



February 24, 2014

Answers to Questions about Presidential Vote Counting and the National Popular Vote Bill

Hon. Ed Jutila
Connecticut House of Representatives
Legislative Office Building
Hartford, CT 06106

Dear Representative Jutila,

Sean Parnell (a lobbyist engaged by the Freedom Foundation of Olympia, Washington to oppose the National Popular Vote Compact) has suggested several hypothetical scenarios in which the presidential vote count might be “incomplete, inaccurate, or simply unavailable” prior to the meeting of the Electoral College in mid-December. Under Parnell’s scenario, a rogue Secretary of State could unilaterally “frustrate” the operation of the National Popular Vote Compact by refusing to certify the statewide vote count for President from his or her state.

SHORT ANSWER:

Existing state laws, existing federal laws, and the provisions of the National Popular Vote Compact prevent Parnell’s hypothetical scenario from being successfully executed.

- Federal law requires creation and delivery of a certificate containing the popular-vote count for President *prior* to the meeting of the Electoral College. Because the refusal of a rogue Secretary of State to certify his own state’s popular-vote count would disenfranchise his own state, voters favoring the about-to-be-disadvantaged presidential candidate could readily obtain a court order (mandamus) compelling compliance with federal law.
- Independently of the above federal requirements, every state has a state law providing a statutory deadline for certification of the popular-vote count for President by a specific date (long before the meeting of the Electoral College in mid-December) at the local-level or state level or both. Voters favoring the about-to-be-disadvantaged candidate could readily obtain a court order (mandamus) compelling compliance with state law.
- Presidential elections in the United States do not depend on the gracious willingness of Secretaries of State to certify their own state’s election returns. If Parnell’s theory about the unlimited power of a rogue Secretary of State to disenfranchise his own state’s voters had any validity, any one of eight Democratic Secretaries of State could have thrown the Presidency to Al Gore in 2000. In 2000, there were eight states that George W. Bush carried that had a Democratic Secretary of State and that had enough electoral votes (five or more) which, if not cast in the Electoral College,

would have elected Al Gore as President (*even after* Bush received Florida's 25 electoral votes). Under the U.S. Constitution, winning the White House requires a majority of presidential electors *appointed*. No Secretary of State has the power (because of both state and federal laws) to prevent the popular vote from his or her state from being counted.

- In addition to existing state and federal laws, the National Popular Vote Compact gives the compacting states tools to guarantee that their electoral votes will be cast, and be cast in favor of the presidential candidate who received the most popular votes in all 50 states (and D.C.). Publicly available official counts for President exist in at least two separate places in *every* state long before the meeting of the Electoral College in mid-December, namely (1) at the level of local government where the votes were actually counted (e.g., towns in Connecticut and counties in most other states) and (2) at the state-level office to which the local vote counts were transmitted. Either set of publicly available official counts could be used.

MORE DETAILED DISCUSSION AND ANSWER:

In testimony before the Rhode Island House Judiciary Committee, Sean Parnell claimed:

“There’s little reason to believe that non-compact states will ... ensure all the votes are counted by the deadline. They may very well decide that it is in their interest to frustrate National Popular Vote, and not finalize their vote counts until well after their electors have met and voted....”

“States are not required to count all ballots by the so-called Safe Harbor date, six days before electors meet. Nor are they required to submit their Certificates of Ascertainment by that date. In fact the states are not required to send in their Certificates of Ascertainment until such time as is (I’m taking the word from U.S. Code Title 3, Section 6) “practicable” after the meeting of electors. And they are not due to the Archivist of the United States until 10 days after the electors meet....”

“In the 2012 election, the state of New York submitted its Certificate of Ascertainment on December 10th, but did not certify its election results until December 31st. In the certified results, President Obama gained more than 300,000 additional votes on top of the total given in the Certificate of Ascertainment. And Governor Romney gained more than 80,000 additional votes. Under our current system, because President Obama had very clearly won the state of New York, the 380,000 votes not included in the Certificate of Ascertainment, did not make a difference. But had NPV been in effect, and the election had been close, such as in 1960 and 2000, the vote counting delay would have been crucial...”¹

Virtually every statement above by Sean Parnell is incorrect. To understand why Mr. Parnell is mistaken, we start by discussing how votes for President are counted.

¹ Hearing on the National Popular Vote bill (Rhode Island bill H5575) at the House Judiciary Committee. Providence, Rhode Island. March 12, 2013.

How Votes for President Are Counted

Contrary to Sean Parnell's claims, *every* state has a specific statutory deadline (long before the mid-December meeting of the Electoral College) for finalizing an official count at either the local or state level and, in almost every state, at *both* levels.

Individual voters cast their votes for President in "election districts" (also called "precincts") throughout the United States.

Shortly after the polls close on Election Night, an official precinct tally is created for each candidate for each office on the ballot (including President) and for the "yes" and "no" positions for each ballot measure. If the votes are counted at the precinct location (as they are, for example, in Connecticut), the election officials at the precinct level produce an official document certifying their precinct's tally.

Precinct tallies are then typically forwarded to some unit of local government (the town level in Connecticut and the county level in most states), and officials at that level of government typically produce an official document aggregating the results from their local area.

Although the procedures vary from state to state, representatives of the candidates, political parties, proponents and opponents of ballot measures, civic groups, and the media typically all have the ability to immediately obtain the vote count for each precinct. Indeed, the almost-instant availability of precinct-level vote tallies provides the basis for the vote tallies that are posted on government web sites and broadcast by the media on Election Night.

Existing state laws also require rapid transmission of official documentation of vote tallies to some designated central location (e.g., the secretary of state). Rapid transmission is required by law in order to prevent a potentially corrupt locality from withholding its vote tallies until it learns the results from other parts of the state.

Connecticut's rapid reporting requirements are typical. Connecticut law requires the delivery of election results from the towns to the Secretary of State either

- (1) by electronic means by midnight on Election Day or
- (2) on paper by 6 PM of the next day.

Specifically, §9-314 of Chapter 148 of Title 9 of the Connecticut General Statutes (entitled "Return of list of votes by moderator") provides:

"(a) As used in this subsection, "moderator" means the moderator of each state election in each town not divided into voting districts and the head moderator in each town divided into voting districts.

The moderator shall make out a duplicate list of the votes given in the moderator's town for each of the following officers: Presidential electors, Governor, Lieutenant Governor, Secretary of the State, Treasurer, Comptroller, Attorney General, United States senator, representative in Congress, state senator, judge of probate, state representative and registrars of voters when said officers are to be chosen.

