

The Pending Presidential Election

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Whatever anyone might tell you, America doesn't have a president-elect. In fact, the presidential election has yet to be held. America's official presidential election will occur on Monday, December 15.

The media's repeated and erroneous references to Barack Obama as "president-elect" may seem like a mere technicality to some. He is anticipated to be president-elect eventually. But the mistaken terminology also represents a fundamental lack of understanding regarding the workings of our Electoral College system.

A few weeks ago, voters went to the polls and cast their ballots. It probably appeared that they were casting their ballots for one of the presidential candidates: Obama, John McCain, or a third-party candidate. They were not. In reality, they were casting their ballots for Republican, Democratic, or third-party electors. Forty-eight states and the District of Columbia award these electors in a winner-take-all fashion. For instance, Texas elected thirty-four Republican electors on November 4 because McCain won the most Texans' votes. If Obama had won Texas, a slate of thirty-four Democratic electors would have been elected instead.

In total, 538 electors were elected on Election Day. These electors have one job: They will represent their states in the real presidential election on December 15. On that day, they will go to designated locations within their states, and they will cast the official ballots for U.S. president.

In all likelihood, Barack Obama will be the choice of a majority of these electors. But technically speaking, it doesn't have to happen.

First, there is the so-called "faithless elector" issue. Obama is expected to receive votes from 365 Democratic electors on December 15 (compared to McCain's 173). Obama will almost certainly receive all or most of these 365 votes. Indeed, some of the Democratic electors are bound by their states' laws to cast their ballots for him. Having said that, it is unclear if these laws can be enforced. Technically, the electors could choose to act differently—and some have done so in the past.

For instance, a D.C. elector abstained from the 2000 presidential election in order to protest the lack of congressional representation for the District of Columbia. (She was supposed to vote for Al Gore, but instead submitted a blank ballot.) Her vote was cast as so many of these faithless votes are: An elector sees a harmless opportunity to make a political statement and does so. None of these faithless electors has ever changed the outcome of a presidential election, and such a scenario would be extremely unlikely to occur absent the "perfect storm." But Americans should be aware of the intricacies of their presidential election system.

Second, there are issues surrounding the war on terrorism. None of us hopes for an attack that would change the outcome of a presidential election. However, in an age of terrorism, the public should at least be educated regarding the logistics of what such an attack would mean if one or more of the candidates were caught in it.

It's happened once before, albeit not because of terrorism. In 1872, a presidential candidate died between the general election day and the meetings of the electors. That year, Ulysses S. Grant ran for re-election against Horace Greeley. The November 5, 1872, election revealed that Grant would defeat Greeley in the electoral vote. Greeley had gained only 66 electors to Grant's 286. Greeley, however, passed away on November 29, 1872, a mere five days before the Electoral College vote on December 4. The situation threw Greeley's electors into confusion. Whom were they to vote for? Three electors decided to vote for Greeley, even though he had passed away. Sixty-three other Greeley electors split their votes among several alternative Democratic candidates. No crisis ensued in 1872 because Greeley was never expected to win. But if Grant had died instead of Greeley, the electors' confusion regarding what to do could have been a real problem. Potentially, no candidate would have obtained a majority of electoral votes. When no candidate obtains a majority, the Constitution provides that the House of Representatives is to choose the president from the top three vote-getters in the electoral vote.

If such a scenario were to occur today, then the Democratic Party would undoubtedly work hard to unify the 365 Democratic electors behind Joe Biden or some other Democrat. But a failure to coordinate Democratic electors could mean that no candidate would obtain a majority of electoral votes. The House would then be expected to choose a president from the top three electoral vote-getters (presumably McCain and two other Democrats). At least theoretically, then, it is still possible for McCain to win the presidential election this year.

But December 15 is not a magical date at which these issues go away. The electors' votes are not formally counted until January 2009. If a presidential candidate were to pass away between the meetings of the electors and January 8, then Congress would have to decide whether to count votes that have been cast for a dead man. In 1873, the votes cast for Greeley were not counted because Congress determined that votes could not be cast for someone who is deceased.

The country will finally and officially have a president-elect on January 8, when Congress counts the electors' votes. At this point (because a candidate will have been formally elected), constitutional provisions for presidential succession kick in if the winning candidate were to unfortunately pass away.

This author is a staunch supporter of the Electoral College, but nothing about the Constitution's presidential election provisions requires these timing issues to exist. They can and should be addressed. Congress can act to close the gap between the general election day, the meetings of the electors, and the counting of the votes. It could declare, in advance, its position on issues such as counting votes for a deceased candidate. Political parties can also take action, perhaps considering what steps they would take to quickly coordinate electors if something happens to a presidential candidate between Election Day and the meetings of the electors. Finally, this author has suggested a plan for automating the casting of electoral votes (although this latter remedy would require a constitutional amendment).

This author is the first to hope that the issues discussed above remain purely academic—problems that could theoretically occur, but won't. On the other hand, it would be wise to address them before the country finds itself with a president it did not intend to elect.