

League of Women Voters of the US Asks for Consensus on National Popular Vote Compact

The following material appears on the website—www.LWV.org-- as “LWVUS Study on the National Popular Vote Compact Background Paper.” Additional background materials on the website include both a pro and a con article, too long to reproduce here (5 pages each.) Members are urged to seek them out and read them. Go to the Search section on the right side and type in “National Popular Vote Compact.” Copies will be provided to discussion leaders at the February units. A suggested resource list is included at end of this material.

Prepared by the LWV US

Selection of the President

The League’s History

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

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

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

The League’s Position

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

The League of Women Voters of the United States believes that the direct-popular-vote method for electing the President and Vice-President is essential to representative government. The League of Women Voters believes, therefore, that the Electoral College should be abolished. The League also supports uniform voting qualifications and procedures for presidential elections. The League supports changes in the presidential election system – from the candidate selection process to the

general election. We support efforts to provide voters with sufficient information about candidates and their positions, public policy issues and the selection process itself. The League supports action to ensure that the media, political parties, candidates, and all levels of government achieve these goals and provide that information.

Explanation of the Position

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

The Electoral College - A Review

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

The Electoral College is a process established by the

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

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

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

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

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

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

ratified by three-fourths of the states.

The Movement against the Electoral College

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

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

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

In 1876, Rutherford B. Hayes beat Samuel J. Tilden by one electoral vote, becoming President despite trailing in the popular vote by a count of 4,288,546 to 4,034,311. In 1888, Benjamin Harrison beat Grover Cleveland with an electoral vote of 233 to 168, despite Cleveland's popular vote margin of 5,534,488 to 5,443,892. Most recently, in the 2000 presidential election, George W. Bush received fewer popular votes than Albert Gore, Jr., but received a majority of electoral votes. The situation was almost reversed in 2004. Although President Bush received more than three million more popular votes than John Kerry, Kerry would have been elected President if Ohio's electoral votes had been cast in his favor.

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

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

The National Popular Vote Compact Proposal

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

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

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

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

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

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

address their mutual concerns. These contracts are typically enacted through the passage of identical legislation by the compacting states.

Under the state legislation proposed to establish the NPV, the popular vote counts from all 50 states and the District of Columbia would be added together to obtain a national grand total for each presidential candidate. Then, state elections officials in all states participating in the plan would award their electoral votes to the presidential candidate who receives the largest number of popular votes in all 50 states and the District of Columbia. The NPV Compact plan would take effect only when it has been enacted by states collectively possessing a majority of the electoral votes. The 270-vote threshold also corresponds essentially to states representing a majority of the people of the United States. As a result, every vote in all 50 states and the District of Columbia would be equally important in presidential elections.

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

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

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

is available is quoted below:

Agreement Among the States to Elect the President by Nationwide Popular Vote

Article I - Membership

Any state of the United States and the District of Columbia may become a member of this agreement by enacting this agreement.

Article II – Right of the People in Member States to Vote for President and Vice President

Each member state shall conduct a statewide popular election for President and Vice President of the United States

Article III – Manner of Appointing Presidential Electors in Member States

Prior to the time set by law for the meeting and voting by the presidential electors, the chief election official of each member state shall determine the number of votes for each presidential slate in each State of the United States and in the District of Columbia in which votes have been cast in a statewide popular election and shall add such votes together to produce a “national popular vote total” for each presidential slate.

The chief election official of each member state shall designate the presidential slate with the largest national popular vote total as the “national popular vote winner.”

The presidential elector certifying official of each member state shall certify the appointment in that official’s own state of the elector slate nominated in that state in association with the national popular vote winner.

At least six days before the day fixed by law for the meeting and voting by the presidential electors, each member state shall make a final determination of the number of popular votes cast in the state for each presidential slate and shall communicate an official statement of such determination within 24 hours to the chief election official of each other member state.

The chief election official of each member state shall treat as conclusive an official statement containing the number of popular votes in a state for each

presidential slate made by the day established by federal law for making a state’s final determination conclusive as to the counting of electoral votes by Congress.

