

## 9 | Administrative Issues Concerning the Proposed Interstate Compact

The proposed “Agreement Among the States to Elect the President by National Popular Vote” (presented in chapter 6) raises several issues concerning the administration of elections, including the following:

- Does the proposed compact impose any significant additional financial cost or administrative burden on state election officials (section 9.1)?
- How would recounts be handled (section 9.2)?

### **9.1 DOES THE PROPOSED COMPACT IMPOSE ANY SIGNIFICANT FINANCIAL COST OR ADMINISTRATIVE BURDEN ON STATE ELECTION OFFICIALS?**

Under the proposed interstate compact, a presidential election would be conducted by each state in the same way that it is now conducted. The proposed compact makes no changes in a state’s laws or procedures for preparing ballots; administering polling places; counting votes at the precinct level; or aggregating the vote counts from the precincts to determine the total number of popular votes cast for each presidential slate in the state.

Under the statewide winner-take-all system currently used by 48 states and the District of Columbia, the state’s chief election official (or state canvassing board) certifies the election of the entire list of presidential electors that is affiliated with the presidential slate that received the most votes in the state. For example, if the Republican presidential slate carries the state, the state’s chief election official certifies the election of the entire slate of Republican presidential electors for the state. These presidential electors collectively represent the will of their state’s voters.

The system currently used in Maine and Nebraska is different. The state’s chief election official certifies the election of a presidential elector affiliated with the presidential slate that carried each separate congressional district in the state. Each district-level presidential elector

represents the will of the voters in the district involved. In addition, the chief election official certifies two presidential electors affiliated with the presidential slate that carried the state. These two senatorial presidential electors collectively represent the will of the voters in their state. For example, if the Democratic presidential slate carries the state and the 1st congressional district, the state's chief election official certifies the election of three Democratic presidential electors (two senatorial electors and one district elector from the 1st district). If the Republican presidential slate carries the 2nd congressional district, the state's chief election official certifies the election of one Republican presidential elector for that district. In this example, two senatorial presidential electors collectively represent the will of their state's voters; the Democratic elector from the 1st district represents the will of that district's voters; and the Republican elector from the 2nd district represents the will of that district's voters.

The only change introduced by the proposed compact occurs *after* a state has finished tallying the statewide total number of popular votes cast for each presidential slate. At that point, there is one additional step under the proposed compact. The votes cast for each presidential slate in all 50 states and the District of Columbia would be added together to produce a national grand total for each presidential slate (section 6.3.3). This is, of course, the same adding-up process that the media, the political parties, and various watchdog groups already do on election night and in the days following each presidential election. Under the proposed compact, the presidential slate with the largest national grand total from all 50 states and the District of Columbia would be designated as the "national popular vote winner." The chief election official of each state belonging to the compact would then certify the election of the entire slate of presidential electors that is affiliated with the presidential slate that has been designated as the "national popular vote winner." For example, if the Democratic presidential slate is the "national popular vote winner," the state's chief election official in every state belonging to the compact would certify the election of the slate of Democratic presidential electors.

The effect of the proposed compact would be that all the presidential electors of all states belonging to the compact would be affiliated with the presidential slate that received the largest total number of popular votes

in all 50 states and the District of Columbia. These presidential electors from the states belonging to the compact will collectively represent the nationwide will of the voters. Under the proposed compact, the presidential electors will meet in mid-December and cast their electoral votes. Because the proposed compact only goes into effect when it has been enacted by states possessing a majority of the electoral votes, the presidential slate receiving the most popular votes from all 50 states and the District of Columbia will receive a majority of the electoral votes in the Electoral College.

As can be seen, there is no significant additional administrative burden or financial cost associated with the proposed interstate compact.

## **9.2 HOW WOULD RECOUNTS BE HANDLED?**

Before discussing the mechanics of recounts, let us recognize that there would be less opportunity for a close election under nationwide popular election of the President than under the prevailing statewide winner-take-all system. A close outcome is considerably less likely in an election with a single pool of votes than in an election in which there are 51 separate pools and hence 51 separate opportunities for a close outcome. Moreover, a close outcome is considerably less likely in larger pool than in a smaller one. Thus, a close outcome is less likely in a single pool of 122,000,000 popular votes than in 51 separate pools each averaging 2,392,159 votes (1/51 of 122,000,000).