Said list shall include a statement of the total number of names on the official check list of such town and the total number checked as having voted.

The moderator may transmit such list to the Secretary of the State by facsimile machine or other electronic means prescribed by the Secretary of the State, **not**

later than midnight on Election Day. If the moderator transmits such list by such electronic means, the moderator shall also seal and deliver one of such lists to the Secretary of the State **not later than the third day after the election.** If the moderator does not transmit such list by such electronic means, the moderator shall seal and deliver one of such lists by hand either (1) to the Secretary of the State **not later than six o'clock p.m. of the day after the election,** or (2) to the state police **not later than four o'clock p.m. of the day after the election,** in which case the state police shall deliver it by hand to the Secretary of the State **not later than six o'clock p.m. of the day after the election.** Any such moderator who fails to so deliver such list to either the Secretary of the State or the state police by the time required shall pay a late filing fee of fifty dollars. The moderator shall also deliver one of such lists to the clerk of such town on or before the day after such election. The Secretary of the State shall enter the returns in tabular form in books kept by the Secretary for that purpose and present a printed report of the same, with the name of, and the total number of votes received by, each of the candidates for said offices, to the General Assembly at its next session.” [Emphasis added]

Between 6 and 10 days after Election Day, local authorities make official determinations on the eligibility to vote of provisional ballots that were cast on Election Day, and the additional official documents are created at the local level to reflect the results of including eligible provisional ballots in the precinct totals. In addition, in the process of rechecking local vote tallies, local authorities sometimes notice and correct administrative errors that may have occurred on Election Night (e.g., transposing digits, accidentally double-counting a precinct).

Then, §9-322a of Chapter 148 of Title 9 of the Connecticut General Statutes requires town clerks to file “official returns” with the Secretary of State no later than 21 days after Election Day.

Not later than twenty-one days following each regular state election, the town clerk of each town divided into voting districts shall file with the Secretary of the State a consolidated listing, in tabular format, as prescribed by the Secretary of the State, of the official returns of each such voting district for all offices voted on at such election, including the total number of votes cast for each candidate, the total number of names on the registry list, and the total number of names checked as having voted, in each such district. The town clerk of such town shall certify that he or she has examined the lists transmitted under this section to determine whether there are any discrepancies between the total number of votes cast for a candidate at such election in such town, including for any recanvass conducted pursuant to section 9-311 or 9-311a, and the sum of the votes cast for the same candidate in all voting districts in such town. In the case of any such discrepancy, the town clerk shall notify the head moderator and certify that such discrepancy has been rectified. Each listing filed under this section shall be retained by the Secretary of the State not less than ten years after the date of the election for which it was filed.

The key point is that, within a few weeks after Election Day (long before the meeting of the Electoral College in mid-December), “official returns” consisting of the precinct-level vote

tallies for President exist *in at least two separate* places in Connecticut (and, indeed, every other state), namely

- at the level of the precinct or unit of local government where the votes were actually counted, and
- at the state office to which the local vote counts were transmitted.

The task remaining at the state level is to add up the “official returns” for each candidate for each office that come in from each town.

Connecticut law is also typical in that it requires the creation of the official statewide vote count by a specific day long before the meeting of the Electoral College in mid-December. In Connecticut, that deadline is the last Wednesday in November. Specifically, §9-315 of Chapter 148 of Title 9 of the Connecticut General Statutes (entitled “Canvass for presidential electors, U.S. senator and members of Congress”) provides:

“The votes returned as cast for a senator in Congress, representatives in Congress and presidential electors shall be publicly counted by the treasurer, Secretary of the State and comptroller **on the last Wednesday of the month in which they were cast**, and such votes shall be counted in conformity to any decision rendered by the judges of the supreme court as provided in section 9-323. In accordance with the count so made, they shall, on said day, declare what persons are elected senators in the Congress of the United States or representatives in Congress, and the Secretary of the State shall forthwith notify them by mail of their election; and **they shall declare the proper number of persons having the greatest number of votes to be presidential electors** and, in case of an equal vote for said electors, shall determine by lot from the persons having such equal number of votes the persons appointed, and **the Secretary of the State shall forthwith notify them by mail of their appointment.**”
[Emphasis added]

Note that the wording “having the greatest number of votes” in §9-315 is what establishes the winner-take-all rule in Connecticut (that is, the winners are the seven candidates for the position of presidential elector who were nominated by the political party of the presidential candidate “having the greatest number of [popular] votes” in Connecticut).

The declaration in Connecticut on the last Wednesday in November required by §9-315 is what section 5 of Title 3, chapter 1 of the United States Code (the so-called “safe harbor” statute) calls the “final determination” of the presidential count.

“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.” [Emphasis added]

Note also that the statewide certification of the presidential vote count under §9-315 and the Secretary of State's notification under §9-315 is the process that identifies the winning presidential electors and gives them the right to cast Connecticut's votes in the Electoral College on the Monday after the second Wednesday in December.

Thus, the schedule of events concerning presidential elections in Connecticut in 2012 was as follows:

- November 6, 2012 — Election Day
- November 7, 2012 — 12 AM midnight deadline for counts from each town to reach the Secretary of State if sent by facsimile machine or other electronic means (as per §9-314)
- November 7, 2012 — 6 PM deadline for counts from each town to reach the Secretary of State if the counts were not already been transmitted by facsimile machine or other electronic means (as per §9-314)
- November 27, 2012 — Deadline for “official returns” to be filed with Secretary of State (as per §9-322a)
- November 28, 2012 — Last Wednesday in November — Deadline for completion of the canvass in Connecticut (as per §9-315)
- December 11, 2012 — “Safe Harbor” date (as per section 5 of Title 3, chapter 1 of the United States Code)
- December 17, 2013 — Meeting of the Electoral College

Sean Parnell envisions a hypothetical scenario in which rogue state officials unilaterally

“may very well decide that it is in their interest to frustrate National Popular Vote, and not finalize their vote counts until well after their electors have met and voted.”

If the National Popular Vote Compact had been in effect in 2012, if Connecticut were a non-compacting state, and if Connecticut officials refused to produce the official statewide tally for President required by §9-315 by November 28, 2012, Connecticut supporters of the presidential candidate who would be disadvantaged by such refusal would have had three separate bases for seeking remedial action—*any one of which would have been sufficient to favorably resolve their problem*, namely

- existing state law,
- existing federal law, and
- provisions of the National Popular Vote Compact.