In event of a tie for the national popular vote winner, the presidential elector certifying official of each member state shall certify the appointment of the elector slate nominated in association with the presidential slate receiving the largest number of popular votes within that official’s own state. If, for any reason, the number of presidential electors nominated in a member state in association with the national popular vote winner is less than or greater than that state’s number of electoral votes, the presidential candidate on the presidential slate that has been designated as the national popular vote winner shall have the power to nominate the presidential electors for that state and that state’s presidential elector certifying official shall certify the appointment of such nominees. The chief election official of each member state shall immediately release to the public all vote counts or statements of votes as they are determined or obtained.

This article shall govern the appointment of presidential electors in each member state in any year in which this agreement is, on July 20, in effect in states cumulatively possessing a majority of the electoral votes.

Article IV – Other Provisions

This agreement shall take effect when states cumulatively possessing a majority of the electoral votes have enacted this agreement in substantially the same form and the enactments by such states have taken effect in each state.

Any member state may withdraw from this agreement, except that a withdrawal occurring six months or less before the end of a President’s term shall not become effective until a President or Vice President shall have been qualified to serve the next term.

The chief executive of each member state shall promptly notify the chief executive of all other states of when this agreement has been enacted and has taken effect in that official’s state, when the state

has withdrawn from this agreement, and when this agreement takes effect generally.

This agreement shall terminate if the electoral college is abolished.

If any provision of this agreement is held invalid, the remaining provisions shall not be affected.

Article V – Definitions

For purposes of this agreement, “chief executive” shall mean the Governor of a State of the United States or the Mayor of the District of Columbia;

“elector slate” shall mean a slate of candidates who have been nominated in a state for the position of presidential elector in association with a presidential slate;

“chief election official” shall mean the state official or body that is authorized to certify the total number of popular votes for each presidential slate;

“presidential elector” shall mean an elector for President and Vice President of the United States;

“presidential elector certifying official” shall mean the state official or body that is authorized to certify the appointment of the state’s presidential electors;

“presidential slate” shall mean a slate of two persons, the first of whom has been nominated as a candidate for President of the United States and the second of whom has been nominated as a candidate for Vice President of the United States, or any legal successors to such persons, regardless of whether both names appear on the ballot presented to the voter in a particular state;

“state” shall mean a State of the United States and the District of Columbia; and

“statewide popular election” shall mean a general election in which votes are cast for presidential slates by individual voters and counted on a statewide basis.

Current Status of the National Popular Vote Compact

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

other states, where some have passed committee and others have passed one house.

**Portions of this background paper are from the LWVUS Impact on Issues, 2006-2007*

National Popular Vote Compact Suggested Resource List

Belenky, Alexander S, “The Good, the Bad and the Ugly,” Michigan Law Review First Impressions, an Online Companion to the Michigan Law Review, 2008, <http://www.michiganlawreview.org/firstimpressions/vol106/belenky.pdf>

FairVote, Center for Voting and Democracy, “2008’s Shrinking Battleground and Its Start Impact on Campaign Activity,” December 4, 2008, <http://fairvote.org/tracker/?page=27&pressmode=showspecific&showarticle=230>

FairVote, “Presidential Election Inequality: The Electoral College in the 21st Century,” <http://www.fairvote.org/?page=1729>

Gringer, David, “Why the National Popular Vote Plan is the Wrong Way to Abolish the Electoral College,” Columbia Law Review, vol. 108, 2008.

Hendricks, Jennifer S., “Popular election of the President: Using or Abusing the Electoral College,” Election Law Review, 2008.

Hertzberg, Hendrick, “Pete du Pointless,” The New Yorker Online, September 16, 2008, <http://www.newyorker.com/online/blogs/hendrikhertzberg/national-popula/>

Hiltachk, Thomas W., “Reforming the Electoral College One State at a Time,” Michigan Law Review First Impressions, an Online Companion to the Michigan Law Review, 2008, <http://www.michiganlawreview.org/firstimpressions/vol106/hiltachk.htm>

Koza, John R, “Answering Myths About the National Popular Vote,” <http://www.nationalpopularvote.com/pages/answers.php>.

