



# Electoral College Reform: 111<sup>th</sup> Congress Proposals and Other Current Developments

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September 13, 2010

**Congressional Research Service**

7-5700

[www.crs.gov](http://www.crs.gov)

R40895

## Summary

American voters elect the President and Vice President indirectly, through presidential electors. Established by Article II, Section 1, clause 2 of the U.S. Constitution, this electoral college system has evolved continuously since the first presidential elections. Despite a number of close contests, this arrangement has selected the candidate with the most popular votes in 48 of 52 presidential elections since the current voting system was established by the 12<sup>th</sup> Amendment in time for the 1804 contest. Three times, however, candidates were elected who won fewer popular votes than their opponents (1876, 1888, 2000), and in a fourth (1824), four candidates split the popular and electoral vote, leading to selection of the President by the House of Representatives. These controversial elections occurred because the system requires a majority of electoral, not popular, votes to win the presidency. This feature, which is original to the U.S. Constitution, has been the object of persistent criticism and numerous reform plans. In the contemporary context, proposed constitutional amendments generally fall into two basic categories: those that would eliminate the electoral college and substitute direct popular election of the President and Vice President, and those that would retain the existing system in some form, while correcting its perceived defects.

In the absence of congressional action since 1977, proponents of direct election have in recent years advanced the National Popular Vote (NPV) plan, a non-constitutional reform option. NPV would bypass the electoral college system through a multi-state compact enacted by the states. Relying on their constitutional authority to appoint electors, NPV would commit participating states to choose electors committed to the candidates who received the most popular votes *nationwide*, notwithstanding results within the state. NPV would become effective when adopted by states that together possess a majority of electoral votes (270). Since 2006, the compact has been introduced in the legislatures of all 50 states and the District of Columbia during at least one session. At the present time, six states with a combined total of 73 electoral votes (Hawaii, 4; Illinois, 21; Maryland, 10; Massachusetts, 12; New Jersey, 15; and Washington, 11) have approved the compact.

For additional information on contemporary operation of the electoral college, please consult CRS Report RL32611, *The Electoral College: How It Works in Contemporary Presidential Elections*, by Thomas H. Neale. This report will be updated as events warrant.

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## Introduction

American voters elect the President and Vice President of the United States under a complex arrangement of constitutional provisions, federal and state laws, and political party practices known as the electoral college system.<sup>1</sup> Despite occasional close elections, this system has selected the candidate with the most popular votes in 48 of the 52 presidential elections held since the 12<sup>th</sup> Amendment was ratified in 1804.<sup>2</sup> The four exceptions have been negatively characterized by some commentators as electoral college “misfires.” In three instances (1876, 1888, and 2000), the electoral college awarded the presidency to candidates who won a majority of electoral votes, but gained fewer popular votes than their principal opponents. In a fourth case (1824), the House of Representatives decided the contest by contingent election because no candidate had an electoral vote majority.<sup>3</sup> These controversial elections occurred because the system requires a majority of electoral, not popular, votes to win the presidency, and this feature, which is original to the U.S. Constitution, has been the object of persistent criticism and numerous reform plans.

The most recent instance in which the popular vote runner-up received a majority in the electoral college occurred in 2000, when George W. Bush and Richard B. Cheney were elected over Al Gore, Jr., and Joseph I. Lieberman, despite having won fewer popular votes.

The 2000 election outcome hinged on the state of Florida, where popular vote totals were extremely close but uncertain after the polls closed. This was due in part to confusing ballots and poorly maintained machinery in some Florida counties, which contributed to uncertainties over which candidate had won the popular vote. Various attempts to conduct recounts or ascertain individual voters’ intentions led to a bitter and protracted struggle that continued for over a month following election day. A Supreme Court decision<sup>4</sup> ended further recounts, leading to certification of Bush-Cheney electors in Florida, and the Republicans’ subsequent election.

Following the 2000 presidential election, both the electoral college system and the shortcomings of election administration procedures and voting machinery (the latter historically a responsibility of state and local governments) were criticized. While a number of constitutional amendments

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<sup>1</sup> For additional information on contemporary operation of the electoral college system, consult CRS Report RL32611, *The Electoral College: How It Works in Contemporary Presidential Elections*, by Thomas H. Neale.

<sup>2</sup> The 12<sup>th</sup> Amendment was proposed and ratified following the presidential election of 1804. It replaced the cumbersome dual voting system by electors that had resulted in a constitutional crisis in the 1800 election. The two systems are sufficiently different that 1804 may be considered a “fresh start” for the electoral college. For further information on the original constitutional provisions and the election of 1800, please consult CRS Report RL30804, *The Electoral College: An Overview and Analysis of Reform Proposals*, by L. Paige Whitaker and Thomas H. Neale. See especially pages 2-3.

<sup>3</sup> The two instances prior to 2000 included 1876, when Rutherford B. Hayes was elected with a slim electoral vote majority over Samuel Tilden, who gained more popular votes, and 1888, when Benjamin Harrison gained the presidency with a comfortable electoral vote majority, but fewer popular votes than incumbent President Grover Cleveland. The election of 1824, unique in American political history, saw the electoral and popular vote split among four major candidates. As no candidate received an electoral vote majority, the House chose from among the three top candidates, electing John Quincy Adams, although Andrew Jackson enjoyed a popular and electoral vote plurality. For additional information on contingent election, please consult CRS Report R40504, *Contingent Election of the President and Vice President by Congress: Perspectives and Contemporary Analysis*, by Thomas H. Neale.

<sup>4</sup> *Bush v. Gore*, 531 U.S. 989 (2000).

were proposed, the 107<sup>th</sup> Congress addressed the latter element of this issue with enactment of the Help America Vote Act (HAVA; P.L. 107-252, 116 Stat. 1666) in 2002. This act, passed with broad bipartisan support, established national standards for voting systems and certain election procedures, and included a program of grants to assist state and local governments in meeting the act's goals.<sup>5</sup>

The successful passage of HAVA contrasted with the lack of legislative activity in recent Congresses on proposed constitutional amendments that would eliminate or reform the electoral college system. The contrast serves to highlight the comparative difficulties faced by would-be electoral college reformers. The fundamentals of the electoral college system were established by the Constitution, and can only be altered by a constitutional amendment, a much more difficult process than the passage of legislation. Moreover, HAVA's prospects for enactment were boosted by the expectation that, while few would defend the sometimes embarrassing failures in voting technology that contributed to passage of the act, efforts to eliminate the electoral college might be vigorously opposed in Congress and the public forum by its various advocates and defenders.

Not all approaches to electoral college reform necessarily involve action at the federal level, however. In 2004, for instance, Colorado voters considered, but rejected, a proposed amendment to the state constitution that would have established the proportional system, one variant of electoral college reform (discussed in the **Appendix**) in that state. More recently, the National Popular Vote (NPV) movement is currently coordinating a campaign that would rely on a multi-state compact, in the form of binding state legislation, to guarantee that the popular vote winners in every election would also win the electoral vote.

This report examines and analyzes alternative proposals for change, presents pro and con arguments, and identifies and analyzes 111<sup>th</sup> Congress proposals and contemporary alternative reform developments.

## **Competing Approaches: Direct Popular Election v. Electoral College Reform**

A wide variety of constitutional proposals to reform presidential election procedures have been introduced over time. In recent decades they have fallen into two categories: (1) those that seek to eliminate the electoral college system entirely and replace it with direct popular election; and (2) those that seek to repair perceived defects while preserving the existing system.

### **Direct Popular Election**

The direct election alternative would abolish the electoral college, substituting a single nationwide count of popular votes. The candidates winning a plurality of votes would be elected President and Vice President. Most direct election proposals would constitutionally mandate today's familiar joint tickets of presidential/vice presidential candidates, a feature that is already

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<sup>5</sup> For additional information on HAVA, please consult CRS Report RS20898, *The Help America Vote Act and Elections Reform: Overview and Issues*, by Kevin J. Coleman and Eric A. Fischer.

incorporated in state law.<sup>6</sup> Some would require simply that the candidates winning the most popular votes be elected. Others, however, would set a minimum threshold of votes necessary to win election—generally 40% of votes cast; in some proposals a majority would be required. Under these proposals, if no presidential ticket were to attain the 40% or majority threshold, then the two tickets with the highest popular vote total would compete in a subsequent runoff election. Alternatively, some versions of the direct popular election plan would provide for Congress, meeting in joint session, to elect the President and Vice President if no ticket received 40% of the vote.

## **Direct Popular Election: Pro and Con**

Proponents of direct popular election cite a number of factors in support of the concept. At the core of their arguments, they assert that the process would be simple, national, and democratic.

- They assert that direct popular election would provide for a single, democratic choice, allowing all the nation’s voters to choose directly the two highest-ranking executive branch officials in the U.S. government, the President and Vice President.
- Further, the candidates who won the most popular votes would always win the election. Under some direct election proposals, if no presidential ticket received at least 40% of the vote, the voters would then choose between the two tickets that gained the most votes in a runoff election. Other direct election proposals would substitute election by a joint session of Congress for a runoff if no ticket received at least 40% of the vote.
- Every vote would carry the same weight in the election, no matter where in the nation it was cast. No state would be advantaged, nor would any be disadvantaged.
- Direct election would eliminate the potential complications that could arise under the current system in the event of a presidential candidate’s death between election day and the date on which electoral vote results are declared, since the winning candidates would become President-elect and Vice President-elect as soon as the popular returns were certified.<sup>7</sup>
- All the various and complex mechanisms of the existing system, such as provisions in law for certifying the electoral vote in the states and the contingent election process, would be supplanted by these comparatively simple requirements.<sup>8</sup>

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<sup>6</sup> This provision, currently used in all states and the District of Columbia, requires each voter to cast a single vote for a joint ticket of two candidates, one for President and one for Vice President. This insures that the President and Vice President will always be of the same political party.

<sup>7</sup> For further information on the succession question, please consult CRS Report RL30804, *The Electoral College: An Overview and Analysis of Reform Proposals*, by L. Paige Whitaker and Thomas H. Neale, and CRS Report RS22992, *The President-Elect: Succession and Disability Issues During the Transition Period*, by Thomas H. Neale.

<sup>8</sup> Contingent election is required when no candidate wins a majority of electoral college votes. The President is elected in the House of Representatives, with each state casting a single vote, regardless of its population and the election results in that state. The Senate elects the Vice President, with each Senator casting a single vote. For further information, please consult CRS Report R40504, *Contingent Election of the President and Vice President by Congress: Perspectives and Contemporary Analysis*, by Thomas H. Neale

Critics of direct election and electoral college defenders oppose these arguments, pointing to what they assert are its flaws.