State Statutory Deadlines

Connecticut's existing specific statutory deadline (and similar statutory deadlines in other states) is not just friendly advice to the Secretary of State and other ministerial officials. It is a legal requirement enforceable in court in the same way that any other state law is enforceable—that is, a court can compel a state official to execute a provision of law by mandamus (a judicial writ ordering performance of a specific action) and a court can enjoin a state official from violating the law with an injunction (a judicial writ prohibiting a specific action).

The table below shows either (1) the specific statewide statutory deadline (for 43 of the 50 states) or (2) in the case of the seven states with no statewide deadline,² the *even earlier* specific statutory deadline for the creation of documents containing the official count for President from local areas. As can be seen, all of these deadlines are long before the meeting of the Electoral College in mid-December.³

State statutory deadlines for certification of presidential elections

| State | Deadline |
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| Alabama | Alabama §17-12-17: All returns of elections required by law to be sent to the Secretary of State must, within 22 days after an election , be opened, counted, and certified in the presence of the Governor, Secretary of State, and Attorney General, or two of them |
| Alaska | Alaska Statutes §15.15.370: Completion of ballot count; certificate: When the count of ballots is completed, and in no event later than the day after the election , the election board shall make a certificate in duplicate of the results. The certificate includes the number of votes cast for each candidate, for and against each proposition, yes or no on each question, and any additional information prescribed by the director. The election board shall, immediately upon completion of the certificate or as soon thereafter as the local mail service permits, send in one sealed package to the director one copy of the certificate and the register. In addition, all ballots properly cast shall be mailed to the director in a separate, sealed package. Both packages, in addition to an address on the outside, shall clearly indicate the precinct from which they come. Each board shall, immediately upon completion of the certification and as soon thereafter as the local mail service permits, send the duplicate certificate to the respective election supervisor. The director may authorize election boards in precincts in those areas of the state where distance and weather make mail communication unreliable to forward their election results by telephone, telegram, or radio. |
| Arizona | Arizona §16-642: The governing body holding an election shall meet and canvass the election not less than six days nor more than twenty days following the election . Arizona §16-648: On the fourth Monday following a general election, the secretary of state, in the presence of the governor and the attorney general, shall canvass all offices. |
| Arkansas | State-level: Within 20 days after the election Country-level: Arkansas 7-5-701: No earlier than forty-eight (48) hours after the election and no later than the fifteenth calendar day after the election, the county board of election commissioners, from the certificates and ballots received from the several precincts, shall proceed to ascertain, declare, and certify the result of the election to the Secretary |

² Alaska, Delaware, Florida, New Hampshire, Ohio, Tennessee, Texas.

³ The District of Columbia Code does not contain a specific statutory deadline; however, because the District of Columbia is already a member of the National Popular Vote compact, the fourth clause of Article III of the compact establishes the statutory deadline on the District of Columbia (namely the federal “safe harbor” date).

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| | of State. |
| California | On the first Monday in the month following the election |
| Colorado | No later than the fifteenth day after any election |
| Connecticut | Last Wednesday in the month in which votes were cast |
| Delaware | Delaware Statutes Title 15, Chapter 57, §5701: Superior Court as board of canvass; convening and composition of Court: (a) The Superior Court shall convene in each county on the 2nd day after the general election at 10 a.m. , for the performance of the duties imposed upon it by §6 of article V of the Constitution of this State and by this chapter. Thereupon the Court, with the aid of such of its officers and such sworn assistants as it shall appoint, shall publicly ascertain the state of the election throughout the county and in the respective election districts by calculating the aggregate amount of all the votes for each office that shall have been given in all of the election districts of the county for every person voted for such office. For this purpose, the Court shall utilize the voting machine recording tapes, voting machine certificates, absentee vote tally sheets and write-in vote tally sheets for each election district provided by the Prothonotary and the Department of Elections for its county, whose representatives shall sit as observers and assistants to the Court during said calculation of the vote. |
| Florida | Florida Statutes Title IX §102.071 Conducting elections and ascertaining the results: Tabulation of votes and proclamation of results.— The election board shall post at the polls, for the benefit of the public, the results of the voting for each office or other item on the ballot as the count is completed. Upon completion of all counts in all races, a certificate of the results shall be drawn up by the inspectors and clerk at each precinct upon a form provided by the supervisor of elections which shall contain the name of each person voted for, for each office, and the number of votes cast for each person for such office; and, if any question is submitted, the certificate shall also contain the number of votes cast for and against the question. The certificate shall be signed by the inspectors and clerk and shall be delivered without delay by one of the inspectors, securely sealed, to the supervisor for immediate publication. All the ballot boxes, ballots, ballot stubs, memoranda, and papers of all kinds used in the election shall also be transmitted, after being sealed by the inspectors, to the supervisor's office. Registration books and the poll lists shall not be placed in the ballot boxes but shall be returned to the supervisor. Title IX §102.112 Deadline for submission of county returns to the Department of State. (2) Returns must be filed by 5 p.m. on the 7th day following a primary election and by noon on the 12th day following the general election. |
| Georgia | §21-2-493As the returns from each precinct are read, computed, and found to be correct or corrected as aforesaid, they shall be recorded on the blanks prepared for the purpose until all the returns from the various precincts which are entitled to be counted shall have been duly recorded; then they shall be added together, announced, and attested by the assistants who made and computed the entries respectively and shall be signed by the superintendent. The consolidated returns shall then be |

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| | certified by the superintendent in the manner required by this chapter. Such returns shall be certified by the superintendent not later than 5:00 P.M. on the seventh day following the date on which such election was held and such returns shall be immediately transmitted to the Secretary of State. |
| Hawaii | No later than 4:30 p.m. on the last day in the month of the election or as soon as returns received from all counties |
| Idaho | County-level: §34-1205: The county board of commissioners shall be the county board of canvassers and the county clerk shall serve as their secretary for this purpose. The county board of canvassers shall meet within seven (7) days after the primary election and within ten (10) days after the general election for the purpose of canvassing the election returns of all precincts within the county. County-level: §34-1205: Immediately after the general election canvass, the county clerk shall issue a certificate of election to the county candidates who received the highest number of votes for that particular office and they shall be considered duly elected to assume the duties of the office for the next ensuing term. State-level: On or before the second Wednesday in December next after such election |
| Illinois | Within 31 days after holding the election |
| Indiana | County-level: IC 3-12-5-7: Not later than noon on the second Monday following an election, each circuit court clerk shall prepare a certified statement under the clerk's seal of the number of votes received by each candidate for ... federal office. State-level: Upon receipt of the certified statements from the circuit court clerks under section 6 of this chapter and not later than noon of the last Tuesday in November , the election division shall tabulate the number of votes cast for each candidate for ... presidential electors. |
| Iowa | Precinct-level: §43.46: The precinct election officials shall deliver all election supplies, by noon of the day after the close of the polls, to the commissioner who shall carefully preserve them and deliver the returns in the condition in which received except as is otherwise required by sections 50.20 to 50.22, to the county board of supervisors State-level: At the expiration of 10 days after the completed canvass |
| Kansas | State-level: Before the first Wednesday in December next after such election |
| Kentucky | County-level: §117.355: Within thirty (30) days after any primary or general election, the county board of elections shall transmit the information required by KRS 117.274(4) to (7) State-level: State Board shall meet to count when all the returns are in or no later than the third Monday after the election |
| Louisiana | Parish-level: RS 18:574: The board shall complete the compilation of the election returns and file one copy of the compiled statement with the clerk of court no later than 4:00 p.m. on the fourth day after the election. One copy of the compiled statement shall be postmarked no later than 12:00 noon on the fifth day after the election and mailed to the secretary of state. The clerk of court shall transmit the election returns as shown by the compiled statement from the parish |

