



THE UNIVERSITY *of*  
NEW MEXICO

**REPORT OF THE CITIZEN PANEL  
THE ELECTORAL COLLEGE AND THE NATIONAL POPULAR VOTE PLAN**

**A STUDY COMPLETED BY THE  
CENTER FOR THE STUDY OF VOTING, ELECTIONS AND DEMOCRACY**

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## **EXECUTIVE SUMMARY**

During the 2011 regular session of the New Mexico State Legislature, the House of Representatives passed House Memorial 56, which called on New Mexico's Secretary of State to "study and compare the current Electoral College system and the national popular vote system" and present her findings to the New Mexico Legislature. The University of New Mexico Center for the Study of Voting, Elections and Democracy (C-SVED) took this opportunity to educate and assist the public and legislative leaders in understanding the costs and benefits of the proposed national popular vote system and to present its conclusions to those engaged in this national debate.

C-SVED formed a Citizen Panel that met three times to discuss the current implementation of the Electoral College and how that would change under a national popular vote system. Citizen Panel members included state legislators, election administrators (in particular county clerks), interest groups focused on election work (including the League of Women Voters and Common Cause, and Verified Voting of New Mexico), prominent members of different New Mexico communities including the Hispanic and Native American communities, and students from the University of New Mexico and New Mexico State University.

### **FIRST MEETING**

The first meeting we examined the Constitution and federal law to understand the legal system under which the presidential electors operate. Drafters of the Constitution established electors because of three principal concerns. These include 1) the threat of mob rule by an uneducated and unformed population, 2) the threat of tyranny through a concentration of power in the Executive Branch, and 3) southern states' concerns that northern states' larger population might overwhelm them and bring an end to slavery. Thus, a college of Electors was created, representing states in a roughly proportional manner, that have the necessary stature, character and information to make decisions about the quality of the presidential contenders. Electors would never be a standing body of the same persons and were prohibited from holding office as federal legislators.

Electors are selected by states in whatever manner states determine. As conceived by the founding fathers, the US Constitution confers no right on US citizens to vote for President. This raises the question whether such a right ought to exist. Since the challenges and threats of the eighteenth century are so far removed from current day, the Citizen Panel explored the advantages and disadvantages of such a system in today's world. Further, the founders based the apportionment of Electors to each state on the federal census and therefore, as populations can change drastically between censuses, the Electoral map often quickly becomes out of date, and not representative of actual voting populations, as presidential elections can occur as late as 8-10 years after the previous census.

Finally, the Citizen Panel introduced the national popular vote plan that provides a state based system that works within the federalist framework of the Electoral College as it was created by the founders. Under the national popular vote plan this happens under the umbrella of

an interstate compact. The compact preserves the Electoral College, while ensuring that every vote in every state will count towards determining the presidential winner. Under the national popular vote compact, all the electoral votes from the enacting states would be awarded to the presidential candidate who received the most popular votes in all 50 states and the District of Columbia (DC). Because the compact does not go into effect until it is enacted by enough states collectively to provide the necessary 270 Electoral College votes to the candidate with the largest popular vote the compact guarantees that the Office of the President would go to the candidate with the most popular votes in the United State of America.

## **SECOND MEETING**

At the second meeting, the Citizen Panel delved into the details of the compact to gauge the impact of the National Popular Vote compact on member and non-member states. State compacts are authorized by the US Constitution and exist for a wide range of interstate needs. Compacts are legal agreements with the force of state and federal law, binding state officials to their provisions and enforceable in court. Once a state enters into a compact, it binds the state legislature from passing laws that would impair that compact, and states may only withdraw from a compact in accordance with the compact terms.

The Citizen Panel was provided a copy of the individual articles of the National Popular Vote compact, which were analyzed in detail. That analysis is provided in the report. The Citizen Panel determined that the compact makes clear that the national popular vote winner can be determined under current federal law and procedurally the compact would not change any state's internal procedures for local election administration officials.

The conducting of the election and the counting of the votes would be identical to today's system. However, instead of allocating electors on the basis of the state outcome, the popular vote counts from all 50 states and the District of Columbia would be added together by the state election official to obtain a national total for each presidential slate. Each state in the compact would then award its electoral votes to the national popular vote winner as it does within the current state system.

## **THIRD MEETING**

The third meeting addressed a number of questions raised by Citizen Panel members. They are highlighted here.

- **Does the National Popular Vote system provide contingencies for the death of a Presidential candidate or designee?** The Citizen Panel explored this in depth and determined that the new system would work the same as the current system with regard to the winning candidate's death.
- **What is the impact on the conduct of campaigns and elections specifically with respect to small states, rural states and "battleground states?"** The Citizen Panel determined that the current system dramatically elevates the importance of certain "battleground" states while diminishing the importance of all other states. Just fifteen

states received over 98.5% of advertising dollars in 2008. Furthermore, given the investment of the major campaigns in recent elections, voter turnout in battleground states has also trended higher than other states with 2008 showing a 6% greater turnout in those states targeted by the campaigns. Because these benefits disproportionately favor only a few states and, consequently, a relatively small amount of voters, it is important to consider whether such a design promotes the collective good of the nation.

The Citizen Panel saw no significant benefit for larger or smaller states under the current system. Indeed of the 13 smallest states in the nation, all but one (New Hampshire) was ignored during the 2008 campaigns under the current system. Moreover, six small states are solidly Republican and six small states are solidly Democrat making it a wash for the two major political parties. If we expand the population to the 25 smallest states, they split their electoral votes 58-57 between the two party nominees in 2008. Of the five largest states, four (CA, IL, NY, TX) are virtually ignored as only Florida has been a battleground state in recent elections and three (CA, IL, NY) are Democratic and one (TX) is Republican. While the Citizen Panel saw no inherent advantage in the current system for either party, more evidence shows that rural states in particular may especially be disadvantaged under the current Electoral College system. For example, in 2004 eight small rural states, whose electoral votes total 29, all voted for the Republican nominee (Bush) by a larger collective margin than the margin that Democratic nominee (Kerry) won California. Yet Kerry secured 55 Electoral votes from California to Bush's 29 despite receiving fewer popular votes over all in these selected states.

Finally, the Citizen Panel noted that the current implementation process has awarded the Presidency to the national popular vote loser four times and determined that it came very close to awarding the Presidency to the loser of the national popular vote several other times. The Citizen Panel looked at five close elections in the last 60 years and noted that with the switch of a just a few thousand votes in two or three states the election would have resulted in the defeat of the popular vote winner, even though in some cases, such as 2004 when Bush won the popular vote by 3.5 million votes, the margin was substantial.

- **What is the impact on the concept of “one person, one vote?”** The Citizen Panel concluded that the Electoral College distorts the number of voters per Electoral College vote due to its guaranteed two-vote allocation to each state. The two-vote allocation creates a situation in which voters in smaller states have a significantly smaller population per Electoral College vote ratio. This smaller population per vote ratio appears to give citizens in smaller states more influence over election outcomes. For example, there were over 670,000 persons per Electoral College vote in New York in 2008, while there were only about 180,000 persons per Electoral College vote in Wyoming in the same year.

The Electoral College also affects the political representation of minority groups, as members of racial minorities tend to be geographically concentrated in state that experience essentially no campaign, also known as blackout states. As a result, the Citizen Panel recognized that racial and ethnic minorities are often overlooked by

campaigns and may be excluded from the election cycle. For example, 62% of the entire African American population lives in blackout states, 72% of the entire Native American population lives in blackout states, and 77% of the entire Latino population lives in blackout states. Thus, minority groups appear to be under represented under the current Electoral College system as it currently operates. This fact is inconsistent with the principal of one person one vote.

## **PUBLIC OPINION REGARDING THIS ISSUE**

The public's attitude about the efficacy of the Electoral College has been formally tracked for decades, and local and national political leaders have had varying and vocal opinions about it since its controversial inception.

The most recent data show that as much as 80% of the population supports the elimination of the Electoral College in favor of another model of presidential voting. A Public Policy Poll from 2008 asked New Mexicans if they believed the candidate who received the most votes in all 50 states should be President, or whether the current system should remain in force. Seventy-two percent of New Mexicans preferred the national popular vote method over the current operation of the Electoral College.

## **CONCLUSION**

The Citizen Panel examined the current Electoral College implementation from multiple perspectives. From our analysis we have come up with several points of consideration for the legislators and the citizens of New Mexico to consider as they grapple with this complex and important issue. Not all of citizen panelists agree with each point of consideration and we have allowed each participant to read, comment, and provide dissent or supporting commentary to the Citizen Panel's overall Consideration.

We evaluate three important perspectives within these points of consideration: 1) voters, 2) interest groups, and 3) states and federalism.

### **Points of Consideration**

1. States have the right to award their Electoral College votes as they choose and therefore have the right to change how they distribute their Electoral College votes.
2. The National Popular Vote represents a method of allocating electoral votes in which all votes are counted equally, one person one vote embodying the principle of political equality.
3. The National Popular Vote encourages more national level campaigning instead of state based campaigning because campaigns will have to mobilize their voters across states instead of simply focusing on the few states that hold the balance of power to select the next President and Vice President.

4. The National Popular Vote will represent more interests than fewer interests because it encompasses the entire population of a group that is the whole group has to be courted by the candidates instead of a segment of that population within a particular state. This is particularly importantly to minorities who overwhelmingly reside in blackout states.
5. The National Popular Vote encourages the promotion of a collective national voter interest over individual state interests.
6. The National Popular Vote Electoral College as currently implemented encourages the promotion of individual state interests over national interests. A corollary to this is that some states are more important and get more interest than other states.
7. The Electoral College as currently implemented encourages candidate activity in battleground states and little to none presidential candidate activity in blackout states. Data shows that racial minorities tend to be geographically concentrated in blackout states, which results in the majority of states AND the majority of minority groups such as Latinos (77%), African Americans (62%) and Native Americans (72%) to be virtually ignored by major presidential candidates.
8. Because New Mexico is a battleground state, certain in-state businesses such as TV and radio stations benefit economically and the state may benefit politically from the current implementation. However, an examination of battleground status suggests that it is fleeting and therefore temporary. New Mexico will not always benefit from this status.
9. A National Popular Vote model does not favor one political party over the other.
10. The concept of federalism is not undermined through a National Popular Vote plan because federal representation and the power of each state are maintained in the body of the US Senate.
11. Because the Presidency is the only office that represents the entire nation and the people within it, the principle of political equality suggests that this office should represent the will of the majority or decisive plurality of the people.
12. The Electoral College does not benefit small states representation over big state representation.

Given these points of consideration, we make the following recommendation:

If the principles of political equality and political legitimacy are essential ingredients to our democratic institutions, changes to the current electoral system should be considered as the current implementation undermines these principles. Therefore the New Mexico Legislature should consider changing to the National Popular Vote plan.

