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Question Concerning Withdrawal from the National Popular Vote Compact

This document discusses the enforceability of the National Popular Vote bill. The National Popular Vote bill is an interstate compact called the “Agreement Among the States to Elect the President by National Popular Vote.”

In particular, this document discusses the hypothetical scenario in which a state legislature and governor might try, for partisan political reasons, to change the “rules of the game” for electing the President by withdrawing from the National Popular Vote compact (say, between the November general election and the mid-December meeting of the Electoral College) and enacting an alternative method of awarding their state’s electoral votes that better suited their political preferences (e.g., legislative appointment of electors).

Although a state is free to withdraw from the National Popular Vote compact at any time, clause 2 of Article IV of the compact delays the effective date of a withdrawal occurring between July 20 of a presidential election year and the January 20 inauguration date. That is, the withdrawal only becomes effective after the presidential election process is completed.

“Any member state may withdraw from this agreement, except that a withdrawal occurring six months or less before the end of a President’s term shall not become effective until a President or Vice President shall have been qualified to serve the next term.”

An attempt to change the “rules of the game” contrary to clause 2 of Article IV

- would violate the Impairments Clause of the U.S. Constitution and be void;
- would violate existing federal law specifying that presidential electors may only be appointed on one specific day in every four-year period, namely the Tuesday after the first Monday in November (i.e., election day);
- would invalidate the “conclusiveness” of that state’s results under existing federal law specifying that presidential electors must be appointed under “laws enacted *prior*” to the Tuesday after the first Monday in November;
- would probably not matter because the national popular vote winner would typically receive about 75% of electoral votes in the Electoral College;
- could only be contemplated, as a practical matter, in about three states because of the partisan division of most state governments, the time delay before new state laws take effect in most states, quorum requirements; and delays inherent in most state legislative procedures;
- would be politically improbable in the real world; and
- would be less likely to occur under the National Popular Vote compact than under the current system—that is, the current system offers less protection.

THE IMPAIRMENTS CLAUSE OF THE U.S. CONSTITUTION PROHIBITS WITHDRAWAL FROM AN INTERSTATE COMPACT IN ANY MANNER OTHER THAN THAT SPECIFIED IN THE COMPACT

An interstate compact is a contract. Withdrawal from any contract may only be made in accordance with the contract's own terms.

Like most interstate compacts, the "Agreement Among the States to Elect the President by National Popular Vote" delays the effectiveness of any withdrawal by a state legislature. Clause 2 of Article IV of the National Popular Vote compact provides:

"Any member state may withdraw from this agreement, except that a withdrawal occurring six months or less before the end of a President's term shall not become effective until a President or Vice President shall have been qualified to serve the next term."

This six-month "blackout" period includes six important events relating to presidential elections, namely the national nominating conventions, the fall general election campaign period, election day on the Tuesday after the first Monday in November, the meeting of the Electoral College on the first Monday after the second Wednesday in December, the counting of the electoral votes by Congress on January 6, and the scheduled inauguration of the President and Vice President for the new term on January 20.

There has never been a court decision allowing a state to withdraw from an interstate compact without following the procedure for withdrawal specified by the compact. The reason is the Impairments Clause of the U.S. Constitution (Article I, section 10, clause 1):

"No State shall ... pass any ... Law impairing the Obligation of Contracts."

The U.S. Supreme Court in *Petty v. Tennessee-Missouri Bridge Commission* (359 U.S. 275 at 285, 79 S.Ct. 785 at 792) in 1952 dismissed the possibility succinctly:

"A compact, is after all, a contract."

Federal and state courts have implemented the U.S. Supreme Court's interpretation of the Impairments Clause for interstate compacts and rebuffed the occasional (sometimes creative) attempts by states to evade their obligations under interstate compacts.

The U.S. District Court for the District of Maryland in 1976 in *Hellmuth and Associates v. Washington Metropolitan Area Transit Authority* (414 F.Supp. 408 at 409) stated:

"Further, when enacted, a compact constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of all parties."

