



LWVUS National Popular Vote Compact Study, Opposing Arguments

by
Gail Dryden and Barbara Klein

There is clearly a lack of respect for the Electoral College. The League of Women Voters of the United States (LWVUS) opposes it. In Gallup surveys support for its abolition in favor of direct popular vote has never fallen below 58 per cent. Nonetheless, the Electoral College has weathered the passage of time even with more than 700 Constitutional amendments proposed to abolish or substantially alter it. All have failed.

Enter the National Popular Vote Compact (NPV Compact)—a way to change the way the President is elected without having to amend the Constitution. There is intense political and citizen interest in any change to the presidential electoral system, so this new way of making change is garnering much attention. Opponents of the NPV Compact indicate a need to look carefully at this particular plan for its limitations and problems as well as at problems with the Electoral College that are not addressed by the NPV Compact.

CONSTITUTIONAL ISSUES

Constitutional Power. Because the U.S. Constitution gives a state legislature the power to determine how a state's electors are chosen, there could be legal challenges to a compact between several states on selection of electors.

Political Compacts. According to opponents a political compact - one that tends to enlarge the political power of compacting states at the expense of either the federal government or non-conforming sister states - may function differently from other types of interstate compacts that cover subjects such as boundaries or economics issues.

Constitutionally, political compacts are permitted between states, but all require **congressional approval**. Under the Constitution's Compact Clause any changes that create a shift in political power require congressional consent. Therefore, without congressional consent the NPV Compact may not be enforceable. Congressional approval has not always been sought for previous state compacts, and the four states that have adopted the NPV Compact have not sought Congressional approval.

The NPV Compact is perceived as a way to circumvent a national stalemate on election reform but the impasse could continue if congressional approval is necessary and difficult to obtain. Senators, who are elected statewide, could be as reluctant as some governors have been to support the NPV Compact if they perceive it as disenfranchising a significant portion of their own state constituency.

The U.S. Supreme Court declined to hear a case about the impact of one state's method of appointing its presidential electors on another state (1966). However, the current Court might

decide to hear a case on the NPV Compact, and could decide against a *group* of state legislatures introducing a new system of electing a president without an amendment to the Constitution.

Non-Compacting States. States not endorsing the Compact could become a fundamental concern constitutionally because the interests of states which have not signed the Compact could be greatly diminished. Opponents say that the electors from states not part of the Compact would have little influence on selection of the President.

Constitutional Protections. The U.S. Constitution is written to protect the interests of the states in order that all states will play a role in the electoral process. The NPV Compact allows as few as 11 states to determine a presidential election and could shift political power between states that are and are not party to the Compact. There is good reason to believe that effective governance would benefit from a broad geographic basis of support. Whether there is a broad geographic base for the Compact won't be known until we know which states enter the compact.

EVALUATING FAIRNESS

Support for a State's Winning Candidate. Voters supporting the candidate who wins their state would want their state's electors to support their choice. If a state's legislature has adopted the NPV Compact, that state's secretary of state would be required to certify electors representing the candidate who is the winner of the national popular vote – not necessarily the candidate who wins the popular vote within the state. Despite the legitimacy of the argument for one person, one vote that the NPV Compact offers nationwide, voters in states which traditionally support one party might be particularly troubled if their state's electors cast their votes for the candidate of an opposing party.

State Identity and Disenfranchisement. While the Electoral College now disenfranchises voters, the NPV Compact could disenfranchise the majority of a state's voters. Disenfranchisement of majorities within states could occur despite the state compact's goal to reflect the majority nationwide. This could happen specifically where state electors had to support the nationwide choice over their own state's choice. For example, if the NPV Compact were adopted within a state and the voters in that state cast a majority of votes for candidate 'A', the state's Electoral College votes would not be cast for that candidate IF candidate 'B' won the most votes from individuals in the 50 states and the District of Columbia combined.

