National Popular Election of the President

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Explanation of "The Agreement Among the States to Elect the President by National Popular Vote"

District of Columbia Bill 18-0769

May 19, 2010

This document explains the National Popular Vote bill (District of Columbia Bill 18-0769) on a section-by-section basis.

The National Popular Vote bill is an interstate compact entitled "The Agreement Among the States to Elect the President by National Popular Vote."

1 Explanation of Article I–Membership

Article I of the compact identifies the compact's prospective parties, namely the 51 jurisdictions that are currently entitled to appoint presidential electors under the U.S. Constitution. These 51 jurisdictions include the 50 states and the District of Columbia (which acquired the right to appoint presidential electors under terms of the 23rd Amendment). Elsewhere in the compact, the uncapitalized word "state" (defined in article V of the compact) refers to any of these 51 jurisdictions. The term "member state" refers to a jurisdiction where the compact has been enacted into law and is in effect.

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

Article II of the compact mandates a popular election for President and Vice President in each member state.

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

The term "statewide popular election" is defined in article V of the compact as

> "a general election at which votes are cast for presidential slates by individual voters and counted on a statewide basis."

From the perspective of the operation of the compact, this clause establishes an essential precondition for a nationwide popular vote for President and Vice President, namely that there will be popular votes to count. The people of the United States have no federal constitutional right to vote for President and Vice President. The people have acquired the privilege to vote for President and Vice President as a consequence of legislative action by their respective states. Moreover, except in Colorado, the people have no state constitutional right to vote for President and Vice President, and the existing privilege may be withdrawn at any time merely by passage of a state law. Indeed, state legislatures chose the presidential electors in a majority of the states participating in the nation's first presidential election (1789). Moreover, state legislatures have

changed the rules for voting for President for purely political reasons. For example, just prior to the 1800 presidential election, the Federalist-controlled legislatures of Massachusetts and New Hampshire—fearing Jeffersonian victories in the popular votes in their states—repealed existing state statutes allowing the people to vote for presidential electors and vested that power in themselves. Article II of the compact precludes the state legislature of a member state from doing this.

Because an interstate compact is a contractual obligation among the member states, the provisions of a compact take precedence over any conflicting law of any member state. This principle applies regardless of when the conflicting law may have been enacted.[1] Thus, once a state enters into an interstate compact and the compact takes effect, the state is bound by the terms of the compact as long as the state remains in the compact. Because a compact is a contract, a state must remain in an interstate compact until the state withdraws from the compact in accordance with the compact's terms for withdrawal. Thus, in reading each provision of a compact, the reader may find it useful to imagine that every section of the compact is preceded by the words

> "Notwithstanding any other provision of law in the member state, whether enacted before or after the effective date of this compact, … ."

Thus, as long as a state remains in the compact, article II of the compact establishes the right of the people in each member state to vote for President and Vice President.

Article II of the compact also requires continued use by member states of another feature of presidential voting that is an essential precondition for a nationwide popular vote for President and Vice President (and that is currently in universal use by the states). Specifically, article II of the compact requires that member states continue to use the short presidential ballot in which the voter is presented with a choice among "presidential slates" containing a specifically named presidential nominee and a vice-presidential nominee.[2] The term "presidential slate" is defined in article V of the compact as

> "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 …."

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[1] Council of State Governments. 2003. *Interstate Compacts and Agencies 2003*. Lexington, KY: The Council of State Governments. Page 6.

[2] This clause does not prevent a presidential candidate from running with more than one vice-presidential nominee. In 2004, for example, Ralph Nader appeared on the ballot in New York as the presidential nominee of the Independence Party with Jan D. Pierce as his vice-presidential nominee. He simultaneously appeared on the New York ballot as the presidential nominee of the Peace and Justice Party with Peter Miguel Camejo as his vice-presidential nominee. There were, necessarily, two different lists of 31 nominees for of presidential elector associated with each of the two Nader "presidential slates" in New York in 2004. Existing New York law treated and counted Nader's Independence Party votes separately from Nader's Peace and Justice Party votes. That is, there were two different Nader "presidential slates" in New York in 2004.

