August 18, 1948

MEMORANDUM

Re: Presidential Electors and the Nominee of the National Convention

This memorandum considers certain of the questions presented when a presidential elector announces before the national election that he intends to vote for a presidential candidate other than the one nominated by the national convention of the elector's party. In particular, this memorandum will consider whether, in such a case, there is any way of compelling the elector to vote for the nominee of his party.

1. The Constitutional and Statutory Background.

The Constitution (Article II, sec. 1, cl. 2) provides as follows:

> "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 duties of the electors are stated in the Twelfth Amendment[1] which replaces the third clause of section 1 of Article II. And the fourth clause of the section is as follows:

> "The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."

[1] "The Electors shall meet in their respective states, and vote by ballot for President and Vice-President . . ."

The acts of Congress dealing with presidential electors and the counting of their votes are found at Title 3, U.S.C., sections 1 to 20. Section 1 provides that the electors "shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year . . ." Other sections authorize the states to make laws on various points of procedure and deal with the transmission of certificates of the electors' votes and the counting of the votes in Congress.

A review of the state statutes would no doubt show that most, if not all, of the states have in their turn enacted legislation which exercises the authority conferred on the states by Congress and in other respects deals with the selection of presidential electors.

2. Court Decisions.

Investigation has thus far disclosed only one case whose real holding bears directly on the problem of this memorandum. That case is Opinion of the Justices, 34 So. (2d) 598 (Sup. Ct. of Ala., April 1, 1948). An Alabama statute (General Acts 1945, p. 605) required that presidential electors "shall cast their ballots for the nominee of the national convention of the party by which they were elected". The Justices, in an advisory opinion to the Governor, unanimously held this statute invalid under the Federal Constitution. Their reasoning was as follows: (a) "The appointment and mode of appointment of

electors belongs exclusively to the state under the Constitution". (b) But "the action of the electors in casting their votes by ballot is governed by the Federal Constitution". (c) ". . . the words used in the original Constitution and the amendment thereof show that he is to follow his own judgment and discretion". (d) "It is true that there has grown up a practice under which electors have felt duty bound by virtue of their own consciences to vote for the nominees of the party that nominates them for election and such electors in casting their ballots have felt influenced by the plans and purposes of the party to which they belong. But this course of action has followed their own personal regard for what was their duty and not some statutory mandate". (e) "When the legislature has provided for the appointment of electors its powers and functions have ended. If and when it attempts to go further and dictate to the electors the choice which they must make for president and vice-president, it has invaded the field set apart to the electors by the Constitution of the United States, and such action cannot stand".

The other cases found thus far which deal with presidential electors contain, in some cases, language declaring that they are morally bound to support the nominee of the national convention, but an examination of the actual holdings of the cases, and of the setting in which such language appears, indicates that these holdings are of limited scope.

The cases in the Supreme Court of the United States are the following:

In re Green, 134 U.S. 377 (1890). Green was convicted in the Virginia State courts of voting for a presidential elector although disqualified by a previous conviction of a crime. The question presented to the Supreme Court was whether the courts of Virginia had jurisdiction. The Supreme Court unanimously held that they did have jurisdiction, on the ground that the electors were State officers.

McPherson v. Blacker, 146 U.S. 1 (1892). A Michigan statute provided that presidential electors should be elected by districts (rather than on a state-wide basis). This mandamus action, brought against the Secretary of State of Michigan, asked that this statute be declared void under the Federal Constitution. The Supreme Court of Michigan upheld the statute and denied mandamus. The U. S. Supreme Court affirmed on the ground that the election of electors by districts was one of the modes of appointment which the legislature could constitutionally direct. The court said that this was so even though electors, in whatever manner selected, were now "chosen simply to register the will of the appointing power in respect of a particular candidate" and even though "in relation . . . to the independence of the electors the original expectation [of the Constitution] may be said to have been frustrated". (p. 36)

Burroughs v. U. S., 290 U.S. 534 (1934). The Supreme Court here upheld an indictment drawn under provisions of the Federal Corrupt Practices Act (U.S.C., Title 2, sec. 241 et seq.) designed to safeguard

an "election of . . . presidential and vice presidential electors". The Court said: "While presidential electors are not officers or agents of the federal government [citing In re Green, supra], they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States." The importance of the election of a President is obvious, and Congress has constitutional power to protect the election from improper use of money (p. 545).