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| | <p>board of election supervisors to the secretary of state no later than 12:00 noon on the fifth day after the election. In a parish containing a municipality with a population of three hundred thousand or more, the parish board of election supervisors shall transmit the election returns as shown by their compiled statement to the secretary of state no later than 12:00 noon on the fifth day after the election. Failure to comply with these time limits shall not void the election.</p> <p>State-level: On or before the 12th day after the general election</p> |
| Maine | <p>Local-level: 21-A §711: The clerk shall record the attested copies of the election return with the Secretary of State within 3 business days after election day.</p> <p>State-level: Within 20 days after the election.</p> |
| Maryland | <p>Within 35 days of the election</p> |
| Massachusetts | <p>Within 10 days after they have been transmitted to the Secretary of State</p> |
| Michigan | <p>County-level: The board shall then proceed without delay to canvass the returns of votes cast for all candidates for offices [...] and shall conclude such canvass at the earliest possible time and in every case within 14 days</p> <p>State-level: On or before the 20th day after the election and no later than the 40th day</p> |
| Minnesota | <p>County-level: §204C.37 The copy of the canvassing board report and the precinct summary statements must be sent by express mail or delivered to the secretary of state. If the copy is not received by the secretary of state within ten days following the applicable election, the secretary of state shall immediately notify the county auditor, who shall deliver another copy to the secretary of state by special messenger.</p> <p>State-level: On the second Tuesday after each state general election the state canvassing board shall open and canvass the returns</p> |
| Mississippi | <p>County-level: The commissioners of election shall, with in ten (10) days after the general election, transmit to the Secretary of State, to be filed in his office, a statement of the whole number of votes given in their county and the whole number of votes given in each precinct in their county</p> <p>State-level: Within 30 days after the date of the election</p> |
| Missouri | <p>Local-level: §115.507.1: Not later than the second Tuesday after each election at which the name of a candidate for nomination or election to the office of president of the United States, United States senator, representative in Congress, governor, lieutenant governor, state senator, state representative, judge of the circuit court, secretary of state, attorney general, state treasurer, or state auditor, or at which an initiative, referendum, constitutional amendment or question of retaining a judge subject to the provisions of article V, section 29* of the state constitution, appears on the ballot in a jurisdiction, the election authority of the jurisdiction shall mail or deliver to the secretary of state the abstract of the votes given in its jurisdiction, by polling place or precinct, for each such office and on each such question.”</p> <p>§115.507.4: “Not later than the second Tuesday after the election, the verification board shall issue a statement announcing the results of each election held within its jurisdiction and shall certify the returns to each political subdivision and special district submitting a candidate or</p> |

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| | question at the election.”The clerks shall, within eight days after they receive the returns, certify and transmit them to the Governor |
| Montana | Local-level: §13-15-301: Immediately after the returns are canvassed, the election administrator shall file the pollbooks, election records, and papers delivered to the board of canvassers... State-level: §13-15-502: Within 20 days after the election , or sooner if the returns are all received, the state auditor, superintendent of public instruction, and attorney general shall meet as a board of state canvassers in the office of the secretary of state and determine the vote. The secretary of state shall serve as secretary of the board, keep minutes of the meeting of the board, and file them in the official records of his office. |
| Nebraska | County-level: §32-1034: Immediately upon the completion of the canvass by the county canvassing board, the election commissioner or county clerk shall prepare an abstract of votes for all officers and issues certified to the election commissioner or county clerk by the Secretary of State.” §32-1035: “If the Secretary of State has not received the abstract of votes from any county by the third Monday after the day of election, the Secretary of State may send a messenger to the election commissioner or county clerk of such county at the expense of such county.” State-level: Within 40 days |
| Nevada | County-level: §293.387.3: The county clerk shall, as soon as the result is declared, enter upon the records of the board an abstract of the result and [...] transmit them to the Secretary of State not more than 7 working days after the election . State-level: Must be completed within 20 days |
| New Hampshire | §659:73 General Content of Return. The election return forms shall be submitted on paper and electronically immediately after the completion of the vote count in the manner prescribed by the secretary of state. The return of votes shall include, but not be limited to: (a) The name of each candidate printed on the ballot and the number of votes that candidate received for the listed office including any write-in votes for the same office on the same ballot where the voter did not mark the printed candidate name. §659:74 Preparing Return. The town or ward clerk shall prepare the election return in duplicate on the forms supplied by the secretary of state and shall sign and shall certify such returns. §659:75 Forwarding; Retaining Copies of Return. One copy of the election return shall be forwarded by the town or ward clerk to the secretary of state in both paper and electronic form no later than 8:00 a.m. on the day following a state election unless the secretary of state orders them at a different time and date. The other shall be kept by the town or city clerk in accordance with RSA 33-A:3-a and shall be open to public inspection at reasonable times. §659:81 Canvass and Declaration Generally. Except as provided in §RSA 659:82, when the secretary of state has received the returns for an office from all towns or wards comprising the elective district for that |

