

Plans to Reform the Electoral College Would Harm Small States

The Presidential Election Process, 2008

"The National Popular Vote Plan is, or should be, an embarrassment to its promoters."

In the following viewpoint, George Detweiler defends the current electoral college system. He examines the National Popular Vote Plan, which would alter the electoral college and highlights the flaws in the proposed reforms. Among the main problems with the reform plan, he argues, are the potential for increased voter fraud and the likelihood that election by direct popular vote would decrease the political influence of small states. Detweiler is a former assistant attorney general for Idaho and a specialist in constitutional law.

As you read, consider the following questions:

1. What are the provisions of the proposed National Popular Vote Plan, as cited by Detweiler?
2. As reported by the author, can individual states choose the manner in which they select electors to the Electoral College?
3. According to Detweiler, how would the National Popular Vote Plan increase electoral fraud in presidential elections?

Assaults on the electoral college are nothing new. The left seems to keep a calendar which schedules dates for periodic attacks on the Constitution's system for electing the president and the vice president. February 23 [2006] was such a date. A press conference at the National Press Club in the nation's capital was showtime for political "has-beens" and "wannabes" from deep left field who unwrapped their latest populist project. Promoters include John B. Anderson (former independent presidential candidate), former Rep. Tom Campbell (R-Calif.), former Senators Birch Bayh (D-Ind.) and Jake Garn (R-Utah), Chellie Pingree (President, Common Cause), and others.

Rankled by any institution which they perceive as less than pure democracy, these populists proposed a National Popular Vote Plan to change the way America chooses its chief executive. Each state's legislature is encouraged to enact legislation establishing a new, uniform method of selecting presidential electors. The program involves an agreement among participating states and goes into effect when adopted by enough states to constitute a majority (270) of the votes in the electoral college. The structure of the agreement is bizarre:

- Each member state conducts a popular election for president and vice president.
- The chief election officer of each state must determine the total popular vote for president/vice president *in the entire nation* even though some states may not have subscribed to the agreement. This is denominated the "national popular vote total."
- Presidential candidates will name their own state of electors. The state election officer will appoint the state of electors pledged to the candidate who is chosen as the "national popular vote winner" to be the official electors for the state. It is now common practice for states to elect their presidential electors on the popular ballot, with the names of these electors appearing beside the presidential candidate whom they are pledged to support. This will be changed by the new system, and presidential electors will no longer be chosen by popular vote, but by one person only—the chief election officer in each member state. Note that the presidential candidate declared to be the "national popular vote winner" may thus win a state's electors even

though he *lost the popular vote in that state*.

- In member states, the chief election officer's determination of the "national popular vote total" is final and no provision for recount (an impossibility since it could be a nationwide recount) is made. Neither is there provision for judicial or other relief in the event of voter fraud. Special provisions are made to break tie votes in the popular presidential vote.
- If any member state (acting only through its chief elections officer) selects too few or too many electors, the presidential candidate declared to be the "national popular vote winner" may appoint the presidential electors for that state. Note that the job of choosing the state's electors is thereby transferred to someone who is not a holder of public office nor even a citizen of the state in question.
- Any member state can withdraw from the agreement, except for a window of six months prior to the expiration of a presidential term. If the withdrawal occurs within that window, it is effective only after an intervening presidential election.
- The agreement terminates automatically if the electoral college is abolished—the real goal of the plan and its supporters.

Creation of the Electoral College

The electoral college was created by Article 1, Section 1 of the Constitution, which provides: "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 Congress." The duty of the electoral college is to elect the president and the vice president in a process specified in Amendment XII. The system provides a measure of equality between the large, populous states and the smaller ones.

Does the Constitution permit a state to select its presidential electors by a means other than popular election? Yes. The electoral college's enabling provision uses the word "appoint" rather than "choose" or "elect." However, in Article 1, Section 10, the Constitution also declares: "No State shall, without the consent of Congress ... enter into any Agreement or Compact with another State." Congress would be likely to approve a National Popular Vote Plan if popular support gave the plan impetus: nevertheless, it is significant that the plan has no mention of any mechanism for securing, or even the need to get, congressional approval.

Problems with Reform Efforts

The plan is a schizophrenic nightmare. It would bind states together into an amorphous mass of voters ostensibly for popular election of presidents. Meanwhile the system reduces the less-populous states to a helpless irrelevancy. While professing "every vote equal," the system for choosing presidential electors could result in a member state selecting electors pledged to a presidential candidate who had lost the election in that state. Also, Lord Acton's adage about absolute power corrupting absolutely is exemplified in the power of the member states' chief election officer, who makes a final unappealable determination of the "national popular vote winner."

The National Popular Vote Plan becomes an invitation to corruption. Voter fraud, hard enough to prove and to remedy when done within the boundaries of any one state, becomes almost impossible to check under the plan. The National Popular Vote Plan forces one state to select electors on the basis of the popular election results for president *in other states, where there is no opportunity for the first state*

to contest the election—but where significant voter fraud could have occurred.

Constitutional infirmities linger. The Constitution empowers each state legislature to determine how its presidential electors are chosen. By adopting the National Popular Vote Plan, a state delegates this power to the entire nation based on who wins the national popular vote. Both federal and state laws recognize that some powers are delegable, while others are not. Is this a power capable of delegation under either the federal or the various state constitutions? Will state or federal judges be able to grant injunctions in case of violations of election laws?

The plan is, after all, a mix of the laws of many states coupled with congressional approval. The plan itself makes no provision for such relief. In such a situation, it would be a legal stretch for a judge to grant an injunction without specific statutory authority. What happens if a state withdraws from the agreement during the six-month window and fails to wait for an intervening presidential election as required by the plan before it pursues its own election laws? No other state has jurisdiction to prevent it. The plan provides no remedy and neither does federal law. All of these issues are food for protracted, unnecessary, costly litigation.

Support for Reform

Despite the litany of infirmities, the National Popular Vote Plan has been introduced in a number of states including California. To date, none has completed the process of enacting it into law. It is important to remember that it is easier to oppose and stop bad legislation than it is to repeal it after it has passed.

The usual suspects of the left-wing press ran with the story of the National Popular Vote Plan after it was announced at the press conference. Predictably, it has the *New York Times'* endorsement. The *Times* urged state legislatures to enact it. Falling in line were the *Chicago Sun-Times*, the *Minneapolis Star Tribune*, the *Denver Post*, the *Houston Chronicle*, and others.

The National Popular Vote Plan is, or should be, an embarrassment to its promoters. To borrow a buzz word from the national education debate, it lacks "intelligent design." It is fraught with evil intentions. It must never be implemented.

Further Readings

Books

Books

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