# **REPORT OF THE CITIZEN PANEL**

## The Electoral College and the National Popular Vote Plan

*A Study Completed by the*  
Center for the Study of Voting, Elections and Democracy

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### **I. MOTIVATION FOR STUDY**

During the 2011 regular session of the New Mexico legislative session, the New Mexico House of Representatives passed House Memorial 056. Sponsored by Representative Mary Helen Garcia, Chair of the House Voters and Elections Committee, the memorial provided that:

“...the secretary of state ...[will] study and compare the current electoral college system and the National Popular Vote system and that the findings of the study be presented to the New Mexico legislative council and the appropriate interim committee by November 2011.”

This legislative context has provided the Center for the Study of Voting, Elections and Democracy (C-SVED) at the University of New Mexico with an opportunity to educate and assist the public and legislative leaders in understanding the costs and benefits of the proposed National Popular Vote system to New Mexicans, and more broadly, to begin a dialogue with the nation on this important public policy issue.

#### **A. Background on the National Popular Vote Initiative**

The National Popular Vote Initiative is a non-partisan state initiative to guarantee that the Electoral College selects the presidential candidate who receives the most votes in the 50 states and the District of Columbia. The Electoral College system, as currently implemented, has on four occasions (1824, 1876, 1888, and 2000) selected a president and vice president who did not win the national popular vote.

This proposal represents an alternative method for allocating Electoral College votes through a state compact (see A for a copy of the state compact). The compact approach maintains the current federalist structure of the US and relies on electors to vote for the office of president. However under the National Popular Vote plan, state compact members would agree to award their Electoral College votes to the national popular vote winner instead of allocating their votes based upon the state outcomes, or state district outcomes (e.g., Nebraska and Maine). The

compact would take effect when the states that have joined the compact, through state legislation, reach the majority of electoral votes necessary for a candidate to win the presidency (currently 270). Currently eight states and the District of Columbia have entered the compact including: Vermont, Maryland, Washington, Illinois, New Jersey, the District of Columbia, Massachusetts, California, and Hawaii. This represents a total of 132 Electoral College votes out of the 538 total Electoral College votes, which is 49% of the total votes (270) necessary to implement the compact.

## **B. Implementation of C-SVED Study**

The purpose of C-SVED is to promote the non-partisan study and evaluation of how elections are conducted, the role of technology, and the identification of best practices in election administration as well as the effects of various approaches to election administration and electoral rules upon the quality of representation within democracies. Given this purpose, C-SVED is in a unique position to begin a dialogue on this important state and national public policy debate to assist Secretary of State Duran, her staff, state legislators and the public as they consider the implications of such a change for New Mexico.

To this end, C-SVED formed a Citizen Panel that met three times to discuss the current implementation of the Electoral College and how that would change under a National Popular Vote system (Panel Members can be found in Appendix B). Citizen panel members were selected to represent the broad interests of the state of New Mexico and include state legislators from across the state, election administrators (in particular county clerks), interest groups that are especially focused on election work (including the League of Women Voters, Common Cause and Verified Voting of New Mexico), prominent members of different New Mexico communities including the Hispanic and Native American communities, and students from the University of New Mexico and New Mexico State University. In all, the citizen panel was composed of 26 members, of which approximately two-thirds attended any particular meeting (see Appendix B for members of the citizen panel).

The first meeting was held in Albuquerque on August 31, 2011. In this meeting we examined the Constitution and federal law to understand the legal system under which the presidential electors operate. We also examined the origins of the Electoral College from the perspective of the founding fathers. We addressed their motivation and expectations for the process. We also examined how the Electoral College system has evolved over time into its current implementation process. We discussed different federal Constitutional plans and state plans that have arisen over time to change the current system, including a Constitutional amendment to change to a national popular vote system and a law that would use a district allocation rule instead of a predominantly winner-take-all system. During this discussion, we introduced the National Popular Vote plan, which is directly linked to House Memorial 56.

The second meeting was held in Santa Fe on September 28, 2011. The second meeting covered the legal history behind state compacts, why they offer an opportunity to change the current Electoral College implementation process, and how the compact would operate. As part of this, we reviewed each article of the National Popular Vote compact and the election administration



process that would need to be in place to implement a National Popular Vote model under the compact plan.

The third meeting was held in Las Cruces on October 28, 2011. The focus of this meeting was to discuss the influence of the current system on voter behavior generally and for New Mexicans in particular and how that would possibly change under a National Popular Vote system. In addition, throughout the meeting various questions were raised about representation, minority group interests, federalism, and administrative processes.

We outline below in more detail the discussions in each meeting. We conclude by discussing what we learned and the opinions of our Citizen Panel regarding the National Popular Vote plan.

## **II. FIRST MEETING: BACKGROUND TO THE ELECTORAL COLLEGE**

### **A. The Context of the Founding**

During our first meeting we created a framework for thinking about representation and how federalism shapes the institutions of government, especially at the federal level. We noted that the three branches of government have different constituencies, and vary in apportionment, term and members in order to frustrate the passions of the majority. Ultimately the intent of our Constitutional design was to weave many different interests into the government fabric to reduce the likelihood that a single interest would dominate.<sup>1</sup> According to the founding fathers, this design feature is necessary to prevent the concentration of political power and hence tyranny. Thus, the founding fathers wanted to guard against the power of a few and the “confusion of the multitude” and the oppression of rulers and the dominance of various factions in government.<sup>2</sup>

Table 1 identifies the branches of the federal government and how they represent different constituencies. Notice how “Constituency,” “Apportionment of Office” and “Term” are different. The House of Representatives represents state districts, which are directly elected every two years whereas the Senate represents the interests of states. Senators also have rotating six-year terms such that two-thirds of its membership is not subject to the most current election cycle. This structural design maintains continuity in government by disconnecting a portion of the elected body from the whims and passions of the electorate during any particular election cycle. The President represents the entire nation and is elected through a federal system that currently links presidential outcomes in states to Electoral College votes. Given the different interests across districts, states, and the nation a large number of interests are brought into government to frustrate one another.

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<sup>1</sup> See Madison, James, Federalist Paper #10, available at: <http://thomas.loc.gov/home/histdox/fedpapers.html>, accessed January 20, 2012.

<sup>2</sup> See Madison, James Federalist Paper #10 and #51, <http://thomas.loc.gov/home/histdox/fedpapers.html>, accessed January 20, 2012.

Table 1. Branches of the Federal Government and their Institutional Structure

	Congress: House	Congress: Senate	Executive (President)	Judicial (Supreme Court)
Constituency	District within State	State	Nation	None
Type of office Apportionment	Electoral (proportional)	Electoral (Federal)	Electoral (Proportional and Federal)	Appointive
Term	2 years	6 years (Rotating)	4 years	Life Appointment
Membership	435	100 (2 X 50)	1	9

The founding fathers discussed the election of the President in Federalist #68. There is strong evidence here and elsewhere that the presidential election should represent the national citizenry. However, in the mind of our founding fathers, an intermediary step, electors, were necessary to calm their fears and to unite the nation. Their concerns stemmed from the potential concentration of power at the presidential level that would undermine the delicate balance of power they had created across institutions. In addition, the founders doubted the general public’s ability to make reasoned choices, especially since the public at that time was largely uneducated. For the most part this was a public in which illiteracy was high, access to information was low, and journalism was largely biased. The founders argued that there needed to be a separate body of electors who would have the necessary stature, character and information to make decisions about the quality of the presidential contenders. Their desire was to minimize corruption within the process for selection of a president. Thus, conceptually they wanted to separate the presidency and its elective body, from the other branches of government so that the office of the president would not be beholden to any preexisting institution, such as state legislatures.<sup>3</sup> Electors fit this description because they would never be a standing body of the same persons and were prohibited from holding office as federal legislators.

As with much of what happened during the Constitutional convention, much of the talk surrounding the institution of the president was about compromises between large and small states and slave and non-slave states. Because of the wide differences among the states in population, it was feared that large state interests would dominate and overwhelm small state interests. In particular, Southern slave states feared the direct vote would shift the balance of power to the North where there were more people and greater suffrage rights. Thus, the Constitutional Convention and the Electoral College system was the result of compromise, conflict and fatigue. Interestingly, the Electoral College as a constitutional institution was the first choice of few delegates and was seen as the “least bad” option.<sup>4</sup>

This social, political, cultural and economic context present at the time of the original Constitutional Convention is far different than today’s. The threat of building a monarchy or

<sup>3</sup> Edwards, George C. III. 2004. *Why the Electoral College is Bad for America*. New Haven: Yale University Press.

<sup>4</sup> Slonim, Shlomo. 1986. “The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President.” *The Journal of American History* 1(73): 35-58.

other dictator is practically impossible. In addition, the threat of mob rule is highly unlikely. The United States of today has well-developed election administration procedures, state and local police forces and societal order is generally maintained. The voter information environment has radically changed as well. Voters are, relatively speaking, well-educated and have immediate access to information through the Internet, television, radio and newspapers. Additionally, 99% of the current population is literate, compared to the estimated 72% of the free population and 5% of the slave population who were literate in 1800.<sup>5</sup> Of course, the issue of slavery that dominated the Constitutional Convention is no longer valid and the presidential powers would not change if we moved from a state dominated elector system to one that considered the aggregation of votes across the nation.

## **B. Constitutional Provisions**

The Constitutional provisions for the election of the President are found in Article II of the Constitution, which provide that, “The executive power shall be vested in a President of the United States of America. He shall hold office during the term of four years, and, together with the Vice President, chosen for the same Term, be elected as follows:”

“Each State shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the state may be entitled in Congress....”

The Twelfth Amendment clarifies the obligations and duties of the electors. It states, “The Electors shall meet in their respective states, and vote by ballot for President and Vice-president, one of whom, at least shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice President...and [shall] transmit sealed to the seat of the government of the United States, directed to the President of the Senate.” Their duties are elaborated in federal statute. For example, electors are appointed on the “first Monday in November, in every fourth year succeeding every election of a President and Vice President (USC, Title 3, Chapter 1, Section 1) and cast 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” USC Title 3, Chapter 1, Section 7).

Importantly, under the Constitution, the people have the right to vote for members of both branches of the US Congress, but not directly for the President and Vice President. In addition, the people have no right to vote for presidential electors, as it is the responsibility of the legislature to determine how electors will be chosen.<sup>6</sup> As the Supreme Court noted in *Bush v. Gore*, 531 US 98, 2000, “The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a

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<sup>5</sup> Costa, Dora and Richard H. Steckel. 1997. “Long-Term Trends in Health, Welfare, and Economic Growth in the United States.” Edited by Richard H. Steckel and Roderick Floud. *Health and Welfare during Industrialization*. Chicago: University of Chicago Press.

<sup>6</sup> This is true in every state except Colorado where the state Constitution explicitly gives the right to vote for the electors to the citizens of the state.

statewide election as the means to implement its power to appoint members of the Electoral College.”

Each state has the same number of electors as they have representation in both Houses of the US Congress. Therefore each state is guaranteed at least three electoral votes: two for their seats in the US Senate and at least one in the US House. After each decennial census congressional representation is altered to adjust for population shifts, which directly affects the number of electors in each state. Importantly, such changes do not account for population shifts between census years, which are ten years apart; thus the Electoral College always over or under represents some states.