The continued use of the short presidential ballot is an essential precondition for a nationwide popular vote because it permits the aggregation, from state to state, of the popular votes that have been cast for various presidential slates. If, for example, the voters in a particular state cast separate votes for individual presidential electors (say, in the manner shown in the 1964 Vermont ballot or the 1960 Alabama ballot), the winning presidential electors from that state would each inevitably have a different vote count. Thus, there would not be any single number available to add into the nationwide tally being accumulated by the presidential slates running in the remainder of the country.

3 Explanation of Article III–Manner of Appointing Presidential Electors in Member States

Article III of the compact prescribes the manner by which each state would appoint its presidential electors under the compact. Article III establishes the mechanics for a nationwide popular election. The first three clauses of article III are the main clauses for implementing nationwide popular election of the President and Vice President.

The first clause of article III of the compact provides:

> "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 phrase "the time set by law for the meeting and voting by the presidential electors" refers to the federal law (title 3, chapter 1, section 7 of the United States Code) providing:

> "The electors of President and Vice President of each State shall meet and give their votes on the first Monday after the second Wednesday in December next following their appointment at such place in each State as the legislature of such State shall direct."

In 2004, the federally designated day for the meeting of the Electoral College was Monday, December 13.

The term "chief election official" used throughout the compact is defined in article V of the compact as

> "the state official or board that is authorized to certify the total number of popular votes cast for each presidential slate."

In most states, the "chief election official" is the Secretary of State or the state canvassing board.

The first clause of article III of the compact requires that the chief election official obtain statements showing the number of popular votes cast for each presidential slate in each state. Then, this clause requires that the popular votes for each presidential slate from all the states be added together to yield a "national popular vote total" for each presidential slate.

Because the purpose of the compact is to achieve a nationwide popular vote for President and Vice President, the popular vote counts from all 50 states and the District of Columbia are included in the "national popular vote total" regardless of whether the jurisdiction is a member of the compact. That is, the compact counts the popular votes from member states on an equal footing with those from non-member states.

Popular votes can, however, only be counted from non-member states if there are popular votes available to count. As already mentioned, Article II of the compact guarantees that each

member state will produce a popular vote count because it requires member states to allow their voters to vote for President and Vice President in a "statewide popular election." Even though all states currently permit their voters to vote for presidential electors in a "statewide popular election," non-member states are, of course, not bound by the compact. In the unlikely event that a non-member state were to take the presidential vote away from its own people (as Massachusetts and New Hampshire did, for partisan political reasons, prior to the 1800 presidential election), there would be no popular vote count available from such a state.

Similarly, in the unlikely event that a non-member state were to remove the names of the presidential nominees and vice-presidential nominees from the ballot and present the voters only with names of unpledged candidates for presidential elector (such as the 1960 Alabama ballot), there would be no way to associate the vote counts of the various unpledged presidential electors with the nationwide tally being accumulated by any regular "presidential slate" running in the rest of the country.

The compact addresses the above two unlikely possibilities by specifying that the popular votes that are to be aggregated to produce the "national popular vote total" are those that are

> "… cast 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** … ." [Emphasis added]

The purpose of the second clause of article III of the compact is to identify the winner of the presidential election:

> "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 third clause of article III of the compact guarantees that the "national popular vote winner" will end up with a majority of the electoral votes in the Electoral College.

> "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**."**

The third clause of article III of the compact refers to the "presidential elector certifying official" rather than the "chief election official" because these two officials are not the same in every state. For example, in some states, the "presidential elector certifying official" is an official or entity that is not otherwise involved in the administration of elections (e.g., the Governor or the Superior Court). The term "presidential elector certifying official" is defined in article V of the compact.

