and may impact outcomes.

Then, there are the party rules. Both parties begin the nomination process in Iowa,¹⁸ but the Iowa Republicans¹⁹ conduct a secret ballot in their caucus, while the Democrats²⁰ require voters to literally stand up for their candidate for all the world to see. All Democratic delegates elected at primaries or caucuses are awarded on a roughly proportional basis dependent upon the candidate's votes.²¹ The Republicans start their nominating season with the same procedure that awards delegates proportionally, but allow states to award delegates on a winner-take-all basis after March 15.²²

Most elected Democratic delegates are pledged to a candidate at the convention,²³ but the party also has "super-delegates"—mainly members of the Democratic National Committee and Democratic members of Congress who collectively constitute approximately 15 percent of the national convention, who are free to vote as they choose.²⁴ On the Republican side, about 95 percent of the elected delegates are bound to their candidate on the convention's first ballot, but only 41 percent are bound on the second ballot.²⁵ Delegates pledged to candidates who have dropped out or who have been released by them, are unbound, even on the first ballot.

14 N.H. Election Laws. §§654:34(II)(b), 659:14

15 N.Y. Elec. Law §8-302(4).

16 Wisc. Stat. Ann. §6.80(2)(a).

17 See http://www.fairvote.org/primaries#presidential_primary_or_caucus_type_by_state

18 Iowa Code Ann. §43.4

19 <https://www.iowagop.org/caucus-participation/>

20 <http://iowademocrats.org/about-iowa-caucuses/>

21 2016 Delegate Selection Rules for the Democratic National Convention, Rule 13 ("Fair Reflection of Presidential Preferences").

22 Rules of the Republican National Committee, Rule 16(c)(2).

23 The national party provides: "All delegates to the National Convention pledged to a presidential candidate shall in good conscience reflect the sentiments of those who elected them." Procedural Rules of the 2016 Democratic National Convention, Rule VIII (F)(3)(c).

24 The Democrats count certain "distinguished" members of the party to be super-delegates as well. Thus, in New York, former President Bill Clinton and former Senate Majority Leader George Mitchell are members of its delegation.

25 See L. Buchanan and A. Parlapiano, "How Trump Could Be Blocked at a Contested Republican Convention," Mar. 9, 2016 (updated Mar. 31, 2016).

The parties also determine who in a state selects the actual people serving as delegates. Some states permit the aspiring presidential candidate to pick his or her delegates; some permit local party leaders to make the choice. Usually the delegates chosen are local party activists, donors or elected officials. As such, depending upon how much input the presidential candidate has in the choice, the delegates often feel more loyalty to the local political establishment than to the presidential candidate.

Moreover, while the delegate may nominally be pledged to a candidate on the first ballot (pursuant to state law or party rule), he or she may be free to vote for anyone on the second or third ballot. In short, the delegates selected in state primaries or caucuses may or may not be required to reflect the voters' choices, or may have to reflect the results for only one ballot at the national convention. That is why there is aggressive maneuvering by the current Republican candidates to have delegates named who are more committed to their candidacy than to the local party leaders.²⁶

And those Republicans hoping for a "dark horse" candidate to emerge, must contend with Rule 40(b) of the Republican National Committee, which provides that its nominee is required to have won a majority of the delegates in eight states.²⁷

One really does need a scorecard detailing each state's laws and party rules—not to mention the national party rules—to follow the nomination process.

All in all, then, the manner by which our nation nominates and elects the president of the United States is nothing less than a procedural obstacle course based upon a hodgepodge of state election laws, as well as national and local party rules. Proposed reforms abound,²⁸ but, for now, this is how we choose our nation's chief executive.

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26 See, e.g., L. Buchanan and A. Parlapiano, "How Votes for Trump Could Become Delegates for Someone Else," N.Y. Times, April 1, 2016.

27 Only if this rule is amended will the Republican convention be able to mimic what the Democrats did in 1968 when Vice President Hubert Humphrey, who had not entered any primaries or caucuses, was nevertheless catapulted into the nomination for President. See B. Parker, "Back to the Future," The Stanford Political Journal, Oct. 31, 2015.

28 See <http://www.nationalpopularvote.com>; J. Goldfeder, "Time to Scrap the Iowa-New Hampshire Obsession," law.com, Jan. 29, 2016.