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| | office, he shall examine, record and total such returns and shall declare elected to the office the same number of persons as the number of officers to which the district is entitled; provided that those persons declared officers-elect shall be those persons who received the highest number of votes cast for said office. |
| New Jersey | No later than the 28 th day after the election |
| New Mexico | County-level: §1-13-13: The county canvassing board shall complete the canvass of the returns and declare the results within ten days from the date of the election. State-level: On the third Tuesday after each election, state board will meet to canvass and declare the results of the election |
| New York | §9-214: The board of elections shall transmit ... a certified copy of the statement of the canvassing board relating to the offices of electors of president and vice president of the United States ... within twenty-five days after the election |
| North Carolina | County-level: §163-182.5: The county board of elections shall meet at 11:00 A.M. on the tenth day after every election held on the same day as a general election in November of the even-numbered year |
| North Dakota | Within ten days and before 4 p.m. on the tenth day following any general election |
| Ohio | Ohio Revised Code, Title 32, §3505.32: "Boards of elections may begin the official canvass of the general election no earlier than the 11th day after the election, and must begin no later than the 15th day after the election. Each board of elections must complete its official canvass and certify no later than the 21st day after the election. |
| Oklahoma | §26-7-136: The county election board shall use such precinct returns to certify the results of such election for county officers and questions and shall transmit electronically or in writing as prescribed by the Secretary of the State Election Board after 5 p.m. on Friday following the election to the State Election Board the completed county returns for all state officers and questions. ... The State Election Board shall use such county returns to certify the results of such election for all state officers and questions after 5 p.m. on Tuesday next succeeding the election. |
| Oregon | County-level: §255.295: Not later than the 20th day after the date of an election , the county clerk shall prepare an abstract of the votes and deliver it to the district elections authority State-level: No later than the 30 th day after any election |
| Pennsylvania | 2004 Act 97 §302 (k): No later than the third Monday following the primary or election |
| Rhode Island | State board shall commence the canvass at 9:00 p.m. on election day and shall continue and complete the tabulation with all reasonable expedition |
| South Carolina | County-level: §7-17-20The county board of canvassers, respectively, shall then proceed to canvass the votes of the county and make such statements of such votes as the nature of the election shall require no later than noon on the Saturday next following the election and at such time shall transmit to the State Board of Canvassers the results of their findings." State-level: State board shall meet within 10 days after any general election |
| South Dakota | County-level §12-20-36: Within six calendar days after the close of |

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| | <p>any election, the officer in charge of the election, with the assistance of a majority of the governing board as the canvassing board, shall make the canvass of votes.”</p> <p>State-level §112-20-47 “Within seven days after the day of election, the Board of State Canvassers shall open and examine the returns from each county. However, if the returns from each county have not been received, the board may adjourn, not exceeding ten days, for the purpose of obtaining the returns from each county. The board shall proceed with the canvass after the returns have been received from each county.”</p> |
| Tennessee | <p>§2-8-101 (a) Meeting of county election commission following election: “The county election commission shall meet at its office upon completion of its duties under §2-8-104, but no later than the third Monday after the election to compare the returns on the tally sheets, to certify the results as shown by the returns in writing signed by at least the majority of them, and to perform the duties prescribed by this chapter.</p> |
| Texas | <p>§68.032 Delivery of Returns and Voted ballots: The copy of the returns required to be delivered to the county clerk shall be delivered not later than two hours, or as soon thereafter as practicable, after the closing of the polls or after the last person voted, whichever is later. . .</p> <p>§68.034 Transmission of Results to Secretary of State. The county clerk shall transmit periodically, by telephone or other electronic means, to the secretary of state the results for the races being tabulated by the secretary. The results shall be transmitted continuously until complete. (b) The county clerk shall transmit the complete or partial results of the early voting for the appropriate races at 7 p.m. on election day. If only partial results are available, the results shall be transmitted periodically until complete.</p> |
| Utah | <p>County-level §20A-4-301 (ii)(b): The board of county canvassers shall meet to canvass the returns at the usual place of meeting of the county legislative body, at a date and time determined by the county clerk that is no sooner than seven days after the election and no later than 14 days after the election.</p> <p>State-level: Fourth Monday of November at noon</p> |
| Vermont | <p>Canvassing committee shall meet at 10:00 A.M. one week after the day of the election</p> |
| Virginia | <p>Fourth Monday in November, if the Board is unable to ascertain results on that day, the meeting shall stand adjourned for not more than three days</p> |
| Washington | <p>Not later than 30 days after the election</p> |
| West Virginia | <p>County-level §3-6-9 “(a) The commissioners of the county commission shall be ex officio a board of canvassers and, as such, shall keep in a well-bound book, marked "election record", a complete record of all their proceedings in ascertaining and declaring the results of every election in their respective counties.</p> <p>(1) They shall convene as the canvassing board at the courthouse on the fifth day (Sundays excepted) after every election held in their county, or in any district of the county, and the officers in whose custody the</p> |

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| | ballots, pollbooks, registration records, tally sheets and certificates have been placed shall lay them before the board for examination.” |
| Wisconsin | County-level §7.60(5)(a): The county clerk shall deliver or transmit the certified statement to the government accountability board no later than 7 days after each primary except the September primary, no later than 10 days after the September primary and any other election except the general election, and no later than 14 days after the general election. State-level: The first day of December following a general election |
| Wyoming | County-level §22-16-103 (c)(i): The county canvassing board shall: Meet as soon as all returns have been received and abstracted, but if any provisional ballots have been cast in the county, not before the time has passed for provisional voters to document their eligibility to register or to vote. The board shall meet at a time and place designated by the county clerk, but no later than the first Friday following the election” §22-16-107 “The certified results of the county canvass shall be posted in the office of the county clerk and copies made available to interested persons.” |

