

# REVITALIZING REPRESENTATIVE DEMOCRACY

The Legal Case for Independently Electing the Vice President

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## INTRODUCTION: A MORE DEMOCRATIC PROCESS

Representative democracy rests on the premise that the people select their leaders through election. Americans choose our members of congress, our senators, and our president.

But the person who is next in line to the most important position in the world never faces the voters directly. More than that, the current process further limits the role that the American people play in choosing the person who is first in line for the presidency. This might have been less problematic when the vice presidency was considered to not even be worth a bucket of warm spit, as Vice President John Nance Garner is credited as saying. Today, however, the vice president's power and influence has grown to the point that the nation must give serious consideration to ensuring that the representative ideal pulses within the office of the person who stands just one heartbeat away from the presidency.

An effort to democratize the vice presidential selection process will likely meet resistance in the form of both political and legal pressure. The political pushback stems from a desire to maintain the status quo for those who benefit from the system. This political argument will have to be met through a campaign to convince the American people that we deserve a voice in the selection and election of the person who serves in the second most important office in the world.

Those who oppose a more democratic vice presidential process may also argue that such an approach lacks support in the law. These arguments may need to be faced in the courts of law. This paper explains that far from preventing an unaffiliated, independent vice presidential campaign, our nation's history, the Constitution, federal law, and state law support a more democratic election process.<sup>1</sup>

## WHAT ABOUT THE CURRENT APPROACH TO VICE PRESIDENTIAL SELECTION?

The starting point for appreciating the need for a change to the current system of vice presidential election requires an understanding of the existing process.

Both the Democratic and Republican parties select their vice presidential nominees at their national conventions in the summer preceding the presidential election. Both parties bestow their conventions' delegates with the ultimate authority to select vice presidential nominees. In truth, however, those delegate votes are simply pro forma affirmations of the person selected by the presidential nominee.

In other words, the Democratic and Republican presidential nominees are selecting who will be the next vice president of the United States.

## THE EXISTING LEGAL FRAMEWORK FOR VICE PRESIDENTIAL ELECTION

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<sup>1</sup> The term "unaffiliated" means unconnected to a major party and the term "independent" means unconnected to a presidential candidate.

The Constitution assigns the vice president just one stated duty: to serve as the Senate's president. In that role, the vice president performs several duties: to break ties, to preside over impeachment trials, and to supervise electoral vote counting. Although commentators and scholars regularly give short shrift to the vice president's formal responsibilities, those duties actually provide support for a democratized vice presidential selection process.

The Constitution's framers placed the vice president in more of a legislative than executive role. In fact, today, former vice presidents receive the same pension as members of Congress, based on the vice president's role as president of the Senate.

If one views the vice president as serving a legislative role, then electing the vice president directly and independently is in line with the purposes and spirit of the 17<sup>th</sup> Amendment, which democratized senate elections.

The Constitution provides few requirements for who may serve as vice president, mandating only that the occupant of that office be at least 35 years old, a natural born citizen, and a resident of the United States for at least fourteen years.<sup>2</sup>

As with the president, the Electoral College elects the vice president. As originally conceived by the Constitution's drafters, the vice president would be the runner-up in the Electoral College. Following the controversy of the presidential election of 1800, the states ratified the Twelfth Amendment, which grants each Elector one vote for president and one vote for vice president. That system remains in place today. (See sidebar about the 1800 election.)

Legally speaking, the Electoral College is the body that is ultimately responsible for selecting the vice president. However, a review of that system reveals that the main source of law surrounding the Electoral College actually comes from states, which decide the process for selecting Electors and provide the rules for whom the Electors may vote.

## THE ELECTION OF 1800

Thomas Jefferson, leader of the Democratic-Republican party, finished second behind his friend John Adams of the Federalist Party in the 1796 presidential election. As the second-place vote-getter, he became Adams' vice president. This meant that for the next four years, Adams's vice president was a member of the opposition. Jefferson took his role seriously, and he actively sought to undermine and discredit the Federalist presidency.

In 1800, Jefferson ran again as leader of the emerging Democratic Party, but this time ran "with" Aaron Burr, with the understanding Burr would become Jefferson's vice president. But the results of the Electoral College vote left Jefferson and Burr tied at 73 votes, with Adams garnering 65. The Jefferson-Burr tie went on for 35 more rounds of voting until Alexander Hamilton persuaded a few Federalists to support Jefferson, who then won the presidency.

This chaos sparked the Twelfth Amendment, which rewrote the Electoral College rules and still governs presidential elections today.

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<sup>2</sup> U.S. Const. Art. II 1, cl. 4; U.S. Const. am. XII.

# WHAT IS THE ELECTORAL COLLEGE AND WHAT DOES IT DO?

The Constitution provides only broad rules governing the Electoral College. Under Article II:

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.

The Twelfth Amendment states, in part:

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate...

Federal law, too, is scant in this area. In fact, only a few provisions in federal law are relevant:

- **Timing of Appointing Electors.** 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.<sup>3</sup>
- **Failure to Make Choice of Prescribed Day.** Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.<sup>4</sup>
- **Number of Electors.** The number of electors shall be equal to the number of Senators and Representatives to which the several States are by law entitled at the time when the President and Vice President to be chosen come into office; except, that where no apportionment of Representatives has been made after any enumeration, at the time of choosing electors, the number of electors shall be according to the then existing apportionment of Senators and Representatives.<sup>5</sup>
- **Meeting and Vote of Electors.** 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.<sup>6</sup>
- **Manner of Voting.** The electors shall vote for President and Vice President, respectively, in the manner directed by the Constitution.<sup>7</sup>

As we can see, under the Constitution and federal law, states possess broad authority to prescribe the rules related to the Electoral College. So what do the state laws say?