- Direct election proponents claim their plan is more democratic and provides for “majority rule,” yet most direct election proposals require that victorious candidates gain as little as 40% of the vote (less than a majority) in order to be elected. Others, moreover, include no minimum vote threshold at all. Still other proposals call for election by Congress should no candidate receive 40% of the popular vote. Critics might ask how the incidence of *plurality* Presidents or Presidents chosen by Congress (a practice strongly rejected by the Founders) could be reconciled with the requirement for strict “*majority rule*” demanded by direct election’s proponents.
- Opponents maintain that direct popular election, without the filtering device of the electoral college, might result in political fragmentation, as various elements of the political spectrum form competing parties, and regionalism, as numerous splinter candidates claiming to champion the particular interests of various parts of the country entered presidential election contests.
- Further, they assert that direct election would foster acrimonious and protracted post-election struggles, rather than eliminate them. For instance, as the presidential election of 2000 demonstrated, close results in a single state in a close election are likely to be bitterly contested. Under direct election, those opposing direct popular election argue, every close election might resemble the post-election contests in 2000, not just in one state, but nationwide, as both parties seek to gain every possible vote. They contend that such rancorous disputes could have profound negative effects on political comity in the nation, and, in the worst case, might undermine the stability of the federal government and the public’s perception of its legitimacy. To those who suggest that the struggle over Florida’s popular vote returns in 2000 was atypical, they could cite the example of Ohio in 2004, where multiple legal actions were pursued even though the popular vote margin for the winning candidates exceeded 118,000.<sup>9</sup>

## Electoral College Reform

Reform measures that would retain the electoral college in some form have included several variants. Most versions of these plans would (1) eliminate the office of presidential elector while retaining electoral votes; (2) award electoral votes automatically, that is, directly to the candidates, without the action of electors; and (3) retain the requirement that a majority of electoral votes is necessary to win the presidency. In common with direct election, most would also require joint tickets of presidential-vice presidential candidates, a practice currently provided by state law. The three most popular reform proposals include (1) the automatic plan, which would award electoral votes automatically on the current winner-take-all basis in each state; (2) the district plan, as currently adopted in Maine and Nebraska, which would award, also automatically, one electoral vote to the winning ticket in each congressional district in each state, and each state’s two additional electoral votes awarded to the statewide popular vote winners; and (3) the proportional plan, which would award, here again, automatically, each state’s electoral

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<sup>9</sup> Bush/Cheney: 2,859,764; Kerry/Edwards: 2,741,165. Ohio Secretary of State website, at <http://www.sos.state.oh.us/>.



votes in proportion to the percentage of the popular vote gained by each ticket. More detailed explanations of these alternatives are included in the **Appendix** to this report.

## **Electoral College Reform: Pro and Con**

Defenders of the electoral college, either as presently structured, or reformed, offer various arguments in its defense.

- They reject the suggestion that it is undemocratic. Electors are chosen by the voters in free elections, and have been in nearly all instances since the first half of the 19<sup>th</sup> century.
- The electoral college system prescribes a federal election of the President by which votes are tallied in each state. The United States is a federal republic, in which the states have a legitimate role in many areas of governance, not the least of which is presidential elections. The Founders intended that choosing the President would be an action American voters take both as citizens of the United States, and as members of their state communities.
- In addition to the electoral votes assigned on the basis of each state’s House of Representatives delegations, the current system also allocates two additional electors to each state, regardless of population. Defenders maintain that this formula is an important “federal” component of the presidential election system, comparable to the two Senators assigned by the Constitution to each state, also regardless of population. Moreover, they note that these “senatorial” electors constitute only 18.6% of the electoral college.
- Further, defenders reject the suggestion that less populous states like Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming, as well as the District of Columbia, each of which casts only three electoral votes, are somehow “advantaged” when compared with California (currently 55 electoral votes). These 55 votes alone, they note, constitute more than 20% of the electoral votes needed to win the presidency, thus conferring on California voters, and those of other populous states, a “voting power” advantage that far outweighs the minimal arithmetical edge conferred on the smaller states.<sup>10</sup>
- The electoral college system promotes political stability, they argue. Parties and candidates must conduct ideologically broad-based campaigns throughout the nation in hopes of assembling a majority of electoral votes. The consequent need to forge national coalitions having a wide appeal has been a contributing factor in the moderation and stability of the two-party system.
- They find the “faithless elector” phenomenon to be a specious argument.<sup>11</sup> Only nine such electoral votes have been cast against instructions since 1820, and none

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<sup>10</sup> For additional information on the voting power theory, please consult CRS Report RL30804, *The Electoral College: An Overview and Analysis of Reform Proposals*, by L. Paige Whitaker and Thomas H. Neale.

<sup>11</sup> Faithless electors are those who cast their votes for candidates other than those to whom they are pledged. Notwithstanding political party rules and state laws, most constitutional scholars believe that electors remain free agents, guided, but not bound, to vote for the candidates they were elected to support. For further information, please consult CRS Report RL30804, *The Electoral College: An Overview and Analysis of Reform Proposals*, by L. Paige Whitaker and Thomas H. Neale.

has ever influenced the outcome of an election. Moreover, nearly all electoral college reform plans would remove even this slim possibility for mischief by eliminating the office of elector.

Supporters of direct election and critics of the electoral college counter that the existing system is cumbersome, potentially anti-democratic, and beyond saving. The following asserted failings are frequently cited.

- The electoral college, direct election supporters assert, is the antithesis of their simple and democratic proposal. It is, they contend, philosophically obsolete: indirect election of the President is an 18<sup>th</sup> century anachronism that dates from a time when communications were poor, the literacy rate was much lower, and the nation had yet to develop the durable, sophisticated, and inclusive political system it now enjoys.
- They find the 12<sup>th</sup> Amendment provisions that govern the election of national leaders when no candidate attains an electoral college majority (contingent election) to be even less democratic than the primary provisions of Article II, Section 1.<sup>12</sup>
- By providing a fixed number of electoral votes per state that is adjusted only after each census, they maintain, the electoral college does not accurately reflect state population changes in intervening elections.
- They assert that the two “constant” or “senatorial” electors assigned to each state regardless of population give some of the nation’s least populous jurisdictions a disproportionate advantage over more populous states.
- The office of presidential elector itself, they note, and the resultant “faithless elector” phenomenon (see footnote 10), provide opportunities for political mischief and deliberate distortion of the voters’ choice.
- They argue that by awarding all electoral votes in each state to the candidates who win the most popular votes in that state, the winner-take-all system effectively disenfranchises everyone who voted for other candidates. Moreover, this same arrangement is the centerpiece of one category of electoral college reform proposal, the automatic plan. For more on the automatic plan, see the **Appendix** to this report.
- Critics further advert to the fact that, although all states currently provide for choice of electors by popular vote, state legislatures still retain the constitutional option of taking this decision out of the voters’ hands, and selecting electors by some other, less democratic means.<sup>13</sup> This option was, in fact, discussed in Florida in 2000 during the post-election recounts, when some members of the legislature proposed to convene in special session and award the state’s electoral votes, regardless of who won the popular contest in the state. The survival of this

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<sup>12</sup> For more detailed information on the contingent election process, please consult CRS Report R40504, *Contingent Election of the President and Vice President by Congress: Perspectives and Contemporary Analysis*, by Thomas H. Neale.

<sup>13</sup> U.S. Constitution, Article II, Section 1, clause 2: “Each State shall appoint *in such Manner as the Legislature thereof may direct* [emphasis added], a number of Electors equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress.”

option demonstrates that even one of the more “democratic” features of the electoral college system is not guaranteed, and could be changed arbitrarily by politically motivated state legislators.

- Finally, they note the electoral college system has the potential to elect presidential and vice presidential candidates who obtain an electoral vote majority, but fewer popular votes than their opponents, as happened in 2000, 1888, and 1876. While a system that allows such a perceived miscarriage of the popular will might have been acceptable in the 19<sup>th</sup> century, opponents of the current system maintain that it has no place in the 21<sup>st</sup>.

## **Electoral College Amendments Proposed in the 111<sup>th</sup> Congress**

Three constitutional amendments concerning the electoral college system were introduced in the 111<sup>th</sup> Congress, H.J.Res. 9 and H.J.Res. 36 in the House of Representatives and S.J.Res. 4 in the Senate.

### **H.J.Res. 9—The Every Vote Counts Amendment**

This measure, the Every Vote Counts Amendment, was introduced in the 111<sup>th</sup> Congress by Representative Gene Green of Texas on January 7, 2009. The proposal was referred to the House Committee on the Judiciary the same day and to its Subcommittee on the Constitution, Civil Rights, and Civil Liberties on February 9. No further action has been taken to date. Sections 1, 3, 4, and 5 of the proposed amendment deal with the election process itself, while Section 2 is largely concerned with voter qualifications

#### **Sections 1, 3 and 4**

Section 1 specifies that the President and Vice President will be elected by “the people of the several States and the district constituting the seat of government.” This provision recapitulates existing requirements of state residence, or residence in the District of Columbia, and implicitly excludes Puerto Rico and U.S. territories.<sup>14</sup> Section 3 sets a plurality, rather than a majority requirement for election. Section 4 establishes in the Constitution the joint candidacy requirement currently provided by all the states, and would prohibit candidates from being joined on the national ballot with more than one person. The purpose here is to avoid multiple “mix and match” candidacies that might confuse the voting public (intentionally or otherwise), and ensure a uniform nationwide standard of candidacy.

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<sup>14</sup> A number of election proposals in recent years, including H.J. Res. 29 and S.J.Res. 4 in the 111<sup>th</sup> Congress, which are examined later in this report, suggest that voters in the insular areas should also have the right to vote for President and Vice President, based largely on the fact that they are U.S. citizens.

## Section 5

Section 5 would empower Congress to provide by law for the following: (1) the death of candidates prior to election day; and (2) any tie vote in a presidential election. This language appears to give Congress broad authority to legislate alternative arrangements in the aforementioned situations. These options might arguably include postponing the presidential election, if a candidate or candidates were to die within close proximity of the election. The amendment could also arguably empower Congress to provide for a second-round election in the event of a tie to break the deadlock, or authorize Congress itself to break a tie. It is less clear whether the amendment would offer an implicit grant of authority to Congress to intervene in the process of replacing *party candidates* under such circumstances, an eventuality that has historically been addressed by the parties through internal procedures.<sup>15</sup> If so, this would constitute a departure from current practice and political tradition by empowering Congress to intervene in the internal workings of the political parties.

## Section 2

Section 2 of the proposed amendment contains three elements relating to voter qualifications. First, it specifies that voters for President and Vice President “shall have the qualifications requisite for electors of Senators and Representatives in Congress.” This sentence builds on, and explicitly extends to the presidential electorate, existing constitutional voter qualifications stated in Article I, Section 2 (for the House), and the 17<sup>th</sup> Amendment (for the Senate), and as further defined and guaranteed by the 14<sup>th</sup>, 15<sup>th</sup>, 19<sup>th</sup>, 24<sup>th</sup>, and 26<sup>th</sup> Amendments. Next, if adopted, it would empower the states to set “less restrictive qualifications with respect to residence.” In contemporary practice, most states have reduced voting residence requirements to an average of 30 days. Since the states already possess the power to reduce or eliminate these periods, this section might be regarded as redundant, or perhaps as providing encouragement, admonishment, or a constitutional imprimatur, to efforts to adopt shorter residence requirements for voters, or to eliminate them altogether.

