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## WRITE-IN FOR PRESIDENT?



BY [JERRY H. GOLDFEDER](#) / LAW.COM CONTRIBUTOR

Recent events have caused a number of Republicans to say they will no longer support their presidential nominee. Take, for instance, Gov. John Kasich of Ohio. He voted early, and wrote in John McCain. Or, Kelly Ayotte, Republican Senator from New Hampshire on the ropes in her re-election bid – she announced she will write in Mike Pence for President. Apart from such votes being symbolic gestures, what is the legal effect?

Kasich's vote will not count at all. Ohio law requires that the write-in candidate file a certificate of candidacy. McCain, running for re-election to the U.S. Senate from Arizona, of course didn't file a presidential candidacy statement in Ohio. So Kasich's "vote" was meaningless.

Ayotte's vote, assuming she sticks to her promise, will also be meaningless. After all, on November 8th, we are voting for presidential electors, not candidates. And, unless I am mistaken, she intends to write in only Pence's name.

So let's back up. Like almost everything else about our elections (registration deadlines, voter ID, recount laws, etc.), it depends upon state laws. Nine states simply do not permit write-in votes, and the United States Supreme Court has allowed this ban. Many, like Ohio, require the write-in candidate to file papers in advance. A handful of states allow write-ins without any restrictions at all. Unsurprisingly, New Hampshire ("Live Free or Die") is one of these free-for-all states.

November 8<sup>th</sup>, popularly known as Election Day, really isn't the day we elect the president. It is the day we choose electors pledged to various candidates. Although most states no longer list the electors' names (they generally say "Electors pledged to so-and-so"), don't be fooled – it is the electors who are elected. And the state's winning electors meet several weeks later – on the first Monday after the second Wednesday in December, which is December 19<sup>th</sup> this year – and elect the president. That is the real Election Day.

We were reminded of this in 2000. Al Gore led George Bush by over 530,000 votes, but Bush ultimately led in electoral college votes – and, for the fourth time in our history, a candidate who came up short in actual votes became president. For better or worse, this is what our Founders created – an indirect procedure for electing our chief executive.

So who are these electors? Every state has its own procedures, but, generally, they are chosen by the state party's *apparatchiks* and are not necessarily die-hard supporters of a particular candidate. Because the constitution says electors cannot be members of Congress or work for the federal government, they are usually local public officials, big donors or party leaders. About half the states require them to vote for the party's nominee, and a few states provide that the casting of a wayward vote is a misdemeanor. Thus far, there have been about a dozen "faithless electors" throughout our history. None have influenced the outcome of any election, and no one has been prosecuted or fined for voting his or her conscience.

Thus, when electors meet in December we can expect that all, or almost all, will vote for their state's winning candidate. Of course, electors might decide to go their own way – and not worry about any legal consequences. After all, the Founders contemplated that electors should employ their wisdom and discretion in choosing a president. Although the issue has never been directly tested in the courts, I doubt whether anyone could interfere with an elector's constitutional prerogative.

Now let's get back to Ayotte's write-in vote for Pence. For it to be meaningful, she would have to write in the names of four electors pledged to Pence – New Hampshire's current allotment – for her ballot to be meaningful. Indeed, she would have to convince a few hundred thousand like-minded Granite-staters to do the same. Assume, however, that she and others merely mark down "Pence," without naming any electors; and further assume that Pence wins the day in her state. It would fall to the state legislature to subsequently choose electors. Neither Ayotte nor other Pence voters would have a legal role in naming New Hampshire's electors – and it would be these four individuals who vote for president on December 19<sup>th</sup>.

All told, then, write-in votes are of limited value.

Indeed, our state-run system for electing a president is a mighty strange way of choosing the world's most powerful leader. Wouldn't it make more sense to have one standard set of laws for our national election? Of course, we have been doing it this way since 1789, and there does not seem to be the popular will to reform the process. Perhaps after this year a groundswell will develop. One direct national election for president would be more democratic – and a lot less complicated.

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*Jerry H. Goldfeder, special counsel at Stroock & Stroock & Lavan LLP, practices election and campaign finance law. He teaches Election Law as an Adjunct Professor at Fordham University School of Law and the University of Pennsylvania Law School, and is the author of Goldfeder's Modern Election Law (NY Legal Publishing Corp., 4th Ed.). He was a script advisor on CNN's mini-series Race for the White House, and writes a Daily Presidential Quiz, which appears on Huffington Post's daily Pollster site. Full disclosure: he serves on Hillary Clinton's National Finance Council, and his views here are his own.*

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