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Recounts in Presidential Elections in Connection with the National Popular Vote Bill

This letter discusses the issue of recounts in presidential elections in connection with the proposed interstate compact entitled the “Agreement Among the States to Elect the President by National Popular Vote.”

- Recounts would be far less likely under the National Popular Vote bill than under the current state-by-state winner-take-all system (section 1).
- The current state-by-state winner-take-all system is not a firewall that helpfully isolates recounts to particular states, but, instead, is the repeated cause of unnecessary artificial crises (section 2).
- Resolution of all disputes relating to a presidential election must, under current federal law, be completed prior to the meeting of the Electoral College in mid-December, which is constitutionally required to be held on the same day in all 50 states (section 3).
- A recount is conducted by personnel indigenous to each state, and no state needs the help of any other state in order to conduct its own recount (section 4).
- No state is put in the position of judging election returns from other states under the National Popular Vote bill (section 5).
- Under a national popular vote, there would be less incentive for fraud and mischief, and less drastic consequences for whatever fraud and mischief does occur (section 6).
- The currently existing schedule for the “final determination” of presidential election results (established by current federal law) and the triggers for recounts should be improved; however, these changes are far more urgently needed for the current state-by-state winner-take-all system than for the National Popular Vote system (section 7).

1. Recounts would be far less likely under a National Popular Vote than under the current state-by-state winner-take-all system.

Recounts in presidential elections would be far less likely to occur under a national popular vote system than under the current state-by-state winner-take-all system (i.e., awarding all of a state's electoral votes to the candidate who receives the most popular votes in each separate state).

In fact, if the President were elected from a single nationwide pool of votes, one would expect a recount once in 332 elections, or once in 1,328 years.

Based on a recent study of 7,645 statewide elections in the 26-year period from 1980 through 2006 by FairVote,¹ the probability of a recount is 1 in 332 elections (23 recounts in 7,645 elections). Thus, with 420 statewide races on the ballot in 2006, there was one statewide recount (the Vermont State Auditor's race). Similarly, there was one recount in 2004 (the Washington state governor) and one in 2008 (the U.S. Senate race in Minnesota).

Under the current state-by-state winner-take-all system, there are 51 separate opportunities for recounts in every presidential election. Thus, our nation's 56 presidential elections have really been 2,084 separate state-level elections. In this group of 2,084 separate elections, there have been five seriously disputed counts. The current system has repeatedly created artificial crises in which the vote has been extremely close in particular states, while not close on a nationwide basis. Note that five seriously disputed counts out of the 2,084 separate state-level elections is closely in line with the historically observed probability of 1 in 332.

A national popular vote would reduce the probability of a recount from five instances in 56 presidential elections to one instance in 332 elections (that is, once in 1,328 years).

A good way to visualize this is to think of the chance of a recount as loading one bullet into a 332-chamber gun. Under a national popular vote, the gun is fired once every 4 years. We can therefore expect a recount once in 332 elections, or once in 1,328 years. In contrast, under the current system, the gun is fired 51 times every 4 years. Therefore, we should not be surprised to have had five seriously disputed counts out of the 2,084 separate state-level elections.

The 2000 presidential election was an artificial crisis created because of Bush's lead of 537 popular votes in Florida. Gore's nationwide lead was 537,179 popular votes (1,000 times larger). Given the miniscule number of votes that are changed by a typical statewide recount (averaging only 274 votes), no one would have requested a recount or disputed the results in 2000 if the national popular vote had controlled the outcome. Indeed, no one (except perhaps almanac writers and trivia buffs) would have cared that one of the candidates happened to have a 537-vote margin in Florida.

There was a recount, a court case, and a reversal of the original outcome in Hawaii in 1960. Kennedy ended up with a 115-vote margin in Hawaii in an election in which his nationwide margin was 118,574.

¹ Fair Vote. 2007. *Survey and Analysis of Statewide Election Recounts 1980-2006* available at <http://www.fairvote.org/reports/?page=1786&articlemode=showspecific&showarticle=2736>.

Samuel Tilden's 3% lead in 1876 was a solid victory in terms of the national popular vote (equal to Bush's solid percentage lead in the 2004 election). However, an artificial crisis was created because of the razor-thin margin of 889 votes in South Carolina, 922 in Florida, and 4,807 in Louisiana. No one would have cared who received more votes in these closely divided states if the President had been elected by a nationwide popular vote.

In fact, the reduction of the chance of a presidential recount would be even greater than stated above because a close result is less likely to occur as the size of the jurisdiction increases. Indeed, only two of the 23 recounts among the 7,645 statewide elections in the 26-year period from 1980 through 2006 were in big states.

Critics of a national popular vote have argued that there could be an extremely close nationwide count in the future (and historical data indeed indicate that there would be one such extremely close election every 1,328 years). However, because about a third of the 50 states are closely divided battleground states even in that rare situation, there would also be, almost inevitably, one or more states with razor-thin popular vote margins. Thus, such an election would also be controversial under the current system.