Electors were originally conceived to be knowledgeable and distinguished citizens meant to exercise independent judgment in casting their vote for a presidential candidate; today however, most electors are nominated at state or other party convention or by the state party’s central committees and are largely party loyalists. They are not allowed to be members of Congress or federal officials.

Through much of the nation’s history, presidential electors appeared directly on the ballot instead of the presidential and vice presidential candidates. Today however, virtually all states have adopted the use of a “short ballot” that only includes the names of the presidential and vice presidential candidates instead of the pre-determined slate of presidential electors. As a result, many voters likely believe they are voting directly for the president and vice-presidential candidates, but in reality are actually voting for a slate of electors.

The most popular method for allocation of Electoral College votes is the winner-take all method, which awards all the Electoral College votes to the candidate who wins the most votes in the state. However, Maine and Nebraska use a district system that allocates some of their Electoral College votes by the congressional district. Interesting enough, recently the state legislature of Nebraska has been considering moving back to a winner-take-all method of awarding its electoral votes, and the state of Pennsylvania has been debating changing to a district based system.<sup>7</sup>

Importantly, the Constitution created an indirect and flexible method for electing the only national office in the US, leaving the method of allocating electors to the states. Although several Constitutional plans have been sponsored to change the election of the president and vice president to a national popular vote, none of them have gained steam. The National Popular Vote plan provides a state based system that works within the federalist framework of the Electoral College as it was created by the founders. This plan would guarantee the presidency to the candidate who receives the most popular votes in the United States of America.

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<sup>7</sup> Brent Martin, “Governor Heineman Favors Change in How Nebraska Allocates Electoral College Votes,” Nebraska Radio Network, September 14, 2011, available at: <http://nebraskaradionetwork.com/2011/09/14/governor-heineman-favors-change-in-how-nebraska-allocates-electoral-college-votes/>, accessed January 5, 2012; Katharine Q. Seelye, “Pennsylvania GOP Weighs Electoral Vote Changes for 2012,” New York Times, September 19, 2011, available at: <http://www.nytimes.com/2011/09/19/us/politics/pennsylvania-republicans-weigh-electoral-vote-changes.html>, accessed January 5, 2012.

The plan preserves the Electoral College, while ensuring that every vote in every state will matter in every presidential election. Under the National Popular Vote system, all the electoral votes from the enacting states would be awarded to the presidential candidate who received the most popular votes in all 50 states and DC. The plan would only take effect when enacted by states possessing a majority of the electoral votes—that is, enough electoral votes to elect a President and Vice President (270 out of 538). Under the National Popular Vote plan this happens under the umbrella of an interstate compact. The compact would not go into effect until enacted by enough states collectively to provide the necessary 270 Electoral College votes to the candidate with the largest popular vote.

Procedurally the compact would not change any state’s internal procedures for local election administration officials. The administration of the election and the counting of the votes would be identical. However, instead of allocating electors on the basis of the state outcome, the popular vote counts from all 50 states and DC would be added together to obtain a national grand total for each presidential slate. Each state in the compact would then award its electoral votes to the popular vote winner in the same manner that they had previously done under a state’s winner-take-all system. The chief election officer in the state would be responsible for determining the national winner by adding together the official statements from each state containing the number of popular votes for each presidential slate. Compact member states facilitate this process by sending each other an official statement of their popular vote totals. Non-member state totals would be obtained through other means. For purposes of transparency, the chief election officer must release to the public all vote counts and statements as they are determined.

### **C. Evolution and Current Implementation of Electoral College**

A recurring theme in discussions about the Electoral College is what the founding fathers intended when they conceived of this system of indirect selection of the president. While there is debate as to the contemporary relevance of this system, an examination of its original structure is informative in the context of the changes proposed by the National Popular Vote plan.

The 1787 Constitutional Convention, which met from May to September, was characterized by tension, dissent and rivalry. Successive crises threatened to destroy the work of the convention as delegates quarreled over regional and large-state/small-state differences. No place was this more pronounced than in the debate over apportionment of representation in the new congress. The deadlock was broken with the adoption of the Connecticut Compromise, which provided for a bicameral national legislature, of which membership in one house was based on the equality of each state (the U.S. Senate), and the other based on the population of each state (the U.S. House of Representatives).<sup>8</sup>

Once the issue of representation in Congress was resolved, the delegates moved on to the task of determining the method for selection of the president. A committee of eleven delegates was commissioned to study possible methods for selection of the president. A number of different

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<sup>8</sup> Lawrence D. Longley, Neal R. Peirce, *The Electoral College Primer 2000*, Yale University Press, 1999.

schemes had been proposed throughout the convention, which included election by Congress and direct election by the people.<sup>9</sup>

Election by Congress, while appealing to many of the delegates, had strong opposition on the grounds that this would make the President subservient to Congress, and thus incapable of independent leadership. Direct vote by the people had its proponents and opponents as well. Proponents of direct election were, not surprisingly, from states with large populations. Opposition to direct election was raised on various grounds, including the general public's lack of knowledge of the candidates; the feckless nature of the general public; the loss of influence of the south because of its large slave population; and the fear that the direct election by the people would consolidate too much power in the hands of a popularly elected president.

Ultimately, convention delegates voted to approve presidential election by a college of electors based on congressional apportionment, with the provision that if no candidate received a majority of the votes of the electors, the final selection would be by the House of Representatives, but with equality of states maintained through one vote per state.

The Constitutional Convention thus created a system for selecting the president that seemingly had broad support, but only by offending the fewest delegates.

As conceived, the Electoral College worked in the following manner:

The President and Vice-president are not elected directly by the people. Instead, they would be elected by a group of people known individually as presidential electors, and collectively as the Electoral College (a term that does not appear in the US Constitution).

As noted previously, Article II of the Constitution provides that “each state shall appoint in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the state may be entitled in Congress...”

As such, there is no US constitutional right for the citizenry to vote directly for the President and Vice-president, or to vote for presidential electors. The Constitution left that to state legislatures to determine on a state by state basis. In New Mexico, like many other states, political parties select who will serve as presidential electors at their state party conventions.

Under federal statute, presidential electors are selected “on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice-president.” This date is commonly known as the “general election” held every four years. The presidential electors of the party whose nominee for president received the highest number of votes in the state's general election are elected presidential electors. Depending on state law, electors may be selected on a district basis, corresponding to the congressional districts within the state, or on the basis of the winner of the popular vote within the state as a whole.

Under federal statute, presidential electors “...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

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<sup>9</sup> Ibid.

as the legislature of such state shall direct.” In New Mexico, the presidential electors convene at the office of the Secretary of State to cast their presidential vote. The votes are certified, and pursuant to federal statute, sent to the “President of the Senate in the seat of government.”

The Electoral College votes from all states are then tallied in a joint session of congress on January 6, following the election.

If no candidate receives a majority of the Electoral College votes, the House of Representatives, choosing from the top three candidates (top five candidates prior to passage of the Twelfth Amendment), selects the President, with one vote per state delegation. If a state delegation cannot decide on a candidate by majority vote, that state cannot award its one vote to any candidate.

Since its adoption in 1787, the Electoral College system has evolved, with five major changes in its operation. Interestingly enough, despite the fact that it is an institution of the US constitution, all but one of these changes have come about through custom, state law, or political necessity, not by formal constitutional change. Nevertheless, these developments have greatly altered the function of the Electoral College, and as one scholar has noted, “the system which emerged in practice is not the system contemplated by the founding fathers.”<sup>10</sup>

One of the earliest changes to the Electoral College process was the transition of electors from being free to choose the candidate of their choice to pledged electors. The intent of the founding fathers was that presidential electors would act as a deliberative body, exercising independent judgment as to who would be the best president and vice president. To this point, Hamilton wrote in Federalist 64 that “as the select assemblies for choosing the President... will in general be composed of the most enlightened and respectable citizens, there is reason to presume that their attention and their votes will be directed to those men only who have become the most distinguished by their abilities and virtues.”

As early as 1826, however, a Senate select committee observed that electors were “usually selected for their devotion to party, their popular manners and a supposed talent for electioneering.”<sup>11</sup> With the rise of national political parties, the stakes became too high, and parties could not allow electors to play the role of independent statesmen; they wanted predictability of result, not the uncertainty of deliberations among independent statesmen.

A second change related to the original concept of a two-step process for the election of the president. The assumption was that the electors would nominate a number of prominent individuals as candidate for president, with no one of them receiving the absolute majority of electoral votes as required by the Constitution. The founders believed that parochial and regional interests would prevail over national consensus and that no one candidate would reach the necessary majority vote of the Electoral College as a body. As such, the final selection of president would not be made by the Electoral College, but rather by the House of Representatives. The key to acceptance of this “two-stage” plan lay in the different character of

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<sup>10</sup> John P. Feerick, “Electoral College: Why It was Created,” *American Bar Association Journal* 54 (March 1968): 255.

<sup>11</sup> Longley and Pierce, Senate Report No. 22, 19<sup>th</sup> Cong. 1<sup>st</sup> sess, Jan. 19, 1826.

the Electoral College and the House contingent voting. The Electoral College, reflecting in a very rough way the population of states, would favor the large states at the cost of the small states – or more accurately, populations rather than equally weighted states. When the contingent House procedure went into effect, as the founders believed it most often would, the voting would be one vote per state delegation, thus representing equally weighted individual states regardless of population. As James Madison described the system, it was “the result of compromise between the larger and smaller states, giving to the latter the advantage of selecting a president from the candidates, in consideration of the former in selecting the candidates from the people.”<sup>12</sup> By itself the Electoral College was not conceived as a bulwark of small-state’s rights; to the contrary, it was seen as favoring large states – or at least the principle of population.

With the rise of national political parties and the selection of electors who were party operatives rather than elder statesmen selected for their independent judgment, the two-stage process relying on the House contingent vote became the exception rather than the rule. And in fact no president since 1824 has been selected by the House contingent vote.

A third change to the Electoral College process was the transition away from selection of electors by state legislative bodies to the selection of electors by popular vote within a state. Although there is no federal constitutional right to vote for electors, all states have adopted law granting the right to vote for electors to the state’s general electorate.

A fourth change in the Electoral College process came about with the shift between apportionment of electoral votes, to the state “winner take all” rule. The founding fathers considered the district system to be the “most equitable” manner to apportion electoral votes. As early as the first competitive presidential election in 1796, it had become clear that the district system diminished a state’s political influence because it fragmented the state’s electoral votes. As noted previously, at least one state (PA) is currently considering a shift to the district system for the very purpose of fragmenting the apportionment of electoral votes within the state.

Finally, a fifth change to the Electoral College process, and also the only constitutional change (the Twelfth Amendment in 1804), was the transition from a single ballot to elect the president and vice-president, to a separate ballot and vote for president, and vice president. The original concept was that electors would cast their vote for president, with the candidate receiving the majority votes becoming president, and the candidate receiving the second highest number of votes becoming vice-president. The single ballot system resulted in John Adams becoming president and Thomas Jefferson becoming vice president in 1796, despite coming from different political parties and having intense personal enmity. When, in 1800, Thomas Jefferson and Aaron Burr received an identical number of electoral votes resulting in 36 ballot attempts in the house contingent vote, the founders recognized the necessity to separate the vote for president and vice president within the Electoral College.