The Commonwealth Court of Pennsylvania in *Aveline v. Pennsylvania Board of Probation and Parole* (729 A.2d. 1254 at 1257, note 10) in 1999 stated:

"A compact takes precedence over the subsequent statutes of signatory states and, as such, a state may not unilaterally nullify, revoke, or amend one of its compacts if the compact does not so provide."

The Council of State Governments summarizes the nature of interstate compacts as follows:

"Compacts are agreements between two or more states that bind them to the compacts' provisions, just as a contract binds two or more parties in a business

deal. As such, compacts are subject to the substantive principles of contract law and are protected by the constitutional prohibition against laws that impair the obligations of contracts (U.S. Constitution, Article I, Section 10).

“That means that compacting states are bound to observe the terms of their agreements, even if those terms are inconsistent with other state laws. In short, compacts between states are somewhat like treaties between nations. Compacts have the force and effect of statutory law (whether enacted by statute or not) and they take precedence over conflicting state laws, regardless of when those laws are enacted.

“However, unlike treaties, compacts are not dependent solely upon the good will of the parties. Once enacted, compacts may not be unilaterally renounced by a member state, except as provided by the compacts themselves. Moreover, Congress and the courts can compel compliance with the terms of interstate compacts. That’s why compacts are considered the most effective means of ensuring interstate cooperation.”¹

It should be remembered that most interstate compacts contain obligations that a member state would never have agreed to unless it could rely on the enforceability of the obligations undertaken by its sister states. Most interstate compacts impose a delay on withdrawal because each member state must be able to rely on each contracting party to fulfill its obligations and must have time (and sometimes other compensation) to adjust if another state desires to withdraw. The enforceability of interstate compacts under the Impairments Clause is precisely the reason why sovereign states enter into interstate compacts. If a state wants to rely on the goodwill and graciousness of other states, it can simply hope for the best by unilaterally enacting its own independent law on the subject matter involved, enacting a contingent law (if permitted by the state constitution), or enacting a uniform state law.

EXISTING FEDERAL LAW SPECIFIES THAT PRESIDENTIAL ELECTORS MAY ONLY BE APPOINTED ON ONE SPECIFIC DAY IN EVERY FOUR-YEAR PERIOD, NAMELY THE FIRST TUESDAY AFTER THE FIRST MONDAY IN NOVEMBER

In addition to violating the Impairments Clause, an attempt by a state legislature to change the “rules of the game” between the November general election and the mid-December meeting of the Electoral College would be invalid because it would violate existing federal law.

A rebellious state legislature and governor would have to first enact a statute repealing (withdrawing from) the National Popular Vote compact. Then, the rebellious legislature and governor would have to provide for the appointment of the state’s presidential electors in some alternative way. The precondition to such appointment would be enactment of a statute specifying a new manner of appointing the state’s presidential electors. For example, the Legislature could specify that it would appoint the state’s presidential electors. Then, the electors would have to be appointed under the newly enacted procedure.

¹ Council of State Governments. 2003. *Interstate Compacts and Agencies 2003*. Lexington, KY: The Council of State Governments. Page 6.

However, existing federal law specifies that presidential electors may only be appointed on one specific day in every four-year period, namely the Tuesday after the first Monday in November. Section 1 of Title 3 of United States Code provides:

“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.”

This federal law is founded on a specific constitutional provision (Article II, section 1, clause 4) granting Congress the power to choose the time for appointing presidential electors:

“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.” [Spelling as per original]

Presidential electors cannot be appointed on any other day in each four-year period.

Note that state legislatures have always had the power to appoint presidential electors themselves, without consulting the voters. Indeed, the people participated in choosing presidential electors in only five states in the nation’s first presidential election in 1789. State legislatures appointed presidential electors as late as 1876. However, if a state legislature decides that it is going to appoint presidential electors, it must do so on the specific day established by Congress (i.e., the Tuesday next after the first Monday in November). It cannot do so after “election day” (i.e., after seeing the election results in its own state or other states).