Finally, Section 2 also proposes to empower Congress to “establish uniform residence and age requirements.” Here again, this provision arguably constitutes a mandate for potential expansion of federal control over elections. Voting residence requirements, as noted previously, have been traditionally a state responsibility, but the amendment would vest in Congress authority to preempt state laws in this area, at least for presidential elections. Similarly, Congress would be empowered by the amendment to establish a lower (or higher) voting age for presidential elections than is currently provided in the 24<sup>th</sup> Amendment.<sup>16</sup> Criticisms of both uniform residence and age requirements on the grounds of costs to the states and excessive federal control over traditional state functions might expect to be countered by the argument that federal elections are a nationwide expression of the public will, for which national voting requirements are fully justified.

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<sup>15</sup> For instance, in 1972, Senator Thomas F. Eagleton resigned as Democratic Party vice presidential nominee on August 1, 1972. He was replaced by R. Sargent Shriver, whose nomination was approved by the Democratic National Committee, as provided for in party rules, on August 8.

<sup>16</sup> Although H.J.Res. 9 does not specify a vehicle by which Congress could effect these changes, legislation seems to be the likely option. Since the amendment refers explicitly to presidential elections only, a further constitutional amendment would probably be required if these provisions applied to other elections as well, such as those for state and local elected officials.

## **Section 6**

Section 6 of the proposed amendment would set the time when it would come into force if ratified: that is, for the first presidential election that occurred one year or longer after the date on which the amendment is declared to be ratified. For instance, if the amendment were successfully proposed by Congress in 2010 and ratified by the requisite number of states before November 6, 2011 (exactly one year before the proximate election day), it would become effective with the presidential election of 2012.

## **H.J.Res. 36**

This measure was introduced in the 111<sup>th</sup> Congress House of Representatives on March 3, 2009, by Representative Jesse L. Jackson Jr. The proposal was referred to the House Committee on the Judiciary the same day and to its Subcommittee on the Constitution, Civil Rights, and Civil Liberties on March 16. No further action has been taken to date. In common with many recent electoral college reform proposals, this measure would not only establish direct popular election of the President and Vice President, but would also provide Congress with expanded authority to legislate in certain areas of election administration.

## **Section 1**

Section 1 of this measure proposes direct popular election of the President and Vice President by the citizens of the United States, “without regard to whether the citizens are residents of a State.” The precise intention of this language is open to differing interpretations. For instance, it would likely be interpreted as empowering citizens registered in U.S. territories to vote for President, on the grounds that they are “citizens of the United States.” It might, however, also be considered to require state and local authorities to permit any citizen to vote in a presidential election, without regard to existing residence or voter registration arrangements. In other words, if a person presents himself at the polls anywhere in the nation with proof of citizenship, his vote would be honored. If so, this might lead to complications in vote counting and registry and increased costs for local authorities. For instance, in order to preserve the integrity of state and local election contests, they might prepare one ballot for the presidential vote, and a separate one for “down ballot” elections in order to ensure that only bona fide residents of that community who are registered in the jurisdiction cast votes for state and local office. Here again, however, the argument may be made that election of the President and Vice President is of such profound national importance, it must transcend the convenience of state and local governments.

## **Section 2**

Section 2 of H.J.Res. 36 declares that “the persons having the greatest number of votes ... shall be elected, so long as such persons have a majority of the votes cast.” This section differs from most direct election proposals, which more commonly establish a 40% plurality or a simple plurality to elect. More problematic, however, is the fact that while it would establish a majority requirement, H.J.Res. 36 does not propose any procedures for elections in which no candidate wins a majority.<sup>17</sup> Since popular vote plurality presidential elections occur with some regularity, this

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<sup>17</sup> Such elections occur with relative frequency. For instance, no candidate received a majority of the popular vote in five of the last 13 presidential elections: 1960, 1968, 1992, 1996 and 2000. Richard M. Scammon, Alice V. (continued...)

omission could arguably be remedied during almost any point in the legislative process by the inclusion of such procedures as a runoff election or election by Congress under such circumstances. An additional option might be to empower Congress to provide by legislation for such events, leaving selection of the procedure to the judgment of the legislature (e.g., “and Congress shall provide by law for such instances in which no such persons shall have a majority of the votes cast”).

## **S.J.Res. 4**

This measure was introduced in the 111<sup>th</sup> Congress on January 8, 2009, by Senator Bill Nelson. The proposal was referred to the Senate Committee on the Judiciary on the same day. No further action has been taken to date. In common with H.J.Res. 36, this measure would both establish direct popular election of the President and Vice President and provide Congress with expanded authority to legislate in certain areas of election administration

### **Section 1**

This section would provide for election of the President and Vice President by “the direct vote of the qualified electors of the several States and territories and the District [of Columbia].” Aside from establishing direct election, Section 1 would also expand the electors to include persons residing in U.S. territories. This would include recognized unincorporated territories: Guam, American Samoa (whose citizens, it should be noted, are not U.S. citizens, but U.S. nationals), the U.S. Virgin Islands, and, arguably, the Commonwealth of Puerto Rico. Questions might be raised here as to whether the Commonwealth of the Northern Marianas would be covered by the amendment. This jurisdiction is in “political union” with the United States; its citizens are citizens of the United States, and it elects a “Resident Representative” to Congress, who sits in the House of Representatives in an arrangement similar to that of Puerto Rico’s Resident Commissioner.

Another, more general, concern here, and one most likely to be raised by defenders of the electoral college, might be the fundamental concept of voting in presidential elections by persons who are not residents of the 50 states or the District of Columbia. The founders, they might argue, never intended that persons who are not residents of “the several states” would vote in presidential elections. Since the first U.S. territory was established under the Constitution in 1789, their voters have never voted in presidential elections, even in the case of incorporated territories which were on track to eventual statehood. Defenders of S.J.Res. 4 might counter with the assertion that while current U.S. territories may be physically removed from the United States, they function as an integral part of the larger American political system; that their voters are citizens of the United States, who are eligible to vote in presidential elections if they are registered in one of the states; and that their inclusion in the presidential election process would provide an impressive demonstration of the nation’s cultural and ethnic diversity.

The last sentence of Section 1 would provide that “[t]he electors in each State, territory, and the District constituting the seat of Government of the United States shall have the requirements requisite for electors of the most numerous branch of the legislative body where they reside.” This language closely parallels that of Article I, Section 2 of the Constitution concerning elections

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(...continued)

McGillivray and Rhodes Cook, *America Votes 26* (Washington: CQ Press, 2006), pp. 8-34.

to the House of Representatives: “the Electors in each State shall have the Qualifications requisite for electors of the most numerous Branch of the State Legislature,” suggesting that its intention is to extend the states’ longstanding authority over the House electorate to that of the President and Vice President. It may be argued, however, that the phrase “legislative body where they reside” might be open to challenge on grounds that it does not specifically identify the sovereign legislature in these jurisdictions, as does Article I, Section 2, which clearly identifies the appropriate body as “the most numerous Branch of the State Legislature.”<sup>18</sup>

## **Section 2**

Section 2 may be divided into two subsections. The first would confer on Congress the power to determine “the time, place and manner of holding the election.” This particular language closely approximates that in Article I, Section 4, clause 1 concerning congressional elections, and arguably expands upon that found at Article II, Section 1, clause 4, which empowers Congress to “determine the Time of chusing the Electors.”

The final clause of Section 2 would confer on Congress a broad new mandate to legislate in areas that have generally been considered the responsibility of the states. In this part of the section, Congress would be empowered “to determine ... the entitlement to inclusion on the ballot and the manner in which the results of the election shall be tabulated and declared.”

With respect to the former part of the clause, “entitlement to inclusion on the ballot[,]” ballot access has sometimes been a source of contention, as minor parties, new parties, and independent candidates for office complain that the state laws are weighted heavily in favor of the two major parties. It is, they claim, too difficult to gain a place on the ballot, and once there, to retain it. Federal authority, they and their supporters might argue, is appropriate for federal elections. Further, it might facilitate the growth and inclusion of democratic alternatives to the existing order and challenge the 150-year duopoly of the existing major parties. Opponents would likely suggest that federal authority over ballot access would be an intrusion into functions successfully administered at the state level for many years. They might further assert that a proliferation of minor and splinter parties might endanger the two-party system, which has generally provided a stable, responsible, democratic arrangement in which the parties have been comparatively broadly based, in both their ideology and geographic appeal.

The latter part of the clause, “and the manner in which the results of the election shall be tabulated and declared[,]” would similarly authorize Congress to legislate in an area traditionally covered by state laws. Here again, the arguments in favor would be those asserting the primacy of the national interest in a national election, perhaps coupled with the suggestion that federal regulation would lead to more efficient and expeditious vote counting. Opponents might again counter with arguments warning against what they might call unwarranted federal intrusion into state responsibilities.

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<sup>18</sup> The fact that several of these jurisdictions possess a unicameral legislature (i.e., the District of Columbia, Guam, and the U.S. Virgin Islands) does not appear to be problematic: Nebraska’s legislature has comprised a single chamber since 1937, a fact that has had no impact on the state’s participation in presidential elections.

## Contemporary Activity in the States

While only a constitutional amendment could alter the fundamental arrangements of the electoral college, some elements of the system could be changed by measures adopted in the states. As noted previously, the Constitution gives the states plenary power in the ways they choose to pick presidential electors. The language in Article II, Section 1, clause 2 is notably broad and general: “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.” This breadth of authority was intended by the founders, who sought to provide considerable discretion to the several states as to how they would choose and allocate presidential electors.<sup>19</sup>

In other words, the states are free to experiment with systems of elector selection and electoral vote and allocation, up to a point. Indeed, it may be argued that with such experiments the states fulfill their traditional role as “laboratories” in which potential national policy initiatives can be developed and tested. This report has previously identified several areas in which the states have exercised their prerogative in the past. First, all 50 states and the District of Columbia (DC) currently provide for joint tickets, in which the public casts a single vote for electors pledged to a single pair of candidates. Next, the states and DC provide for popular election of presidential electors. Finally, in all but two jurisdictions, Maine and Nebraska,<sup>20</sup> the electors are chosen *en bloc* under the general ticket or winner-take-all system; that is, the group or ticket electors pledged to the candidates who win a plurality of popular votes in the state are elected as a group. Three recent efforts to effect change by using the power accorded to states in Article II, Section 1, clause 2 are discussed briefly below.

## National Popular Vote—Direct Popular Election Through An Interstate Compact

The National Popular Vote (NPV) campaign, conceived in the wake of the 2000 presidential election and launched in 2006, would eliminate existing electoral college arrangements without the need for a constitutional amendment. It would substitute *de facto* direct popular election by means of an interstate agreement or compact. Under the compact’s provisions, legislatures of the 50 states and the District of Columbia would exercise their Article II, Section 1 authority to appoint presidential electors themselves. The key provision of NPV is, however, that the states would then appoint electors committed to the presidential/vice presidential ticket *that gained the most votes nationwide*. This would deliver a unanimous electoral college decision for the candidates winning a plurality of the popular vote.