The average change in the margin of victory as a result of a recount was a mere 274 votes. The original outcome remained unchanged in over 90% of the recounts.

It is important to note that the question of recounts comes to mind in connection with presidential elections only because the current system so frequently creates artificial crises and unnecessary disputes.

More importantly, the possibility of a recount should not even be a consideration in debating the merits of a national popular vote. No one has ever suggested that the possibility of a recount constitutes a valid reason why state governors or U.S. Senators, for example, should not be elected by a popular vote.

2. The current state-by-state winner-take-all system is not a firewall that helpfully isolates recounts to particular states, but, instead, is the repeated cause of unnecessary artificial crises.

It is sometimes argued that the current state-by-state winner-take-all rule acts as a helpful firewall that helpfully isolates post-election disputes to individual close states. In fact, the state-by-state winner-take-all system is not a helpful firewall, but instead the cause of unnecessary fires.

Under the current state-by-state winner-take-all system, there are 51 separate vote pools in every presidential election that matter. Thus, our nation's 56 presidential elections have really been 2,084 separate state-level elections. These 51 separate pools regularly create artificial crises in elections in which the vote is not at all close on a nationwide basis, but close in particular states. This is the reason why there have been five seriously disputed counts in only 56 presidential elections (as listed in section 1).

If anyone is genuinely concerned about minimizing the possibility of recounts, then a single national pool of votes provides a way to drastically reduce the likelihood of recounts and eliminate the artificial crises that are regularly produced by the current state-level winner-take-all system.

3. Resolution of all disputes relating to a presidential election must, under current federal law, be completed prior to the meeting of the Electoral College in mid-December, which is constitutionally required to be held on the same day in all 50 states.

The laws governing the finalization of the count (and completion of any recount) for a presidential election are entirely different than those governing, say, a disputed race for, say, one of the 100 seats in the U.S. Senate (e.g., the 2008 Senate race in Minnesota).

The U.S. Constitution establishes a strict overall national schedule for finalizing the results of a presidential election. These existing provisions would apply to elections conducted under the proposed National Popular Vote legislation in the same way that they apply to elections conducted under the current system.

The U.S. Constitution provides:

“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.”² [Spelling as per original]

Congress has exercised this constitutional power to set the uniform nationwide date for meeting of the Electoral College.

“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.”³

Under both the current system and the National Popular Vote approach, all counting, recounting, and judicial proceedings must be conducted so as to reach a “final determination” prior to the uniform nationwide date for the meeting of the Electoral College in mid-December.

The U.S. Supreme Court has made it clear that the states are expected to make their “final determination” six days before the Electoral College meets (the so-called “safe harbor” date established by section 5 of title 3 of the United States Code).

In 2008, the “safe harbor” date was December 8, and the Electoral College meeting date was December 15.

It may be argued that the schedule established by the U.S. Constitution, existing federal statutes, and existing state statutes may sometimes rush the count (and may possibly even create injustice). However, there can be no argument that this schedule exists in the U.S. Constitution, federal statutes, and state statutes and that this existing schedule guarantees “finality” prior to the meeting of the Electoral College in mid-December. The existing constitutional and statutory schedule would govern the National Popular Vote compact in exactly the same way that it governs elections under the current system.

² U.S. Constitution. Article II, section 1, clause 4.

³ United States Code. Title 3, chapter 1, section 7.

4. A recount is conducted by personnel indigenous to each state, and no state needs the help of any other state in order to conduct its own recount.

A recount is not an unimaginable horror or a logistical impossibility. All Secretaries of State routinely have plans in place for a recount in advance of every election. A recount is a recognized contingency that is occasionally required in the course of conducting elections, and recounts do indeed occur about once in every 332 statewide elections.

No state needs the help of any other state in order to conduct its own recount. The personnel and resources necessary to conduct a recount are indigenous to each state. Thus, a state's ability to conduct a recount inside its own borders is unrelated to whether a recount is being conducted in another state.

Under both the current system and the National Popular Vote approach, all counting, recounting, and judicial proceedings must be conducted so as to reach a "final determination" prior to the uniform nationwide date for the meeting of the Electoral College in mid-December.

In fact, the U.S. Supreme Court has made it clear that the states are expected to make their "final determination" six days before the Electoral College meets (the so-called "safe harbor" date established by section 5 of title 3 of the United States Code).

Because all states must finalize their count (or finish their recount) by the "safe harbor" date in early December, and because the only remaining step required by the National Popular Vote bill is adding up the vote totals from all 50 states and the District of Columbia, the final national vote totals will be available six days before the Electoral College meets.

5. No state is put in the position of judging election returns from other states under the National Popular Vote bill.

Existing federal law specifies that each state's own "final determination" of its presidential election returns is "conclusive" (if done in a timely manner and in accordance with laws in existence prior to Election Day). The wording of the National Popular Vote compact is directly patterned after this existing federal law and requires each state to treat as "conclusive" each other state's "final determination" of its presidential vote.

The "safe harbor" provision of federal law specifies the conditions under which a state's "final determination" is considered "conclusive."

