

LWVUS Study on the National Popular Vote Compact Background Paper

By Carol Mellor

Selection of the President

The League's History

A League study of the presidential electoral process culminated in its 1970 position supporting direct election of the President by popular vote as an essential element of representative government. The League also has supported national voting qualifications and procedures for presidential elections to ensure equity for voters from all states and to facilitate the electoral process.

At the 2002 Convention, the League voted to expand and update its position. The League came to concurrence on a new position in June 2004. The new position takes into account the entire presidential selection process and supports a process that produces the best possible candidates, informed voters and optimum voter participation.

At the 2008 Convention, the delegates voted to adopt a new study, "The Advisability of Using the National Popular Vote Compact among the States as a Method for Electing the President."

The League's Position

Statement of Position on Selection of the President, as Announced by the National Board, January 1970, Revised March 1982 and Updated June 2004:

The League of Women Voters of the United States believes that the direct-popular-vote method for electing the President and Vice-President is essential to representative government. The League of Women Voters believes, therefore, that the Electoral College should be abolished. The League also supports uniform voting qualifications and procedures for presidential elections. The League supports changes in the presidential election system – from the candidate selection process to the general election. We support efforts to provide voters with sufficient information about candidates and their positions, public policy issues and the selection process itself. The League supports action to ensure that the media, political parties, candidates, and all levels of government achieve these goals and provide that information.

Explanation of the Position

The League strongly believes that the Electoral College should be abolished and not merely "reformed." One "reform" which the League specifically rejects is the voting by electors based on proportional representation in lieu of the present "winner-takes-all" method. Such a system

would apportion the electoral votes of a state based on the popular vote in that state. Instead of making the Electoral College more representative, such proportional voting would increase the chance that no candidate would receive a majority in the Electoral College, thereby sending the election of the President to the House of Representatives where each state, regardless of population, would receive only one vote. Election of the President by the House further removes the decision from the people and is contrary to the “one person, one vote” principle. The League also does not support reform of the Electoral College on a state-by-state basis because the League believes there should be uniformity across the nation in the systems used to elect the President.

The Electoral College - A Review

Although the LWVUS has specifically adopted a position calling for the abolition of the Electoral College, a short review of the mechanics of that system of Selection of the President is helpful to an understanding of the National Popular Vote Compact.

The Electoral College is a process established by the founding fathers as a compromise between election of the President by Congress and election by popular vote. In short, the people of the United States vote for electors who then vote for the President and Vice President.

Each state is entitled to a number of presidential electors equal to its total representation in the House and Senate. The District of Columbia is awarded a number of electors equal to that of the least populous state.

The founding fathers designed this constitutional plan to promote several principles they considered important. One goal was to ensure that smaller states had a role in the election of the President. Secondly, the emphasis on the power of the state as contrasted to the power of the individual voter fostered the principles of federalism which are the core of the governmental process. Finally, the use of electors rather than popular vote assuaged concerns that the electorate was not competent or knowledgeable enough to be entrusted with the direct election of important government officials, such as the President and Vice President.

The electors are selected, according to the Constitution, in the “manner” designated by the state's “legislature” (the Congress in the case of the District). At present, the “manner” chosen by every state is by popular election. Most of the states (and the District of Columbia) use a winner-take-all system, in which the candidate who receives a majority of the vote, or a plurality of the popular vote (less than 50 percent but more than any other candidate) takes all of the State's electoral votes. In Maine and Nebraska, the winner of the popular vote in each congressional district wins an elector, and the remaining two electors are chosen based on the statewide vote.

On Election Day, the voters cast their ballots for electors, even though the names of the candidates for President and Vice President are often the names shown on the ballot. Each state's electors meet forty days after Election Day, and the formal balloting for president takes

place at those meetings.

Many different proposals to alter the presidential election process by amending the Constitution, including direct nation-wide election by the people, have been offered over the years. None have been passed by Congress and sent to the States for ratification. Under the most common method for amending the Constitution, an amendment must be proposed by a two-thirds majority in both houses of Congress and ratified by three-fourths of the states.

The Movement against the Electoral College

The most compelling argument against the Electoral College is that it prevents the direct election of the President by popular vote and is, therefore, contrary to modern principles of representative government. Studies show that more than 70 percent of American citizens favor the election of the President by popular vote.

Beyond this basic theoretical objection is the very practical objection that the Electoral College system enables candidates who have not received the most votes cast by American voters to become President.

We have seen such an outcome four times in our history. The first time was the 1824 election which was won by John Q. Adams even though he received fewer electoral votes and fewer popular votes than Andrew Jackson. (Adams won the election in the House of Representatives, with 13 State delegations voting for him, seven voting for Jackson and three voting for Crawford. This happened because there were more than two viable candidates, and would have been a less likely outcome in a two candidate race.)