For purposes of illustration, suppose that the compact was in effect in 2004, and that Colorado was a member of the compact in 2004, and that the Republican presidential slate received the most popular votes in all 50 States and the District of Columbia (as was the case in the 2004 presidential election). In that event, the Colorado Secretary of State would declare the nine presidential electors who had been nominated by the Colorado Republican Party to be elected as Colorado's members of the Electoral College.

Because the purpose of the compact is to implement a nationwide popular election of the President and Vice President, it is the *national* vote total—not each state's separate statewide vote count—that would determine the national winner. Under the compact, the Electoral College would reflect the *nationwide* will of the voters—not the voters' separate statewide wills. Thus, the presidential electors nominated by the Republican Party in *all* states belonging to the compact

would have won election as members of the Electoral College in their states. If Colorado voters had favored the Kerry-Edwards slate in 2004, the presidential electors nominated by the Republican Party in Colorado, for example, still would have won election as members of the Electoral College in Colorado in 2004 because the specific purpose of the compact is to award enough electoral votes to win the Presidency to the presidential candidate with the most votes nationwide.

Because the compact becomes effective only when it encompasses states collectively possessing a majority of the electoral votes (i.e., 270 or more of the 538 electoral votes), the presidential slate receiving the most popular votes in all 50 States and the District of Columbia is guaranteed at least 270 electoral votes when the Electoral College meets in mid-December. Given the fact that the Bush-Cheney presidential slate received about 3,500,000 more popular votes in the 50 States and the District of Columbia in 2004 than the Kerry-Edwards slate, the compact would have guaranteed the Bush-Cheney slate a majority of the electoral votes in the Electoral College. Under the compact, the Bush-Cheney slate would have received a majority of the electoral votes even if 59,393 Bush voters in Ohio had switched to Kerry in 2004 thereby giving Kerry the most popular votes in Ohio. In contrast, under the present system, if Kerry had carried Ohio, Kerry would have received all of Ohio's 20 electoral votes and Kerry would have been elected to the Presidency with 272 electoral votes (to Bush's 266).

The first three clauses of article III of the compact are the main clauses for implementing nationwide popular election of the President and Vice President. The remaining clauses of article III of the compact deal with administrative matters and technical issues.

The fourth clause of article III of the compact requires the timely issuance by each of the compact's member states of an "official statement" of the state's "final determination" of its presidential vote.

> "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 particular deadline in this clause corresponds to the deadline contained in the "safe harbor" provision of federal law (section 5 of title 3, chapter 1 of the United States Code). The phrase "final determination" in this clause corresponds to the term used in the "safe harbor" provision. Section 5 provides:

> "If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned."

The federally established "safe harbor" date for the 2004 presidential election was Monday December 6, 2004.

The fourth clause of article III of the compact, in effect, mandates each member state to comply with the "safe harbor" deadline. As a practical matter, this clause is merely a backstop because the vast majority of states already have specific state statutory deadlines for certifying the results of presidential elections, and these existing statutory deadlines come earlier than the federal "safe harbor" date. This clause is a backstop for the additional reason that the U.S. Supreme Court in *Bush v. Gore* effectively treated the "safe harbor" date as a deadline for a state's "final determination" of its presidential election results.[3]

The word "communicated" in the fourth clause of article III of the compact is intended to permit transmission of the "official statement" by secure electronic means that may become available in the future (rather than, say, physical delivery of the official statement by an overnight courier service).

The fifth clause of article III of the compact provides:

> "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."

When the joint session of Congress counts the electoral votes on January 6th as provided in title 3, chapter 1, section 15 of the United States Code, each state's own "final determination" of its vote is considered "conclusive" as to the counting of electoral votes by Congress if it was finalized by the date established in the "safe harbor" provision of federal law (title 3, chapter 1, section 5). This section makes each state's (and, in particular, each *non-member* state's) final determination of its popular vote similarly "conclusive" when the chief election officials of the compact's member states add up the national popular vote under the terms of the compact.

The sixth clause of article III of the compact deals with the highly unlikely event of a tie in the national popular vote count:

> "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."

