



**Testimony Against the Secret Presidential Elections Bill (HB1531)
by Saul Anuzis at the
New Hampshire House Committee on Election Law
January 28, 2020**

New Hampshire House bill HB1531 would require the state's presidential vote count to be kept secret until after the Electoral College meets (about 7 weeks after the November election).

HB1531 violates Article 8 of the New Hampshire Constitution

Hardly any governmental proceeding calls for transparency more than the counting of votes.

The New Hampshire Constitution (Article 8) provides,

“the public's right of access to governmental proceedings and records shall not be unreasonably restricted.”

Secret statewide vote counts by a single official conflict with the principle of having “many eyes” monitor vote counting

Under HB1531, a single official would receive the secret election counts from New Hampshire's 370 towns and wards, add them up in secret, and keep the local and statewide counts secret until after the Electoral College meets (about 7 weeks after the November election).

If secrecy of the actual vote count were successfully maintained at the town and ward level, the bill would make it impossible for any watchdog group, candidate, political party, the media, or ordinary citizen to compare the secretly computed statewide outcome with what happened on Election Day in the towns and wards.

Because HB1531's required secrecy does not end until after the Electoral College meets, inadvertent errors would remain undiscovered until after New Hampshire's electoral votes were cast in the Electoral College.

HB1531 will never go into effect, because it allows a single presidential candidate to completely negate the bill simply by asking for a recount

HB1531's authors recognized that their goal of keeping the presidential vote count secret inherently conflicts with a candidate's ability to get a recount.

The bill's authors (understandably) decided not to go so far as to advocate abolishing recounts in New Hampshire.

Under existing New Hampshire law (RSA 669),

“any candidate for whom a vote was cast” may demand a recount if “the difference between the votes cast for the applying candidate and a candidate declared elected is less than 20 percent of the total votes cast.”

HB1531 specifically enables a single presidential candidate to totally negate the bill by the simple maneuver of requesting a recount. The bill says:

“Unless a recount has been requested pursuant to RSA 669, no officer, employee, or contractor of the state of New Hampshire or its political subdivisions shall publicly release the number of votes cast in the general election for president of the United States until after the time set by law for the meeting and voting of presidential electors has passed in all states.”

The conflict between secret elections and recounts is probably irresolvable. In any case, allowing a single presidential candidate to negate the bill is an explicit acknowledgement that the bill has no possibility of ever actually becoming operational.

Secret court proceedings would be necessary to keep vote counts secret

Because a presidential recount would likely involve litigation, HB1531 cannot succeed in achieving its goal of secret elections without also requiring secret court proceedings.

Professor Norman Williams of Willamette College in Oregon (the person who first proposed the idea of secret elections in 2011) specifically recognized that secret court proceeding would necessarily have to go hand-in-hand with secret vote counts. Williams pointed out the necessity of

“... releasing the vote totals only to the candidates on the condition that the totals are kept confidential until after the Electoral College meets. Such selective release would allow the losing candidate to pursue a **judicial election contest, which itself could be kept closed to the public to ensure the vote total’s confidentiality**, but it would frustrate the NPVC [National Popular Vote Compact] by keeping other states from knowing the official vote tally.”¹
[Emphasis added]

The bill’s failure to make court proceedings secret is a tacit acknowledgement that the bill has no possibility of ever actually working.

Keeping the vote secret would necessarily require trying to muzzle presidential candidates during a recount

Existing New Hampshire law (RSA 660:5) provides,

“candidates, their counsel, and assistants shall have the right to inspect the ballots and participate in the recount.”

¹ Williams, Norman R. 2011. Reforming the Electoral College: Federalism, majoritarianism, and the perils of subconstitutional change. 100 *Georgetown Law Journal* 173. November 2011. Page 213.

However, HB1531 does not cover any of these people. Instead, the bill’s secrecy requirement covers only an “officer, employee, or contractor of the state of New Hampshire.”

Manifestly, there is no politically plausible—much less constitutional—way by which any state law could succeed in muzzling a presidential candidate in the midst of a presidential recount controversy.

HB1531 is silent as to how to resolve the inherent conflict between having a presidential candidate “participate” in a recount while simultaneously keeping the count secret—probably because the conflict is irresolvable.

HB1531 fails to lay out a workable method of running a dual system of vote counting in each town and ward—half secret and half non-secret

Congress, the General Court, and other offices are elected at the same time as President.

Existing New Hampshire law (RSA 659:63) provides:

“the counting of votes shall be public.”

Also, existing New Hampshire law (RSA 659:70) provides,

“the moderator shall announce the **final count for each office.**”

Watchdog groups, candidates, political parties, the media, and ordinary citizens in New Hampshire’s 370 towns and wards expect to know the vote counts for Congress, the General Court, and other offices and issues that are on the same ballot as the President.