Federal Statutory Deadlines

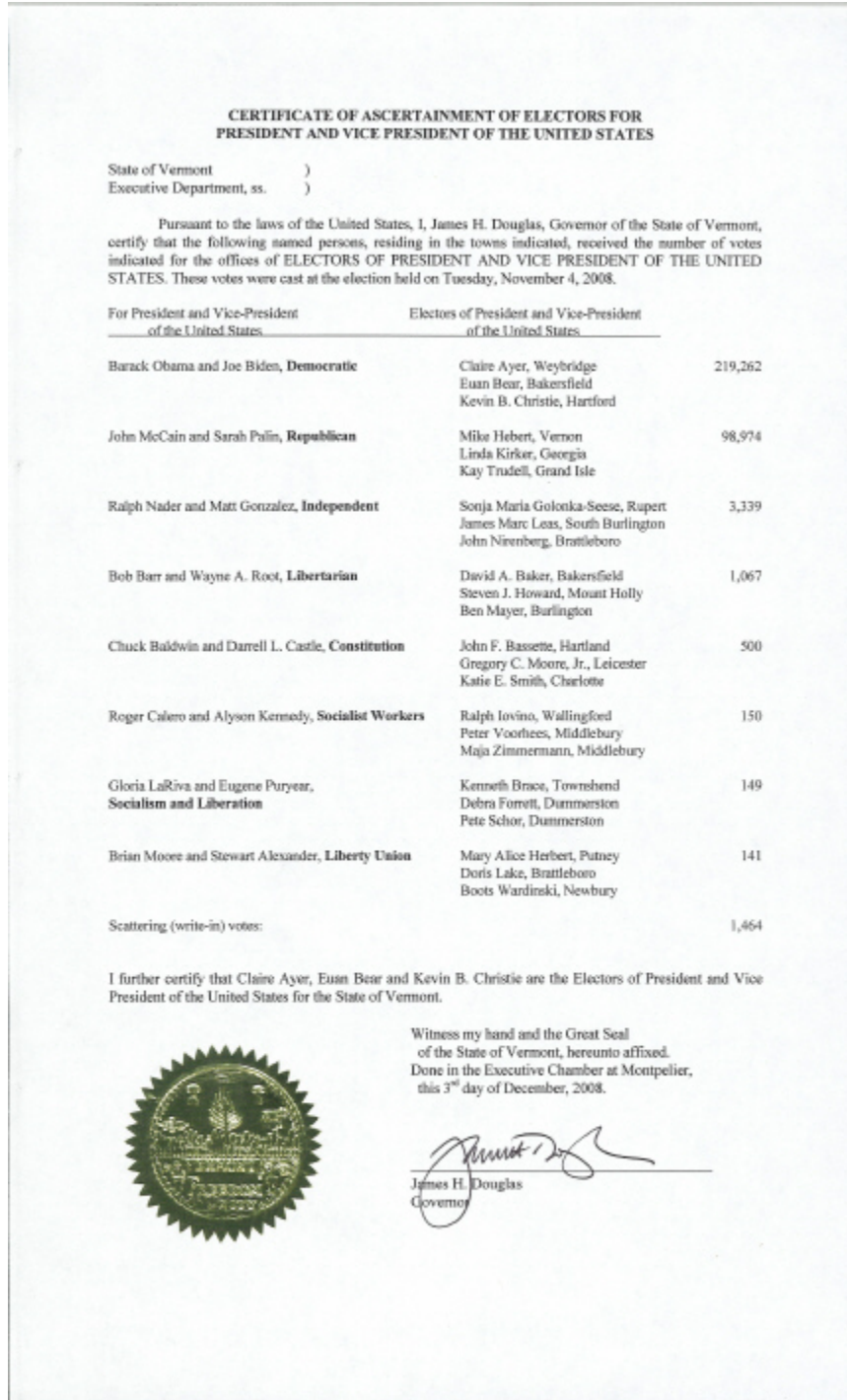
Federal law requires completion of the vote tally for President *prior* to the meeting of the Electoral College. Specifically, federal law requires the *delivery* to the presidential electors of six copies of a “Certificate of Ascertainment” containing the official count (the “canvass”) of the number of popular votes cast for each candidate for President prior to their meeting. Indeed, the “Certificate of Ascertainment” containing the official count is the evidence supporting the presidential electors’ right to vote at the meeting of the Electoral College in mid-December.

Section 6 of Title 3 of the United States Code requires:

“It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States **a certificate of such ascertainment** of the electors appointed, setting forth the names of such electors and **the canvass or other ascertainment under the laws of such State of the number of votes given or cast** for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to **deliver to the electors of such State, on or before the day on which they are required by section 7 of this title to meet, six duplicate-originals of the same certificate under the seal of the State;** and if there shall have been any final determination in a State in the manner provided for by law of a controversy or contest concerning the appointment of all or any of the electors of such State, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate under the seal of the State to the Archivist of the United States a certificate of such determination in form and manner as the same shall have been made; and the certificate or certificates so received by the Archivist of the United States shall be preserved by him for one year and shall be a part of the public records of his office and shall be open to public inspection; and the Archivist of the United States at the first meeting of Congress thereafter

shall transmit to the two Houses of Congress copies in full of each and every such certificate so received at the National Archives and Records Administration. [Emphasis added]

For illustration, Vermont's 2008 Certificate of Ascertainment is shown below:



Sean Parnell envisions a hypothetical scenario in which the national popular vote count for President might be “unavailable” prior to the meeting of the Electoral College.

“There’s little reason to believe that non-compact states will ... ensure all the votes are counted by the deadline. They may very well decide that it is in their interest to frustrate National Popular Vote, and **not finalize their vote counts until well after their electors have met and voted...**”⁴ [Emphasis added]

Parnell apparently believes that the rogue state official can have his cake and eat it too.

Parnell does not seem to realize that the presidential electors in the rogue state official’s own state cannot cast their votes in the Electoral College until they have been certified by their own state as having been elected to the position of presidential elector. If the vote counts are not certified in the rogue official’s own state, then there would be no presidential electors in the rogue official’s own state. It is the numerical vote count contained in the Certificate of Ascertainment that establishes the presidential electors’ right to vote. It is thus impossible to “finalize [the] vote count until well after their electors have met and voted.” In short, the rogue official’s attempt to “frustrate” the National Popular Vote Compact means disenfranchising the voters of his own state.

Needless to say, voters in the rogue official’s own state (and, in particular, voters who voted for the presidential candidate who would be disadvantaged by the rogue official) would object to being disenfranchised on the whim of the rogue official. A ministerial official does not have the power to negate the votes of every voter in his state by preventing the casting of a state’s electoral votes simply because he wants to “frustrate” the National Popular Vote Compact. These voters in the rogue official’s own state would cite Section 6 of Title 3 of the United States Code requiring the delivery of six copies of the Certificate of Ascertainment to the presidential electors *prior* to the meeting of the Electoral College because it is this certification that enables the presidential electors to take their seats and vote in the Electoral College.

In addition, Sean Parnell both selectively and inaccurately quoted the above federal law (section 6 of Title 3 of the United States Code) in his testimony to the Rhode Island House Judiciary Committee:

“States are not required to count all ballots by the so-called Safe Harbor date, six days before electors meet. Nor are they required to submit their Certificates of Ascertainment by that date. In fact the states are not required to send in their Certificates of Ascertainment until such time as is (I’m taking the word from U.S. Code Title 3, Section 6) “practicable” after the meeting of electors. And they are not due to the Archivist of the United States until 10 days after the electors meet.”⁵

Parnell’s testimony is misleading because he *selectively* focuses only on the *extra seventh copy* of a state’s presidential count that is to be “sent in” to the National Archivist. In fact, no one cares when this seventh copy is “sent in” to the Archivist, much less when the Archivist actually receives it. The important point is that section 6 specifically requires six *original copies* of the

⁴ Hearing on the National Popular Vote bill (Rhode Island bill H5575) at the House Judiciary Committee. Providence, Rhode Island. March 12, 2013.