The purpose of the seventh clause of article III of the compact is to ensure that the presidential slate receiving the most popular votes nationwide gets what it is entitled to—namely 100% of the electoral votes of each member 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 seventh clause of article III of the compact addresses six potential situations that might prevent the national popular vote winner from receiving all of the electoral votes from a member state. These situations arise because of gaps and ambiguities in the widely varying language of state election laws concerning presidential elections.

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[3] *Bush v. Gore*. 531 U.S. 98. 2000.

First, the winning presidential slate might not be on the ballot in a particular member state. Presidential candidates (particularly third-party candidates) frequently fail to get on the ballot in a particular state because they did not comply with the state's ballot-access requirements (or perhaps did not even attempt to be on the ballot in a particular state). If a presidential candidate were to win the popular vote nationally without having qualified to be the ballot in a particular state belonging to the compact, there would no official slate of presidential electors "nominated in association with" the "national popular vote winner" in that particular member state. The remedy for this situation (and each of the other situations described below) is to employ the concept behind the current law for choosing presidential electors in Pennsylvania. Under current Pennsylvania law, each presidential nominee directly nominates the presidential electors who will run in association with the nominee's presidential slate in Pennsylvania.[4] Thus, under the seventh clause of article III of the compact, the unrepresented presidential candidate would have the power to nominate the presidential electors for the state involved. The state's presidential elector certifying official would then certify the appointment of the candidate's choices for presidential elector. Note that the nomination of the presidential electors would, in this situation, come after the November voting (i.e., after the presidential slate involved had won the nationwide popular vote and had been declared to be the "national popular vote winner").

Second, no presidential electors may be "nominated in association with" the winning presidential slate in a particular member state because of some unforeseen situation that might arise under the language of state election codes. The Republican National Committee scheduled the 2004 Republican National Convention somewhat later than usual. In particular, the convention was scheduled to be held after Alabama's statutory deadline for each political party to file the name of its presidential and vice-presidential nominees with state officials. The scheduling of the convention created the possibility that there would be no Republican presidential slate on the Alabama ballot in 2004. The problem was satisfactorily resolved when the Alabama legislature agreed to pass special legislation in early 2004 to change the state law.

Third, a full slate of presidential electors may not be nominated in association with the winning presidential slate in a particular member state. For example, in 2004, Congressman Sherrod Brown was nominated as a Democratic presidential elector in Ohio. Brown was ineligible to be a presidential elector because the U.S. Constitution provides:

> "No Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."[5]

Although Brown submitted his resignation and the Ohio Democratic Party nominated a replacement, some contended that Ohio's procedure for filling a vacancy among the list of nominees for presidential elector did not permit naming a replacement in this case because there had been no legal nomination for Brown's position in the first place and hence no vacancy to fill. This contention remained unresolved because Kerry did not carry Ohio in 2004.

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[4] The method of direct appointment of presidential electors by the presidential nominee is regularly used in Pennsylvania. Section 2878 of the Pennsylvania election code provides: "The nominee of each political party for the office of President of the United States shall, within thirty days after his nomination by the National convention of such party, nominate as many persons to be the candidates of his party for the office of presidential elector as the State is then entitled to."

[5] U.S. Constitution. Article II, section 1, clause 2.

Fourth, the possibility exists that more presidential electors might be nominated in association with a presidential candidate than the state is entitled to send to the Electoral College. Fusion voting (section 2.10) creates the possibility that two or more competing slates of presidential electors could be nominated in association with the same presidential slate.

