THE NATIONAL POPULAR VOTE INITIATIVE

Committee on Election Law

JULY 2010

NEW YORK CITY BAR ASSOCIATION
COMMITTEE ON ELECTION LAW

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A. Introduction

The Election Law Committee has devoted attention to a proposal called the National Popular Vote Initiative ("NPVI"), which seeks to alter the current electoral college system through state legislation. In this report the Committee will briefly summarize its position on the NPVI and the electoral college system it seeks to reform. The Committee has concluded that while there are strong arguments favoring the adoption of the NPVI proposal, there is considerable risk and uncertainty associated with litigation that could arise from the implementation of the proposal.

B. Background: The Electoral College

The framers of the U.S. Constitution determined that the president would not be popularly elected, based on the principle of one-person, one-vote, but instead would be chosen by an Electoral College, the number of Electors appointed to vote in each state being "equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress." U.S. Const. Art II, Sec. 1, Clause 2.

The Electoral College, however, which thus supplants popular election of the president, problematically originated in a sentiment, circulated among and expressed by several of the framers, that the voting population was, in essence, politically incompetent and could not be trusted with the responsibility of selecting its own Chief Executive.[1]

This sentiment today, and its historical consequences (*e.g.* the elections of 1876, 1888, and 2000, in which the candidates who won the popular vote did not become president), are justifiably widely regarded as anti-democratic and as having no place in the U.S. constitutional system. Indeed, it is an affront to voters each presidential election that a candidate who obtains the greatest number of votes would not be guaranteed to win the election because the founders believed that only a select few were sufficiently wise or sagacious to be entrusted with the electoral prerogative.

[1] John Jay wrote that such a system had a "vast advantage over direct elections by the people where the activity of party zeal, taking advantage of indifference, ignorance, and the hopes and fears of the unwary and uninterested, often places men in office by the votes of a small portion of the electors" (Federalist No. 64). Similarly, Alexander Hamilton said that the electors would "be most likely to possess the information and the discernment required in such complicated investigations" (Federalist No. 68). Elbridge Gerry stated that a popular election would be "radically vicious" and that the "ignorant[t]" people, as he put it, would be "misled by a few designing men" (Records of the Constitutional Convention).

The Electoral College is also problematic because, among other things beyond the scope of this report, it tends to distort presidential elections by encouraging candidates to focus their campaigns only on those states which benefit them in terms of garnering electoral votes, to the frequent neglect of significant portions of the voting population whose states are viewed by the candidates as strategically less productive.

Thus, because the Electoral College is an institution which preserves this untenable outlook, and concomitant corrosive practices, among our national political institutions, it is the Committee's view that the Electoral College system today is objectionable and ought to be abolished. Failing to abolish it, or attempting its reform, tends to bring the U.S. system of presidential elections into disrepute.

Notwithstanding the undesirability of continuing to maintain the Electoral College in our constitutional system, and mindful of the practical political and constitutional difficulties involved in bringing about a constitutional amendment which would simply abolish the Electoral College, the Committee has given some attention to a recent development known as the National Popular Vote Initiative as a possible alternative to a constitutional amendment.

C. The National Popular Vote Initiative

The National Popular Vote Initiative ("NPVI") is an alternative to a constitutional amendment which would abolish the Electoral College. Under the NPVI proposal, states may enter into an interstate compact, through the passage of state legislation, by which the state's electoral votes would be awarded to the winner of the popular vote at the national level. Therefore, if New York were to adopt the NPVI legislation, then, instead of counting votes for president in New York and awarding the state's 31 electoral votes to the winner, the state's electoral votes would remain unallocated until the votes had been counted for the entire country, and the winner of that count would receive New York's votes.

The NPVI would not require all 50 states to enter into the NPV compact. Once states accounting for 270 electoral votes enter the compact, the effect will be that the national winner of the popular election will be elected president. Accordingly, the legislation passed by states includes a provision that the compact will only take effect when states amounting to 270 electoral votes have joined the compact. The compact among the states also provides that no state shall withdraw from the compact within the six months preceding the election.