Battleground States. Those supporting the NPV Compact argue that in the current system the election is fought in a few battleground states where the Electoral College votes are at stake. The NPV Compact creates a different scenario, but not necessarily a better one. The majority of the population of the United States resides in concentrated urban areas. In order to gain the most popular votes, a candidate will tend to campaign primarily in areas of dense population, ignoring sparsely populated rural areas. The concerns of many rural areas could be overlooked as candidates speak to issues resonating with urban populations.

State's Rights. The NPV Compact asserts state's rights and the ability to enter into a compact with other states to achieve a goal. However, the Compact would reduce the rights of the state itself and increase rights of individuals in all states. Each state would relinquish an independent role in the selection of the president and vice president by mandating that each state that is party to the Compact vote in a certain manner.

Influencing the Winner. The NPV Compact takes effect if enough states have ‘signed on’ to represent 270 electoral votes. The 11 largest states together have the 270 electoral votes that would be needed for the Compact to take effect and, if they were the only states to join the compact, could determine the outcome of the election even if 39 other states did not participate in the Compact. The first four states that have signed on to the Compact vary in size, so it is likely that it would take more than 11 states to reach the threshold for the Compact to take effect. The popular vote from all states would be used to determine the winner of the national popular vote, but it would be a dangerous precedent to allow a small number of states to have undue influence over selection of the president.

Questioning the approach. Clearly, some opponents simply think it inappropriate or unfair to have an approach like the NPV Compact that by avoiding the amendment process, is a ‘work-around’ to the Constitution.

MECHANICAL ISSUES AND POSSIBLE FLAWS

Mechanisms for Enforcement of the NPV Compact. Methods for enforcing the Compact, if it were broken, are unclear. For instance, it may be necessary for a state or states to bring a lawsuit against noncomplying states as part of the enforcement process. The Compact might be deemed unenforceable with the potential to disrupt procedures of the Electoral College. The Constitution gives each state the power to determine how that state’s electors shall be appointed. However, it is not at all clear that the power to change the appointment process could be limited.

Timing. There are questions of timing as well. If a state pulls out of the compact during the Compact’s ‘blackout period’, *it is unclear* what authority, if any, could force it to return or how long this might take. Given constitutional requirements regarding when the Electoral College casts its votes and when a president is inaugurated, this could be serious indeed.

Other NPV Compact provisions suspend the rules of the Compact and return to the Electoral College if another state pulls out of the compact too close to the election. This, too, *could* cause disruption .

Close Elections. Some opponents of the NPV Compact are concerned that the Compact does not address electing a president with less than majority support, which is also possible under the current Electoral College system. They point out that in really close races a popular majority may not exist. This can be true in our current system as well, although some believe that the requirement for a majority of votes in the Electoral College helps establish the legitimacy for the president. While many voters were distressed at the outcome during the 2000 presidential election, most accepted the legitimacy of the system. Some opponents to direct elections and the NPV Compact think that the Electoral College adds this legitimacy in close elections.

Winning Levels. The NPV Compact proposal does not *improve* on the current system by demanding the president be elected by an actual ‘majority’ (50 per cent plus 1 vote) of the people. The NPV Compact may come no closer than the current system to electing a nationwide majority winner, as it still allows a candidate with only the ‘plurality’ of the vote to be selected President.

Plurality. A plurality is the standard of the NPV Compact. Some proposals for direct election of the president include provisions for a minimum level of 40 per cent. A majority of the popular

vote might be preferable, but it is unfortunate that the NPV Compact doesn't require at least 40 per cent for a candidate to become president. Election reforms could have been included in the proposal that would have guaranteed majority winners, but in the end were not.

As noted above "Close Elections" some argue that in the Electoral College even when the President receives less than a majority of the vote there is at least the legitimacy of a majority in the Electoral College because all but two states award electors on a winner-take-all basis. In the end the winner has at least an illusion of a majority mandate after winning 270 electoral votes.