Table 2 provides a summary of the five changes to the operation of the Electoral College since its constitutional creation in 1787.

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<sup>12</sup> Ibid.



Table 2: The Evolving Electoral College

<b>CONSTITUTIONAL INTENT</b>	<b>EVOLUTION OVER TIME</b>
<b>Free Electors:</b> Contemplated that electors would be independent statesmen who exercised individual judgment for the benefit of the country.	<b>Pledged Electors:</b> Electors selected on the basis of party loyalty, financial support of a party, or out of a desire to have an ethnically or gender balanced elector slate.
Contemplated a two-step process of selecting president once certified electoral votes are submitted to the Senate.	In practice, consists of a single-step process of selecting president once certified electoral votes are submitted to the Senate.
Legislative selection of electors.	Popular selection of electors.
District rule for apportionment of electoral votes.	Winner-take-all rule for apportionment of electoral votes.
<b>Electors cast one vote:</b> The candidate who receives the most votes became President, the candidate with the next highest vote count became Vice-President.	<b>Electors Cast Two Votes:</b> With the 12 <sup>th</sup> Amendment (1804), electors cast one vote for a Presidential Candidate, and one vote for a Vice-Presidential Candidate.

#### D. Evaluating Electoral Systems

The founders offered us a scheme of representation, but they also created great flexibility within the Constitution as to how to implement the Electoral College. As citizens deliberating the current implementation and whether it should be changed, we need to have a measuring stick or standard that encompasses widely shared values that are essentially self-evident from which we can evaluate the current system. One such standard is the ideal of democracy and how well democratic values are embedded in our institutions.

Representative democracy, which is embodied in our republican form of government, is one such standard that encompasses rule by the people, exercised indirectly through elected leaders. Principles closely associated with republicanism are political legitimacy, political equality and political liberty.

Political legitimacy is the principle that the legitimacy of the state depends on the consent or will of its citizens who are the source of all political power. From this perspective the people are the ultimate source of political authority and it is closely tied to the concept of majority rule.

Political equality means that each citizen should have equal influence over public outcomes. This implies that the system of government should be an electoral democracy. This is because the voting booth is the only place where each person is equal. Electoral democracy promotes the principle of one person, one vote. In the United States every ten years we confirm the important premium we place on the idea of “one person one vote” when we reapportion congressional districts to be equal in power and influence in terms of the number of people in each district.

Political liberty represents the basic freedoms of the citizen inherent to a representative democracy. These are essential to the formation and expression of the popular will and its translation into public policy. These include rights such as freedom of speech, conscience, press,

assembly, and association, as well as freedom from arbitrary arrest and the right to run for public office.

With these principles, we can move forward to examine critically the current system and consider the National Popular Vote model. This is important for us to do because as Thomas Jefferson said, “I am not an advocate of frequent changes in laws and constitutions, but laws and constitutions must go hand in hand with the progress of the human mind as that becomes more developed, more enlightened, as new discoveries are made, new truths discovered, and manners and opinions change. With the change of circumstances institutions must advance also to keep pace with the times.”

### **III. SECOND MEETING: BACKGROUND ON STATE COMPACTS, FORMAL EXAMINATION OF THE NATIONAL POPULAR VOTE PLAN**

#### **A. Compacts**

Because the National Popular Vote plan is based upon an interstate compact, we need to understand how interstate compacts operate. As early as the Articles of Confederation, and included in the US Constitution, provisions were articulated for legal agreements or contracts between states. States generally enter into interstate compacts to obtain some benefit that could only be achieved through cooperative and coordinated action with one or more other states. These include compacts on a diverse set of topics including: agriculture, boundary disputes, civil defense, education, energy, fisheries, water rights, and flood control to name a few. Compacts may be enacted by a state’s governor, administrative agencies, or through state or federal legislative action.

Although the Constitution states in Article I, Section 10, “No state shall, without the consent of Congress...enter into any agreement or compact with another state,” there is no historical precedent of submitting compacts to Congress for approval and there is not a single instance where a state or federal court invalidated a compact for lack of Congressional consent.

Thus, state compacts are authorized by the US Constitution and exist for a wide range of interstate needs. Compacts are legal agreements that have the force of state law, binding state officials to their provisions and enforceable in court. Once a state enters into a compact the state and its officials are bound by the terms of the compact, the state legislature is prevented from passing laws that would impair that compact, and states may only withdraw from a compact in accordance with its terms.

#### **B. Formal Examination of the National Popular Vote Bill**

The articles discussed below refer to the articles as they are defined within the state compact (see Appendix A).

Article I established the compact’s prospective parties, which is all 51 election jurisdictions (the 50 states and the District of Columbia) for US President and Vice President.

Article II requires each member state to conduct a statewide popular election for President and Vice President. This is necessary because there is no constitutional right to vote for President and Vice President.

Article III defines the manner of appointing presidential electors in member states. Article III, Section 1 instructs the chief election official of each member state to add together the number of popular votes for each presidential slate in all the 51 election jurisdictions to determine the national popular vote winner. Article III, Section 4 requires that member states provide the necessary information on election totals in their state by safe harbor day, which is six days before the day for the meeting of the electors to cast their votes. Article III, Section 5 requires the state chief election official to 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. Thus, from non-member states this information will come from either 1) state certification of their elections, which mostly happen prior to safe harbor day or 2) through certificates of ascertainment, which are required by federal law and certify the number of votes cast within each state for each presidential slate.<sup>13</sup> After summing up the totals and determining the national popular vote winner, Article III, Section 2 suggests that the chief election officer of each member state shall designate the presidential slate with the largest national popular vote total as the national popular vote winner. Importantly, this clause makes other states election processes, assuming they have a popular vote, valid for each member state and therefore appropriate to use to determine the national popular vote winner. Thus, although there are differences across states in terms of election law, these differences are inherent to our federal structure and are not the concern of other state chief election officials when summing the vote totals. Therefore, the chief election officer of a state does not have the power to examine or judge the presidential election returns, only the duty to sum the total. Each state makes its own final determination and its totals are conclusive. Importantly Article III, Section 8 creates transparency in the process by requiring each election official to immediately release to the public all vote counts or statement of votes as they are determined. This is an important check on the process since results across states will be released by each member state.

The appropriate electors are then summoned to the State House or other location on the appropriate constitutionally mandated day to vote for the national popular vote winner (see Article III, Section 2, and Article III, Section 3).

A variety of contingencies are included in the compact. For example, in the unlikely event of a national popular vote tie, then each member states reverts to a state winner take all plan (Article III, Section 6). There are also provisions to deal with procedural issues such as the winning slate not being on the ballot in a particular state or the absence of a full slate of qualified electors—such as if an elector was not entitled to such a position. In these cases, the national popular vote winner would have the power to nominate the presidential electors for that state (Article III, Section 7).

Article III, Section 9 designates that this compact will be in effect in any year in which this “agreement is, on July 20, in effect in states cumulatively processing a majority of the electoral

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<sup>13</sup> Certificates of ascertainment can be found at: <http://www.archives.gov/federal-register/electoral-college/2008/certificates-of-ascertainment.html>.

votes.” This means that the compact only is in place when it has the necessary majority of electoral votes to ensure that the office of president and vice president is given to the national popular vote winner. States can withdraw from the compact at any time, “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,” (Article IV, Section 2). This provision allows states to withdrawal but provides for a blackout period so that it cannot be used for partisan purposes in the midst of a campaign.

#### **IV. THIRD MEETING: PANEL QUESTIONS**

Our 3<sup>rd</sup> meeting largely focused on questions that came up by panel members during the course of the first two meetings. Therefore, we address these distinct questions below.

##### **A. Death of the Presidential Candidate**

The first question was regarding how the death of a national popular vote winner would be handled under the National Popular Vote plan. It is important to recognize here that regardless of how the President and Vice President are selected (whether under the existing Electoral College system or under the proposed compact system) there are four periods of time during which death, disability, disqualification or withdrawal may influence the process. They are:

- 1) Between adjournment of the national party convention, when a party candidate is selected, and the November election;
- 2) Between the November election and the day the presidential electors meet to cast their ballot in December;
- 3) Between the day the electors cast their ballot in December and January 6, when the House and Senate meet in joint session to count the electoral votes; and
- 4) Between January 6 and inauguration of the President-elect and Vice-President elect on January 20.

Under the National Popular Vote compact death, disability, disqualification or withdrawal would be handled identically to the way it is currently.

There is no federal law to address the first time period, between adjournment of the national party convention and the November election. This contingency is addressed in party rules of the Democratic and Republican parties. For the Democratic Party the rule provides that the members of the Democratic National Committee have the power to fill the vacancy. For the Republican Party the rule provides that the members of the Republican National Committee are authorized to fill the vacancy or, depending on time constraints, call a new convention to nominate a new candidate.

Theoretically during the second time period electors would be free to vote for anyone they pleased, but the national party rules for the filling of vacancies by the national committees would still be in effect. As such, it is likely that electors would respect the national party committees

decision on a replacement and it would likely be that the vice presidential nominee would move up to the presidential slot.

During the third time frame national party rules would no longer govern; instead federal law would apply. Most constitutional scholars believe that, in the event a candidate dies or is otherwise disqualified, the Twelfth Amendment gives Congress no choice but to count all the electoral votes cast, provided the person voted for was alive when the ballots were cast. The US House Committee Report endorsing the 20<sup>th</sup> Amendment agrees. From this perspective, Congress would be required to count the votes and declare the deceased candidate the winner. The operative law would then be Section 3 of the 20<sup>th</sup> Amendment that provides, “If at the time fixed for the beginning of the term of the President, the President-elect shall have died, the Vice President-elect shall become President.” And, when the Vice President-elect shall become President, he/she would be authorized under the 25<sup>th</sup> Amendment to nominate a new Vice President.

During the fourth time frame, the 20<sup>th</sup> amendment would also be in effect, allowing the Vice President elect to ascend to the office of the President. If both the President and Vice President were unable to serve on January 20, then the Automatic Succession Act of 1947 would go into effect, placing the Speaker of the House, the President pro tempore of the Senate, and then various other Cabinet officials in line for the office of the presidency.

## **B. The Effect of National Popular Vote Plan on the Conduct of Elections**

The first fact to note regarding the conduct of elections is that battleground states get more attention than blackout states. Campaigns classify states into five categories: safe Democratic, marginal Democratic, battleground, marginal Republican and safe Republican.<sup>14</sup> Each party’s candidate uses the same data to determine targeting and the focus of the campaign, resulting in symmetry between the party candidate on which states are battlegrounds and which are not. Candidates concentrate a majority of resources in the battleground states, while marginal states receive fewer resources, and in safe states very few, if any, resources, are spent. This means that battleground states receive the majority of attention and resources from the candidates. Table 3 shows the number of electoral votes by state and the number of campaign events held by the presidential or vice presidential candidate in each state. Notice that most states have no campaign events, while the state of Ohio had 62, followed by Florida with 46 and Pennsylvania with 40.<sup>15</sup> New Mexico was a battleground state in 2008 and had eight campaign events.