The 2000 presidential election is remembered as being close because George W. Bush's total of 2,912,790 popular votes in Florida was a mere 537 more than Gore's statewide total of 2,912,353. Under the statewide winner-take-all rule used in Florida (and almost all other states), the 537-vote lead entitled Bush to all 25 of Florida's electoral votes. There was, however, nothing particularly close about the 2000 presidential election on a nationwide basis. Al Gore had a nationwide lead of 537,179 popular votes. Gore's nationwide lead was larger than, for example, Nixon's lead of 510,314 in 1968 and Kennedy's lead of 118,574 in 1960.<sup>1</sup> The closeness of the 2000 presidential election was an artificial crisis manufactured by Florida's use of the statewide winner-take-all system. No one would even have considered a recount in 2000 if the nationwide

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<sup>1</sup> Congressional Quarterly. 2002. *Presidential Elections 1789–2002*. Washington, DC: CQ Press. Pages 146 and 148.

popular vote had controlled the outcome. No one would have cared whether Bush did, or did not, carry Florida by 537 popular votes.

Similarly, the 2004 election was also not close in terms of the nationwide popular vote. President George W. Bush had a nationwide lead of about 3,500,000 popular votes. However, people had to wait until the morning of Wednesday November 3, 2004, to find out the outcome of the popular vote in Ohio. A switch of 59,388 popular votes in Ohio would have given Kerry all of Ohio's 20 electoral votes and the Presidency. Again, the illusion of closeness resulted from the statewide winner-take-all system used in Ohio—not because the election was genuinely close on a nationwide basis.

In fact, no presidential election since the 19th century has been won by fewer than 100,000 votes on a nationwide basis. The closest presidential election since 1900 was the 1960 election in which John F. Kennedy led Richard M. Nixon by 118,574 popular votes nationwide. A margin of 118,574 popular votes is not particularly close on a nationwide basis. Such a margin would have been unlikely to be questioned. No margin of that size is likely to be overturned by any recount. The 1960 election is remembered as being close because a switch of 4,430 votes in Illinois and a switch 4,782 votes in South Carolina would have given Nixon a majority of the electoral votes. If Nixon had carried both of those states, Kennedy still would have been ahead nationwide by almost 110,000 popular votes, but Nixon would have won the Presidency. The 1960 election then would have become yet another election in which the winner of the nationwide popular vote did not win the Presidency. In any case, the perceived closeness of the 1960 election was an illusion manufactured by the statewide winner-take-all system used in Illinois and South Carolina—not because the nationwide margin of 118,574 was ever likely to be overturned by any recount.

Table 9.1 shows the popular vote count for the Democratic and Republican presidential candidates in each presidential election since 1900 (except that Theodore Roosevelt's vote is shown for the 1912 presidential election because he polled more votes as nominee of the Progressive Party than did the Republican nominee, William Howard Taft). Column 4 shows the difference between the first- and second-place candidates. None of these elections was particularly close in terms of the nationwide popular vote. This is true even though the number of votes cast nationwide in the early years of the 20th century was only about 10% of the present-day turnout of 122,000,000 votes.

**Table 9.1 WINNING MARGINS IN PRESIDENTIAL ELECTIONS BETWEEN 1900 AND 2004**

ELECTION	DEMOCRAT	REPUBLICAN	DIFFERENCE
1900	6,357,698	7,219,193	861,495
1904	5,083,501	7,625,599	2,542,098
1908	6,406,874	7,676,598	1,269,724
1912	6,294,326	4,120,207	2,174,119
1916	9,126,063	8,547,039	579,024
1920	9,134,074	16,151,916	7,017,842
1924	8,386,532	15,724,310	7,337,778
1928	15,004,336	21,432,823	6,428,487
1932	22,818,740	15,760,426	7,058,314
1936	27,750,866	16,679,683	11,071,183
1940	27,343,218	22,334,940	5,008,278
1944	25,612,610	22,021,053	3,591,557
1948	24,105,810	21,970,064	2,135,746
1952	27,314,992	33,777,945	6,462,953
1956	26,022,752	35,590,472	9,567,720
1960	34,226,731	34,108,157	118,574
1964	43,129,566	27,178,188	15,951,378
1968	31,275,166	31,785,480	510,314
1972	29,170,383	47,169,911	17,999,528
1976	40,830,763	39,147,793	1,682,970
1980	35,483,883	43,904,153	8,420,270
1984	37,577,185	54,455,075	16,877,890
1988	41,809,074	48,886,097	7,077,023
1992	44,909,326	39,103,882	5,805,444
1996	47,402,357	39,198,755	8,203,602
2000	50,992,335	50,455,156	537,179
2004	59,028,111	62,040,610	3,012,499