HB1531 would impose secrecy concerning the presidential vote count on the “moderators” in each of New Hampshire’s 370 towns and wards and the myriad of other people who serve as an “officer, employee, or contractor of the state of New Hampshire” in the conduct of elections.

The bill fails to specify how to operate a dual system of vote counting in each town and ward—half secret and half non-secret—probably because there is no workable or practical way to do this.

HB1531 contains no fines or jail time for the crime of revealing vote counts

The bill can only work if secrecy is maintained by the “moderators” in each of New Hampshire’s 370 towns and wards and the hundreds of other officers, employees, and contractors involved with conducting elections.

However, HB1531 contains no penalties to enforce secrecy—perhaps because fining or jailing people for the crime of revealing vote counts is politically implausible and almost certainly unconstitutional.

Under HB1531, New Hampshire would voluntarily surrender the “conclusive” status that existing federal law confers on states that make their “final determination” six days before the meeting of the Electoral College

Existing federal law gives “conclusive” status to a state’s “final determination” of its vote only if the “final determination” is made **six days before** the Electoral College meets.

Because the explicit purpose of HB1531 is to delay New Hampshire’s “final determination” of its presidential vote count until **after** the meeting of the Electoral College, New Hampshire’s electoral votes would lose their “conclusive” status and thereby become open to challenge in both Congress and the courts.

The Electoral Vote Count Act of 1887 (now section 5 of Title 3 of the U.S. Code, and often called the “safe harbor” law) provides:

“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.”

HB1531 violates the federal law requiring a Certificate of Ascertainment containing the presidential vote count “on or before” the Electoral College meets

Advocates of HB1531 strenuously deny that it violates the Electoral Vote Count Act of 1887 (now section 6 of title 3 of U.S. Code). However, their denials are based on **selectively discussing** only part of the relevant statute.

The facts are that existing federal law requires each state’s governor to produce and deliver, **“on or before the day”** of meeting of the Electoral College, six duplicate-original copies of a “certificate of ascertainment” containing “the names of such electors and the **canvass** or other ascertainment under the laws of such State **of the number of votes given or cast.**”

Sean Parnell, a lobbyist opposed to the National Popular Vote compact, claimed the opposite in his February 24, 2014 testimony before the Connecticut Government Administration and Elections Committee. His testimony **selectively mentioned** only one of the seven identical copies of the state’s Certificate of Ascertainment, namely the copy that is sent to the National Archives for historical purposes on a leisurely basis. Parnell testified:

“The Certificate includes popular vote totals for presidential candidates or their electoral college slates.

“However, contrary to the assumption of the Compact’s advocates and assertions made in *Every Vote Equal*, states are not required to submit their Certificates or make them public prior to the meeting of the Electoral College.

Federal law is very clear – the governor of each state is required to submit the Certificate of Ascertainment via registered mail to the Archivist of the United States ‘...as soon as practicable after the conclusion of the appointment of the electors...’

“There is nothing in federal law that requires the governor to submit it prior to the meeting of the Electoral College. [Emphasis added]

Parnell's **selective discussion** of existing federal law failed to mention that there is, in fact, a specific deadline in federal law concerning the other six identical copies of the Certificate of Ascertainment, namely "**on or before the day**" of meeting of the Electoral College.

Here is what the Electoral Vote Count Act of 1887 (now section 6 of title 3 of U.S. Code) actually says:

"It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and **it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by section 7 of this title to meet, six duplicate-originals of the same certificate** under the seal of the State; and if there shall have been any final determination in a State in the manner provided for by law of a controversy or contest concerning the appointment of all or any of the electors of such State, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate under the seal of the State to the Archivist of the United States a certificate of such determination in form and manner as the same shall have been made; and the certificate or certificates so received by the Archivist of the United States shall be preserved by him for one year and shall be a part of the public records of his office and shall be open to public inspection; and the Archivist of the United States at the first meeting of Congress thereafter shall transmit to the two Houses of Congress copies in full of each and every such certificate so received at the National Archives and Records Administration."

New Hampshire's 2016 Certificate of Ascertainment is shown below. As can be seen, the Certificate was dated December 7, 2016—12 days **before** the meeting of the Electoral College in 2016.

