

**BRENNAN
CENTER
FOR JUSTICE**

Testimony of

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Before the

**Committee on Government Operations and the Environment
of the Council of the District of Columbia
Regarding
The National Popular Vote Plan**

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Introduction

On behalf of the Brennan Center for Justice at NYU School of Law, I thank Councilmember Cheh and the Committee on Government Operations and the Environment for holding this hearing on the National Popular Vote proposal, and for extending the invitation to speak with you today.

My name is Amanda Rolat, and I am a legal fellow at the Brennan Center. The Brennan Center is a non-partisan public policy and legal advocacy organization that focuses on fundamental issues of democracy and justice. We unite scholars and advocates in pursuit of a vision of inclusive and effective democracy. The Center's Democracy Program researches and promotes reforms that eliminate barriers to full and equal political participation and that foster responsive governance.

The Democracy Program has worked with many of the groups represented at today's hearing to support the National Popular Vote proposal. As several other speakers have explained today, the National Popular Vote proposal — or “NPV” — would establish a compact among states to guarantee that the presidency would be awarded to the presidential candidate who receives the most popular votes across the 50 states and District of Columbia. NPV addresses a problematic barrier to a more fully involved and counted electorate — the winner-take-all system — under which all of a state's electoral votes are awarded to the candidate who receives the most popular votes in that state.

Because of winner-take-all, a candidate can receive fewer votes than his or her opponent, and yet still win the presidency. This has happened four times in our nation's history.

I am delighted to testify before you on this subject, and hope today to briefly highlight our conclusions on the constitutionality of this proposal. We have engaged in a comprehensive review of legal critiques of the National Popular Vote plan. Most opponents of NPV concede its constitutionality, but other critics of NPV have suggested that it runs afoul of various constitutional provisions — including the Compact and Guarantee Clauses. Critics have suggested that NPV encroaches on the sovereignty of the non-compacting states, and that it applies unconstitutional pressure on non-compacting states to join. Our analysis indicates that these criticisms are misguided. We conclude that NPV is constitutional.

I will first explain where states participating in the NPV compact derive their authority to do so: Article II, Section 1 of the constitution, which provides that the states have plenary authority to designate their electoral college votes as they see fit (providing, of course, that in doing so they do not violate other constitutional commands, such as those guaranteed by the Equal Protection Clause). I will then discuss several other constitutional provisions which critics of NPV have cited in suggesting the proposal raises constitutional concerns. In particular, I will address the Compact Clause of Article I, Section 10, which has been interpreted to require Congressional approval only for so-called “political” compacts. Though a presidential election certainly implicates “political” issues in the sense that the word is traditionally understood, NPV is not a “political” compact as that term has been interpreted under the existing jurisprudence. I will also address the Guarantee Clause of Article IV, Section 4 and explain that concerns that the NPV proposal implicates the Guarantee Clause are misguided.

I. States and the District of Columbia May Appoint Their Electors Pursuant to the NPV Plan Because the Constitution Grants Them Plenary Authority To Appoint Electors As They Choose.

A. States Have Plenary Power in Appointing Electors

Article II, Section 1 of the Constitution spells out the procedure for electing the President. Under Article II, we, the People, elect our President indirectly through the electoral college. Section 1 of Article II directs states to “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 the Congress.”¹ The candidate receiving the majority of these electors' votes gains the presidency — although if no candidate wins a majority of votes, the House of Representatives elects the President (with each state receiving one vote). This indirect selection of the President is how the Framers intended the president to be elected.

¹ U.S. Const. art. 2, §1, cl. 2 (emphasis added).

As the text of Article II makes clear, the legislatures of the several states may appoint electors “in such Manner” as they direct. The Constitution makes clear that Congress has no authority to prescribe how a state will appoint its electoral college votes. The Supreme Court has made clear that the text of Article II, Section 1 is properly understood according to its plain meaning. Thus, in its important 1892 decision in *McPherson v. Blacker*, the Court announced that states have “plenary” power to choose the manner of appointing their electoral votes.² In that case, the Supreme Court rejected a challenge to a Michigan law which switched the state’s method of appointing electors from the winner-take-all method, which had become the national norm, to a district-by-district method. The Court made clear that a state legislature had the power to change the method of appointing electors — even if a particular method of appointing electors had prevailed for years, and even if all or nearly all the other states utilized a different method of appointing electors.

The Court has never retreated from the interpretation of Article II, Section 1 that gives the states full discretion in appointing electors. Indeed, it more recently reaffirmed that state legislatures have plenary power to determine how to appoint electors in *Williams v. Virginia State Board of Elections*, in which it summarily affirmed a district court’s decision that rejected a challenge to Virginia’s decision to allocate its electors according to the winner-take-all system.³ Especially in comparison to the significant constitutional limitations on state power contained in Article I for choosing the time, place and manner of holding elections for U.S. Senators and Representatives, the constitution makes clear that the states’ discretion to appoint their presidential electors is unusually unconstrained.