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<sup>14</sup> Darren R. Shaw, “The Methods behind the Madness: Presidential Electoral College Strategies, 1988-1996,” *The Journal of Politics* 61: 893-913.

<sup>15</sup> The data in this table comes from the book, “Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote, 3<sup>rd</sup> edition,” by John R. Koza, Barry Fadem, Mark Grueskin, Michael S. Mandell, Robert Richie, Joseph F. Zimmerman. It is available at: [www.nationalpopularvote.com](http://www.nationalpopularvote.com)

Table 3. Electoral College Votes by Campaign Events

<b>State</b>	<b>Electoral votes</b>	<b>Campaign events</b>
Ohio	20	62
Florida	27	46
Pennsylvania	21	40
Virginia	13	23
Missouri	11	21
Colorado	9	20
North Carolina	15	15
New Hampshire	4	12
Nevada	5	12
Michigan	17	10
Indiana	11	9
New Mexico	5	8
Wisconsin	10	8
Iowa	7	7
Maine	4	2
Minnesota	10	2
District of Columbia	3	1
West Virginia	5	1
Tennessee	11	1
All other states	330	0
<b>Total</b>	<b>538</b>	<b>300</b>

Table 4 makes a similar point by comparing campaign donations to advertising spending by state.<sup>16</sup> Notice that over half of all advertisement resources are spent in the top five battlegrounds, while a majority of the states receive no advertising. New Mexico received about 2.3% of all the advertising dollars in the 2008 election.

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<sup>16</sup> Ibid.

Table 4. Campaign Donations and Advertising by State, 2008

State	Total Donations	% of National Donation	Peak-Season Ad expenditures	% of peak-season Ad expenditures
Florida	41,770,516	4.91	29,249,985	18.18
Pennsylvania	23,929,821	2.81	24,903,675	15.48
Ohio	15,984,435	1.88	16,845,415	10.47
Virginia	44,845,304	5.27	16,634,262	10.34
North Carolina	14,337,669	1.68	9,556,598	5.94
Indiana	6,225,848	0.73	8,964,817	5.57
Wisconsin	8,133,046	0.96	8,936,200	5.56
Missouri	9,997,747	1.17	7,970,313	4.95
Colorado	18,800,854	2.21	7,944,875	4.94
Nevada	5,273,523	0.62	7,108,542	4.42
Michigan	15,007,118	1.76	5,780,198	3.59
Minnesota	10,894,627	1.28	4,262,784	2.65
Iowa	3,649,836	0.43	3,713,223	2.31
New Mexico	6,418,313	0.75	3,134,146	1.95
New Hampshire	4,045,877	0.48	2,924,839	1.82
All others	621,807,906	73.05	2,933,011	1.81
Totals	851,122,440	100	160,862,883	100

Note: States ranked from most to least expenditures

Because New Mexico is a battleground state it receives more election-related activity from the candidates, the political parties, and from interest groups than many other states. In 2008, C-SVED research data indicated that there were over 204 unique Democratic ads and 152 unique Republican ads for the presidential election.<sup>17</sup>

These activities have some effect on voters in battleground states relative to their counterparts in blackout states. The effect on voter turnout suggests that there may be a modest to substantial impact, but the degree to which turnout is quantifiably above that of blackout states is conditional on whether or not the contest is competitive. Keena Lipsitz (2009) finds that there was a 3% increase in turnout among battleground states in 1988, no difference in 1992 and 1996, when the race was not competitive, a 3% increase in 2000 and a 6% increase in 2004.<sup>18</sup>

However, there is no evidence that on average citizens in battleground states express more interest in the election. Interest levels are the same, even though citizens report greater exposure

<sup>17</sup> Lonna Rae Atkeson and Lorraine Tafoya. 2008. "Close, but Not Close Enough: Democrats Lose Again by the Slimmest of Margins in New Mexico's First Congressional District," In *War Games: Issues and Resources in the Battle for Control of Congress*, edited by David Magleby and Kelly Patterson, Boulder: Paradigm Publishers.

<sup>18</sup> Lipsitz, Keena. "The Consequences of Battleground and 'Spectator' State Residency for Political Participation," (2009), *Political Behavior* 31:187-209.

to campaign contact and more frequent campaign contact. There is evidence that citizens in battleground states participate in more campaign activities, especially rallies, but also wearing a button, volunteering, and convincing others for whom to vote. In addition, there is evidence that battleground state citizens learn more about the presidential candidates and are able to recall more specific open-ended likes and dislikes about the party candidates.<sup>19</sup>

Importantly, because most rural states are not battleground states, their interests are not protected by the current implementation of the Electoral College. As the Electoral College currently operates, battleground states and their policy needs take priority over all other states.

### C. Campaign Effects

While it is hard to know exactly how the National Popular Vote plan would change presidential election campaigning, there is reason to believe that the campaign might be brought to a greater number of people to get out the popular vote across states. Clearly, urban centers would be a primary location for the Democratic Party to court their voters, and Republicans would likely have to focus on more rural areas. Table 5 shows how in 2004, the Kerry margin in California is easily countered by the votes in a number of more rural, less populated, and Republican states.<sup>20</sup>

Table 5. Margins of Victory, 2004

State	Bush Margin	Kerry Margin	Bush Electoral Votes	Kerry Electoral votes
Alaska	79,864		3	
California		1,235,659		55
Idaho	228,137		4	
Montana	92,353		3	
Nebraska	258,486		5	
North Dakota	85,599		3	
South Dakota	83,340		3	
Utah	422,543		5	
Wyoming	96,853		3	
Total	1,347,175	1,235,659	28	55

### D. Political Party Advantages and Disadvantages and the Electoral College

Table 5 indicates that, in this instance, the Republican Party is clearly disadvantaged as it realized only 28 electoral votes to the Democrats' 55 votes, despite tallying more popular votes. However, in a close contest either party could easily lose the popular vote, but win the Electoral

<sup>19</sup> W.L. Benoit, G.J. Hansen, and R. Lance Holbert, (2004) "Presidential Campaign and Democracy," *Mass Communication and Society* 7: 177-90; J. Wolak (2006), "The Consequences of Presidential Battleground Strategies for Citizen Engagement," *Political Research Quarterly* 59: 353-61.

<sup>20</sup> Koza et al.



College vote. No particular party is advantaged by the current system. Table 6 provides examples of six recent cases where a small vote change could have affected the outcome of the election.<sup>21</sup> In 2004, for example, 60,000 votes in Ohio would have switched the outcome such that President Bush would have won the popular vote and Senator Kerry would have won the Electoral College vote even though Bush had 3.5 million more popular votes than Kerry. In six recent elections, the winner of the popular vote nearly lost the election due to the closeness of the race in certain states. Although occurring only once in the past six presidential election cycles (in 2000), the loser of the national popular vote nearly won the Presidency multiple times in the last 60 years.

Table 6. Six Elections Where Relatively Small Vote Changes Could Have Changed the Outcome

<b>Popular Vote Winner</b>	<b>Electoral Vote Winner</b>	<b>Popular vote Lead</b>	<b>Electoral votes of popular vote winner</b>	<b>Electoral votes of Electoral vote winner</b>	<b>Popular vote switch that would affect outcome</b>
Bush	Bush	3,319,608	286	286	59,393 in OH
Gore	Bush	537,179	267	271	269 in FL
Carter	Carter	1,682,970	297	297	5,559 in OH & 3,687 in HA
Nixon	Nixon	510,645	301	301	10,245 in MO and 67,481 in IL
Kennedy	Kennedy	114,673	303	303	4,430 in IL & 4,782 in SC
Truman	Truman	2,135,570	303	303	3,554 in OH & 42,835 in NJ

Moreover, there is no evidence to suggest that one party is more or less advantaged in the least populated states. Table 7 shows how the 25 least populated states voted in the 2008 election.<sup>22</sup> Notice how the 25 least populated states were equally split between the Democratic and Republican Party.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid.

Table 7. 25 Least Populated States and Electoral College Votes, 2008

<b>State</b>	<b>Democratic</b>	<b>Republican</b>
District of Columbia	3	
Wyoming		3
Vermont	3	
North Dakota		3
Alaska		3
South Dakota		3
Delaware	3	
Montana		3
Rhode Island	4	
Hawaii	4	
Idaho		4
Maine	4	
New Hampshire	4	
Nebraska	1	4
West Virginia		5
New Mexico	5	
Nevada	5	
Utah		5
Kansas		6
Arkansas		6
Mississippi		6
Iowa	7	
Connecticut	7	
Oklahoma		7
Oregon	7	
<b>Total</b>	<b>57</b>	<b>58</b>

Note: States ranked from least to most populated

### **E. Public Opinion on the Electoral College as Currently Implemented**

Public opinion over the years has supported changing the current implementation of the Electoral College system to a National Popular Vote model. Gallup Polls, for example, has been tracking attitudes on this issue since 1967. Their questions do not compare the current process to the National Popular Vote plan, but to a Constitutional amendment that would do away with the Electoral College completely and elect the president through a national popular vote. This data shows that there has been well over majority support, at times as much as 80% of the population, supporting the elimination of the Electoral College in favor of some sort of National Popular

Vote model.<sup>23</sup> Importantly in a recent Gallup poll this attitude was true for a majority of all partisan groups. A Public Policy Poll, dated December 21-22, 2008 asked New Mexicans, “How do you think we should elect the President: should it be the candidate who gets the most votes in all 50 states, or the current electoral college system?” Seventy-two percent (72%) of New Mexicans agreed that it should be the candidate who gets the most votes in all 50 states, while only twenty-eight percent (28%) supported the current Electoral College system.<sup>24</sup>

#### **F. “One person, one vote” and Political Equality in the Electoral College**

The Electoral College distorts the number of voters per Electoral College vote due to its guaranteed two-vote allocation to each state and inability to account for population changes. The two-vote allocation creates a situation in which voters in smaller states have a significantly smaller population per Electoral College vote ratio. This smaller population per vote ratio gives citizens in smaller states more influence over election outcomes. For example, there were over 670,000 persons per Electoral College vote in New York in 2008, while there were only about 180,000 persons per Electoral College vote in Wyoming in the same year. The trend is exacerbated by the Electoral College’s inability to account for population change, as populations can change drastically between Censuses, while the Electoral College vote total remains the same. High growth states, such as Nevada, which grew over 30% in a decade, are particularly disadvantaged.

The Electoral College also affects the political representation of minority groups, as members of racial minorities tend to be geographically concentrated in blackout states. The result is that racial and ethnic minorities are often overlooked by campaigns and may be excluded from the election cycle entirely. For example, 62% of the entire African American population lives in a blackout state, 72% of the entire Native American population lives in a blackout state, and 77% of the entire Latino population lives in a blackout state. Thus, minority groups appear to be unrepresented under the current Electoral College system.