At the present time, fusion voting is routinely and widely used in only one state—New York. Because fusion voting is so routinely used in New York, the procedures for handling fusion voting in connection with presidential elector slates are well established. In 2004, for example, voters in New York had the opportunity to vote for the Bush-Cheney presidential slate on either the Republican Party line or the Conservative Party line. The political parties sharing a presidential nominee in New York nominate a common slate of presidential electors. Thus, the Republican and Conservative parties nominated the same slate of 31 presidential electors for the 2004 presidential election. The popular votes cast for Bush-Cheney on the Republican and Conservative lines were added together and treated as votes for all 31 Republican-Conservative candidates for the position of presidential elector. The popular votes cast for Kerry-Edwards on the Democratic Party line and the Working Families Party line were similarly aggregated and attributed to the common Kerry-Edwards slate of presidential electors. In 2004, the Kerry-Edwards presidential slate received the most popular votes in New York and therefore became entitled to all of New York's 31 electoral votes. The common Kerry-Edwards slate of 31 presidential electors was therefore declared to be elected to the Electoral College in New York. New York's 2004 Certificate of Ascertainment shows this aggregation.

Fusion voting is, however, permissible at the present time under the laws of a dozen and a half other states under various circumstances. Moreover, fusion voting proposals are currently under active consideration in several other states.[6] The laws of states where fusion is not routinely used would almost certainly lead to situations in which two competing elector slates are nominated under the banner of the same presidential slate.

Fifth, there is another way in which more presidential electors might be nominated in association with a particular presidential candidate than the state is entitled to send to the Electoral College. In states permitting presidential write-ins (section 2.8), it is possible for different slates of presidential electors to be written in by the voters in association with the same write-in presidential slate. Thus, a situation akin to fusion might arise in those states in connection with presidential write-ins.

Sixth, in some states permitting presidential write-ins, it is possible that an insufficient number of presidential electors may be nominated in association with a particular presidential slate. For example, the Minnesota election code does not specifically require that a full slate of presidential electors be identified at the time of the advance filing of write-in slates (section 2.8). In fact, it requires advance filing of the name of only one presidential elector even though Minnesota has 10 electoral votes.[7] Moreover, voters in Minnesota may cast write-in votes for President without advance filing.

The eighth clause of article III of the compact enables the public, the press, and political parties to closely monitor the implementation of the compact within each member state:

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[6] There was a statewide ballot proposition in 2002 in Alaska on fusion voting. The proposition was defeated.

[7] Minnesota election law. Section 204B.09, subdivision 3.

> "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."

The unmodified term "statements" is intended to refer to both "official statements" of a state's "final determination" of its presidential vote (the fourth clause of article III of the compact) and any intermediate statements that the chief election official may obtain or consider at any time during the process of determining a state's presidential vote. The unmodified term "statement" is also intended to encompass the variety of types of documentation that may arise under the various practices and procedures of the states for officially recording and reporting their presidential votes. The Certificate of Ascertainment issued by the state in accordance with federal law,[8] for example, would be considered to be a "statement."

Because time is severely limited prior to the constitutionally mandated meeting of the Electoral College in mid-December, the term "immediately" is intended to eliminate any delays that might otherwise apply to the release of information by a public official under general public-disclosure laws.

The ninth clause of article III of the compact provides:

> "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."

This "governing" clause operates in conjunction with the first clause of article IV of the compact relating to the date when the compact as a whole first comes into effect:

> "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."

The ninth clause of article III—the "governing" clause—employs the date of July 20 of a presidential election year because the six-month period starting on this date contains the following six important events relating to presidential elections:

- the national nominating conventions,[9]
- the fall general election campaign period,
- election day on the Tuesday after the first Monday in November,
- the meeting of the Electoral College on the first Monday after the second Wednesday in December,
- the counting of the electoral votes by Congress on January 6, and
- the scheduled inauguration of the President and Vice President for the new term on January 20.

The ninth clause of article III of the compact addresses the question of whether article III governs the conduct of the presidential election in a particular year whereas the first clause of article V specifies when the compact as a whole initially comes into effect. The importance of this distinction is that it is theoretically possible that the compact could come into effect by virtue of enactment by states possessing a majority of the votes in the Electoral College (i.e., 270 or

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[8] Title 3, chapter 1, section 6 of the United States Code deals with issuance of Certificates of Ascertainment by the states (and is discussed in section 2.4).