Nothing in the constitution mandates the winner-take-all system now used in most states. Two states, Maine and Nebraska, currently use a system other than winner-take-all. In those two states, the winner of each congressional district receives one elector and the winner of the state as a whole gets an additional two electors. Historically, states have used a variety of often-changing methods of selecting electors. In the early republic, more than half of the states chose electors in their legislatures, without any direct involvement by the public. When states began moving toward popular election of presidential electors, they did not take a uniform path: about half used a district system similar to that currently used in Maine and Nebraska, and the other half used a winner-take-all approach.⁴ Today, as has been the case throughout the nation’s history, states retain the right to alter the method they use to appoint electors — and even to choose a method that does not involve direct popular election. Any state wishing to amend its system need only pass a state law to do so.

² *McPherson v. Blacker*, 146 U.S. 1, 35 (1892).

³ 393 U.S. 320 (1969) (per curiam), *affirming* 288 F. Supp. 622 (E.D. Va. 1968).

⁴ See Jennings “Jay” Wilson, *Bloc Voting in the Electoral College: How the Ignored States Can Become Relevant and Implement Popular Election Along the Way*, 5 Election L. J. 384, 397 (2006).

It is important to note that states could not adopt a method of appointing electors that violated the Equal Protection Clause of the 14th Amendment — for example, by appointing electors based on a state popular vote in which the votes of white and black voters were accorded different weight. While Congress does not have the power to direct how states appoint their electoral college votes, it would of course have the power to act under its broad 14th Amendment remedial powers if a state's policy — or the NPV compact — infringed on individual citizens' voting rights. The NPV compact does not.

B. Appointing Electors According to the National Popular Vote Winner Does Not Require a Constitutional Amendment

Opponents of the NPV compact argue that only a constitutional amendment could alter the current winner-take-all scheme used in most states.⁵ This argument goes too far: as demonstrated above, two states already reject that system, and the remaining states retain the power to embrace alternative systems. Certainly, the constitution could be amended to discard the electoral college as a whole. But the way in which states choose to appoint their electors to the electoral college can be changed without changing the overall infrastructure of the electoral college itself. The NPV compact would do just this, preserving the electoral college structure while simply altering the choice certain states have made about how to appoint their electors.

While opponents argue that the NPV compact is simply an end-around the amendment process⁶, this argument is unavailing; the NPV compact expressly preserves the electoral college and the existing constitutional structure. Amending the constitution is, of course, one way in which the country could ensure that the presidency is awarded to the winner of the national popular vote. While it is an obvious answer, however, it is not the only answer. Nor is it required. To be clear, we do not assert that the NPV compact is a good alternative to what is simply too hard to effect.⁷ Entering into the NPV compact does nothing the states have not done before: it simply changes the method of allocating electoral votes, within an unchanged electoral college. And under the NPV compact, unlike the case if a constitutional amendment mandated a national popular vote, states would retain the right to withdraw from the NPV system, and to change their method of appointing electors — back to the winner-take-all system, to the district-based system, or to another alternative.

It is possible, of course, that if the NPV compact were put into effect, a consensus would emerge that it is desirable to take the further step of amending the constitution to permanently enshrine a national popular vote, and make it impossible for states to revert

⁵ See e.g., Martin G. Evans, *Picking a President – Through the Constitution*, Boston Globe, January 22, 2008.

⁶ See e.g., Derek T. Muller, *The Compact Clause and the National Popular Vote Interstate Compact*, 6 Election L. J. 372, 373 (2007).

⁷ The constitution, of course, is designed to discourage amendments. It requires both the House and Senate to pass an amendment by a supermajority, two-thirds vote, and then requires three-quarters of the states to ratify the amendment.

to a winner-take-all (or other) system. However unlikely such a development might be, there is substantial precedent for state innovation to prompt constitutional amendment. By the time Congress passed the 26th Amendment in 1971, which lowered the voting age to 18, for example, Georgia, Kentucky, Alaska and Hawaii already had a minimum voting age below 21. By the end of the nineteenth century, Idaho, Colorado, Utah and Wyoming had enfranchised women before ratification of the 19th Amendment in 1920 granted women the right to vote. And by the time the 17th Amendment established direct election of U.S. senators in 1913, seven states (Oregon, Nevada, Arizona, Colorado, Kansas, Minnesota, and Oklahoma) already effectively chose senators by popular vote.

II. The Constitutional Objections Raised by Critics of NPV Are Unavailing.

Critics of the NPV compact who have argued that there are constitutional obstacles to putting it into effect offer two central objections: first, that the NPV compact could not be given effect without formal Congressional approval; and second, that it runs afoul of the Guarantee Clause. Both arguments are flawed.

A. The NPV Compact Does Not Require Congressional Consent

Under long-standing precedent, states have the authority to enter into the NPV compact without Congressional approval. The question of Congressional approval, of course, is of particular salience in the District of Columbia. While Congressional endorsement of the NPV compact might be politically desirable — and might strengthen the chances of judicial enforcement of the NPV compact — it is not a constitutional prerequisite.