Koza, John R., Barry Fadem, Mark Grueskin, Michael S. Mandell, Robert Richie and Joseph F. Zimmerman, “Every Vote Equal: A State-based Plan for Electing the President by National Popular Vote,” 8th edition, National Popular

Vote Press, 2006, <http://www.nationalpopularvote.com/>
Available online or for ordering.

League of Women Voters of the United States, Impact on Issues 2006-2008, Washington, DC, Pub #386, http://www.lwv.org/Content/ContentGroups/ImpactIssues/2006_Impact_web.pdf

Leib, Ethan J. & Eli J. Mark, "Democratic Principle and Electoral College Reform," Michigan Law Review First Impressions, an Online Companion to the Michigan Law Review, 2008,
<http://www.michiganlawreview.org/firstimpressions/vol106/leibmark.htm>

Muller, Derek T., "More Thoughts on the Compact Clause and the National Popular Vote: A Response to Professor Hendricks," Election Law Journal, 2008, Symposium on the National Popular Vote Plan.

Muller, Derek T., "The Compact Clause and the National Popular Vote Interstate Compact," Election Law Journal, vol. 6, no. 4, 2007.

National Popular Vote, "Question of Congressional Consent for the Agreement among the States to Elect the President

by National Popular Vote," <http://www.nationalpopularvote.com/resources/Cong-Consent-V7-2008-6-5.pdf>

National Popular Vote, "Responses to Concerns about the National Popular Vote Bill," www.nationalpopularvote.com.

Raskin, Jamin B., "Neither the Red States nor the Blue States but the United States: The National Popular Vote and American Political Democracy," Election Law Journal, 2008, Symposium on the National Popular Vote Plan.

Rathbun, Daniel P., "Ideological Endowment: The Staying Power of the Electoral College and the Weaknesses of the National Popular Vote Interstate Compact," Michigan Law Review First Impressions, an online companion to the Michigan Law Review, 2008,
<http://www.michiganlawreview.org/firstimpressions/vol106/rathbun.htm>

"Sidestepping the Electoral College," Opinion, Los Angeles Times, August 18, 2008.

Smith, Bradley A., "Vanity of Vanities: National Popular

NCA News and Notes . . .

By Melpi Jeffries, President, LWVNCA

LWVNCA is soliciting applications for the Madeline Naumann Achievement Award. The Madeline Nauman Achievement Award was established in December, 1998, to recognize outstanding achievements of local Leagues, whose effects, applicability, or interest transcend local League boundaries. Management achievements and program achievements will receive consideration. The award is presented biannually on odd-number years and consists of an Award Certificate and an unrestricted grant of \$300.00. Each League may submit up to three applications. Contact Patricia Sullivan, Chair of the award committee at fjsull@att.net for more information and send the applications to her by March 1, 2009.

LWVNCA will contact our local members of Congress to support legislation granting DC Voting Rights in the House of Representatives, which is being introduced in a more favorable political climate. NCA will urge an early vote. LWVNCA is also sending the Board of LWVUS material about DC's structural deficit related to the LWVUS position

on a federal payment to DC.

The results of local program planning are eagerly awaited since LWVNCA has recruited a potential chair for each of the program items suggested.

Last but not least, LWVNCA will sponsor a block of seats for a performance of the CAPITOL STEPS in the Ronald Reagan Building stage on March 20, 2009. The admission charge will be \$45.00. Contact Barb Sherrill, bmsherrill@comcast.net.

Think Green . . .

More than 56 percent of the paper consumed in the U.S. during 2007 was recovered for recycling — an all-time high. This impressive figure equals nearly 360 pounds of paper for each man, woman, and child in America. (Paper Industry Association Council, 2007)

National Popular Vote Compact Consensus Questions

NPV Compact Consensus Questions for discussion meetings.