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<sup>19</sup> This power is not, however, absolute. Federal court decisions have struck down state laws concerning appointment of electors that were found to be in violation of the 14<sup>th</sup> Amendment’s guarantee of equal protection. For additional discussion, see *United States Constitution: Analysis and Interpretation Constitution Annotated*, Article II, Section 1, Clauses 2-4. Available at [http://www.crs.gov/products/conan/Article02/topic\\_S1\\_C2\\_1\\_2.html](http://www.crs.gov/products/conan/Article02/topic_S1_C2_1_2.html).

<sup>20</sup> See the **Appendix** to this report for further information on the district plan established in Maine and Nebraska.



## Origins

The idea for NPV is generally credited as originating in a 2001 article by constitutional scholars Akhil and Vikram Amar. The authors suggested that a compact by a group of states would be able to achieve the goal of direct popular election without the need to meet the constitutional requirements necessary for a constitutional amendment.<sup>21</sup> This proposal, which became the National Popular Vote plan, relies on the Constitution's broad grant of power to each state to "appoint, *in such Manner as the Legislature thereof may direct* [emphasis added], a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."<sup>22</sup>

## The Plan

Specifically, the plan calls for an agreement or compact in which the legislatures in each of the participating states would agree to appoint electors (and hence, electoral votes) pledged to the candidates who won the *nationwide popular vote*. The appropriate authority in each state would tally and certify the "national popular vote total" within the state; the state figures would be aggregated and certified nationwide, and in each state the slate of electors pledged to the "national popular vote winner" would be appointed. Barring unforeseen circumstances, the NPV would result in a unanimous electoral college vote: 538 electors for the winning candidates for President and Vice President.

In order to address state concerns about premature commitment to the NPV plan, the process would come into effect only after approval of the compact by a number of states whose total electoral votes equaled or exceeded 270, the current majority required to elect under the Constitution.

In the event the national popular vote were tied, the states would be released from their commitment under the compact, and would choose electors who represented the presidential ticket that gained the most votes in each particular state.

States would retain the right to withdraw from the compact, but if a state chose to withdraw within six months of the end of a presidential term, the withdrawal would not be effective until after the succeeding President and Vice President had been elected.

One novel provision would enable the presidential candidate who won the national popular vote to fill any vacancies in the electoral college with electors of his or her own choice, presumably provided the electors meet constitutional qualifications for that office.

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<sup>21</sup> Akhil Reed Amar and Vikram David Amar, "How to Achieve Direct National Election of the President Without Amending the Constitution," *Findlaw's Writ*, December 28, 2001, <http://writ.news.findlaw.com/amar/20011228.html>.

<sup>22</sup> U.S. Constitution, Article II, Section 1, clause 2.

## **National Popular Vote, Inc.**

The NPV advocacy effort is managed by National Popular Vote, Inc., a “501(c)(4)”<sup>23</sup> nonprofit corporation, established in California in 2006 by Barry Fadem, an attorney specializing in initiative and referendum law, and Stanford University professor John R. Koza.<sup>24</sup> As a 501(c)(4) entity, it is permitted to engage in political activity in furtherance of its goal, so long as this is not its primary activity. The organization’s board members include former Senators and Representatives of both major political parties, which appears to suggest a degree of bipartisan support on the national level. As of September 22, 2009, NPV claimed the support of 1,777 state legislators, over one-sixth of the 7,382 total, and endorsement by the *New York Times*, *Los Angeles Times*, *Chicago Sun-Times*, *Minneapolis Star Tribune*, *Boston Globe*, *Miami Herald*, and other newspapers.<sup>25</sup>

## **Action in the State Legislatures**

The vehicle for NPV, as noted earlier in this report, is the interstate agreement or compact, “Agreement Among the States to Elect the President by Popular Vote.”

## **States Approving the National Popular Vote Compact**

Since its inception in 2006, the National Popular Vote compact has been introduced during at least one session in the legislatures of all 50 states and the District of Columbia.<sup>26</sup> The following six states, possessing a total of 73 electoral votes, had adopted it by the time of this writing:

- **Hawaii** (four electoral votes), enacted over governor’s veto, May 1, 2008;
- **Illinois** (21 electoral votes), approved April 7, 2008;
- **Maryland** (10 electoral votes), approved March 10, 2008;
- **Massachusetts** (12 electoral votes), approved August 4, 2010;
- **New Jersey** (15 electoral votes), approved January 13, 2008; and
- **Washington** (11 electoral votes), approved April 28, 2009.

## **State Legislative Approvals of the National Popular Vote Compact Negated by Gubernatorial Veto**

In 2008, the legislatures of the three following states also approved the National Popular Vote compact. These actions, however, were overturned by gubernatorial vetoes.

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<sup>23</sup> 26 U.S.C. 501 (c)(4). Organizations recognized by the Internal Revenue Service under this provision of the IRS Code may lobby for legislation and participate in political campaigns and elections.

<sup>24</sup> Rick Lyman, “Innovator Devises Way Around Electoral College,” *New York Times*, September 22, 2006, <http://www.nytimes.com/2006/09/22/us/politics/22electoral.html>.

<sup>25</sup> National Popular Vote website, <http://www.nationalpopularvote.com/>.

<sup>26</sup> Although not a state, the District of Columbia was included in presidential elections by the 23<sup>rd</sup> Amendment to the Constitution, and was allocated three electors.

- **California** (55 electoral votes), vetoed September 30, 2008;
- **Rhode Island** (four electoral votes), vetoed July 2, 2008; and
- **Vermont** (three electoral votes), vetoed May 16, 2008.

### **State Action in the 2009-2010 Legislative Sessions**

The NPV interstate compact was introduced in the legislatures of 33 states during their 2009-2010 legislative sessions. At the time of this writing, it has been approved in Washington in 2009, and Massachusetts in 2010, and also passed one chamber in 10 others. Further action in 2010 is unlikely, as most legislatures had adjourned sine die at the time of this writing. States that took favorable action in 2009 and 2010 are listed below:

- **Arkansas** (six electoral votes), passed in the House in 2009, no floor action in the Senate prior to adjournment;<sup>27</sup>
- **Colorado** (nine electoral votes), passed in the House in 2009, no floor action in the Senate;<sup>28</sup>
- **Connecticut** (seven electoral votes), passed in the House in 2009, placed on the calendar in the Senate, but no further action;<sup>29</sup>
- **Delaware** (three electoral votes), passed in the House in 2009, no action in the Senate<sup>30</sup>;
- **Massachusetts** (12 electoral votes), approved August 4, 2010;<sup>31</sup>
- **Nevada** (five electoral votes), passed in the House in 2009, no floor action in the Senate;<sup>32</sup>
- **New Mexico** (five electoral votes), passed in the House in 2009, but postponed indefinitely in the Senate;<sup>33</sup>
- **New York** (31 electoral votes), passed in the Senate in 2010, no action in the Assembly;<sup>34</sup>
- **Oregon** (seven electoral votes), passed in the House in 2009, no further action in the Senate;<sup>35</sup>

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<sup>27</sup> Arkansas: <http://www.arkleg.state.ar.us/assembly/2009/R/Pages/BillInformation.aspx?measureno=HB1339>.

<sup>28</sup> Colorado: HB 09-1299, <http://www.leg.state.co.us/Clics/Clics2009A/csl.nsf/MainBills?openFrameset>.

<sup>29</sup> Connecticut: [http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill\\_num=HB06437](http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=HB06437).

<sup>30</sup> Delaware: <http://legis.delaware.gov/LIS/LIS145.NSF/vwLegislation/HB+198?Opendocument>.

<sup>31</sup> Massachusetts: "Governor Patrick Signs National Popular Vote Bill," Press Release, Official Web Site of the Governor, August 4, 2010, [http://www.mass.gov/?pageID=gov3pressrelease&L=1&L0=Home&sid=Agov3&b=pressrelease&f=100804\\_Natl\\_popular\\_vote\\_signing&csid=Agov3](http://www.mass.gov/?pageID=gov3pressrelease&L=1&L0=Home&sid=Agov3&b=pressrelease&f=100804_Natl_popular_vote_signing&csid=Agov3).

<sup>32</sup> Nevada: <http://www.leg.state.nv.us/75th2009/Reports/history.cfm?ID=801>.

<sup>33</sup> New Mexico: [http://www.nmlegis.gov/lcs/\\_session.aspx?Chamber=H&LegType=B&LegNo=383&year=09](http://www.nmlegis.gov/lcs/_session.aspx?Chamber=H&LegType=B&LegNo=383&year=09).

<sup>34</sup> New York: "Reforming Presidential Elections: Senate Passes National Popular Vote Legislation," Press Release, June 8, 2010, New York Senate website: <http://www.nysenate.gov/press-release/reforming-presidential-elections-senate-passes-national-popular-vote-legislation>.

<sup>35</sup> Oregon, <http://www.leg.state.or.us/cgi-bin/searchMeas.pl>.

- **Rhode Island** (four electoral votes), passed in the Senate, defeated in the House;<sup>36</sup>
- **Vermont** (three electoral votes), passed in the Senate in 2009, no action in the House;<sup>37</sup> and
- **Washington** (11 electoral votes), passed both chambers of the legislature, approved by the governor on April 28, 2009.<sup>38</sup>

## National Popular Vote: Support and Opposition

Arguments in support of and opposition to the National Popular Vote proposal embrace points generally similar to the pros and cons for direct popular election examined earlier in this report. In most plans that would establish direct election of the president, the central issue is a question of “one big thing” versus “many things”—that is, the simplicity, logic, and democratic attractiveness of the direct election idea as compared to the more complex array of related but arguably less compelling factors cited by supporters of the existing system.<sup>39</sup>

The National Popular Vote movement advocates the NPV compact on the grounds of fairness and respect for the freely expressed voice of the voters which is the cornerstone of all direct popular election plans. In particular, it advocates a national vote that, *de facto*, eliminates the role of states by binding them to support the nationwide vote winners, notwithstanding the results in their own jurisdictions. According to the NPV website, the central argument in its favor is that the compact “would guarantee the Presidency to the candidate who receives the most popular votes in all 50 states (and the District of Columbia).”<sup>40</sup> It would guarantee at least a plurality President and Vice President, thus eliminating any possibility of Presidents who won fewer votes than their opponent, one of the most widely criticized aspects of the electoral college system. It would also reduce the likelihood of other problem areas under the existing system, including the faithless elector, “disenfranchisement” under the winner-take-all system, “voting power” advantages conferred on more populous states, or, conversely, arithmetical advantage derived by less populous states, and the potential for contingent election under the 12<sup>th</sup> Amendment.<sup>41</sup> It is difficult to underestimate the appeal of this simple yet arguably compelling proposal: the candidates who win the most votes should win the presidency (and vice presidency).

Opponents, by comparison, have cited many of the assertions examined earlier in this report. These may be categorized as philosophical and political criticisms of the NPV plan. Generally,

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<sup>36</sup> Rhode Island: (Senate Bill 161), Senate passage, <http://dirac.rilin.state.ri.us/BillStatus/WebClass1.ASP?WCI=BillStatus&WCE=ifrmBillStatus&WCU>; House rejection, <http://www.ballot-access.org/2009/06/19/rhode-island-house-defeats-national-popular-vote-bill/>.

<sup>37</sup> Vermont: <http://www.leg.state.vt.us/database/status/summary.cfm>.