In 1828, Rutherford B. Hayes beat Samuel J. Tilden by one electoral vote, becoming President despite trailing in the popular vote by a count of 4,288,546 to 4,034,311. In 1888, Benjamin Harrison beat Grover Cleveland with an electoral vote of 233 to 168, despite Cleveland's popular vote margin of 5,534,488 to 5,443,892. Most recently, in the 2000 presidential election, George W. Bush received fewer popular votes than Albert Gore, Jr., but received a majority of electoral votes. The situation was almost reversed in 2004. Although President Bush received more than three million more popular votes than John Kerry, Kerry would have been elected President if Ohio's electoral votes had been cast in his favor.

These circumstances have prompted much discussion on the advisability and feasibility of reforming our election process to eliminate the Electoral College and to elect the President by direct election. This conversation is not new. Over the past 200 years, according to the National Archives, more than 700 proposals have been introduced in Congress to reform or eliminate the Electoral College. Indeed, several joint resolutions were introduced in the current Congress on this issue. The proposals, all introduced in the House of Representatives, were referred to the Committee on the Judiciary, where no action has been taken.

Against this background comes the National Popular Vote Compact Proposal (NPV).

The National Popular Vote Compact Proposal

The National Popular Vote Compact proposal offers a method of achieving the result of election of the President by popular vote without amending the Constitution to eliminate the Electoral College. Instead, this method uses the mechanism of the Electoral College to ensure that the candidate who receives the most popular votes is elected President of the United States.

Under the proposed legislation to enact the National Popular Vote Compact, all of the state's electoral votes would be awarded to the presidential candidate who receives the most popular votes in all 50 states and the District of Columbia. The bill would take effect only when enacted, in identical form, by states possessing a majority of the electoral votes—that is, enough electoral votes to elect a President (270 of 538)

The NPV Compact proposal is predicated upon the portion of the United States Constitution which states:

“Each State shall appoint, in such Manner **as the Legislature thereof may direct**, a Number of Electors...” (*Article II, Section 1, Clause 2*) (boldface emphasis added)

The constitutional wording, “as the Legislature thereof may direct,” contains no restriction on the states' exercise of their power with respect to their electors. The U.S. Supreme Court has repeatedly characterized the authority of the states over the manner of awarding their electoral votes as “plenary” and “exclusive.” Therefore, the states have the right to decide how to select their electors and award their electoral votes. Thus, proponents of the NPV Compact claim that the U.S. Constitution need not be changed in order to implement nationwide NPV. Rather, they maintain, this change can be accomplished in the same way that the current system evolved—namely, the states will use their exclusive and plenary power to decide the manner of awarding their electoral votes.

An additional constitutional underpinning of the NPV is the Compact Clause (*Article I, Section 10, Clause 3*), which permits states to enter into legally enforceable contractual obligations to undertake agreed joint action with other states. Interstate compacts are typically used to address problems that concern more than one state—the states which are affected enter into a compact (contract) which regulates their actions, ensuring uniform response by the states to address their mutual concerns. These contracts are typically enacted through the passage of identical legislation by the compacting states.

Under the state legislation proposed to establish the NPV, the popular vote counts from all 50 states and the District of Columbia would be added together to obtain a national grand total for each presidential candidate. Then, state elections officials in all states participating in the plan would award their electoral votes to the presidential candidate who receives the largest number of popular votes in all 50 states and the District of Columbia. The NPV Compact plan would take effect only when it has been enacted by states collectively possessing a majority of the electoral

votes. The 270-vote threshold also corresponds essentially to states representing a majority of the people of the United States. As a result, every vote in all 50 states and the District of Columbia would be equally important in presidential elections.

The compact contains a six-month blackout period during which no state can withdraw from the compact. The blackout period starts on July 20 of each presidential election year and runs through the January 20 inauguration. Interstate compacts are contracts. It is settled compact law and settled constitutional law that withdrawal restrictions—very common in interstate compacts—are enforceable because the U.S. Constitution prohibits a state from impairing any obligation of contract.

The legislation contains other procedural provisions that would ensure the smooth functioning of the agreement. For example, one clause addresses the possibility of a tie in the national popular vote. If there is no national popular vote winner, each state chooses the electors for the candidate who has won that state.

Another clause addresses circumstances in which the winner of the national popular vote might be prevented from receiving the electoral votes from a member state. For example, it is possible that the winner of the national popular vote fails to appear as a candidate in a particular state and, therefore, there are no appropriate electors for the state to certify. To address that situation and five other situations identified by the drafters of the legislation as possible anomalies in the process they have developed, a mechanism is provided whereby the desired result is obtained by allowing the presidential candidate who has received the largest number of votes in the national election to select the electors in the state in which no electors associated with the winning slate have been elected. The full text of the compact is available at www.lwv.org.

Current Status of the National Popular Vote Compact

Since passage of the National Popular Vote Compact is accomplished on a state-by-state basis, its status is fluid. As of September 1, 2008, the legislation necessary to activate the compact has been signed into law in four states: Maryland, New Jersey, Hawaii and Illinois, for a total of 50 of the 270 electoral votes required to activate the NPV Compact. NPV Compact bills have been introduced in 15 other states, where some have passed committee and others have passed one house.

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*Portions of this background paper are from the LWWUS Impact on Issues, 2006-2008