Turning to other courts, Seay v. Latham, 182 S.W. (2d) 251 (Sup. Ct. of Texas 1944), discloses a remedy there held available to a State party against electoral nominees opposing the party's wishes. Fifteen of the persons nominated in May, 1944, as Democratic presidential electors announced after the Democratic national convention that they would not support the presidential nominee of that convention. In September the State Democratic Convention adopted a resolution canceling the nomination of the fifteen and nominating fifteen others in their place. The new fifteen brought this mandamus action against the Texas Secretary of State to compel him to certify that they were the nominees. The Supreme Court of Texas granted mandamus, holding that the September convention had the authority to cancel the May nominations and make new ones.

The Court said:

10 "The power to determine the policies of the Party, including the power to determine who shall represent it in the selection of the President and Vice-President of the United States, when not otherwise provided by statute

or by rule of the association, resides in the State convention of the Party . . ." [p. 253]

"In the case at bar the same authority which made nominations in the first instance, the Democratic Party, acting through a regularly convened convention, withdrew the nominations. No equitable rights had accrued in favor of the nominees in the meantime. In the absence of a law prescribing when and how the nominations should be made, we think it necessarily follows that the same authority which made the nominations in the first instance could withdraw them and substitute the names of others in their stead. The Party was free to handle the matter as it saw fit, so long as there was no fraud or oppression and the members of the Party were given a reasonable opportunity to express their views. To hold otherwise would force the Party to retain as its representatives those who are no longer agreeable to it." [p. 254]

". . . The sufficiency of the cause for the withdrawal of the nominations is not a matter for this Court to determine." [p. 255]

Thomas v. Cohen, 146 Misc. 836, 262 N.Y. Supp. 320 (Sup. Ct., Kings County 1933) reviews the tradition of the electoral college at length and contains strong language to the effect that "an elector who attempted to disregard that duty [to choose the nominee of the national convention] could, in my opinion, be required by mandamus to carry out the mandate of the voters of his state" (p. 326). But there was no such attempted disregard in this case. On the contrary, the situation seems to have been academic. The petitioner contended that the voting machines at the Presidential election of 1932 should have disclosed the names of candidates for presidential elector instead of the names of the candidates for President but he disclaimed any desire to upset the results of the election, and the exact nature of the relief sought by way of mandamus is not disclosed by the report.

The Court denied mandamus, saying that neither the Constitution nor the Election Law required the voting machine to show the names of those nominated as electors.

Other cases relating to the form of the ballot are:

State ex rel Hawke v. Meyers, 132 Ohio State. 518, 4 N.E. (2d) 397 (Sup. Ct. of Ohio 1936). Held: Under state law, names of candidates for presidential election need not appear on the ballot.

State v. Pettijohn, 107 Kan. 447, 194 Pac. 328 (1920). Held: Separate square in which to vote separately for each candidate for presidential elector is not required.

3. Analysis.

If the nominee for elector is at odds with his state party, several courses may be explored. The state party may cancel his nomination and nominate someone else, if there is still time for new nominations and state statutes permit in other respects. See Sanz v. Latham, supra. If this cannot be done and the nominee's intended action is contrary to the understandings on which he was nominated, the state party might try to get an injunction against him.

If the nominee for elector is in accord with his state party -- if, in other words, the opposition to the national candiate stems from the state party itself --, the state party will not wish to take action against the electoral nominee. In that case those wishing to support the national candidate can consider filing their own slate of candidates for electors.

A state law directing the electoral nominee to vote for the national candidate of his party would be confronted with Opinion of

the Justices, supra, and possibly also with questions of delegation of legislative power. Further, if the electoral nominee is in accord with his state party in opposing the national candidate, such a law might be attacked as a legislative intervention in a purely party matter.