Currently, five states have passed the legislation: WA (11), IL (21), MD (10), NJ (15), and HI (4). There are five other states where the bill has passed both houses: CA (55), CO (9), VT (3), RI (4), and MA (12). If these five states sign the bills into law, the total electoral votes accumulated will be 144. (Of course, this is based on 2008 numbers and subject to change following the 2010 census).[2]

[2] On June 7, 2010, the New York Senate passed the National Popular Vote bill, No S2286A / A1580B. The bill will next be considered by the New York Assembly.

1. Objections to the National Popular Vote Initiative

Among the important objections raised with respect to the proposal are the following:

1) The proposal violates the constitution, which clearly outlines the manner in which the president should be elected, and reflects the founders' clear intention that the president would not be elected by popular vote. Such a fundamental change to the structure of our government should take place in the form of a constitutional amendment, not state legislation.

2) The proposal creates a substantial risk of a constitutional crisis or failed election, which could arise as a result of litigation among the states over the terms of the compact, or a question of how a breach of the compact might be remedied, for example. It appears that there is a significant possibility that prolonged litigation stemming from an election where NPVI was in place could prevent the country from successfully electing a president.

3) Among other areas which could lead to litigation is the fact that the proposal fails to address the numerous inconsistencies among state laws governing federal elections. For example, if state A's voter registration policies are inconsistent with the constitution of state B, is it appropriate for the electoral votes of state A to be awarded based on the votes counted in state B?

4) Similarly, counting procedures and recount rules within each state vary greatly and present potential problems for this proposal. If the votes cast in state A will be affected by the counting of votes in state B, then the voters in state A could have an interest in the procedures used in state B (i.e., under the Equal Protection clause). Without uniform federal standards for national elections, there is a potential for many difficult issues of this kind to disrupt an election.

5) The ability of a state to withdraw from the compact, even as limited to six months prior to the election, creates the potential for partisan, strategic behaviors, such as where every four years the states revisit whether to remain within the compact. (And the prospect of a state withdrawing close to or even during the election, particularly where the removal of that state brings the total electoral votes below the majority, creates further potential for a failed, or at least severely disrupted, election.)

Each of the foregoing objections have been answered, in part, respectively, as follows by advocates of the compact:

1) Interstate compacts are enforceable because there is substantial precedent supporting them. Compacts are contracts and as such are guaranteed inviolability under the federal Constitution; they therefore are enforceable. The litigation problem can't be avoided if states signing on willfully attempt to undermine the compact's effectiveness, but there is no reason to believe that litigation will substantially impede the compact's implementation, assuming the level of political will it took for the state to enter into the compact in the first place, and given the simplicity of the NPVI idea.

2) The NPVI does not create the situation where inconsistencies among state laws governing federal elections could violate constitutional rights of individual voters, because under the current constitutional system, states have plenary power to exercise control over their own delegates and election procedures, and the individual citizen does not have a federal constitutional right to vote for president. Accordingly, the citizen of any one state does not have an interest in the electoral procedures of another state, especially regarding collateral pre-election issues like voter registration.

3) Similarly, an individual voter in State A would have no standing to bring an Equal Protection challenge to the counting procedures in another state without a constitutional amendment fundamentally revising the national election system. 4) State governments have nothing to gain by rescinding their participation in what is already known to be a politically popular mode of conducting elections. The state government that says we are returning to the antiquated electoral college system, after agreeing to the compact, will necessarily have a lot to explain to its own voters.

D. Conclusion

Having considered the objections and responses summarized above, the Committee has reached the conclusion that while there are strong arguments that the NPVI is sound as a matter of constitutional and federal common law, there is sufficient uncertainty about the legality of the proposal to create a meaningful risk of protracted litigation over the results of a presidential election conducted under the NPVI. Beyond the potential for legitimate disputes over the intersection of state and federal law, the unprecedented structure of the NPVI creates an opportunity for those unhappy with the outcome of a presidential election to attempt to alter that outcome through the courts. Absent the possibility for advisory opinions to create confidence in the system and preclude opportunistic behavior, we see no way to ensure the likelihood of a smooth and successful presidential election under the NPVI. Consequently, while the Committee applauds authors of the initiative, and shares in the opposition to the current electoral system that led to the development of the proposal, we are unable to recommend the implementation of the NPVI as it is currently proposed.

Committee on Election Law

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