<sup>38</sup> Washington: <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=5599&year=2009>.

<sup>39</sup> “The fox knows many things, but the hedgehog knows one big thing.” This quotation of the Greek poet Archilochus by Sir Isaiah Berlin in his essay “The Hedgehog and the Fox,” has come to be widely applied to the comparative ways of knowing—the comprehension of a single, overarching principle or fact, versus that of a detailed and interconnected array of related facts, ideas, and principles. Winston Churchill, for instance, might be characterized as a fox, and Vladimir Lenin, a hedgehog.

<sup>40</sup> National Popular Vote website, <http://www.nationalpopularvote.com/pages/explanation.php>.

<sup>41</sup> Contingent election takes place under the existing system if no candidates receive a majority of electoral votes. For further information, please consult CRS Report RL32695, *Election of the President and Vice President by Congress: Contingent Election*, by Thomas H. Neale.

they do not deny the appeal of the argument favoring direct popular election and the NPV plan. They suggest, however that the various benefits conferred by the electoral college system, the “many things,” are of such cumulative value that they outweigh the “one big thing” attractiveness of NPV. Among these are assertions that

- the current arrangement is a fundamental component of federalism;
- the arithmetical electoral vote power conferred on less populous states by the electoral college system is dwarfed by the “voting power advantage” (the power to sway election results) enjoyed by residents of more populous states, which tend to be urban, and include substantial numbers of ethnic minority group voters;
- it promotes a moderate and geographically inclusive two-party system; and
- it deters post-election strife and controversy by magnifying the winners’ electoral vote margin in most elections.<sup>42</sup>

A further philosophical criticism rests on the grounds of the “concurrent majorities” tradition. This concept holds that, in order for any policy proposal to be able to claim legitimacy in a continent-spanning federal republic such as the United States, it needs to gain broad acceptance by a majority of citizens, representing a wide range of geographic regions, within a limited period of time. This concept has never been written into law or the Constitution, but Congress has historically honored the concurrent majorities idea by requiring that most constitutional amendments be approved by the states within a seven-year period following an amendment’s proposal by Congress. Where, critics may ask, is a similar time limit governing the National Popular Vote proposal? What is the date certain after which an effort to adopt NPV would expire, or return to “square one”?<sup>43</sup> If the NPV approaches its own benchmark of 270 electoral votes on or before July 20 of a presidential election year (the trigger date set by the proposed compact), what sort of disruptive effect would this have on the presidential nominating campaign, or, for that matter, on the measured deliberations of the legislatures of states that have rejected the NPV compact, or those in which pro-NPV legislation was never introduced.

NPV supporters have also suggested a practical benefit to nearly all non-“battleground states” from the compact. They maintain that presidential nominees and their organizations would spread their presence and resources more evenly as they campaigned for every vote nationwide, rather than concentrate on winning key states:

candidates have no reason to poll, visit, organize, campaign, or worry about the concerns of voters of states that they cannot possibly win or lose. This means that voters in two thirds of the states are effectively disenfranchised in presidential elections because candidates concentrate their attention on a small handful of “battleground” states. In 2004, candidates

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<sup>42</sup> For a more detailed discussion of these points, please consult CRS Report RL30804, *The Electoral College: An Overview and Analysis of Reform Proposals*, by L. Paige Whitaker and Thomas H. Neale, pp. 7-16.

<sup>43</sup> There is one example of an amendment that was ratified many years after its proposal, the 27<sup>th</sup> Amendment, which prohibits changes in congressional pay from taking effect until “an election of Representatives shall have intervened.” This amendment was submitted in 1791 as part of the package that became the Bill of Rights, but did not gain the necessary three fourths approval among the states until 1992. It is worth noting, that none of the Bill of Rights amendments included the now-traditional seven-year limitation.

concentrated over two-thirds of their money and campaign visits in just five states; over 80% in nine states, and over 99% of their money in just 16 states.<sup>44</sup>

For instance, according to this argument, voters in a state like California seldom see the presidential or vice presidential nominees or benefit from campaign spending because even though it controls the largest number of electoral votes, the Golden State is regarded in recent elections as being reliably Democratic in its presidential sympathies. Similar arguments would apply to Texas, a state that has voted for Republican presidential nominees since 1980.

Opponents might argue that spreading campaign spending resources in states that aren't "battlegrounds" is a questionable goal with which to justify such a profound change in the presidential election process. Campaign appearances, spending by campaign organizations, and collateral spending generated by the attendant media, they might continue, were never intended to be a local economic stimulus package, nor are the amounts in question sufficient to make much of a difference in any state, with the possible exception of sparsely populated New Hampshire during its quadrennial primary campaign. Moreover, they might continue, it is equally dubious to assert that nominees will slight the concerns of citizens of the states from which they draw their greatest support, or that concentrated campaigning in the "battleground" states somehow "disenfranchises" voters in others. In the modern era, only a tiny percentage of voters ever actually see a presidential or vice presidential candidate from either party. Television, the Internet, and newspapers, not rallies and torchlight parades, are the sources of voters' information on the campaign today.

Another point of view was presented in *The Wall Street Journal* by former Delaware Governor Pierre S. (Pete) duPont IV. He maintained that, contrary to assertions NPV would stimulate more frequent candidate appearances in less populous states,

direct election of presidents would lead to geographically narrower campaigns, for election efforts would be largely urban.... Rural states like Maine, with its 740,000 votes in 2004, wouldn't matter much compared with New York's 7.4 million or California's 12.4 million votes.<sup>45</sup>

## **National Popular Vote: Legal and Constitutional Issues**

Some observers have raised questions as to the constitutionality of the National Popular Vote plan. Derek T. Muller, writing in *Election Law Journal*, asserts, first, that NPV is an interstate compact within the meaning of the Constitution, and as such, it must be approved by Congress before it could take effect.<sup>46</sup> The author reviews the history of interstate compacts and their interpretation over the past two centuries, noting that, as currently construed, certain types of interstate agreements or compacts do not require the explicit consent of Congress; these "may be entered without the consent of Congress, because they do not affect national sovereignty or concern the core meaning of the Compact Clause."<sup>47</sup> They are, in effect, not compacts in the

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<sup>44</sup> National Popular Vote website, <http://www.nationalpopularvote.com/pages/explanation.php>.

<sup>45</sup> Pete du Pont, "Trash the 'Compact,'" *Wall Street Journal*, August 28, 2006, available at <http://www.opinionjournal.com/columnists/pdupont/?id=110008855>.

<sup>46</sup> "No State shall, without the consent of Congress, ... enter into any Agreement or Compact with another State, or with a foreign Power." Article I, Section 10, clause 3.

<sup>47</sup> Derek T. Muller, "The Compact Clause and the National Popular Vote Interstate Compact," *Election Law Journal*, vol. 8, no. 4 (n.d.), 2007, p. 382. Examples include the multi-state "EZ-Pass" auto toll agreement, and the northeastern (continued...)

constitutional sense. He goes on to assert that the National Popular Vote agreement is, however, an interstate compact that would require explicit congressional approval, because of the ways it binds the states to a particular course of action, places time limits on their ability to withdraw from NPV, and more generally meets or exceeds conditions historically found to define “interstate compacts” by the Supreme and other U.S. Courts.<sup>48</sup>

Muller goes on, moreover, to maintain that the NPV concept is inherently unconstitutional unless specifically approved by Congress. Reviewing the record of federal court decisions concerning interstate compacts, the author asserts that the NPV compact would enhance the political power of participating states, but reduce that of those that did not join the compact:

States have an interest in appointing their electors as they see fit, and the Presidential Electors Clause of the Constitution grants this exclusive authority to the states. Technically, the non-compacting sister states can still appoint electors, but the Interstate Compact makes such an appointment meaningless. The outcome of the Electoral College would be determined by an arranged collective agreement among compacting states, regardless of what non-compacting states do about it.... This evisceration of political effectiveness is a sufficient interest to invoke the constitutional safeguard of congressional consent.<sup>49</sup>

The National Popular Vote movement agrees with Mr. Muller’s thesis as to whether NPV is an interstate compact. *Every Vote Equal*, the movement’s major printed resource, concludes,

The subject matter of the proposed “Agreement Among the States to Elect the President by National Popular Vote” concerns the manner of appointment of a state’s presidential electors. The U.S. Constitution gives each state the power to select the manner of appointing its presidential electors.... Thus the subject matter of the proposed interstate compact is a state power and an appropriate subject for an interstate compact.<sup>50</sup>

Contrary to Mr. Muller, however, *Every Vote Equal* maintains that the Constitution implicitly permits valid interstate agreements without the need for congressional approval on any subject that falls within the states’ constitutional authority.<sup>51</sup> The authors further note that since the NPV compact would concern the manner of appointment of a state’s electors, a power that resides exclusively with the states, the agreement would therefore be an appropriate subject for an interstate compact.<sup>52</sup> They go on to assert that the Supreme Court has twice rejected the argument that an interstate compact was unconstitutional because “it impaired the sovereign rights of non-member states or enhanced the political power of the member states at the expense of other states,” as has been asserted by NPV opponents.<sup>53</sup>

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(...continued)

states Regional Greenhouse Gas Initiative.

<sup>48</sup> Ibid., pp. 388-389.

<sup>49</sup> Muller, “The Compact Clause and the National Popular Vote Interstate Compact,” p. 391.

<sup>50</sup> John R. Koza, Barry Fadem, et al., *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote* (Los Altos, CA: National Popular Vote Press, 2006), pp. 284-285.

<sup>51</sup> Two examples are EZ Pass and the Regional Greenhouse Gas Initiative.

<sup>52</sup> Koza, Fadem, et al., *Every Vote Equal*, pp. 284-285.

<sup>53</sup> Ibid., citing *U.S. Steel Corp. V. Multistate Tax Commission*, 434 U.S. 452, 494n. 23 (1978) (White dissenting), and *Northeast Bancorp, Inc. V. Board of Governors of the Federal Reserve System*, 472 U.S. 159, 176 (1985).

Other questions have been raised concerning whether the National Popular Vote compact might violate the Voting Rights Act.<sup>54</sup> Writing in *Columbia Law Review*, David Gringer maintains that NPV may be at variance with several provisions of the act, particularly with respect to the voting power theory.<sup>55</sup> Specifically, he argues that the plan conflicts with Section 2 of the act because moving from “a state-based to a national popular vote dilutes the voting strength of a given state’s minority population by reducing its ability [voting power] to influence the outcome of presidential elections.”<sup>56</sup> Gringer also asserts that the NPV compact may violate Section 5 of the act, which restrains “covered”<sup>57</sup> jurisdictions from implementing changes to “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting,”<sup>58</sup> until the proposed change has been reviewed for potential discriminatory intent or effect by the U.S. Attorney General or a three-judge panel from the U.S. District Court for the District of Columbia. This process is known as preclearance. He argues that the NPV compact would qualify as a covered practice under Section 5, and that the legislatures of all the affected states would be required to obtain preclearance before implementing the compact.<sup>59</sup>

The National Popular Vote organization has responded to Gringer’s assertions on its website, noting that

The National Popular Vote bill manifestly would make every person’s vote for President equal throughout the United States in an election to fill a single office (the Presidency). It is entirely consistent with the goal of the Voting Rights Act. There have been court cases under the Voting Rights Act concerning contemplated changes in voting methods for various representative legislative bodies.... However, these cases do not bear on elections to fill a single office (i.e., the Presidency).<sup>60</sup>

It is beyond the scope of this report to speculate on the outcome of questions that might be raised concerning the National Popular Vote compact on any of the legal or constitutional issues cited previously. The fact that they have been identified and noted, however, suggests the possibility that NPV might be subject to legal challenges before it could become operational should it meet the 270 electoral vote threshold.