### **V. CONCLUSION**

Our Citizen Panel examined the current Electoral College implementation from multiple perspectives. We considered the federalist nature of our system, the intent of the founding fathers, the design and flexibility of our Constitution, the impact on minorities, the value of one person, one vote, its effect on our system of election, whether it advantages one party or another, and public opinion. We also examined in detail the proposed Compact that would implement the National Popular Vote plan and how compacts generally work and operate within our federalist structure. Within that discussion we examined how the compact would be implemented and what that would mean for election processes.

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<sup>23</sup> Gallup, “American Would Swap Electoral College for Popular Vote,” October 24, 2011, available at: <http://www.gallup.com/poll/150245/americans-swap-electoral-college-popular-vote.aspx>, accessed January 4, 2012.

<sup>24</sup> A Public Policy Poll, “76% of New Mexico Voters Support a National Popular Vote for President in December 2008 Poll,” available at: [http://nationalpopularvote.com/pages/polls.php#NM\\_2008DEC](http://nationalpopularvote.com/pages/polls.php#NM_2008DEC), accessed January 4, 2012.

From our analysis we have come up with several points of consideration for the legislators and the citizens of New Mexico to consider as they grapple with this complex and important issue. Not all of citizen panelists agree with each point of consideration and we have allowed each participant to read, comment, and provide dissent or supporting commentary to the Citizen Panel's overall Consideration.

We evaluate three important perspectives within these points of consideration: 1) voters, 2) interest groups, and 3) states and federalism.

### **Points of Consideration**

1. States have the right to award their Electoral College votes as they choose and therefore have the right to change how they distribute their Electoral College votes.
2. The National Popular Vote represents a method of allocating electoral votes in which all votes are counted equally, one person one vote embodying the principle of political equality.
3. The National Popular Vote encourages more national level campaigning instead of state based campaigning because campaigns will have to mobilize their voters across states instead of simply focusing on the few states that hold the balance of power to select the next President and Vice President.
4. The National Popular Vote will represent more interests than fewer interests because it encompasses the entire population of a group that is the whole group has to be courted by the candidates instead of a segment of that population within a particular state. ***This is particularly importantly to minorities who overwhelming reside in blackout states.***
5. The National Popular Vote plan encourages the promotion of a collective national voter interest over individual state interests.
6. The Electoral College as currently implemented encourages the promotion of individual state interests over national interests. A corollary to this is that some states are more important and get more interest than other states.
7. The Electoral College as currently implemented encourages candidate activity in battleground states and little to no presidential candidate activity in blackout states. Data shows that racial minorities tend to be geographically concentrated in blackout states, which results in the majority of states AND the majority of minority groups such as Latinos (77%), African Americans (62%) and Native Americans (72%) to be virtually ignored by all presidential candidates.
8. Because New Mexico is a battleground state, certain in-state businesses such as TV and radio stations benefit economically and the state may benefit politically from the current implementation. However, an examination of battleground status suggests that it is fleeting and therefore temporary. New Mexico will not always benefit from this status.

9. A National Popular Vote model does not favor one political party over the other.
10. The concept of federalism is not undermined through a National Popular Vote plan because federal representation and the power of each state are maintained in the body of the US Senate.
11. Because the Presidency is the only office that represents the entire nation and the people within it, the principle of political equality suggests that this office should represent the will of the majority or decisive plurality of the people.
12. The Electoral College does not benefit small states representation over big state representation.

Given these points of consideration, we make the following recommendation:

If the principles of political equality and political legitimacy are essential ingredients to our democratic institutions, changes to the current electoral system should be considered as the current implementation undermines these principles. Therefore the New Mexico Legislature should consider adopting the National Popular Vote plan.

## Citizen Panel Contributions to the Report

### **Introduction**

While it was C-SVED's initial intention to poll the individual members of the Citizen Panel to achieve a consensus on a series of conclusions about the Electoral College and the proposed compact approach, given the divergent views of the members expressed throughout this process, we concluded no consensus would emerge during at the end of the third meeting.

Thus we decided, as the sponsors of the study, that the Report would reflect the presentations and discussions from our Citizen Panel meetings. The legislative considerations found in the Conclusion of the Report are based on those discussions and the facts about the Electoral College process. So, for example, we believe that we fairly included concerns that congressional approval may be needed for the compact to take effect. However, the fact that congressional approval has never been required in other similar circumstances suggests otherwise, and at this juncture represents a very strong precedent that congressional approval **would not** be an impediment to the adoption or implementation of the one proposed here. We represent those concerns and this answer on pages 11 and 12 of the Report.

In addition, during our second meeting, the Citizen Panel concluded that the overall proposal, including states adopting a compact in which the members would award their electoral votes to the winner of the national popular vote, was constitutional and thus we agreed that we would stay away from the question of constitutionality and couch the "considerations" found in the Report's Conclusion in terms of state sovereignty and rights.

We use this issue as an example of how we tried to be responsive to the concerns of panel members. Importantly, we did not want to get into a "tit-for-tat" with regard to individual members' opinion. We considered each panel member's opinion valid, an important contribution to this report and to the broader debate. Therefore, we invited all panel members to review the report and offer their own concurrences and dissents, which we have incorporated into the final body of this Report. Legislative considerations and conclusions by Panel members that are contrary to those reached by UNM C-SVED are included in this Report.

We also would like to take this opportunity to address a few specific points we heard back from Panel members.

Representative Nate Gentry felt we might not have accurately reflected the discussion on some points. We worked hard to encapsulate over nine hours of discussion into the report and may have left items out that were important to one or more panel member. In contemplation of such a concern, we indicated early in this process that we would incorporate panel member concurrences and dissents to the Report's content and conclusions.

In her dissent, Professor Antoinette Sedillo-Lopez expressed a concern that C-SVED failed to address certain issues she raised regarding constitutionality, the practical application and fairness of the National Popular Vote proposal, as well as its impact on New Mexico. We

believed we addressed those concerns in detail, albeit drawing different conclusions than she did based upon the data and research we presented.

Finally, with regard to Senator Rod Adair's feedback, while some Panel members may believe we brought a certain point of view to this discussion, our conclusions were based on the data we found and information presented and discussed. Many of our conclusions were based on simple facts, such as the under-representation of minorities in battle ground states, the failure of the current implementation method to preserve the "one person, one vote" principle, and the multiple times that the national popular vote winner lost or nearly lost the Presidential election, just to name a few. UNM C-SVED drew our conclusions from the facts we discussed, our own knowledge and extensive research of the issue, which is evidenced by the many citations and footnotes in the Report. We believe our work represented, in Senator Adair's words, a "scholarly" effort with "high quality academic analyses."

**Comments of Maggie Toulouse Oliver, Bernalillo County Clerk, concerning the  
C-SVED Report of the Citizen Panel on the Electoral College and the National  
Popular Vote Plan**

As the County Clerk in New Mexico's largest-population county, I was pleased to be afforded the opportunity to participate in the C-SVED-coordinated citizen panel regarding the Electoral College. However, despite my occupation, I came onto the panel with two main perspectives: First, I brought into the process my perspective as a voter in a small, swing state that currently benefits from the Electoral College model; and secondly, I brought my perspective as a former academic in the area of Political Science, specifically with a background in American Politics and the Founding.

Via neither of these perspectives does my partisanship (I am a registered Democrat) play a role. I came to the panel with the viewpoint that I did not favor a shift from the current implementation of the Electoral College. This viewpoint had two foundations: First; that I believed in the wisdom of the Founders to create a filter by which oft-impassioned whims of the "masses" could be passed through in selection of the Executive; and second, that my experience as a voter in New Mexico taught me that it is to my individual - and our state's collective - advantage to have the current system in place. As a smaller state, our consistent "swing" status has brought the attention of our issues and needs to presidential candidates that would not otherwise happen in a model that did not consider the weight of electoral votes vs. the popular vote.

Let me say at the outset of these comments that I became convinced throughout the course of the panel that a shift to a popular vote model of selecting the president is to our nation's and our democracy's advantage. However, I want to couch that viewpoint in the context that I do not necessarily agree with some aspects of this report, in that while I believe a shift to the popular vote via the NPV *may* bring the desired effects, a.k.a "Points of Consideration" as listed on page, 22, I am not convinced that a shift to the NPV alone will cause those effects to take place. In fact, I think there are greater factors at stake in our American system of elections that must also be addressed in order for the desired outcomes to come to fruition.

I also think that the more desirous course for a shift away from the Electoral College form of electing the president would be to pass a constitutional amendment. While I recognize that the political will likely does not currently exist in order to for such to take place, I believe that it would be the cleanest and most ideal way to accomplish the goals of electing the president via the popular vote.

First, let me address what caused the shift in my perspective over the course of the panel. At first, my position regarding the benefit to a small state like New Mexico remained entrenched regardless of the potential democratic possibilities that could possibly emerge as a result of a shift away from the current Electoral College model. It seemed that to do so would be to permanently shift our state and its voters away from their current place of influence on the presidential election process. Given that New Mexico is a small state in terms of population and economy, it is to the state's benefit to continue to play a role in the



presidential election process in a way that it would not get to under another system of election.

However, I came to realize how tenuous this influence under the current model really is and how minute the real sphere of influence on the election process can potentially be, when the example was given of the accusations around the mishandling of the election in certain precincts in Cuyahoga County, Ohio in 2004. Truly, the outcome of the presidential election came down to the decisions rendered by a relatively small group of voters and even more than that, the decisions made by those with the responsibility for the counting of those votes.

As we saw first-hand in the 2000 presidential election, the decisions of a handful of officials have the power to hold an entire nation in suspense over the outcome of an election. A situation even more undesirable than the Cuyahoga County issue in 2004 arose in 2000, when a group of 5 Supreme Court justices determined the outcome of our presidential election even though the popular vote varied by over 500,000 nationwide. This is not truly democratic, and therefore my opinion about the need to prolong the current Electoral College model has changed.

Second, let me discuss what I think are the greater structural issues that affect elections in America and which I believe need to be addressed in order to cause the democratic expansion that the NPVI is hoping to achieve. Our democracy exists alongside a pro-corporate, capitalist economy. This in and of itself does not necessarily create the conditions under which our system of government has become beholden to special financial interests, however, due to the fact that money plays the most significant role in the election of government officials at each and every level, it is impossible to discuss the democratization of our government without looking at the comparative advantage of those with great financial resources versus those with less. Further, the lack of consistent election laws across the states creates an environment in which a national campaign must necessarily focus its efforts at the state level.

I believe the “Points of Consideration” mentioned in the report could potentially come to fruition if the National Popular Vote initiative were to achieve adoption by the requisite number of states totaling at least 270 electoral votes and therefore rendering it “in force.” However, I am not sure that those “Points of Consideration,” including the nationalization of campaign outreach and the desired effect of presidential campaigns to become more focused on all individuals (and hence, more democratic) rather than special interests, can be achieved without addressing the above-mentioned issues.