⁵ Hearing on the National Popular Vote bill (Rhode Island bill H5575) at the House Judiciary Committee. Providence, Rhode Island. March 12, 2013.

Certificate of Ascertainment be *delivered* to the state’s presidential electors *prior* to the meeting of the Electoral College.

In addition, Parnell’s testimony is misleading because he *deceptively* misquotes the federal statute concerning the irrelevant seventh copy of the Certificate of Ascertainment. The statute does not say that the states are required to send in their Certificates of Ascertainment at “such time as is ... ‘practicable’ *after the meeting of electors.*” Instead, the statute actually says that the Certificates are to be sent in “as soon as practicable *after [the final] determination*” of the presidential count. The “final determination” is an event that typically occurs far more than six days *before* the meeting of electors (on November 28, 2012, in the case of Connecticut). By misquoting the statute, Parnell tries to convey the impression that the critical event is when the irrelevant seventh copy of the Certificate of Ascertainment is dropped in the mail, whereas the critical event is the state’s “final determination” of the vote count.

Tools Provided by the National Popular Vote Compact

Sean Parnell seems to think that the states belonging to the National Popular Vote Compact would sit passively by while a rogue state official unilaterally attempted to “frustrate” the casting of their state’s electoral votes by failing to finalize the presidential vote from the rogue official’s state.

Indeed, the political context for Sean Parnell’s hypothetical scenario would be that the rogue state official was attempting to throw the election to the *second-place* presidential candidate after a nationwide presidential campaign had been run, over a period of many months, and in which the candidates and the public all thought that the winner would be the candidate who received the most popular votes in all 50 states (and D.C.).

In fact, the National Popular Vote Compact arms the compacting states with ample tools to guarantee that all of their electoral votes will indeed be cast, and be cast in favor of the presidential candidate who received the most popular votes in all 50 states (and D.C.).

The first clause of Article III of the National Popular Vote 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.” [Emphasis added]

As will be seen below, in normal circumstances the National Popular Vote Compact gives the compacting states no discretion as to how to “determine” the vote count for a particular state, whereas, in other circumstances, the compacting states have a certain amount of discretion.

Compacting States

For compacting states, the process is especially straight-forward. The fourth clause of Article III of the National Popular Vote Compact requires issuance by a compacting state of an “official statement” of the state’s “final determination” of its presidential vote prior to the federal “safe harbor” date.

“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 above six-day deadline 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 with the term used in section 5 of federal law.

Thus, the fourth clause of Article III of the compact is a state statutory requirement that each compacting state must comply with the federal “safe harbor” deadline. Although the National Popular Vote Compact does not specify the exact form of the “official statement,” the “official statement” would undoubtedly, in practice, simply be an additional copy of the Certificate of Ascertainment that the state is already required to issue under section 6 of Title 3, chapter 1 of the United States Code.

Non-Compacting States

The process of determining the presidential vote count for non-compacting states would be entirely routine on occasions when the officials of non-compacting states comply with their own state law and comply with sections 5 and 6 of federal law—as, indeed, 100% of the states have done since enactment of the existing federal procedures shortly after the disputed 1876 presidential elections.

If the officials of non-compacting states comply with state and federal law and issue their Certificate of Ascertainment, the fifth clause of Article III of the National Popular Vote Compact gives the compacting states *no discretion* as to how to “determine” the presidential vote count from those states:

“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.”

[Emphasis added]

In other words, the National Popular Vote Compact gives deference—in the same way as the current system gives deference—to each state’s “final determination” made by the “safe harbor” date (six days before the meeting of the Electoral College).

However, the National Popular Vote Compact does not depend on any particular piece of paper. The officials administering the National Popular Vote Compact in the compacting states have a statutory obligation to ensure that their own state’s electoral votes are cast, and that they are cast in favor of the presidential candidate who received the most popular votes in all 50 states (and D.C.). The “final determination” of a state’s presidential vote does not have to come in the form of the Certificate of Ascertainment. It could just as well be evidenced by, say, the official minutes of the state board of canvassers or any other official document from the state containing the vote count.

As previously mentioned, within a couple of days after Election Day, *official documents* containing the vote tallies of a presidential election exist in at least two separate places in every state, namely

- at the level of local government where the votes were actually counted, and
- at the state office to which the local returns were transmitted.

Thus, if a rogue state official attempted to withhold certification of the statewide vote tally in order to attempt to throw the presidential election to the *second-place* presidential candidate, the officials administering the National Popular Vote Compact in the compacting states would undertake their own good faith effort to “determine” the presidential vote count in the rogue state official’s state.

One option available to officials administering the National Popular Vote Compact in the compacting states would be to acquire the *official* documents containing the local-level vote tallies that are already residing at the state’s designated central location in compliance with state law.

A second option available to officials administering the National Popular Vote Compact in the compacting states would be to acquire the *official* documents from the intermediate level of government that aggregated the election returns from the individual precincts in its area. In most states, this would be the minutes from the country board of canvassers (or equivalent body). In Connecticut, it would be the documents created by the town clerks no later than 21 days after the election (as per §9-322a).

It should be emphasized that the above theoretical options are never going to occur, because federal law alone precludes Sean Parnell’s hypothetical scenario in which a rogue state official attempted to throw the presidential election to the *second-place* presidential candidate by unilaterally trying to withhold his state’s “official” vote tally.

However, as a parlor game, let us consider what would happen under these unlikely scenarios.

The rogue state official would undoubtedly whine that this process was “less official” than usual.

The rogue state official (or, more precisely, allies of the second-place candidate located in the compacting states) would contemplate suing the officials of the compacting states in order to dispute their use of one of the above options. Of course, where there is no harm, there is no foul. A “less official” official vote tally is still official. More importantly, a “less official” official vote tally is only harmful if it is inaccurate in some way—in particular, if it harms a particular presidential candidate. The burden of proof on potential plaintiffs would be to demonstrate either (1) that the officials administering the compact incorrectly added up the numbers found in the official documents or (2) that the official numbers were incorrect. We can safely assume that officials administering the compact know how to add. Thus, anyone contemplating a lawsuit would immediately realize that the necessary evidence of the correct vote tally from the rogue official’s non-compacting state would be the official certification of the vote tally that the rogue official was unilaterally withholding for partisan purposes. To win their lawsuit and stop the official administering the compact from “determining” the vote count under one of the above options, the plaintiffs would need the rogue official to release the official presidential vote count! At that point, the officials administering the National Popular Vote Compact would, of course, use it.

