

THE STATE OF OREGON
SENATE COMMITTEE ON RULES

*SB 1512: An Act Relating to the Agreement Among the States to
Elect the President by National Popular Vote*
February 6, 2018

Submitted By: Tara Ross
Author of *Enlightened Democracy: The Case for the Electoral College* and
The Indispensable Electoral College

Overview

I urge you to protect the Electoral College by voting against SB 1512. The 2016 election was admittedly tough in many ways, but the Electoral College is not to blame. To the contrary, getting rid of it would simply extend the problems of our divisive primary system to the general election process. Moreover, the NPV legislation carries its own set of special problems, which will create even more legal and logistical chaos in our presidential election system. The Electoral College is one of the few remaining marks of sanity left in our presidential election system. It should be protected.

Modern Benefits of the Electoral College

- *The Benefits of Federalism.* Presidential candidates must build national coalitions of voters. Historically speaking, the candidate who builds the broadest coalition of support will win. The process discourages presidential candidates from focusing too exclusively on one region, state, or special interest group.
- *Moderation and Compromise.* As a matter of history, the Electoral College has encouraged Americans to work together, across state lines. A direct election system, by contrast, would look more like the 2016 primary process: multi-party races, a fractured electorate, no incentives to build coalitions or to work together.
- *Stability and Certainty in Elections.* The Electoral College typically produces quick and undisputed outcomes. Any problems are isolated to one or a handful of states. Fraud is minimized because it is hard to predict where stolen votes will matter.

Problems Created by NPV's Compact

- *Differing States' Laws.* NPV attempts to combine 51 different state (and D.C.) election processes together to obtain one national outcome. This will create chaos, litigation, and confusion. One of the three constitutional lawyers who originally proposed an NPV-like mechanism has conceded this difficulty.
- *Disenfranchised Voters.* Some voters may be disenfranchised because their votes will be counted in different ways, depending on their state of residence.
- *Legal Issues.* NPV's end run around the constitutional amendment process creates constitutional and legal problems, which will be the subject of much litigation.

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Full Testimony

I encourage you to protect the Electoral College by voting against SB 1512. Such advice doubtless feels like a non-sequitur in a state that voted against Donald Trump. Americans increasingly seem to believe that pro-Trump voters should be for the Electoral College, while anti-Trump voters should be against the Electoral College. Both beliefs are equally mistaken. The Electoral College does not favor one political party over another. Instead, the Electoral College will always reward the party that does the best job of reaching out to a diverse cross-section of Americans. It will penalize parties and candidates that takes voters for granted. These are healthy incentives in a large, diverse republic such as our own.

First, I will discuss the benefits that the Electoral College still provides today. Second, I will discuss the special difficulties created by NPV's plan, which could create even more legal and logistical chaos in our presidential election system.

The Benefits of the Electoral College

The Constitution seeks to reconcile two seemingly irreconcilable goals: The Founders wanted the people to govern themselves, but they also wanted to protect minority interests. A simple democracy would not accomplish this objective: Bare or emotional majorities can too easily outvote and tyrannize minority groups—even very large, reasonable ones. An old analogy notes that a simple democracy is like two wolves and a sheep voting on what's for dinner.

The sheep certainly doesn't feel good about being eaten just because it got a chance to vote!

The Founders sought to create something better than this type of simple democracy. They created a Constitution with many safeguards: We have separation of powers, presidential vetoes, a bicameral Congress, and supermajority requirements to do things like amend the Constitution. The Electoral College is just one of these safeguards, intended to protect our liberty from unreasonable rule.

The Electoral College continues to help our country in many ways: It encourages coalition-building and motivates candidates to reach out to a wide variety of voters. It penalizes those who rely upon isolated pockets of support in one region, one state, or among voters in one

special interest group. It encourages moderation and compromise from political parties and their candidates. Finally, the state-by-state election process isolates voting problems to one or a handful of states, making it much harder to steal elections.

If all this is true, then what happened in 2016? No one seemed very interested in reaching out to voters and building diverse coalitions, as the Electoral College requires.

Problems began early in the political primaries: On the Republican side, too many candidates were contending for the nomination. The electorate became fractured: Divisiveness, anger, and single-issue voting were rewarded. Coalition-building incentives were absent. Soon the divisive primaries fed into a general campaign season that was also characterized by anger, name-calling, and finger-pointing. Polls showed that both candidates were generally disliked. Neither party had focused on nominating a unifying figure who could bring people together. In the end, one party lost the election. The other didn't win so much as it avoided losing.

We've been here before. The country has been divided and angry. We've had series of close presidential elections in which it seemed that coalition-building was a thing of the past. In the years after the Civil War, the Electoral College proved its ability to heal just this sort of division.

Consider the political landscape as it existed back then: Democrats were strong in the South, but they also didn't have enough electoral votes in those states to win a presidential election. Thus, they had to reach out to some non-southerners. In the meantime, Republicans were in the opposite situation: They were strong in the North and the Northwest. They had enough electoral votes to win without southern support, but just barely. It was safer to seek out some southern votes, too. In other words, both political parties were forced to reach a hand across the political aisle—pretty much whether they wanted to or not. Both parties had incentives to earn the support of new voters. Over time, the incentives inherent in the presidential election process helped to heal some of the divide between North and South. Such coalition-building and inclusiveness is healthy for our country.