Even the highly controversial 1876 presidential election was not close in terms of the nationwide popular vote. Democrat Samuel J. Tilden received 4,288,191 popular votes—254,694 more than the 4,033,497 popular votes received by Rutherford B. Hayes. Tilden’s percentage lead of 3.05% was greater than George W. Bush’s 2004 lead of 2.8%. The 1876 election is remembered as having been close because Hayes had extremely narrow popular-vote leads in several states, namely

- 889 votes in South Carolina,
- 922 votes in Florida,
- 1,050 votes in Oregon,

- 1,075 votes in Nevada, and
- 2,798 votes in California.<sup>2,3,4,5</sup>

Again, the closeness of the 1876 presidential election was an artificial crisis created by the statewide winner-take-all system.

Having said that, even with a single pool of 122,000,000 votes, it is conceivable that the nationwide popular vote could some day be extremely close (say, a few hundred or a few thousand votes out of 122,000,000). In that event, the vote count and the inevitable recount would be handled in the same way as it is currently handled—that is, under the generally serviceable laws that govern all elections. An extremely close election will almost inevitably engender controversy. The guiding principle in such circumstances should be that all votes should be counted fairly and expeditiously. Of course, if the nationwide popular vote count were extremely close on a nationwide basis, it would be very likely that the vote count would, simultaneously, be close in a number of states.

In terms of logistics, the personnel and procedures for a nationwide recount are already in place because every state is always prepared to conduct a statewide recount after any election. Indeed, there are statewide recounts for certain statewide offices and ballot propositions in virtually every election cycle. As Senator David Durenberger (R-Minnesota) said in the Senate in 1979:

“There is no reason to doubt the ability of the States and localities to manage a recount, and nothing to suggest that a candidate would frivolously incur the expense of requesting one. And even if this were not the case, the potential danger in selecting a President rejected by a majority of the voters far outweighs the potential inconvenience in administering a recount.”<sup>6</sup>

<sup>2</sup> Congressional Quarterly. 2002. *Presidential Elections 1789–2002*. Washington, DC: CQ Press. Page 125.

<sup>3</sup> Morris, Roy B. 2003. *Fraud of the Century: Rutherford B. Hayes, Samuel Tilden, and the Stolen Election of 1876*. Waterville, ME: Thorndike Press.

<sup>4</sup> Robinson, Lloyd. 1996. *The Stolen Election: Hayes versus Tilden—1876*. New York, NY: Tom Doherty Associates Books.

<sup>5</sup> Rehnquist, William H. 2004. *Centennial Crisis: The Disputed Election of 1876*. New York, NY: Alfred A. Knopf.

<sup>6</sup> *Congressional Record*. July 10, 1979. Pages 17706–17707.

Senator Birch Bayh (D-Indiana) summed up the concerns about extremely close elections and recounts in a Senate speech by saying:

“Fraud is an ever present possibility in the electoral college system, even if it rarely has become a proven reality. With the electoral college, relatively few irregular votes can reap a healthy reward in the form of a bloc of electoral votes, because of the unit rule or winner take all rule. Under the present system, fraudulent popular votes are much more likely to have a great impact by swinging enough blocs of electoral votes to reverse the election. A like number of fraudulent popular votes under direct election would likely have little effect on the national vote totals.

“I have said repeatedly in previous debates that there is no way in which anyone would want to excuse fraud. We have to do everything we can to find it, to punish those who participate in it; but **one of the things we can do to limit fraud is to limit the benefits to be gained by fraud.**

**“Under a direct popular vote system, one fraudulent vote wins one vote in the return. In the electoral college system, one fraudulent vote could mean 45 electoral votes, 28 electoral votes.**

“So the incentive to participate in ‘a little bit of fraud,’ if I may use that phrase advisedly, can have the impact of turning a whole electoral block, a whole State operating under the unit rule. Therefore, so the incentive to participate in fraud is significantly greater than it would be under the direct popular vote system.”<sup>7</sup> [Emphasis added]

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<sup>7</sup> *Congressional Record*. March 14, 1979. Page 5000.