The only exception permitted by Congress to the above requirement would not be applicable. Section 2 of Title 3 of United States Code provides:

“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.

THE SAFE HARBOR PROVISION CONFERS CONCLUSIVITY ONLY ON APPOINTMENTS OF PRESIDENTIAL ELECTORS MADE UNDER “LAWS ENACTED PRIOR TO” ELECTION DAY

The “safe harbor” section of federal law (Title 3, section 5) treats a state’s appointment of presidential electors as “conclusive” only if the appointment is based on

“**laws enacted prior to the day** fixed for the appointment of the electors.”
[Emphasis added]

The day fixed by law for appointment of presidential electors is the Tuesday next after the first Monday in November. Under the hypothetical scenario, the law that would have been in effect “prior to” election day would have been the National Popular Vote compact. Article II of the compact (entitled “Right of the People in Member States to Vote for President and Vice President”) provides:

“Each member state shall conduct a statewide popular election for President and Vice President of the United States.”

This provision means that the legislature cannot appoint presidential electors.

THE HYPOTHETICAL SCENARIO WOULD PROBABLY NOT MATTER BECAUSE THE WINNER OF THE NATIONAL POPULAR VOTE WOULD TYPICALLY RECEIVE ABOUT 75% OF ELECTORAL VOTES IN THE ELECTORAL COLLEGE (THAT IS, A CUSHION OF ABOUT 135 ELECTORAL VOTES ABOVE THE 270 NEEDED TO WIN THE PRESIDENCY)

Under the National Popular vote compact, the nationwide winning candidate would typically receive a highly exaggerated percentage (about 75%) of the votes in the Electoral College in any given presidential election. The reason is that the National Popular Vote bill guarantees that the presidential candidate receiving the most popular votes in all 50 states and the District of Columbia will receive at least 270 electoral votes from the states belonging to the compact. Then, in addition to this minimum guaranteed bloc of 270 or more electoral votes from the compacting states, the nationwide winning candidate would receive a certain number of additional electoral votes from whichever non-compacting states he or she happened to carry (under existing laws for awarding electoral votes in the non-compacting states). Because the non-compacting states would likely be divided approximately equally between the candidates, the nationwide winning candidate would generally expect to receive a highly exaggerated percentage (about 75%) of the votes in the Electoral College. That is, there would be a substantial cushion (equal to about 25% of the 538 electoral votes—that is, a cushion of about 135 of the 538 electoral votes). Thus, the hypothesized highly partisan maneuver in one (or even several states) would almost certainly not actually affect who became President.

THE HYPOTHETICAL SCENARIO WOULD NOT WORK IN PRACTICE BECAUSE OF THE PARTISAN DIVISION OF MOST STATE GOVERNMENTS AND THE TIME DELAY BEFORE NEW STATE LAWS TAKE EFFECT

Even if the Impairments Clause and sections 1 and 5 of Title 3 of federal law did not exist, there are practical reasons that would prevent the hypothetical scenario of changing the “rules of the game” between the November general election and the mid-December meeting of the Electoral College.

A state belonging to the National Popular Vote compact can only change the way it chooses its presidential electors by enacting two new state statutes. The first new statute would attempt to withdraw from the compact (i.e., repeal it) in violation of the compact’s terms, and the second new statute would create a new procedure for choosing presidential electors (presumably the legislature designating itself as the body to appoint presidential electors).

A politically motivated change in the manner of appointing a state’s presidential electors would be a partisan maneuver of the most extreme and extraordinary nature. Attempting to pass such legislation could not even be contemplated in most states because of quorum requirements, the partisan composition of the state legislature, and the time delay before new state laws take effect (i.e., state constitutional requirements).

In 3 states (Texas, Oregon, Indiana), there is a two-thirds quorum requirement for the legislature. Because no political party has two-thirds control of both houses of the legislature in any of these 3 states, it would be impossible to even contemplate this kind of partisan maneuver in this group of 3 states.

Although partisan control changes from year to year in particular states, no political party is in control of both houses of the legislature plus the governorship in about half of the states at any given moment. Thus, in 21 additional states, no political party controls a majority of both houses of the legislature plus the governorship (or has a veto-proof legislative majority in both houses).