Enhanced Value of Votes Cast in the Rogue Official’s State

The vote cast by a voter in a non-compacting state acquires additional value because of the existence of the National Popular Vote Compact (even though that voter’s state has not adopted the compact). Specifically, a vote cast by a voter in a non-compacting state counts towards the national popular vote total which will determine how the compacting states cast their electoral

votes. Given that the legislature of the rogue state has permitted its voters to vote for President, those voters have an inherent right to have the full value of their vote reflected in the choice of the President—that is, they have a right to have their state’s vote count finalized in a timely manner so that their vote can help determine how the compacting states cast their electoral votes.

Thus, voters of the rogue official’s state could sue to force the rogue official to issue an “official” count for their state. The U.S. Supreme Court has long recognized that a state need not permit its voters to vote for President; however,

“when the state legislature vests the right to vote for President in its people, the right to vote ... is fundamental.”⁶

The 2000 Presidential Election

It should be noted that the nation has historical experience indicating that there is no such thing as rogue state officials who unilaterally attempt to prevent the casting of their own state’s electoral votes for partisan reasons.

It should be noted that the U.S. Constitution does not require that a candidate obtain a majority of the electoral votes (that is, 270 of 538) in order to be elected President. Instead, the 12th Amendment states:

The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors **appointed.**” [Emphasis added]

Thus, if a state fails to appoint its presidential electors, the number of electoral votes required for election is reduced.⁷

In 2000, George W. Bush received 271 electoral votes (counting the 25 that he received from Florida) and Al Gore won 267 electoral votes. A majority of 270 (of 538) was required for election.

In 2000, there were eight states that George W. Bush carried under the current state-by-state winner-take-all system; that had a Democratic Secretary of State; and that had enough electoral votes (five or more) which, if not cast, would have elected Al Gore as President (even after Bush received all 25 of Florida’s electoral votes). Those states were Al Gore’s home state of Tennessee, Bill Clinton’s home state of Arkansas, Georgia, Kentucky, Mississippi, Missouri, North Carolina, and West Virginia.

If Sean Parnell’s hypothetical scenario were legally permissible, it would have occurred in 2000 under the *current* state-by-state winner-take-all system.

⁶ *Bush v. Gore*. 2000. 146 U.S. 1, 35.

⁷ There have been several occasions when a state failed to appoint its presidential electors. For example, New York did not appoint presidential electors in 1789 because the two houses of the legislature could not agree on how to appoint them. Notably, the Southern states did not appoint presidential electors in the 1864 election during the Civil War.

The delayed vote count in New York in 2012 due to Hurricane Sandy

In his testimony to the Rhode Island House Judiciary Committee, Sean Parnell inaccurately described the unique “no harm–no foul” situation that developed in New York state after Hurricane Sandy in 2012.

“In the 2012 election, the state of New York submitted its Certificate of Ascertainment on December 10th, but did not certify its election results until December 31st. In the certified results, President Obama gained more than 300,000 additional votes on top of the total given in the Certificate of Ascertainment. And Governor Romney gained more than 80,000 additional votes. Under our current system, because President Obama had very clearly won the state of New York, the 380,000 votes not included in the Certificate of Ascertainment, did not make a difference. But had NPV been in effect, and the election had been close, such as in 1960 and 2000, the vote counting delay would have been crucial...”⁸

The facts are that, just before Election Day in 2012, Governor Cuomo issued an executive order permitting any voter in the federally-declared disaster area (New York City and suburbs) to cast a provisional ballot at *any* polling place in the state. The result was 400,629 provisional ballots—about four times the state’s usual number of provisional ballots. Under the best circumstances, counting provisional ballots is a time-consuming and labor-intensive task. Normally provisional ballots are cast in the voter’s own precinct (or occasionally in a neighboring precinct). Because these 400,629 voters were scattered around the state, most of these 400,629 paper ballots did not contain the names of candidates for congressional, state legislative, judicial, and local offices appropriate for the voter’s actual home precinct. Thus, it was necessary to make a separate determination, office-by-office, of the voter’s eligibility to vote for each of these 400,629 provisional ballots. For example, if the voter was temporarily living somewhat close to his actual home, he might still be in his own congressional district, but not in his own state legislative district. It was clear on Election Night that 400,629 votes in New York could not possibly affect Obama’s winning New York’s electoral votes (or, for that matter, Obama’s nationwide lead of several million votes).

In this “no harm–no foul” situation (with no aggrieved or affected party), the bipartisan State Board of Elections decided not to divert governmental personnel who were already stretched thin because of urgent hurricane relief to the task of unraveling the complicated situation created by the unexpected 400,629 provisional ballots. Instead, they approved a vote count prior to the meeting of the Electoral College that did not include the 400,629 provisional ballots. A few weeks later, the Board issued a corrected count that included the 400,629 provisional ballots.

Douglas A. Kellner, Co-Chair of the New York State Board of Elections has stated:

“If the final New York count had been required to determine the identity of the President, the New York State Board of Elections would have accelerated its official count—regardless of whether the outcome of the election was being determined by the state-level winner-take-all rule or the national popular vote.”

⁸ Hearing on the National Popular Vote bill (Rhode Island bill H5575) at the House Judiciary Committee. Providence, Rhode Island. March 12, 2013.

In other words, if the 400,629 provisional ballots had been relevant to determining the identity of the President—under either the current system (if New York had been a closely divided “battleground” state) or under the National Popular Vote Compact (if the nationwide vote was closely divided)—the Board would have done the obvious thing and deployed the required number of personnel to promptly count all the votes.

On the other hand, if the National Popular Vote Compact had been in effect in November 2012, the New York State Board of Elections conceivably could have made the same decision that it actually made in the unique situation in 2012, namely to defer counting of the 400,629 provisional ballots (because these ballots would not possibly have affected Obama’s nationwide lead of almost five million votes).

Of course, the current state-by-state winner-take-all system is more susceptible to a result-altering problem created by a hurricane than the national popular vote system. The 2000 presidential election was determined by 537 votes in a hurricane-prone battleground state (Florida). If Hurricane Sandy had hit a closely-divided “battleground” state that was crucial in determining the national outcome under the current state-by-state winner-take-all system (such as North Carolina, Pennsylvania, Virginia, or Florida), state officials would not have had the option of deferring the count of their provisional ballots.

Please call me if you have any questions or would like to discuss this matter further.

Yours truly,

A handwritten signature in cursive script that reads "John Koza".

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