[9] All recent national nominating conventions of the major parties have met after July 20.

more of the 538 electoral votes), but that, at some future time, the compacting states might no longer possess a majority of the electoral votes. The situation could arise in any of four ways.

First, a future federal census might reduce the number of electoral votes possessed by the compacting states so that they no longer account for a majority of the electoral votes. This could occur if the compacting states happened to lose population relative to the remainder of the country. In that event, the compact provides that the compact as a whole would remain in effect (because the compact would have come into initial effect under the first clause of article IV of the compact); however, article III (the operative article in the compact) would then not "govern" the next presidential election. If additional state(s) subsequently enacted the compact—thereby raising the number of electoral votes possessed by the compacting states above 270 by July 20 of a subsequent presidential election year—article III of the compact would then again govern presidential elections.[10]

As a second example, if one or more states withdrew from the compact and thereby reduced the number of electoral votes possessed by the remaining compacting states below 270 by July 20 of a presidential election year, the compact as a whole would remain in effect, but article III (the operative article in the compact) would not govern the next presidential election.

As a third example, if a new state were admitted to the Union and if the total number of seats in the U.S. House of Representatives (and hence the total number of electoral votes) were permanently or temporarily adjusted upwards, it is conceivable that the compacting states might no longer possess a majority of the new number of electoral votes. If the newly admitted state and/or some combination of other pre-existing state(s) subsequently enacted the compact—thereby raising the number of electoral votes possessed by the compacting states above a majority of the new number of electoral votes—article III of the compact would again govern.

As a fourth example, if the number of U.S. Representatives (set by federal statute) were changed so that the number of electoral votes possessed by the compacting states no longer accounted for a majority of the new number of electoral votes, article III of the compact would not govern the next presidential election. Proposals to change the number of members of the House are periodically floated for a variety of reasons. For example, Representative Tom Davis (R–Virginia) recently proposed increasing the number of Representatives from 435 to 437 on a temporary basis in connection with his bill to give the District of Columbia voting representation in Congress.[11]

As long as the compacting states possess a majority of the electoral votes on July 20 of a presidential election year, article III of the compact would govern the presidential election. In practice, the question as to whether the compact would govern a particular presidential election

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[10] As a practical matter, the scenario can only arise if the number of electoral votes possessed by states belonging to the compact hovers close to 270.

[11] H.R. 2043—The D.C. Fairness in Representation Act. Introduced May 3, 2005. Based on the 2000 census, Utah is the state that would become entitled, under the existing formula for distributing U.S. Representatives among the states, to the second temporary additional congressional seat. As a matter of practical politics, the two additional seats would be expected to divide equally among the Democrats and Republicans. If the Davis bill were to pass in, say, 2006, there would be 540 electoral votes in the 2008 presidential election. The Davis bill provides that the number of seats in the House would revert to 435 after the 2010 census.

would be known long before July 20 of the presidential election year. Changes resulting from the census are no surprise because the census does not affect congressional reapportionment until two years after the census.[12] A new state enters the Union only after a time-consuming congressional process. Moreover, no territories are likely to be admitted as a new state in the near future. Enactment of a state law withdrawing from an interstate compact is a time-consuming, multi-step legislative process involving the introduction of a bill, action on the bill in a committee in each house of the state legislature, debate and voting on the bill on the floor of each house, and presentation of the bill to the state's Governor for approval or disapproval.[13] In addition, new state laws generally do not take immediate effect but, instead, take effect at a particular future time.[14] Moreover, a withdrawal from the proposed compact cannot take effect during the six-month period between July 20 of a presidential election year and the subsequent January 20 inauguration date (as discussed below). Finally, enactment of any federal statutory change in the number of U.S. Representatives is a time-consuming, multi-step legislative process.

4 Explanation of Article IV—Additional Provisions

The first clause of article IV of the compact (quoted above) specifies the time when the compact initially would take effect. A state is not counted for purposes of this clause until the compact is "in effect" in the state in accordance with the terms of the state's constitution schedule specifying when state laws take effect.