The State of New Hampshire

* * * * *
Executive Department
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This is to certify that on the eighth day of November, two thousand and sixteen, Dudley Dudley, Beverly Hollingworth, Terie Norelli and Carol Shea-Porter were duly chosen by the qualified electors of New Hampshire to be their electors of President and Vice-President of the United States. Following are the names of the persons voted for and their respective votes:

Democratic Party		Green	
Dudley Dudley	348,526	Elizabeth Ropp	6,496
Beverly Hollingworth	348,526	Peter Newland	6,496
Terie Norelli	348,526	Mary Heslin	6,496
Carol Shea-Porter	348,526	Ryan Fowler	6,496
Republican Party		American Delta	
Ellen Suprunowicz	345,790	Elizabeth Wood	678
Jane Johnson	345,790	Sarah-Leigh Badger	678
Fredrick Doucette	345,790	Thomas Peter McLaughlin	678
Louis Gargiulo	345,790	Anthony Boddie	678
Libertarian			
Brian Chabot	30,777		
Brian McQuade	30,777		
Tania Butler	30,777		
Brian Shields	30,777		



In testimony whereof, I hereto set my hand and cause to be affixed the Seal of the State of New Hampshire, this seventh day of December, in the year of Our Lord, two thousand and sixteen.


Margaret Wood Hassan, Governor

*By the Governor, with advice
Of the Executive Council:*


William M. Gardner
Secretary of State

After New Hampshire's four members of the Electoral College met on December 19, 2016, New Hampshire created a certificate saying how the four presidential electors voted and that they did so "in accordance with the Act of Congress approved February 3, 1887."

Advocates of HB1531 acknowledge that its purpose is "throwing the system into chaos"

HB1531 does not claim that the administration of New Hampshire elections would be improved by conducting secret elections.

Instead, this proposed legislation would only go into effect at

"such time that states cumulatively possessing a majority of the electoral votes have enacted the National Popular Vote Interstate Compact."

That is, the bill only calls for secret elections when **other states** enact certain legislation.

"**Throwing the system into chaos**" is the specific goal of this kind of legislation, according to Sean Parnell, a lobbyist opposed to the National Popular Vote compact in his February 24, 2014 testimony before the Connecticut Government Administration and Elections Committee:

"A very simple way for any non-member state to thwart the Compact, either intentionally or unintentionally, would simply be to not submit their Certificate or release it to the public until after the electoral college has met. This simple act would leave states that are members of the compact without vote totals from every state, **throwing the system into chaos.**"² [Emphasis added]

A recent article in the conservative publication *Townhall* describes HB1531 as "particularly nutty"

An article in the conservative publication *Townhall* entitled "National Popular Vote Opponents Are Afraid of the Constitution" by Ashley Herzog said:

"The tinfoil hat wearers, the faction that includes moon-landing deniers and the kind of crackpots William F. Buckley Jr. and Russell Kirk expelled from mainstream conservatism, has set its sights on derailing the National Popular Vote Interstate Compact. ... One pundit is actually suggesting that the Granite State defy federal law, specifically section 3, title 3 of the U.S. code—a provision in effect since 1887—to throw a monkey wrench into the final nationwide tally for president. **This particularly nutty idea** would involve New Hampshire refusing to submit the state's official vote count until after electors meet."³ [Emphasis added]

² Parnell, Sean. 2014. Testimony before Connecticut Government Administration and Elections Committee. February 24, 2014 .

³ Herzog, Ashley. 2020. National Popular Vote Opponents Are Afraid of the Constitution. *Townhall*. January 18, 2020. <https://townhall.com/columnists/ashleyherzog/2020/01/18/national-popular-vote-opponents-are-afraid-of-the-constitution-n2559694>

“Crazy,” “anti-democratic,” and “completely unacceptable” are how a long-time opponent of the National Popular Vote compact recently described HB1531 in the conservative publication *Daily Signal*

Tara Ross has regularly testified at state legislative hearings throughout the country in opposition to the National Popular Vote compact since 2007. She is the author of three books defending the current state-by-state method of awarding electoral votes. On January 14, 2020, she wrote in the conservative publication *Daily Signal*:

“New Hampshire legislators have introduced an election bill that would be **completely unacceptable** under normal circumstances. But these are not normal times.

“Constitutional institutions, especially the Electoral College, are under attack.

“Extraordinary action may be needed. Thus, some New Hampshire legislators have proposed to withhold popular vote totals at the conclusion of a presidential election. The numbers would eventually be released, but not until after the meetings of the Electoral College.

“The idea sounds **crazy** and **anti-democratic**. In reality, however, such proposals could save our republic: They will complicate efforts to implement the National Popular Vote legislation that has been working its way through state legislatures.”⁴ [Emphasis added]

While we don’t often agree with Tara Ross, we do agree with her that HB1581 is “crazy,” “anti-democratic,” and “completely unacceptable.”

⁴ Ross, Tara. 2020. New Hampshire Is Fighting Back to Defend the Electoral College. *Daily Signal*. January 14, 2020. <https://www.dailysignal.com/2020/01/14/new-hampshire-is-fighting-back-to-defend-the-electoral-college/>