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<sup>54</sup> The Voting Rights Act, (42 U.S.C., § 1973 et seq.).

<sup>55</sup> The voting power theory, developed by political scientist Lawrence D. Longley in the 1970s, holds that a state’s influence depends on the size of its electoral college delegation, and its consequent ability to influence the outcome of an election. According to the voting power theory, California has the greatest voting power, because its 55 electoral votes comprise more than 20% of the total needed to win the presidency. By comparison, according to Longley, the arithmetical advantage conferred on less populous states by the so-called “senatorial” electors provides almost no leverage in most presidential elections. For a full explanation of voting power, see Lawrence D. Longley and Neal R. Peirce, *The Electoral College Primer 2000* (Yale University Press, New Haven: 1999), pp. 149-161.

<sup>56</sup> David Gringer, “Why the National Popular Vote Plan is the Wrong Way to Abolish the Electoral College,” *Columbia Law Review*, vol. 108, 2008, p. 208.

<sup>57</sup> Covered jurisdictions were defined in the act as effectively those in which there was evidence of discrimination against minority voting rights in the years prior to passage of the original Voting Rights Act in 1965. They include eight states and local jurisdictions in another eight, located largely, though not exclusively, in the south.

<sup>58</sup> 42 U.S.C. 1973c.

<sup>59</sup> Gringer, “Why the National Popular Vote Plan is the Wrong Way to Abolish the Electoral College,” p. 188.

<sup>60</sup> National Popular Vote, *Myths About the National Popular Vote*, “18.1 Myths About the Voting Rights Act,” <http://www.nationalpopularvote.com/pages/answers/m18.php>.



## Two Unsuccessful Intra-State Initiatives: Colorado Amendment 36 and California Counts

Although the National Popular Vote campaign has gained considerable attention since it was launched in 2006, it has not been the only effort to secure electoral college reform outside the constitutional amendment process. State initiative campaigns were also active in Colorado and California during the same decade.

### Colorado Amendment 36 (2004) : A Proportional Plan State Initiative

The proportional plan of awarding electoral votes has been proposed as an alternative to the winner-take-all or general ticket method dominant today. This plan is examined in greater detail in the **Appendix** to this report. Briefly, it would require electors (and electoral votes) to be allocated in each state according to the percentage of popular votes won by the competing candidates. For example, assume State X is allocated 10 electoral votes. Next, assume in the election, Candidate A<sup>61</sup> receives 60% of the popular vote, Candidate B receives 30%, and Candidate C, representing a third party or independent candidacy, receives 10%. Under the general ticket or winner-take-all plan, Candidate A would win all 10 electoral votes. Under the proportional plan, Candidate A would win six electoral votes, Candidate B would receive three, and Candidate C would receive one vote.

On November 2, 2004, Colorado voters considered and rejected a proposed state proportional plan constitutional amendment.<sup>62</sup> If the amendment had passed and survived legal challenges, it would have provided proportional allocation of Colorado's presidential electors for 2004 and future presidential elections. This was possible through citizen action because Colorado is one of the 18 states that provide for the proposal and approval of amendments to their state constitutions by popular vote.<sup>63</sup>

The amendment sought to allocate electoral votes and electors based on the proportional share of the total statewide popular vote cast for each presidential ticket. The percentage of the vote each ticket received would have been multiplied by Colorado's total of nine electoral votes. These figures would then have been rounded up or down to the nearest whole number of electors and electoral votes, but any ticket that did not receive at least one electoral vote under this method would have been eliminated from the total. If the sum of whole electoral votes derived from this computation were to be *greater* than nine, then the ticket receiving at least one whole electoral vote, but fewest popular votes, would have had its electoral vote total reduced by one. This process would have continued until the computed allocation of votes reached nine. Conversely, if the sum of whole electoral votes awarded after rounding were *less* than nine, then such additional

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<sup>61</sup> In this case, "Candidate A," etc., actually refers to the joint ticket of candidate for President and Vice President nominated by Party A. The same applies to Candidates B and C.

<sup>62</sup> Amendment 36, available at <http://www.lawanddemocracy.org/pdffiles/COamend36.pdf>.

<sup>63</sup> For detailed information on ballot placement requirements in Colorado, please consult Council of State Governments, *The Book of the States*, 2004 edition, vol. 36 (Lexington, KY: The Council of State Governments, 2004), p. 14.

electoral votes as necessary to bring the number up to nine would have been allocated to the ticket receiving the most popular votes, until all nine electoral votes were so allocated. In the event of a popular and electoral vote allocation tie (i.e., Candidates A and B each receiving 4.5 electoral votes), then the Colorado Secretary of State was to determine by lot who would receive the evenly split electoral vote.<sup>64</sup>

At the time, questions were raised as to whether this effort was constitutional. The fact that Colorado's proposed Amendment 36 would have altered the formula for awarding electoral votes by *a vote of the people*, not the legislature, was the salient issue in contention. The Colorado legislature's right under Article II to establish a proportional system was not in dispute; the question rather, was, did the Colorado legislature have authority to *subdelegate* its Article II powers to determine and change the existing method of appointing electors to a popular vote to the voters at large? Could the voters of Colorado have acted in place of, or *as* the state legislature? The Colorado Constitution specifically empowers the people of the state "to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly."<sup>65</sup>

Proponents of Amendment 36 argued that this was sufficient authority to change the allocation of electoral votes by popular vote. Further, the fact that the U.S. Constitution does not expressly prohibit this procedure, or others like it, arguably provides an implicit endorsement of such actions. On the other hand, opponents could note that the U.S. Constitution clearly delegates this power to the state legislatures, and only the state legislatures.<sup>66</sup> Moreover, a commentary on the Colorado process of amendment by initiative noted that, "An amendment is not valid just because the people voted for it. The initiative gives the people of a state no power to adopt a constitutional amendment which violates the federal constitution."<sup>67</sup>

These arguments were ultimately rendered moot by the people's decision. After a spirited campaign that stirred some national interest, Amendment 36 was ultimately defeated by a vote of 1,307,000 to 697,000.<sup>68</sup> For the record, if the amendment had been in effect for the 2004 election, the Bush-Cheney ticket would have received five electoral votes, while Kerry-Edwards would have received four. Under the winner-take-all system, the Republican ticket received all nine Colorado electoral votes.

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<sup>64</sup> Proposed Colorado Amendment 36, § 2-4.

<sup>65</sup> Constitution of the State of Colorado, Article V, Section 1, clause 1.

<sup>66</sup> See, e.g., *McPherson v. Blacker*, 146 U.S. 1, 25 (1892) holding that the word "legislature" in Article II, Section 1, clause 2 of the U.S. Constitution operates to limit the states; *Hawke v. Smith*, No. 1, 253 U.S. 221 (1920) holding that the language of Article V is "plain," and that there is "no doubt in its interpretation" that ratification of amendments is limited to the only two methods specifically granted by the Constitution; but see, *Ohio ex rel. Davis v. Hildebrand*, 241 U.S. 565 (1916) holding that a referendum did not violate the use of the word "legislature" in Article I, Section 4, clause 1 of the Constitution.

<sup>67</sup> *Colorado Revised Statutes, 2003*, vol. 1 (n.p. : LexisNexis, 2003), p. 380.

<sup>68</sup> Colorado, Secretary of State, *Official Publication of the Abstract of Votes Cast for the 2003 Coordinated[, ] 2005 Primary[, ] 2004 General [Elections]* (n.p., n.d.), pp. 138-139.

## The Presidential Reform Act, “California Counts” (2007-2008) – A State District Plan Initiative

The district system for awarding electoral votes is uncommon among reform proposals in that it is currently in effect in two states, Maine and Nebraska. Under the district plan, popular votes are tallied twice: first, district by district,<sup>69</sup> and again on a statewide basis. The presidential ticket (actually elector) who won the most votes in each district receives one vote (actually one elector) from that district. The ticket winning the statewide count is awarded two additional electors, representing the two additional “senatorial” electors each state receives. For more detailed information on the district plan, see the **Appendix** to this report.

In July 2007, a group styled “Californians for Equal Representation” filed a legislative ballot measure with the California Attorney General; the proposed statute, the Presidential Election Reform Act, incorporated a standard district system for allocating presidential electors.<sup>70</sup> Supporters asserted that the winner-take-all system had discounted and disenfranchised millions of California voters in the past. For instance, in 2004, the Democratic Kerry-Edwards ticket received 54.3% of the popular vote, and all 55 electoral votes, while the Republican Bush-Cheney ticket, which received 44.4% of the popular vote, gained none.<sup>71</sup> If the district system had been in place in California in 2004, Kerry-Edwards would have received 33 electoral votes, and Bush-Cheney, 22.<sup>72</sup> Opponents claimed that Californians for Equal Representation was a Republican-dominated and funded group whose goal was to obtain Republican electors in a state that has voted Democratic in presidential contests since 1992. California Counts, the advocacy group coordinating support for the measure, denied the allegation and countered by releasing lists of Democratic and Independent contributors.<sup>73</sup>

The proposed measure was also criticized on constitutional grounds. One commentator asserted that the act was a legislative initiative that would likely be found unconstitutional if challenged. He argued that, as with Colorado in 2004, the constitutional grant of power to the states to appoint electors “in such manner as the Legislature thereof may direct” ought to be narrowly construed. By this reasoning, a legislative act passed by initiative would be invalidated because the Constitution requires action by the state legislature, and only the legislature, to change the process.<sup>74</sup>

The proposed California Presidential Election Reform Act thus became an object of political and constitutional controversy almost from the start. A further obstacle was the need to collect supporting petitions from voters equal in number to 5% of votes cast in the most recent gubernatorial election, a total of 433,971 valid signatures of registered voters at that time.<sup>75</sup>

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<sup>69</sup> Most district plan proposals assume congressional districts will be used, but in the past, some have suggested ad hoc presidential election districts.

<sup>70</sup> Californians for Equal Representation, *Petition to the Attorney General*, July 17, 2007, [http://ag.ca.gov/cms\\_pdfs/initiatives/2007-07-17\\_07-0032\\_Initiative.pdf](http://ag.ca.gov/cms_pdfs/initiatives/2007-07-17_07-0032_Initiative.pdf).

<sup>71</sup> *America at the Polls* 26, p. 28.

<sup>72</sup> *Electoral College Vote by Congressional District, 1996-2004*, CRS Congressional Distribution Memorandum by Kevin J. Coleman, Royce Crocker, Dana Ely and Terrence Lisbeth, September 10, 2007, p. 3.