The same version of a compact must, of course, be enacted by each member state. The phrase "substantially the same form" is found in many interstate compacts and is intended to permit minor variations (e.g., differences in punctuation and numbering or inconsequential typographical errors) that sometimes occur when the same law is enacted by various states.

The second clause of article IV of the compact permits a state to withdraw from the compact but provides for a "blackout" period (of approximately six months) restricting withdrawals:

> "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 purpose for the delay in the effective date of a withdrawal is to ensure that a withdrawal will not be undertaken—perhaps for partisan political purposes—in the midst of a presidential campaign or in the period between the popular voting in early November and the meeting of the Electoral College in mid-December. This restriction on withdrawals is warranted in light of the

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[12] For example, the 2000 federal census did not affect the 2000 presidential election. The results of the 2000 census affected the 2002 congressional election and the 2004 presidential election.

[13] Similarly, the citizen-initiative process is a time-consuming, multi-step process that typically involves an initial filing and review by a designated state official (e.g., the Attorney General), circulation of the petition, and voting in a statewide election (usually a November general election).

[14] State constitutions generally specify when new state laws take effect. A super-majority vote is typically required to give immediate effect to a legislative bill. The details vary from state to state.

subject matter of the proposed interstate compact.[15] The blackout period starts on July 20 of a presidential election year and would normally end on January 20 of the following year (the scheduled inauguration date). Thus, if a statute repealing the compact in a particular state were enacted and came into effect in the midst of the presidential election process, that state's withdrawal from the compact would not take effect until completion of the entire current presidential election cycle. The language used in the compact tracks the wording of the 20th Amendment. The date for the end of the present President's term is fixed by the 20th Amendment as January 20th; however, the 20th Amendment recognizes the possibility that a new President might, under certain circumstances, not have been "qualified" by that date. The blackout period in the compact ends when the entire presidential election cycle is completed under terms of the 20th Amendment.

The third clause of article IV of the compact concerns the process by which each state notifies all the other states of the status of the compact. Notices are required on three occasions—namely when the compact has taken effect in a particular state, when the compact has taken effect generally (that is, when it has been enacted and taken effect in states cumulatively possessing a majority of the electoral votes), and when a state's withdrawal has taken effect.

The fourth clause of article IV provides that the compact would automatically terminate if the Electoral College were to be abolished.

The fifth clause of article IV is a severability clause.

5 Explanation of Article V—Definitions

Article V of the compact contains definitions.

There are separate definitions for the "chief election official" and the "presidential elector certifying official" because these terms may, in some states, refer to a different official or body.

The definition of "presidential slate" in Article V of the compact is important because voters cast votes for a team consisting of a presidential and vice-presidential candidate and because the votes for each distinct team are aggregated separately in the national count under the terms of the compact. "Presidential slate" is defined as

> "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."

The above definition permits the substitution of nominees on a given presidential slate if, for example, a nominee were to die during the presidential election cycle,[16] resign from a slate,[17] or become disqualified.[18]

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[15] Delays in the effective date of withdrawals are commonplace in interstate compacts (and, indeed, in contracts in general). See section 5.15.3 for additional discussion on withdrawals from interstate compacts in general and section 8.6 for additional discussion on withdrawals from the proposed compact in particular.

[16] Horace Greeley, the (losing) Democratic presidential nominee in 1872, died between the time of the November voting and the counting of the electoral votes.

[17] Senator Thomas F. Eagleton of Missouri resigned from the 1972 Democratic presidential slate.

Because North Dakota's ballot lists only the name of the presidential candidate, the definition of "presidential slate" in the proposed compact contains a savings clause for North Dakota.