The incentives today are the same. The first party to realize its mistakes and to once again focus on coalition-building will also begin winning presidential elections in landslides. In a country as large and diverse as our own, such incentives are healthy and necessary if we are to regain our footing and to thrive. Eliminating the Electoral College will simply undermine our ability to heal.

Problems Created by NPV

The current presidential election process blends federalist and democratic principles. America holds 51 completely separate, purely democratic elections each presidential election year (each state, plus D.C.). Each state is responsible for its own election. Differences among states' laws are irrelevant because votes cast in one state do not affect the outcome in another state. In short: 51 elections are held; 51 sets of state election laws govern these elections; 51 outcomes are achieved. Everyone is treated fairly.

NPV would change this. America would still hold 51 state-level elections, governed by 51 sets of election laws. But NPV would attempt to derive only one outcome from these 51 processes. Suddenly, variances among states' laws—previously irrelevant—would matter a great deal. **Now these varying laws ensure unequal treatment of voters.**

Consider the issue of early voting. Voters in Oregon have their own laws regarding early voting. Other states might have different provisions regarding when early voting starts, how long it lasts, or who may early vote and how they may early vote. If Oregon's voters are competing only against other Oregon voters in a contest to determine the identity of Oregon's electors, then they have no reason to care what the rules are in another state. Ballots cast in other states do not affect the identity of an Oregon elector. However, once NPV throws voters of all states into the same election pool, then many problems begin to arise. **With NPV in place, the identity of an Oregon elector could be changed by a vote cast in Minnesota or Alaska or any other state.** How can Oregon voters be equal with those in Minnesota if they have less time to vote? Or if it is harder to obtain an absentee ballot?

There are many other differences among states' laws: States differ in whether they allow felons to vote. They differ in their requirements for ballot qualification. States have different criteria for what triggers recounts within their borders. These differences could cause a whole host of problems. What if the national total is close—close enough to warrant a recount—but a recount can't be conducted because the margins in individual states were not close? Or perhaps recounts are conducted, but only in two or three states, each with a different idea of how to count a hanging chad. Perhaps other states see what is going on and choose to conduct recounts that their statutes previously deemed optional. The process would become politicized.

One well-respected constitutional lawyer, Prof. Vikram David Amar, has acknowledged the real dangers created by these issues. Amar's opinion is important: NPV is based upon an idea that he and two other professors proposed in 2001. Yet Amar notes that a “problem I see in the current National Popular Vote bill is that **it does not guarantee a true national election with uniform voter qualification, voter mechanics, and vote-counting standards. Absent such uniformity, some states might have incentives to obstruct or manipulate vote counts.**”

Additional problems are created by the fact that NPV gives the presidency to the candidate winning *any* plurality. NPV is not looking for a majority winner. It is not even looking for a minimum plurality. Thus, a candidate could win with only 15 or 20 percent of votes nationwide.

Such an idea sounds far-fetched today, with America's two-party system firmly in place. But if elimination of the Electoral College undermines the two-party system, as many believe it will, then such results are entirely possible.

But it gets even worse. Under this scheme, Oregon could be forced to award its entire slate of electors to a candidate who was not on its ballot. By the terms of the NPV compact, this candidate could be entitled to personally appoint the seven electors who will represent Oregon in the Electoral College vote. He could even appoint people from out-of-state, if he thought they were more likely to be faithful to him in the Electoral College vote.

Finally, remember that NPV's compact is a temporary solution—easy to join and unjoin, by its own terms—as opposed to a constitutional amendment, which would be a relatively permanent solution. Imagine that NPV has just enough states to be operable during the 2020 election. The presidential campaigns are proceeding on the assumption that a national direct election will be in place on Election Day. But in late June, Massachusetts gets worried that the Republican will win the national popular vote. In disgust, its legislature decides to pull out of NPV's compact. Suddenly, NPV no longer has enough states to proceed. The country is again hosting a normal presidential election with the Electoral College in place. Well, unless some other state changes its mind and swiftly adopts NPV for purely political, partisan reasons.

This kind of flip-flopping back and forth is not good for the stability of the country or its presidential election system.

There are many other legal and constitutional issues created by NPV's compact: Is its interstate compact an illegal end-run around the constitutional amendment process? Will the compact require congressional approval? Does NPV's entire scheme fail under Court precedents such as *U.S. Term Limits, Inc. v. Thornton* and *Clinton v. New York*? Does the compact create Equal Protection issues because of the unequal treatment of voters? **Reasonable legal arguments can be made for any of these positions, and they will doubtless be litigated at length.** Such extended litigation is harmful to the stability of our political system—to say the least.

Formally eliminating the Electoral College through a constitutional amendment would be unhealthy for the country. But NPV's attempt to skirt the constitutional amendment process altogether would create added difficulties. These logistical and legal nightmares could haunt the country each and every presidential election year.

Conclusion

If we effectively eliminate the Electoral College, as NPV proposes, then we are turning our general election process into something that too closely mirrors our failed and divisive primary system. We'd be dismantling an incentive structure that has historically pushed our country toward healing in difficult times. Reform in the election system is necessary, but that reform should be implemented in the primary process. The Electoral College should be preserved.

I urge you to vote against the National Popular Vote legislation that has been proposed.