Recounts. Were a recount to be necessary within a state, the national outcome might be uncertain, thereby potentially disrupting the timely meeting of the Electoral College. In a close race there would be no single national standard governing the recount process, as indeed there is not now. Each state has its own statutory recount criteria. The variations in rules governing recounts could raise issues of equal protection among the states. There is nothing in the NPV Compact that gives the compacting states authority to conduct the recount were a state to refuse. A state in the Compact could be sued by the other states within the Compact, but it isn't clear whether a state outside the Compact could do so. The NPV Compact contains no authority to carry out these recounts and must rely on the state's procedures, possibly prolonging the time it takes a state to appoint its electors or even to determine the final result of the popular count nationwide.

Election Fraud/Voter Suppression. This argument addresses the difference between direct elections and the current system as opposed to the NPV Compact in particular. It is unlikely that fraud will occur in states where the votes indicate a clear choice and the election is not close, because a large number of fraudulent votes or a large amount of voter suppression would be needed to alter the election results. In the current system, fraud is generally limited to a few areas, and especially suspected in 'battleground' states. Election observers and federal law enforcement can concentrate resources there. Fraud investigations at the national level, however, would be much more difficult when an election is to be decided by national popular vote totals.

OTHER ISSUES

Pre-clearance States and the Voting Rights Act. Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas and portions of Virginia, California, Florida, Michigan, New Hampshire, New York, North Carolina and South Dakota are obligated under the Voting Rights Act (VRA) to seek approval of the United States Attorney General or a three-judge panel for the District of Columbia before adopting "any voting qualification or prerequisite to voting, or standard practice, or procedure with respect to voting."

The VRA is often cited in state redistricting plans and might be a basis for challenging the NPV Compact if prior approval is not secured.

Faithless Electors. The issue of an elector or group of electors casting their votes in an unexpected manner is acknowledged but listed under "Other Issues" for two reasons. (1) Under the Compact it is expected that the electors of the "winning candidate" side will be those to cast the votes nationally. (2) There is little practical reason to believe that this is a major issue. Of the 21,915 electoral votes cast for the president in 55 elections between 1789 and 2004, only 11 were a surprise. One was accidentally cast, nine were considered 'grand-standing' after the election when the electors knew their votes would make no difference. Only one (for Thomas

Jefferson in 1796) was cast with the hope of changing the election. Opponents fear that with the NPV Compact some electors might feel an injustice would occur to their home state if they cast their vote for the national winner and thus may be tempted to violate the Compact.

LEAGUE ISSUES

Uniform Standards. THE LWVUS supports uniform standards for all elections. The NPV Compact is not uniform in that it can be enacted by some states and not others. Uniform national voting standards is *already* the League's position. While the current Electoral College system is also not uniform (as with Maine and Nebraska), neither is the NPV Compact. National level changes to the process that are consistent across the states would engender a better balance of issues and concerns of the body politic rather than any measure adopted on a state-by-state basis.

CONCLUDING ARGUMENTS AGAINST THE NPV COMPACT

While the United States is a Republic and not a direct democracy, the LWVUS supports direct election of the president. One person – one vote – for one seat. The League rejects arguments for federalism over those for individual voters' rights in this matter. This is why the LWVUS supports abolishing the Electoral College. However, any question of abolishing the Electoral College must, by necessity, consider the replacement.

Not Perfect. From a functional standpoint the case for the NPV Compact appears to be that it is an imperfect system replacing a system that is also not perfect – the Electoral College. This proposal seems to be gaining interest based on its novelty and the public's enthusiasm for eliminating the Electoral College. However, a new plan should present more compelling reasons than these to support such major change.

Uniform Procedures. The LWVUS supports uniform procedures for presidential elections, changes in the candidate selection process and actions that ensure achievement of these goals. The League seeks to replace the Electoral College with direct election of the President. But enthusiasm for replacing the Electoral College may not be sufficient reason to support the NPV Compact given the potential constitutional problems.

Circumventing the Constitution. It is clear that changing the Constitution is extremely difficult; it was so designed. It is important for the League to consider whether changes in the election of the president should be accomplished through normal constitutional amendment procedures or the 'work around' proposed in the NPV Compact.