Note that this definition comports with present practice in that it treats a slate as a unit containing two particular candidates in a specified order. Ralph Nader appeared on the ballot in New York in 2004 as the presidential nominee of both the Independence Party and the Peace and Justice Party. Nader ran with Jan D. Pierce for Vice President on the Independence Party line in New York in 2004, but with Peter Miguel Camejo for Vice President on the Peace and Justice Party line. Thus, there were two different "Nader" presidential slates in New York in 2004. Each "Nader" slate had a different slate of presidential electors in New York in 2004. The votes for these two distinct "presidential slates" were counted separately. There was no fusion of votes between the Independence Party and the Peace and Justice Party in this situation because there were two distinct presidential slates and two distinct slates of presidential electors.

The definition of "statewide popular election" in article V is important. At the present time, all states conduct a "statewide popular election" for President. However, if a state were to withdraw from its voters the power to vote for President (as Massachusetts and New Hampshire did in the 1800 presidential election), there would be no popular votes available to count from that state. If there is no popular vote to count from a particular state, the "national popular vote total" would necessarily not include that state.

5.1 Possible Federal Legislation

The enactment of the proposed "Agreement Among the States to Elect the President by National Popular Vote" would provide an excellent opportunity for Congress to review existing federal laws concerning presidential elections.

The proposed "Agreement Among the States to Elect the President by National Popular Vote" is intended to be entirely self-executing. To this end, the compact identifies officials in each member state to perform the necessary tasks of obtaining the popular vote counts from all the states, adding up the votes from all the states to yield the "national popular vote total," and designating the "national popular vote winner." These tasks could be simplified by the establishment of an administrative clearinghouse for these functions. Such a clearinghouse might be established by federal law. Alternatively, the officials of the compacting states might themselves establish such a clearinghouse.

Numerous problems have been identified concerning the existing schedule of events involving the November general election, the "safe harbor" date, the timing of the meeting of the Electoral College in mid-December, the counting of the votes by Congress in early January, and the presidential inauguration scheduled for January 20.

Leonard M. Shambon, an assistant to the co-chairman of the Ford-Carter Commission on Election Reform in 2001 and a member of the advisory board to the Carter-Baker Commission in 2005, described some of the problems associated with the current schedule in a 2004 article entitled "Electoral-College Reform Requires Change of Timing."[19] Many of problems identified in the Shambon article are incorporated in H.R. 1579, introduced by Representative David Price

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[18] A presidential candidate must be a natural-born citizen.

[19] Shambon, Leonard M. 2004. Electoral-College Reform Requires Change of Timing. *Roll Call*. June 15, 2004.

(D–North Carolina) on April 12, 2005.[20] They are discussed further by Suzanne Nelson in an article entitled "Three-Month Period Imperils Presidency."[21]

In addition, Norman Ornstein, a resident scholar at the American Enterprise Institute, described additional potential problems concerning presidential elections in a 2004 article entitled "Want a Scary Scenario for Presidential Chaos? Here Are a Few."[22]

Additional issues have been raised by John C. Fortier, a resident fellow of the American Enterprise Institute and Norman Ornstein in a 2004 article entitled "If Terrorists Attack Our Presidential Elections"[23] and by Jerry H. Goldfeder, an elections law attorney in New York and Adjunct Professor at Fordham University School of Law, in an article entitled "Could Terrorists Derail a Presidential Election?"[24]

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[20] H.R. 1579—To amend title 3, United States Code, to extend the date provided for the meeting of electors of the President and Vice President in the States and the date provided for the joint session of Congress held for the counting of electoral votes, and for other purposes. Introduced April 12, 2005.

[21] Nelson, Suzanne. Three-Month Period Imperils Presidency. *Roll Call*. November 2, 2004.

[22] Ornstein, Norman. 2004. Want a Scary Scenario for Presidential Chaos? Here Are a Few. *Roll Call*. October 21, 2004

[23] Fortier, John C. and Ornstein, Norman. 2004. If Terrorists Attack Our Presidential Elections. 3 *Election Law Journal* 4. Pages 597–612.

[24] Goldfeder, Jerry H. 2005. Could Terrorists Derail a Presidential Election. 32 *Fordham Urban Law Journal* 3. May 2005. Pages 523–566.