Amending the Constitution

1. Which statement best reflects the consensus of the group? Select one.
 - a. Action to alter a basic element of the Constitutional framework, which is achievable by amendment to the Constitution, should be accomplished by amendment to the Constitution.
 - b. Action by states through a compact process is an acceptable way to alter the method for electing the President and Vice-President.
 - c. The group could not reach consensus.

2. Which statement best reflects the consensus of the group? Select one.
 - a. Because a compact has never before been used to address a fundamental constitutional issue such as voting, the chance that it might set a precedent for the future leads to the conclusion that it is better that the League continue to work for an amendment to the Constitution to establish the direct popular election of the President and the abolition of the Electoral College.
 - b. Despite the novelty of the use of the compact approach to address a fundamental constitutional issue such as voting, the League should support the NPV Compact as a way of achieving an important goal.
 - c. The group could not reach consensus.

Congressional Consent

3. Which statement best reflects the consensus of the group? Select one.
 - a. The possibility that the NPV Compact will require congressional consent is not of sufficient concern to block the implementation of the plan.
 - b. The possibility that the NPV Compact will require congressional consent is sufficient to conclude that the plan should not be implemented without obtaining such consent.
 - c. The group could not reach consensus.

Enforcement

4. Which statement best reflects the consensus of the group? Select one.
 - a. The NPV Compact contains sufficient enforcement provisions to assure smooth operation of the plan.
 - b. Although it is not possible to determine whether the enforcement provisions will be sufficient to assure smooth operation of the plan, the plan should be passed anyway.
 - c. Enforcement of the plan is likely to add uncertainty and bring the courts into the presidential election in ways that raise substantial concerns.
 - d. The lack of adequate enforcement provisions is sufficient to conclude that the NPV is not a viable plan.
 - e. The group could not reach consensus.

Uniformity

5. Which statement best reflects the consensus of the group? Select one.
- The uniformity of voting systems is more important to American democracy than the possibility that the NPV Compact can be adopted.
 - The NPV Compact is more important than uniformity of voting systems because it would succeed in achieving the popular election of the President.
 - The group could not reach consensus.

Popular Election of the President

6. Which statement best reflects the consensus of the group? Select one.
- It is more important to achieve the goal of national popular election of the President than it is to achieve the goal of abolition of the electoral college.
 - It is more important to amend the Constitution to abolish the Electoral College than it is to achieve the goal of popular election of the President by alternative methods, such as the NPV Compact.
 - The group could not reach consensus.

Achievability

7. Which statements reflect the views of the group?
- The NPV Compact will have problems being passed because of the need for congressional consideration and the need for action by so many states.
 - Agree Disagree No Consensus
 - A constitutional amendment to establish the direct popular election of the President and the abolition of the Electoral College will continue to have problems being passed.
 - Agree Disagree No Consensus

Victory For Open Government . . .

Rule 18 Dies with the Opening of the 2009 Session of the General Assembly

By Jane Hilder, Action Director

Does anyone remember the LWVFA campaign against Rule 18? That was the rule implemented by the Republican leadership in the Virginia House of Delegates several years ago that decreed that legislation would initially be dealt with by subcommittees of the House committees, where votes of legislators to kill a bill or forward it on to the full committee would be by unrecorded vote. The final decision of the subcommittee would be public, but not how each legislator on the subcommittee voted. As Washington Post writer Anita Kumar wrote December 14, "An unrecorded vote makes it difficult to track a member's position on controversial legislation."

Both LWV-VA and LWVFA had campaigned against this rule

in past legislative sessions because it was a violation of open government. We had spoken against the rule to legislators and President Sherry Zachry had written letters protesting the rule to the Washington Post and other newspapers. This inspired the Post to write an editorial several years ago calling on the House leadership to record subcommittee votes in the name of government transparency. On December 14, 2008, the Republican caucus met in Richmond and decided that subcommittee votes would be recorded during the current 2009 session.

This is an improvement over past practices. Learn more about keeping government "honest" during LWVFA's panel discussion planned for March 18th on "transparency in government."