<sup>73</sup> “Dumbfounded Dems” *San Jose Mercury-News*, November 11, 2007.

<sup>74</sup> Vikram David Amar, “The So-Called Presidential Reform Act: A Clear Abuse of California’s Initiative Process,” *FindLaw Legal News and Commentary*, August 17, 2007, <http://writ.news.findlaw.com/amar/20070817.html>.

<sup>75</sup> Computed from California, Secretary of State, Elections Division, *Statement of Vote, 2006 General Election*, p. x, (continued...)

Organizers first abandoned their effort to place the initiative on the June 3, 2008, primary ballot, opting instead for the November 4 general election ballot, but this goal also was beyond the means of the measure's supporters. On February 5, 2008, press reports indicated that no petitions had been filed with the Elections Division of the Office of the California Secretary of State, and that the California Presidential Reform Act would not be on either ballot in 2008.<sup>76</sup> Statement of the Vote reports issued by the California Secretary of State confirm that the measure appeared on neither the primary nor general election ballot in 2008.<sup>77</sup>

## Prospects for Change—An Analysis

### Trends in Congressional Electoral College Reform Proposals

Congressional interest in constitutional amendments to reform or eliminate the electoral college has declined in recent decades. Despite a brief uptick following the problematic 2000 presidential election, the trend has continued: only a handful of relevant amendments have been introduced in each succeeding Congress—three to date in the 111<sup>th</sup> Congress. This arguable lack of congressional interest, and demonstrable lack of legislative activity, contrasts strongly with the period between 1950 and 1979, when electoral college reform measures were regularly considered in the Senate and House Judiciary committees, and proposed amendments were debated in the full Senate on five occasions, and in the House twice.<sup>78</sup>

From those proposals that have been offered in recent years, two trends may be identified. First, the volume of proposed amendments that would *reform* the electoral college, as opposed to those that would *eliminate* the electoral college and substitute direct popular election, has declined almost to zero. Second, the scope of proposed direct popular election amendments is arguably evolving in complexity and detail.

It is unclear whether the first development reflects a decline in support for the electoral college, a lack of organized interest in reform proposals, or simply the absence of a sense of urgency on the part of Members who might be inclined to support or defend the current system or some revised variant. It is likely that if a direct election amendment gained broad congressional support and began moving toward congressional approval and proposal to the states, Members who support the current system in some form would coalesce to defend the electoral college. Alternatively, they might be spurred by the prospect of action to propose reform measures that would address problem areas of the current system, while retaining its basic structure. This was the case the last

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(...continued)

[http://www.sos.ca.gov/elections/sov/2006\\_general/complete\\_sov.pdf](http://www.sos.ca.gov/elections/sov/2006_general/complete_sov.pdf).

<sup>76</sup> See, for example, Shane Goldmacher, "Electoral College Measure Falls Short," *Sacramento Bee Capitol Alert*, February 5, 2008.

<sup>77</sup> California, Office of the Secretary of State, *Statement of the Vote, June 8, 2008 Statewide Direct Primary Election*, available at [http://www.sos.ca.gov/elections/sov/2008\\_primary\\_june/sdp08SOV.pdf](http://www.sos.ca.gov/elections/sov/2008_primary_june/sdp08SOV.pdf), and *Statement of the Vote, November 8, 2008 General Election*, available at [http://www.sos.ca.gov/elections/sov/2008\\_general/sov\\_complete.pdf](http://www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf).

<sup>78</sup> For a detailed examination and analysis of these efforts, please consult Neal R. Peirce and Lawrence P. Longley, *The People's President: The Electoral College in American History and the Direct Vote Alternative*, rev. ed. (New Haven, CT: Yale University Press, 1981), pp. 131-206.

time a direct election amendment came to the floor (in the Senate), during the 95<sup>th</sup> Congress (1979-1980).<sup>79</sup>

Another apparent trend is that recent reform proposals go beyond the concept of simply substituting direct election for the electoral college. In recent Congresses, such amendments have been more likely to include provisions that would enhance and extend the power of the federal government to legislate in such areas as residence standards, definition of citizenship, national voter registration, inclusion of U.S. dependencies in the presidential election process, establishment of an election day holiday, ballot access standards for parties and candidates, etc. This trend, it may be posited, arguably reflects frustration on the part of many voters and their elected representatives over the uncertainties and inconsistencies in local election administration procedures that were revealed in the 2000 and 2004 presidential elections. If the amendments in which such provisions have been incorporated were to be proposed and ratified, they could be used to set broad national election standards (provided Congress chose to exercise the new authority granted in these proposals) which would supersede many current state practices and requirements.

This eventuality raises two possible issues. The first is whether such federal involvement in traditionally state and local practices would impose additional costs on state and local governments, and thus be regarded as an “unfunded mandate.” Indeed, bills that had the effect of imposing uncompensated costs on state and local election authorities might be subject to points of order on the floor of both the House and Senate.<sup>80</sup> One response by the state and local governments might be to call for federal funding to meet the increased expenses imposed on them by federal requirements. Precedent for this exists in the grant program incorporated in the Help American Vote Act (HAVA)<sup>81</sup>.

A second issue is related to the consequences of such an amendment, and centers on perceptions as to whether it might be regarded as federal intrusion in state and local responsibilities. For instance, a more far-reaching scenario might include the gradual assumption of the entire election administration structure by the federal government. In this hypothetical case, questions could be raised as to (1) the costs involved; (2) whether a national election administration system could efficiently manage all the varying nuances of state and local conditions; and (3) what would be the long-term implications for federalism? Conversely, it could be asserted that a national election administration structure is appropriate for national elections, and that state or local concerns are counterbalanced by the urgent requirement that every citizen be enabled and encouraged to vote, and that every vote should be accurately counted.

## **Prospects for a Constitutional Amendment**

Some observers assumed that action of the electoral college in 2000, in which George W. Bush was elected with a small majority of electoral votes, but fewer popular votes than Al Gore, Jr., would lead to serious consideration of constitutional amendment proposals that would have reformed or eliminated the electoral college. Notwithstanding these circumstances, none of the

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<sup>79</sup> For an account of action in both the 94<sup>th</sup> and 95<sup>th</sup> Congresses, please consult *ibid.*, pp. 197-206.

<sup>80</sup> For additional information, please consult CRS Report for Congress CRS Report RS20058, *Unfunded Mandates Reform Act Summarized*, by Keith Bea and Richard S. Beth.

<sup>81</sup> Help America Vote Act - HAVA: P.L. 107-252; 116 Stat. 1666.

amendments introduced in either the 107<sup>th</sup> through 110<sup>th</sup> Congresses received more than routine committee referral. In the 107<sup>th</sup> Congress, attention focused, instead, on proposals for election administration reform, resulting in passage of the Help America Vote Act (HAVA) in 2002. As noted previously, this legislation substantially expanded the role of the federal government in the field of voting systems and election technology through the establishment of national standards in these areas and the provision of federal assistance to the states to improve their registration and voting procedures and systems.<sup>82</sup> The congressional response to the 2000 election controversy was incremental, rather than fundamental.

Other factors may also contribute to the endurance of the electoral college system. Perhaps foremost is the fact that the U.S. Constitution is not easily amended. Stringent requirements for proposed amendments, including passage by a two-thirds vote in each chamber of Congress, and approval by three-fourths of the states, generally within a seven-year time frame, have meant that successful amendments are usually the products of (1) broad national consensus, (2) a sense that a certain reform is urgently required, or (3) active long-term support by congressional leadership.<sup>83</sup> In many cases, all three aforementioned factors contributed to the success of an amendment.<sup>84</sup> Further, while the electoral college has always had critics, its supporters can note that it has selected “the people’s choice” in 48 of 52 presidential elections held since ratification of the 12<sup>th</sup> Amendment, a rate of 92.3%.<sup>85</sup>

In the final analysis, given the high hurdles—both constitutional and political—faced by any proposed amendment, it seems unlikely that the electoral college system will be replaced or reformed by constitutional amendment unless or until its alleged failings become so compelling that large concurrent majorities in Congress, the states, and among the public, are disposed to undertake its reform or abolition.

Another factor influencing the potential for a successful amendment is, arguably, public perceptions of how well the electoral college has functioned. The system worked almost perfectly, at least according to contemporary expectations, in the presidential election of 2008. Democratic nominee Senator Barack Obama was able to translate a 7% popular vote margin of 52.9% (69,457,000) to 45.7% (59,935,00) for his Republican opponent, Senator John McCain, into an overwhelming electoral vote margin of 67.9%, to 32.1% (365 votes to McCain’s 173).<sup>86</sup> Given this outcome, it is arguable that there will likely be little congressional interest in devoting the

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<sup>82</sup> For additional information on HAVA, please consult CRS Report RS20898, *The Help America Vote Act and Elections Reform: Overview and Issues*, by Kevin J. Coleman and Eric A. Fischer.

<sup>83</sup> Article V of the Constitution also provides for amendment by a convention, which would assemble on the application of the legislatures of two-thirds of the states. Any amendments proposed by such a convention would also require approval of three-fourths of the states. This alternative method, however, has never been used.

<sup>84</sup> These conditions have been met in some cases only after a long period of national debate; for example, the 19<sup>th</sup> Amendment, which extended the right to vote to women, was the culmination of decades of discussion and popular agitation. In other instances, amendments have been proposed and ratified in the wake of a sudden galvanizing event or series of events. An example of this may be found in the 25<sup>th</sup> Amendment, providing for presidential succession and disability, which received widespread national support following the 1963 assassination of President John F. Kennedy.

<sup>85</sup> The exceptions, as noted earlier, were the elections of 1876, 1888, and 2000, when candidates were elected who had a majority of electoral votes, but fewer popular votes than their major opponents. The one case in which the electoral vote was hopelessly fragmented among four candidates occurred in 1824, when contingent election resolved the electoral college deadlock. Even in this case, the President, John Quincy Adams, was able to govern successfully, despite criticism that he was selected in the House of Representatives.

<sup>86</sup> U.S. Federal Election Commission, *2008 Official Presidential General Election Results*, available at <http://www.fec.gov/pubrec/fe2008/2008presgeresults.pdf>.

high levels of time and energy demanded to consideration of an electoral college-related amendment in the 111<sup>th</sup> Congress.

## **State Action—A Viable Reform Alternative?**

For at least a century, American tradition has enshrined the role of the states as “laboratories of reform,” in which innovative policy experiments could be tested on a limited scale, and, if successful, ultimately adopted at the federal level. In the question of electoral college reform, at least some of the states appear to have assumed their classic role by implementing policy alternatives. Maine and Nebraska, as noted earlier in this report, have followed the district system for decades, and for the first time in 2008, one of the two states, Nebraska, split its electoral vote. Senator Obama took one electoral vote, having won the 2<sup>nd</sup> Congressional District, while Senator McCain took three, having won the 1<sup>st</sup> Congressional District and the statewide tally.<sup>87</sup>

Arguably, the most compelling recent developments in the field of electoral college reform have emerged at the state level. Two of these, Colorado Amendment 36 in 2004 and “California Counts” in 2006-2007, were unsuccessful, but both aroused interest in and support and criticism for their attempts to reform the electoral college, within the two respective states.