Thus, it would be impossible to even contemplate this kind of partisan maneuver in this group of 21 states.

In 13 additional states, state constitutional provisions relating to the time when new state laws take effect means that the hypothetical scenario (i.e., enacting two new laws) could not take effect in time to impact the mid-December meeting of the Electoral College. There are only five weeks between the November election and the mid-December meeting of the Electoral College. In these 13 states, new laws take effect 60 days (and, in most cases, more than 60 days) after signing by the governor. The only exception to this normal delay is if the law is passed as an “emergency bill” by a certain required super-majority (2/3, 3/4, or 4/5). No political party has the required super-majorities in this group of 13 states.

The above eliminates 39 states from the hypothetical scenario.

That leaves 13 states where the hypothetical partisan maneuver would be theoretically possible (AR, CO, CT, FL, GA, HI, IO, NH, NC, RI, SC, WV, WY). However, this group of 13 states would be immediately winnowed down to about three states because of two independent factors.

First, the hypothetical partisan maneuver would be pointless and futile in states where the political control of the state government already coincides with the national popular vote. For example, the Republican-controlled Wyoming legislature would be content if the Republican presidential candidate had won the national popular vote. This factor would immediately eliminate about half of the 13 states.

Second, the hypothetical partisan maneuver would be irrelevant unless the state is a member of the compact. Making the reasonable assumption that about half of all states will be in the compact when it takes effect, this second factor would eliminate about half of the remaining states. Half of a half of 13 is 3 states.

Even then, the hypothetical partisan maneuver in this winnowed-down group of 3 states would be ineffective for several additional reasons.

First, the 3 states might not possess enough electoral votes to affect the outcome in the Electoral College. That is, the compact might well be enacted by a sufficiently large number of states so that the remaining compacting states would possess more than 270 electoral votes.

Second, and most importantly, in a typical future presidential election under the National Popular Vote compact, the candidate winning the national popular vote will generally receive about 75% of the electoral votes. That is, the national popular vote winner can expect to receive about 405 electoral votes under the National Popular Vote compact — not just a bare majority of the electoral votes (270 of 538). The reason is that the candidate winning the national popular vote would win about half of the electoral votes of the non-member states (because these states would continue to appoint their presidential electors under existing laws).

Third, the minority in most state legislatures can often delay the enactment of new legislation through various parliamentary tactics (e.g., filibusters, offering endless amendments, refusing to waive various notice and scheduling requirements that are customarily waived, etc.).

Fourth, in some states (such as Colorado and Wyoming), a protest referendum petition could (and almost certainly would) be quickly circulated to suspend the action of the state legislature. Such petitions automatically and unconditionally suspend the effectiveness of any state law passed by the legislature until a subsequent statewide election. Protest referendum petitions generally require only a modest number of signatures. The aggrieved political party could quickly acquire the requisite number of signatures. There would be no time to hold the referendum in the short five-week period between the November general election and the mid-December meeting of the Electoral College.

Thus, even if the Impairments Clause and sections 1 and 5 of Title 3 of federal law did not exist to prevent the hypothetical partisan maneuver, it is unlikely that coordinated maneuver by multiple rebellious state legislatures and governors could possibly affect the outcome of the presidential election.

POLITICAL IMPROBABILITY OF AN UNPRECEDENTED MANEUVER IN THE REAL-WORLD

The hypothetical maneuver would be unprecedented and politically improbable in the real world. There would be virtually no public support for changing the “rules of the game” after the people voted in November.

It should be remembered that the political context of the hypothetical maneuver at some future time when the National Popular Vote compact is in effect would be that

- more than 70% of the American public favors a nationwide vote for President,
- more than 70% of the public in the state involved favors a nationwide vote for President,
- the legislature and governor of the state involved has responded to its own voters and enacted the National Popular Vote bill, and
- the National Popular Vote compact has been enacted by (25 or so) states representing a majority of the people of the United States, and
- a nationwide presidential campaign had already been conducted in which the candidates and the voters acted in accordance with the expectation that the national popular vote will determine who will become President.