The Compact Clause provides that “No State shall, without the consent of Congress . . . enter into any Agreement or Compact with another State.”⁸ Although the text of the Compact Clause explicitly references the need to secure Congressional consent, the clause has been consistently read only to require consent for so-called *political* compacts.⁹ The Supreme Court affirmed this principle, and articulated the current test for political compacts, in *U.S. Steel Corp. v. Multistate Tax Commission*,¹⁰ in which the Court outlined a two-prong test for determining which compacts are “political.” First, a compact is political if it increases state power in a way that encroaches on federal supremacy.¹¹ Second, a compact will be deemed political if, by joining it, the participating states encroach on the authority and power of non-compacting states. If a compact satisfies either one of these two prongs, it is considered to be political, and requires Congressional consent to take effect.

⁸ U.S. Const. art. I, § 10, cl. 3.

⁹ See *Virginia v. Tennessee*, 148 U.S. 503 (1893).

¹⁰ 434 U.S. 452 (1978).

¹¹ *U.S. Steel Corp.*, 434 U.S. at 479.

As demonstrated above, because Congress has no power to influence states' choices with regard to allocating their electoral college votes, the NPV compact does not in any way encroach on federal power. It, therefore, does not trigger classification as a political compact under the first prong of the *U.S. Steel* test.

The NPV compact is also non-political under the second prong of the test, because it does not accomplish any more than what the states could individually do on their own. Critics of the NPV compact argue that if it were adopted, non-adopting states would experience undue pressure to join, and therefore, that it encroaches on the power of non-compacting states. But non-participating states would still retain plenary power to decide how to appoint their electors, regardless of the decisions of other states.¹² In fact, each state is currently locked into the winner-take-all system because any state's political influence would be diminished if it were to unilaterally begin appointing electors differently. Any pressure to join the NPV compact, then, would be no different than the pressure states currently feel to remain entrenched in our current system. Thus, adoption of the NPV compact would not encroach on the power of the non-compacting states.

Because the NPV compact would not encroach on the political power of the federal government or non-compacting states, it is not considered a political compact under the applicable jurisprudential test. Congressional approval is therefore not required for states to agree to allocate their electoral college votes to the winner of the national popular vote.

B. The Guarantee Clause Is No Obstacle to the NPV Compact

Opponents have also argued that the Compact would violate the Guarantee Clause of Article IV, Section 4 of the Constitution. The Guarantee Clause states that “the United States shall guarantee to every State in this Union a Republican Form of Government.”¹³ According to NPV's critics, the clause guarantees the federal election of the President from the majority of the people within each state, not of the nation. Further, critics claim, employing state statutes to accomplish a national popular vote would violate structural aspects of our federal system.¹⁴ These arguments are mistaken.

The suggestion that the NPV plan runs afoul of the Guarantee Clause conflicts with the Supreme Court's interpretation of the clause. The Guarantee Clause has been interpreted to prevent federal power from encroaching on the states. Never has it been construed to suggest that a state legislature cannot legislate as to the manner of appointing electors — a power that the constitution explicitly commits to the state legislatures. Simply put, there is no precedential support for the proposition that the

¹² See *U.S. Steel Corp.*, 434 U.S. at 478.

¹³ U.S. Const. art. 4, § 4, cl. 1.

¹⁴ Kristin Feeney, *Guaranteeing a Federally Elected President*, 103 NW. U. L. REV. 1427, 1443 (2009).

Guarantee Clause applies to state legislation that neither encroaches on the supremacy of the federal government nor commandeers the legislative autonomy of fellow states.

The NPV compact does not fundamentally alter the allocation of power between the states and federal government within our federalist system. It does not change the way the President is elected, but instead, only changes the method that participating states use to award their own electoral votes. Further, the NPV compact does not alter the political character or autonomy of each state. It maintains the electoral college, and the system in which each state chooses its own method of assigning electoral votes (and reserves the right to change that method at any time). Even though the allocation of electoral college votes under the NPV compact is based on the national vote tally, it is still the prerogative of each state legislature to choose its own method. Regardless of what other states may choose to do, every state remains free to appoint its own presidential electors however it sees fit, even if the NPV compact were adopted. Nothing in the Guarantee Clause prohibits this arrangement.

Conclusion

Opponents who critique the National Popular Vote bill favor a system that, by its very design, excludes voters in some states from meaningfully participating in the selection of our President. There is nothing in the Constitution, or its interpretation by the Supreme Court, that would prevent states and the District of Columbia from embracing a system in which the vote of every citizen in the nation is weighted equally in selecting the President.

The NPV compact would give voters in every state a real voice and a genuine opportunity to participate in presidential elections. The proposal is a vitally important solution that will ensure every citizen's vote will count equally in our presidential elections. The proposal is fair and non-partisan. It would force our presidential candidates to campaign before a much broader range of citizens than they do under the current system, in which a disproportionate share of campaign resources are focused on voters in a handful of battleground swing states. It will ensure that our presidents, in fact, represent a much broader electorate. It will encourage voter turnout and civic engagement.