Without addressing the strong influence of moneyed special interests of all political stripes on our system of elections, I believe that removing the distorted influence of individual states on the presidential election process may only lead to other and possibly unforeseen distortions that exist independently of the Electoral College. It’s also not clear to me that a state-by-state method of campaign organization wouldn’t continue to exist where campaigns believe that the election laws of one state favor positive outcomes for their candidate versus another. I think the politicization of issues like photo voter

identification at the polls serves to underscore that states' election laws can and will be the target of political strategies by both political parties at the national level.

Regardless of these concerns and the potential influence of external factors, we know for a fact that until a fundamental shift to electing the president by the popular vote has been made that presidents will continue to be elected via the current model and that regardless of any shifts in those external factors that the current dynamics created by that model will continue. Therefore, I would support the recommendation of this report, that the New Mexico legislature should consider adoption of the National Popular Vote initiative. However, if the legislature were to decide to enact such a measure, it must do so with the full understanding that by its actions alone to enter into the NPV compact that not all of the anticipated outcomes may come to fruition without addressing the additional factors previously mentioned. I hope this report and its affiliated comments will serve to guide the legislature in its decision-making process.

**Comments of Steven Robert Allen**  
**Former Executive Director, Common Cause New Mexico**

It was an honor to serve on this Citizen Task Force and to re-examine this fascinating subject. As I previously mentioned, I was a supporter of the National Popular Vote plan long before being invited to join this effort, and my support is perhaps even stronger now.

Common Cause, my former employer, has strongly endorsed the NPV plan, and I have spent much of the last four years exploring this proposal in detail. In particular, I have read or heard the major arguments against the concept as presented by some very smart people. Most of these arguments have been thoroughly refuted to my intellectual satisfaction.

The one exception is the argument that New Mexico, as a swing state, benefits from the current system of electing the president. This argument, it seems to me, is irrefutable. Ultimately, though, I believe that the NPV plan would be such a vast functional improvement over our current system for electing the president that it should be supported. Part of my reasoning is that it's quite unlikely that the enormous economic and political benefit New Mexico receives, especially during presidential election years, will continue indefinitely.

The bottom line is that national polling consistently shows that an overwhelming majority of the American public views the president as a representative, not of the 50 states, but of the entire American populace. In this, I side wholeheartedly with the majority. The current system, which allows the president to be elected without the support of a majority of voters, undermines the legitimacy of the presidency. I believe the rationalization for this system – as outlined in Federalist #68 and elsewhere – no longer has any validity in a 21<sup>st</sup> century democracy.

Nothing in the National Popular Vote proposal circumvents the U.S. Constitution, which gives states the exclusive right to determine how they will award their Electoral College votes. Furthermore, although it's likely that the issue of Congressional consent will be litigated if the compact goes into effect, I don't view this as a serious obstacle to the proposal or as a sufficient reason to withdraw my support.

There is no such thing as a perfect election system. That said, many reforms can and should be made to improve the way elections function in the United States. We need to reform our system for financing campaigns. We should allow qualified New Mexicans to register to vote at polling places. We should continue to increase the sophistication and effectiveness of poll worker training. The list goes on.

The National Popular Vote proposal is just one of many ways to improve an imperfect system. I believe it will ultimately be implemented, and I think this is a good thing for American democracy. Reforms such as NPV increase the legitimacy of our system of government, helping voters understand that their votes do, in fact, matter. It certainly wouldn't present the end of the road for democracy reform in our country, but it would be an important step in the right direction.

### **Opinion of Paul Stokes**

Thank you for the opportunity to comment on this report. I find it to be an excellent exposition of the effects of the procedures of the Electoral College and the National Popular Vote Initiative.

My principal comments are with regard to technical issues that arise from potential or actual errors in the vote count.

Many, maybe all, states have well developed election administration procedures, but the United States as a single entity has almost none at all, with the most important exception being the simple matter of adding up votes of the electoral college. This is one aspect of the NPVI that would require substantial changes compared to the current system.

Considering the national popular vote as an aggregation of the votes of each state, it can be viewed as an analog to votes for statewide offices as being aggregations of the votes in each county. Much thought has gone into how this is done in the states, and therefore, the procedures for the NPV should probably be modeled upon what might be considered the best of the state election administrations. If that were done, the NPV would need to develop procedures to evaluate the accuracy of the results of each state, and to conduct recounts in the event of close elections. For example, many states, including New Mexico, require a full recount of a race if the initial results indicate that the number of votes that separate the candidates are within a small fraction of the total vote (In New Mexico, this fraction is 0.5%, some other states use smaller fractions.). This is a major operation for a statewide race (think the Coleman/Franken race in Minnesota), so it would truly be a monumental operation in the entire country. And several of the races mentioned in the report would meet that threshold.

Such recounts might not even be constitutional, inasmuch as the states are given the responsibility for conducting elections.

Checking the accuracy in the Electoral College vote is almost always simpler, because close races that could affect the Electoral College vote occur in just a few battleground states.

Post-election audits conducted on a statistically significant number of ballots, such as are done in New Mexico, are a popular method amongst election integrity advocacy groups for checking the accuracy of elections. Such audits could be conducted nationally, but for statistical reasons, cannot simply be based on audits conducted in each state (Likewise, statewide races cannot be effectively audited by independent audits in each county.). Again, administering such a post-election audit across the entire country would probably be a nightmare, and maybe not constitutional.

Of course, implementation of the NPV could be done without regard to possible errors in the vote count - just accept the results certified by each state. However, suspicions often arise about errors in various states, and with a close election, this could result in a crisis of confidence, similar to the Florida situation in the year 2000. Taking that case as an example, there were attempts, however unsuccessful, to resolve uncertainties in the election results. It is far from clear how that would be done in a close race conducted by the NPV.

For me, then, accepting the NPVI should depend on some serious work to consider how the NPV would be administered. I haven't seen that. And I would like to see it as a condition placed on the recommendation of the report.

Opinions on other aspects of the report

Notwithstanding the reasonable and authoritative comments of Professor Antoinette Sedillo Lopez, I support the concept of the NPVI, if proper implementation procedures can be developed, on the grounds that the presidential constituency is, in spirit, the body politic of the United States, not the states of the United States.

Moreover, I put little weight on the fact that small states like New Mexico would lose electoral influence by the NPVI. While it is true that they would, the current system reduces the influence on people who live in large population centers compared to the NPVI. Treating this issue as a parochial matter does not seem to me to be in the best interests of the country.

For your consideration, I have also edited or commented on a few phrases or sections of the document using the "track changes" tool in Microsoft Word.

Thank you for doing this important work. It should be a great help for the benefit of our legislators.

**Dissenting View**  
**by Antoinette Sedillo Lopez**  
**Professor of Law, University of New Mexico**

It was an pleasure to work on this Citizen Task Force. The Center for the Study of Elections, Democracy and Voting did a marvelous job of presenting information, encouraging discussion, and writing up a fine report. The idea of abolishing the Electoral College is

popular due to the four instances in which the presidential candidate received the higher vote total of the popular vote, but not the majority of the electoral college vote. However, I must respectfully dissent from the recommendation to join the National Popular Vote Plan. I do so for several reasons:

- 1) I am concerned about the constitutionality of an attempt to circumvent the United States Constitution.
- 2) The practical operation of the National Popular Vote Plan may make the Plan unworkable;
- 3) I see fairness issues in replacing one imperfect mechanism with another imperfect mechanism. And, finally,
- 4) I worry that New Mexico will be particularly left out of the presidential political process as a sparsely populated, rural state with unique demographics and a deep and complex relationship with the federal government.

I will briefly provide more details about my concerns.

### **Constitutional Issues**

While it is true that states have entered into state compacts without seeking congressional approval as required by the Constitution, political compacts that enlarge the power of the states adopting the compact over those states that do not adopt the compact may require congressional approval. The states that have adopted the National Popular Vote Plan have not sought congressional approval and we were informed that National Popular Vote, Inc., the non-profit organization that is pushing this plan across the country, does not advocate that states seek congressional approval. The nine states that have adopted the compact have not sought congressional approval. That leaves the plan vulnerable to destabilizing litigation.

Mathematically, as few as 11 states could adopt the compact and change the way our president is selected. While flawed, the drafters of the constitutional Electoral College process sought to ensure that individual states had a voice in selecting the president. They are to act as sovereign units within the federal republic in selecting the president of our union of states. The drafters also created a Federal Constitution that is difficult to amend. The National Popular Vote Plan circumvents the constitutional amendment process and dramatically reduces states' participation as sovereign units within our federal system. This raises a fundamental question as to whether through compacts, states can effectively amend the constitution. This sets up a troubling precedent for other potential "work arounds" to decide constitutional issues.

### **Practical Operation of Plan**

There are practical problems with potential enforcement issues. Since the states have the constitutional power to select their electors, it is unclear how the Compact would be enforced if a state decided not to comply with the compact. This could result in hotly

contested litigation. The appropriate venue for bringing such enforcement litigation is unclear and it would probably end up in the Supreme Court, which would then allow a non-elected body to decide on the selection of a president. This ultimately undermines democracy.

The fact that the Compact does not require the national popular vote winner to win by a majority is also a practical problem. The Electoral College requires a majority of Electors thus providing the winner an assurance of majority support when viewed state by state. The National Popular Vote Plan could result in a president who does not win a majority on a state by state count, or on a popular vote count. This failure to achieve majority support could hamper effectiveness as the national leader of the union of states.

### **Fairness Issues**

The Compact requires the Secretary of State to certify electors who represent the candidate who won the national popular vote and not the electors who were elected by the voters in New Mexico. The first time that this outcome is different, I predict that voters in New Mexico will become concerned about the fact that their voice does not matter as New Mexicans. There are good reasons that a presidential candidate should be selected by broad geographical, state-by-state support, and when it becomes clear that larger, more populous regions of the country will determine our president, voters in small states and rural areas will see the fairness of the Plan differently.

While the current electoral college does disenfranchise some voters, the National Popular Vote Plan will simply disenfranchise a different group of voters, since it also is not a uniform process for direct election of the president. While the Center's study points out that the majority of electoral activity occurs in battleground states, the National Popular Vote Plan will simply change the concentration of activity. While the Center states that Democrats will tend to focus on urban areas and Republicans will focus on rural areas, this scenario is fluid. Eventually, both parties are going to allocate their resources to target the demographically dense populations and the largest swaths of interest united voters. So the "battlegrounds" will simply change. Currently, it is rational to treat states as sovereign political units, since we are a federal republic. A new approach of targeting nation-wide interest groups and demographically dense areas and media markets does not represent an improvement in the political process.

The National Popular Vote Plan does not address the issues raised by potential recounts, the lack of national standards for recounts, the lack of national standards for the franchise within each state, voter suppression or other issues that are of concern in the election process. Indeed, these serious issues might be less likely to be addressed after the adoption of the National Popular Vote Plan.