The hypothetical scenario of a rebellious state legislature and governor assumes that the public strongly and enthusiastically supports the state-by-state winner-take-all system and would blindly support a high-handed, last-ditch maneuver to restore it (in a state whose governor and legislature had already enacted the National Popular Vote bill). In reality, there is no significant public support for the current system, either at the national or state level. 70% of the American people support the idea that the candidate who receives the most votes in all 50 states and DC should win the Presidency (with 20% opposed, and 10% undecided). Virtually identical percentages have been registered in polls in big states (California), small states (Maine), battleground states (Michigan), mid-western states (Missouri), and southern states (Arkansas).

Given the citizen nature of most state legislatures, it would require an extraordinary degree of control to whip a party’s state legislators into line for such an unprecedented maneuver.

To execute the proposed partisan maneuver, the governor and both houses of the legislature would have to convene on election day (i.e., the Tuesday next after the first Monday in

November). This is, of course, the very same day when most state legislators are usually out campaigning in their districts (where, in most states, they are up for re-election). This is also the very same day when the voters would be coming to the polls to cast their ballots for President in accordance with current state law (i.e., the National Popular Vote compact). Thus, the governor and the legislature would be holed up in the State Capitol on election day, telling the voters that they intended to ignore the choice the people were in the process of making.

The fact is that there would be no public support for this hypothetical maneuver. Tellingly, in 2000, the American people accepted the ascendancy of the second-place candidate to the Presidency because everyone understood that the 2000 election had been conducted under the well-known “rules of the game” (i.e., the state-by-state winner-take-all rule). This was the case even though 70% of the public disapproves of the current state-by-state winner-take-all system and favors a national popular vote.

IF THERE IS A POTENTIAL PROBLEM, THE CURRENT SYSTEM IS EVEN WORSE

The hypothetical scenario is an inappropriate criticism of the National Popular Vote compact because the compact (relying on the Impairments Clause and existing federal law) handles the situation of a rebellious state legislature and governor in a superior way to the current system (which relies only on existing federal law). Under the current system, if a governor and a state legislature want to appoint presidential electors themselves, there would be no *constitutional* basis to challenge that maneuver. In contrast, if a governor and legislature attempted such a maneuver under the National Popular Vote compact, two centuries of settled law concerning the enforceability of interstate compacts under the Impairments Clause would be available to rebuff the attempt.

For example, we did not see, in 2000, the Democratic governors and Democratic-controlled state legislatures of North Carolina or West Virginia convening special sessions to repeal their existing laws awarding their states’ presidential electors to the candidate who received the most popular votes in their respective states (George W. Bush), but, instead, awarding their states’ electoral votes to the candidate who received the most popular votes nationwide (Al Gore). Similarly, we did not see the North Carolina Legislature switching to an allocation of electoral votes based on congressional districts or proportionally. Either of those alternative methods would have given Al Gore enough electoral votes to win a majority of the Electoral College.

In the 1960 presidential election, for example, John F. Kennedy won the nationwide popular vote by 114,673 votes. However, his electoral-vote majority depended on the fact that he had carried Illinois by 4,430 popular votes and South Carolina by 4,732 votes. Some members of the South Carolina legislature suggested that the legislature ignore the popular vote count in the state, change the rules for awarding the state’s electoral votes after election day, and appoint all the state’s presidential electors themselves (that is, appoint non-Kennedy electors). Nothing came of similar suggestions that the Florida Legislature appoint all of the state’s presidential electors in 2000.

ADDITIONAL INFORMATION

For additional information about the details of operation of the National Popular Vote bill, see the book *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote*.

Our web site is www.NationalPopularVote.com.

CONCLUSION

The hypothetical scenario of withdrawing from the National Popular Vote compact is not only prohibited by the Impairments Clause of the U.S. Constitution and existing federal law, it is a theoretical parlor game, devoid of any connection to the real political world.