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<sup>3</sup> 3 U.S.C. § 1.

<sup>4</sup> 3 U.S.C. § 2.

<sup>5</sup> 3 U.S.C. § 3.

<sup>6</sup> 3 U.S.C. § 7.

<sup>7</sup> 3 U.S.C. § 8.

## STATE LAWS: THE ELECTORAL COLLEGE

### How States Select their Electors

Every state has laws that allow political parties to select a slate of electors. It appears that most, if not all, states also provide for unaffiliated electors. For example, Colorado allows an unaffiliated candidate for president or vice president to file a list of electors.<sup>8</sup> Similarly, Florida provides that candidates for “President and Vice President with no party affiliation” can file a petition with a slate of electors when the candidate qualifies for the ballot.<sup>9</sup> In Ohio, too, a candidate must qualify for the ballot when submitting a list of electors.<sup>10</sup>

Indeed, a review of all fifty states’ (plus the District of Columbia’s) laws on this subject indicates that every state provides some path for unaffiliated candidates to designate electors to vote for vice president.

### What About Disloyal Electors?

Only a handful of states impose requirements that an elector vote for the state’s popular vote winners.<sup>11</sup> Therefore, an unaffiliated, independent candidate for vice president could receive votes from the Electors chosen by the political party process. For example, a Republican Elector in 2016 could have cast a presidential electoral vote for Donald Trump while casting a vice presidential electoral college vote for someone other than Mike Pence. Generally speaking, though, the states rely on the fact that each party selects its own slate of electors and so the parties choose loyalists and party insiders for the role. This does make it difficult, but not impossible, to get an Elector to vote against the party’s nominee and become a disloyal Elector.

It’s important to note that, even though there have been some disloyal Electors in the past, no state has ever prosecuted anyone for a disloyal electoral vote. It is therefore a legally tenable strategy to pursue votes of disloyal Electors.

## BALLOT ACCESS: THE LEGAL FRAMEWORK EXISTS

An unaffiliated candidate must first secure access to the state’s ballot. State rules vary about how an unaffiliated candidate gains a spot on the ballot. Most states require an unaffiliated candidate to collect signatures from a specified percentage of voters, although some require only that the individual pay a fee.

While an independent candidacy for vice president will cause confusion in many secretaries of state offices because of the untested nature of the concept, a review of state laws provides clear markers for how to secure a spot on the ballot as a vice presidential nominee. Nearly every state makes specific provisions for unaffiliated candidates for vice president and there exists significant room to maneuver within the existing statutory framework. (See sidebar for one example.)

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<sup>8</sup> Colo. Rev. Stat. § 1-4-303.

<sup>9</sup> Fla. Stat. 103.021(3).

<sup>10</sup> Ohio Rev. Code Ann. § 3513.257.

<sup>11</sup> The Supreme Court has held that states may impose these requirements on electors, so there is not likely to be a successful legal challenge to laws that impose loyalty requirements on Electors.

Of course, practical challenges for an unaffiliated, independent candidate also exist. Such a campaign will require states to re-conceptualize their ballots so that people can vote separately for president and vice president. Redesigning the ballot is not hard, however, especially if the process begins early enough, which it must because the signature-collecting deadlines are set, in part, to allow sufficient time to design and print the ballots. Moreover, that an independent vice presidential run would require election officials to adjust their current systems to comply with the state's election laws demonstrates that such an independent vice presidential campaign is well grounded legally.

Put another way, while changes must be made by elections officials, the fact remains that the law allows for an unaffiliated, independent vice presidential campaign.

## COLORADO: A BALLOT ACCESS EXAMPLE

Colorado allows an unaffiliated candidate to gain a spot on the ballot by paying a \$1,000 fee. And the state law makes specific independent reference to vice presidential candidates:

“No later than 3 p.m. on the ninetieth day before the general election, a person who desires to be an unaffiliated candidate for the office of president or vice president of the United States shall submit to the secretary of state either a notarized candidate's statement of intent together with a nonrefundable filing fee of one thousand dollars or a petition for nomination pursuant to the provisions of section 1-4-802 and shall include either on the petition or with the filing fee the names of registered electors who are thus nominated as presidential electors.”

Thus, this language allows someone to run for vice president without being tied to a particular presidential candidate.

## THE LEGAL BOTTOM LINE

Party leaders used to choose their candidates in smoke-filled back rooms. But our nation's history shows a concerted and deliberate move towards democratizing our most important elected offices. These days, the parties select their nominees largely through open processes that allow voters to have their say. Senators used to be selected by state legislators, for instance, but now they must be directly elected by popular vote. Even as these other institutions become more democratic, vice presidential election remains antiquated.

The Constitution, federal law, and state law all allow for an independent, unaffiliated run for the vice presidency. Moreover, Electors may vote for any candidate for vice president that the Electors deem fit. The practical reality, however, is that because the state-level process is so partisan, most likely an unaffiliated candidate for vice president would have to gain a spot on the state ballot and then receive enough votes to sway the slate of Electors to her/his candidacy.

Yet this important foundational fact is clear: nothing in the Constitution or federal or state law prevents the candidacy of an unaffiliated vice president. Any legal effort to stop such a candidate from seeking a spot on a state's November ballot would likely fail.

The vice presidency is too important to allow the undemocratic selection process to persist.