### **Special Concern to New Mexicans**

Since its admission to the Union in 1912, New Mexico has been unique among the states. It still is. It is a majority/ minority state with a significant number of Hispanic and Native residents. It is a very rural state and has a significant federal presence within the state. It has a fragile desert environment and an economic base heavily dependent on governmental employment and expenditures. It has a high poverty rate and a high rate of accompanying social problems. And, politically it split. While the Center's report states that its status as a battleground state is fleeting, its five electoral college votes have been important to presidential candidates for at least the last five cycles. Thus, presidential campaigns have paid attention to the demographics and needs of the state. And, once elected president, they retain the awareness of the unique circumstances of the state. This has been very important to New Mexico. While it is possible that New Mexico may not continue to be a battleground state, it is not in our interest in the current political climate to cede our influence in presidential politics.

### **Dissent to the Report of the Citizen Panel on the Electoral College and the National Popular Vote Plan**

#### **Rhonda Burrows, Lincoln County Clerk**

I respectfully dissent from the recommendation to the New Mexico Legislature to consider changing to the National Popular Vote Plan, particularly by compact.

The Constitution of the United States has served to create the most effective form of government of this last 200+ years and continues to allow this country to lead the world in the recognition of citizen's rights. The National Popular Vote Plan is a movement to "nationalize" the election of the president and to replace the "federalist" electoral college. If this is truly the "will of the people" of the individual States then the Constitution clearly provides a mechanism to make this change by amendment.

James Madison in Federalist #39 stated "... in the authoritative mode of introducing amendments, it (*the Constitution*) is neither wholly federal or wholly national".

Efforts to usurp this process by compact would lead a reasonable person to consider the proposal would not meet the test of the amendment process and thus would not be valid. Noting the Constitution has been amended 27 times (17 after the Bill of Rights) to reflect the "will of the people".

I further concur with the concerns about administrative problems of a National Popular Vote as expressed by Professor Lopez and other panel members. I would add to those an additional concern which might create legal challenge and undermine continuity. A compact entered into by various States at various times by varying members of their legislative body could create a scenario whereby an individual is elected in one cycle by virtue of the National Popular Vote Plan and subsequently face election by the traditional Electoral College when States, after a shift in legislative membership, choose to revoke their membership in such a compact. This type of controversy and opportunity for legal challenge undermine the confidence of both candidates and voters in the election process.

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Duncan Scott  
Paul M. Kienzle III  
Paul W. Spear

January 12, 2012

RE: **Dissent: Report of the Citizen Panel on the Electoral College and the National Popular Vote Plan, January 4, 2012**  
**National Popular Vote Initiative and Compact (NPV)**  
**Republican Party of New Mexico, General Counsel**

I, Paul M. Kienzle III, am General Counsel for the Republican Party of New Mexico. I dissent from Report of the Citizen Panel on the Electoral College and the National Popular Vote Plan, January 4, 2012 ("Report"), and do not endorse the National Popular Vote Initiative and Compact (NPV).

My points will be brief in hope that they will be more easily digestible upon quick review. These points are not exhaustive.

1. **THERE IS NO COMPELLING REASON TO CHANGE THE CURRENT ELECTORAL COLLEGE SYSTEM.**

It was clear from the final session in Las Cruces, New Mexico, that Panel members were not convinced that there is a compelling reason to change the current Electoral College system. "If it ain't broke, don't fix it."

2. **NPV IS UNCONSTITUTIONAL.**

NPV is a political compact that requires Congressional approval under the Constitution. The Compact Clause of the Constitution (U.S. Const. Art. I, § 10, Cl. 3) provides that "No State shall, without the Consent of Congress...enter into any Agreement or Compact with another State." As presently proposed, NPV seeks to circumvent the Constitution. Moreover, schemes to change the Electoral College have failed numerous times to gain approval of Congress over a long period of years.



3. **NPV SUBVERTS THE WILL OF NEW MEXICO VOTERS.**

NPV would award New Mexico's Electoral Votes to the Presidential candidate who is the national popular vote winner **even if New Mexico voters by a majority did not vote for that candidate.** The national popular vote winner could win by a **mere plurality, not a majority.** You can already hear the howling from disenfranchised New Mexico voters who find that their State's Electoral Votes went for a candidate not of their choosing and then to a candidate that received a **mere plurality** of national votes. That is bad public policy.

4. **NPV IGNORES THE BUILDING BLOCKS OF POLITICAL PARTIES: STATES.**

Political parties are built State-by-State, not region-by-region or city-by-city. NPV would hamper political party building activities as focus is drawn away from States to broader regions and more populace areas. The present Electoral College focuses on States and enhances State political party building. Members of the New Mexico Legislature and Executive Department will be hard pressed to vote for any measure that effectively directs party-building dollars from New Mexico to other States with more urban population centers.

5. **NPV IS NO BETTER THAN THE CURRENT ELECTORAL COLLEGE WINNER-TAKE-ALL SYSTEM.**

Item 11 on page 23 of the draft Report states that a "decisive plurality" is good enough to award all of New Mexico's Electoral Votes to a Presidential candidate. Under the model NPV in the Appendix attached as Exhibit A to the Report, all of New Mexico's Electoral Votes are awarded to the Presidential candidate who receives the "largest national popular vote total". **No majority of national votes is required.** If a **mere plurality** of votes is enough to award all of New Mexico's Electoral Votes to a Presidential candidate, how is that any different than the criticism of the current Electoral College system of winner-take-all where a plurality will get the job done too?

**6. THIS COUNTRY IS A REPUBLIC, NOT A DIRECT POPULAR DEMOCRACY.**

The Electoral College reflects the fact that this country is a Republic and not a direct popular democracy. The Electoral College is yet another example of how the Constitution protects us all from a tyranny of the majority. Federalism is at stake here. While States are free to enter into political compacts with Congressional approval under the Constitution, NPV minimizes the role of federalism and takes power away from the States and largely gives it to individuals in populace urban centers. States are not a mere “department” of the federal government. States should fight to keep their rightful place at the constitutional table.

**7. SMALL STATES AND SWING STATES ARE HURT BY THE NPV.**

Under NPV, Presidential candidates can ignore small States and swing States and focus precious resources on populace urban areas to scare up a plurality (not a majority) of the national popular vote. There is no good reason to campaign in New Mexico (being a small state and many times a swing state) when campaign dollars yield potentially more national popular votes in more populace areas. Rural areas (of which New Mexico has many) get short shrift; urban areas with the majority of votes get all the attention. “Follow the Money”: contributions from outside populace States or States with large urban areas will flow to those areas, further tilting the playing field against the other States.

**8. VOTER FRAUD DOOMS THE NPV.**

Under the present Electoral College System, voter fraud is contained on a State-by-State basis, firewalled from other States. Under NPV, voter fraud can spread nationally and infect the whole Presidential election process. It is best to contain and stop the contagion at the State level. With different voting standards and qualifications to vote and different timing and recount standards in the 50 States, there is no way to get a level playing field. Unless voting is “federalized” which guts federalism.

**9. QUESTION WHETHER NPV FAVORS ONE POLITICAL PARTY OVER ANOTHER.**

Gaming a change of the Electoral College to favor one political party over another is bad public policy. Much good and bad can be said about the present Electoral College system, but few will claim that it automatically tilts in favor of one political party or another. This dovetails with the lack of a compelling reason to change the current Electoral College system.

**10. FAITHLESS ELECTORS CAN UNDO THE NPV.**

Faithless Electors, those persons who cast the actual votes in the Electoral College, might be tempted to cast their votes for the Presidential candidate who received the most votes in their State and not the national popular vote winner to avoid the situation where their State's Electoral Votes would go for a candidate not of their choosing.

By: /s/ Paul M. Kienzle III Date: January 12, 2012  
Paul M. Kienzle III

**Statement of Dr. Gloria Taradash**

Thank you for the invitation to serve on this important panel. It was a unique opportunity to be involved in a process dedicated to analyzing the potential effects of changing the very structure of our electoral process. I want to thank Maggie for her thoughtful response. She spoke to the concerns I also had. I remain concerned about the movement spreading across many states to make voting more difficult and effectively suppressing one man, one vote, the very foundation of the National Popular Vote Plan. Like Maggie, I believe these underlying factors must be addressed for this most important movement to be successful. Thank you for the report. I support your findings.

Gloria Taradash, Ph.D.



## Appendix A. Compact

### **Article I–Membership**

Any State of the United States and the District of Columbia may become a member of this agreement by enacting this agreement.

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

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

### **Article III–Manner of Appointing Presidential Electors in Member States**

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 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 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.

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 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.

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.

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 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.

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.

#### **Article IV-Other Provisions**

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.

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 chief executive of each member state shall promptly notify the chief executive of all other states of when this agreement has been enacted and has taken effect in that official's state, when the state has withdrawn from this agreement, and when this agreement takes effect generally.

This agreement shall terminate if the electoral college is abolished.

If any provision of this agreement is held invalid, the remaining provisions shall not be affected.

#### **Article V-Definitions**

For purposes of this agreement,

"chief executive" shall mean the Governor of a State of the United States or the Mayor of the District of Columbia;

"elector slate" shall mean a slate of candidates who have been nominated in a state for the position of presidential elector in association with a presidential slate;

"chief election official" shall mean the state official or body that is authorized to certify the total number of popular votes for each presidential slate;

"presidential elector" shall mean an elector for President and Vice President of the United States;

“presidential elector certifying official” shall mean the state official or body that is authorized to certify the appointment of the state’s presidential electors;

“presidential slate” shall mean 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;

“state” shall mean a State of the United States and the District of Columbia; and

“statewide popular election” shall mean a general election in which votes are cast for presidential slates by individual voters and counted on a statewide basis.

Appendix B. List of Participants at Each Meeting

Name	Attended Meeting 1	Attended Meeting 2	Attended Meeting 3
Senator Rod Adair		X	
Alex Adams (UNM Student)	X	X	
Mr. Steve Allen (Executive Director, Common Cause)	X	X	
Ms. Lisa Bryant (UNM Student)	X	X	
Lincoln County Clerk Rhonda Burrows	X	X	
Ms. Amber Carrillo (Native American Alliance & UNM student)	X	X	
Representative David Doyle		X	
Dona Ana County Clerk Lynn Ellins	X	X	X
Santa Fe County Clerk Valerie Espinoza		X	
Senator Stephen Fischmann			X
Representative Nate Gentry	X	X	
Mr. Paul Kienzle, III (Counsel to the Republican Party of New Mexico)	X	X	X
Ms. Carrie D. La Tour (NMSU Student)	X		X
Ms. Meredith Machen (League of Women Voters)		X	
Lincoln Deputy County Clerk Tammie Maddox	X	X	X
Ms. Paula Nielson (League of Women Voters)			X
Mr. David Odegard (UNM Student)	X		
Ms. Gayle Pinkey (League of Women Voter	X		
Ms. Mary Schruben		X	
Law Professor Antoinette Sedillo Lopez	X	X	
NM Elections Director Bobbi Shearer	X	X	X
Mr. David Smoak	X	X	X
Mr. Paul Stokes	X		X
Dr. Gloria Taradash	X	X	X
Bernalillo County Clerk Maggie Toulouse Oliver	X	X	X
Senator Tim Wirth		X	
Moderators			
Professor Lonna Atkeson	X	X	X
Kim Proctor (Graduate Student Political Science)	X	X	X
Jim Noel (Center Associate)	X	X	X