## **The National Popular Vote Compact: Tortoise? Hare? or Non-Starter?**

Perhaps more noteworthy than the failed state initiatives cited above, or at least better publicized, has been the National Popular Vote campaign, an organized nationwide initiative that has drawn bipartisan support from a wide range of state and local office holders. Moreover, its advisory board includes national political figures and seven former U.S. Senators and Representatives representing both parties,<sup>88</sup> and NPV claims the support of 1,777 state legislators (out of a total of 7,382).<sup>89</sup> As noted earlier in this report, the legislatures of six states disposing a total of 73 electoral votes had approved the NPV compact by the end of August 2010.

These results may seem modest at first glance: 73 electoral votes comprise only 27% of the 270 vote threshold after which participating states would begin to observe the compact. Allowing for the vicissitudes of state legislative calendars, however, and the need to build popular interest and support, the accession of six states to the compact in just over two years time arguably commands greater respect. Moreover, it should be recalled that the NPV compact passed in the California, Rhode Island, and Vermont legislatures, but was vetoed by the governors of those states. While the two New England states would only have contributed seven electoral votes to the NPV tally had they not been vetoed, the result arguably would have been far different had California’s 55

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<sup>87</sup> Nebraska, Secretary of State, *Official Results of the Nebraska General Election, November 4, 2008*, available at <http://www.sos.ne.gov/elec/pdf/2008%20General%20Canvass%20Book.pdf>. At the time of this writing, Maine has not split its electoral vote in any presidential election.

<sup>88</sup> Former Representatives John B. Anderson, John H. Buchanan, Thomas J (Tom) Campbell, and Thomas J. (Tom) Downey; former Senators Birch Bayh, David Durenberger, and Jake Garn.

<sup>89</sup> Council of State Governments, *The Book of the States*, 2010 edition, volume 42 (Lexington, KY: The Council, 2010), p. 103. This figure does not include the Council of the District of Columbia, 13 members, which serves the function of a state legislature for the federal district.

electoral votes been added to the tally: NPV would have enjoyed the support of nine states disposing 135 electoral votes, half the total needed for the compact to be implemented among signatory states. Would California's accession to NPV have generated more substantial momentum? It is impossible to know for sure, but it is worth noting that both Rhode Island and the Golden State will have new governors 2011,<sup>90</sup> changes that may encourage proponents of the NPV compact to try again.

It is difficult to foresee the ultimate course of the NPV movement at the time of this writing. Judging by the number of states that acceded to the compact since 2008, it has generated a not-insubstantial degree of support, but it remains to be seen whether the levels of public interest and state legislative approval necessary to gain momentum can be generated by the NPV movement and its supporters.

## Concluding Observations

John F. Kennedy, while serving in the Senate, was a leading defender of the electoral college against proposals to establish a district plan variant in place of the current (then and now) general ticket or winner-take-all system of allocating electoral votes. In the course of Senate floor debate on this question in 1956, he paraphrased a comment by Viscount Falkland, a 17<sup>th</sup> century English statesman, declaring of the electoral college, "It seems to me that Falkland's definition of conservatism is quite appropriate [in this instance]—'When it is not necessary to change, it is necessary not to change.'"<sup>91</sup> This aphorism may offer a key to the future prospects of the electoral college. To date, policymakers have generally concluded that it has not been necessary to change the existing system, or perhaps more accurately, there has been no compelling call for change.

The first and only major constitutional overhaul of the electoral college system to date, the 12<sup>th</sup> Amendment, was a direct response to turmoil accompanying the presidential election of 1800. This was a fundamental "crisis of regime" that, once surmounted, motivated Congress to propose a major reform, the 12<sup>th</sup> Amendment, in very short time. The fundamentals established by that amendment have remained intact for more than two centuries. As long as the electoral college system functions well enough to avoid provoking a national crisis of similar scale, it may remain unchanged, if not unchallenged.

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<sup>90</sup> Rhode Island Governor Donald Carcieri is term limited; California Governor Arnold Schwarzenegger is retiring. New Hampshire Governor John Lynch is a candidate for reelection.

<sup>91</sup> Sen. John F. Kennedy, Remarks in the Senate, *Congressional Record*, vol. 102, March 20, 1956, p. 5156.



## **Appendix. Electoral College Reform Proposal Variants**

This appendix presents an expanded description of the three most frequently proposed plans to reform the electoral college.

### **The Automatic Plan**

This reform proposal would award all electoral votes in each state directly to the winning candidates who obtained the most votes statewide. In almost all versions, a plurality would be sufficient in individual states to win the state's electoral votes; most versions provide for some form of contingent election in Congress in the event no candidate wins a nationwide majority of electoral votes. This alternative would constitutionally mandate the "general ticket" or "winner-take-all system" currently used to award electoral votes in 48 states and the District of Columbia.

Proponents of the automatic plan argue that it would maintain the present electoral college system's balance between federal and state power, and between large and small states. Proponents note that the automatic plan would eliminate the possibility of "faithless electors."<sup>92</sup> Further, the automatic plan would help preserve the present two-party system, under a state-by-state, winner-take-all method of allocating electoral votes. This, they assert, is a strength of the existing arrangement, because it tends to reward parties that incorporate a broad range of viewpoints and embrace large areas of the nation.

Opponents, on the other hand, note presidential elections are still indirect under the automatic system. They further assert that "minority"<sup>93</sup> Presidents could still be elected under the automatic system, and it still provides no electoral vote recognition of the views and opinions of voters who choose the losing candidates.

### **The District Plan**

This reform proposal would continue the current allocation of electoral votes by state, and, in common with most reform plans, would eliminate the office of presidential elector. It would award one electoral vote to the winning candidates in each congressional district (or other, ad hoc, presidential election district) of each state. Two electoral votes, reflecting the two additional "constant" or "senatorial" electoral votes assigned to each state by the Constitution, would be awarded to the statewide vote winners. This alternative would constitutionally mandate the system currently used to award electoral votes in Maine and Nebraska.<sup>94</sup>

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<sup>92</sup> Faithless electors are those who vote for a candidate other than the one to whom they are pledged. For instance, in 2000, a District of Columbia Democratic elector pledged to the Gore-Lieberman ticket cast a blank ballot as a protest against the election results in general. In 1988, a West Virginia Democratic elector reversed the order of candidates, voting for Lloyd Bentsen for President and Michael Dukakis for vice President.

<sup>93</sup> Presidents and Vice Presidents elected with an electoral vote majority, but fewer popular votes than their major opponents.

<sup>94</sup> The district plan is a permissible state option under the Constitution, which does not specify any particular method for awarding electoral votes. In fact, the district plan was widely used in the 19<sup>th</sup> century.

Proponents of the district plan argue that it would more accurately reflect the popular vote results for presidential and vice presidential candidates than the winner-take-all method, or the automatic plan, because, by allocating electoral votes according to popular vote results in congressional districts, it would take into account political differences within states.<sup>95</sup> They also suggest that in states dominated by one party, the district plan might provide an incentive for greater voter involvement and party vitality, because it would be possible for the less dominant party to win electoral votes in districts where it enjoys a higher level of support, e.g. “Upstate” New York versus the New York City metropolitan area, or northern California vs. the Los Angeles and San Francisco metropolitan areas.

Opponents would note that the district plan retains indirect election of the nation’s chief executive, that the potential for “minority” Presidents would continue, and that it might actually weaken the two-party system by encouraging parties that promote narrow geographical or ideological interests and that may be concentrated in certain areas. In fact, they might suggest that adoption of the district plan would encourage gerrymandering as the parties maneuvered for advantage in presidential elections.

Nebraska split its district votes presidential election for the first time in the 2008, awarding four electors to Republican candidate Senator John McCain, who won two congressional districts and the statewide vote, and one to the Democratic nominee, Senator Barack Obama, who received the most popular votes in state’s second congressional district.<sup>96</sup> Maine has yet to split its electoral votes under the district plan.

## **The Proportional Plan**

This reform proposal would award electoral votes in each state in proportion to the percentage of the popular vote gained by each ticket. Some versions, known as “strict” proportional plans, would award electoral votes in proportions as small as thousandths of one vote, that is, to the third decimal point, while others, known as “rounded” proportional plans, would use various methods of rounding to award only whole numbers of electoral votes to competing candidates. As noted in the main body of this report, voters in Colorado rejected a proposed state constitutional amendment (Amendment 36) at the November 2, 2004, general election that would have established a rounded proportional system in that state.<sup>97</sup> For further information on this proposal,

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<sup>95</sup> The question of what districts would be used under a district plan has been considered over time. The use of either ad hoc presidential election districts, or existing congressional districts could be mandated, or states could be offered the option of using either method. The ad hoc district variant of the district plan would empower the states to create special presidential election districts, one for every seat the state holds in the House of Representatives, while rewarding the two “senatorial” electors to the statewide vote winner. A further variation might be to eliminate the “senatorial” electors, and establish a number of presidential election districts equal to the *total* Senate and House delegations in each state. Any such districts would undoubtedly need to conform to existing Supreme Court mandates that they be as equal in population as possible, in order to assure that the doctrine of “one person, one vote” is observed. The minimal population differences between congressional districts and the fact they are already in existence might argue for their use. On the other hand, in contemporary practice, congressional districts do not always follow the boundaries of existing political subdivisions, recognized regions, or less formal “communities,” thus vitiating one of the arguments in favor of the district system, that it takes into effect the different political leanings of different parts of a state. These options might open an opportunity for experiment on the “states as laboratories for the nation” model.

<sup>96</sup> Robin Tyvser, “Obama Wins Electoral Vote in Nebraska,” *Omaha World-Herald*, November 8, 2008. Available at [http://www.omaha.com/index.php?u\\_page=2835&u\\_sid=10481441](http://www.omaha.com/index.php?u_page=2835&u_sid=10481441).

<sup>97</sup> The Constitution does not currently provide for fractions or parts of electoral votes, so a strict proportional system would require a constitutional amendment. Since a rounded proportional plan or system would award whole electoral (continued...)

please consult CRS Report RL32611, *The Electoral College: How It Works in Contemporary Presidential Elections*, by Thomas H. Neale.

Proponents of the proportional plan argue that it comes closer than other reform plans to electing the President and Vice President by popular vote, while still preserving the state role in presidential elections. They also assert that the proportional plan reduces the likelihood of “minority” presidents—those who win with a majority of electoral votes, but fewer popular votes than their chief opponent. They also suggest that this option would more fairly account for public preferences, by allocating electoral votes within the states to reflect the actual support attained by various candidates, particularly in the strict, as opposed to rounded, version of the proportional plan, while still retaining the role of the states.

Opponents suggest that the proportional plan retains the same fundamental flaw of all the others, in that it retains indirect election of the President, which they assert is inherently less democratic than direct popular election. They also note that the proportional plan could still result in “minority” Presidents and Vice Presidents, and by eliminating the magnifier effect of the automatic and district plans, might actually result in more frequent electoral college deadlocks, situations in which no candidate receives the requisite majority of electoral votes.

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votes, it is currently a permissible state option under the Constitution.