"If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned."⁴

The fifth clause of article III of the National Popular Vote compact provides:

⁴ United States Code. Section 5 of title 3, chapter 1.

“The chief election official of each member state shall treat as conclusive an official statement containing the number of popular votes in a state for each presidential slate made by the day established by federal law for making a state’s final determination conclusive as to the counting of electoral votes by Congress.”

In short, no state has any power to judge the presidential election returns of any other state under either the National Popular Vote compact or the current system.

6. Under a national popular vote, there would be less incentive for fraud and mischief, and less drastic consequences for whatever fraud and mischief does occur.

The potential for political fraud and mischief is not uniquely associated with either the current system or a national popular vote. In fact, the current state-by-state winner-take-all system magnifies the incentive for fraud and mischief because all of a state’s electoral votes are awarded to the candidate who receives a bare plurality of the votes in each state.

Under the current system, the national outcome can be affected by mischief in one of the closely divided battleground states (e.g., by placing insufficient or defective voting equipment into the other party’s precincts, by selectively and overzealously purging voter rolls). The ill-advised use of the butterfly ballot by a Democratic election official in one county in Florida cost Gore an estimated 6,000 votes — far more than the 537 popular votes that he needed to carry Florida and win the White House in 2000. However, an incident involving 6,000 votes would have been a mere footnote if the nationwide count had governed the presidential election (where Gore’s margin was 537,179).

Senator Birch Bayh (D–Indiana) summed up the concerns about possible fraud in a 1979 Senate speech by saying:

“One of the things we can do to limit fraud is to limit the benefits to be gained by fraud. Under a direct popular vote system, one fraudulent vote wins one vote in the return. In the electoral college system, one fraudulent vote could mean 45 electoral votes.”⁵

In the 1950s and 1960s, accusations of voter fraud by both political parties were commonplace in Illinois and various other states. In 1960, a switch of 4,430 votes in Illinois and a switch of 4,782 votes in South Carolina would have given Nixon a majority of the electoral votes. However, 4,430 votes in Illinois were only a focus of controversy in 1960 because of the statewide winner-take-all rule. John F. Kennedy led Richard M. Nixon by 118,574 popular votes nationwide. So, four thousand votes in two states would not have been decisive in 1960 in terms of changing the national popular vote. If Nixon had carried Illinois and South Carolina in 1960, he would have won a majority of the votes in the Electoral College without receiving a majority of the popular votes nationwide.

⁵ *Congressional Record*. March 14, 1979. Page 5000.

7. The currently existing schedule for the “final determination” of presidential election results (established by current federal law) and the triggers for recounts should be improved; however, these changes are far more urgently needed for the current state-by-state winner-take-all system than for the National Popular Vote system.

As discussed in section 1, recounts in presidential elections would be far less likely to occur under a national popular vote system than under the current state-by-state winner-take-all system (i.e., awarding all of a state’s electoral votes to the candidate who receives the most popular votes in each separate state). Under a national popular vote, one can expect a recount once in 332 elections, or once in 1,328 years.

Having said that, the current schedule for the “final determination” of the results of a presidential election (established by current federal law) and the triggers for recounts should be improved in the following five ways.

First, Congressman David Price of North Carolina has filed bills in Congress in recent years (e.g., J.R. 1579 in 2005) to move the meeting of the Electoral College from the first Monday after the second Wednesday in December to January 2 (or January 3 if January 2 is a Sunday). This change would add 17 (or 18) days to the period available to the states to make their “final determination” of presidential election results.

Second, we believe that federal law should be amended to say that a state must complete its initial count of votes for President no later than two weeks after election day (i.e., the schedule already required by Minnesota and some other states).

Third, we believe that federal law should be amended to give the presidential candidate himself (or herself) the unconditional right to initiate a recount immediately after the initial count, with such a recount being paid for by the presidential candidate. According to Election Line,⁶ a candidate already has an unconditional right to initiate a recount in 25 states and a conditional right to do so in 14 additional states.

Fourth, because time is of the essence in resolving disputes involving presidential elections, no time should be sacrificed by perfunctory (and often cosmetic) “automatic recounts” (unless they can be directed at the specific issues that must be decided in a particular race).

Fifth, because time is of the essence in resolving disputes involving presidential elections, we believe that federal law should be amended to give the presidential candidate the right to initiate the “contest” phase of the dispute, without any delay.

Note that the above changes are more urgently needed under the current winner-take-all system than they would be under the National Popular Vote compact, because there are 51 separate opportunities for a recount in every presidential election under the current winner-take-all system, whereas there is only one pool of votes under a national popular vote.

⁶ ElectionLine.Org Briefing. *Recounts: From Punch Cards to Paper Trails*. Briefing No. 12. October 2005. <http://www.pewcenteronthestates.org/uploadedFiles/ERIPBrief12.SB370updated.pdf>.

8. Additional Information

For additional information about the details of operation of the National Popular Vote bill and the issue of recounts, see chapter 6 and sections 10.3 and 9.2 of the book *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote*.

Our web site is www.NationalPopularVote.com.