

A De-facto National Popular Vote in 2008

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Abstract

The election of a popular vote loser in the United States presidential election of 2000 exposed the electoral college as a threat to democracy, but subsequent reform failed to occur. A repeat debacle was barely avoided in 2004, and with today's closely-balanced political parity, a repeat of 2000 is still possible in 2008. A plan is in motion to achieve a de-facto national popular vote by interstate compact, but it will not be in effect until 2012 at the earliest. In this paper, I propose a possible temporary solution involving candidate agreement and the support of state parties that could be put in effect as early as the 2008 election.

Background

History of the Electoral College

The electoral college is the method of electing the President of the United States laid out in the Constitution and the Twelfth Amendment. It specifies a college of electors who meet on in their separate states on a set day to choose the President. A state's number of electors is equivalent to its representation in the legislature (two Senators and a population-proportional number of Representatives). After long debate at the Constitution Convention, where the merits of legislative appointment, executive appointment, statewide popular voting, and district voting were debated, it was finally decided to leave the selection of electors to the states. States have almost complete discretion in this regard, except in cases of discrimination.

Initially, the founders hoped these electors would be outstanding citizens chosen by the people to choose a president for them. However, with the emergence of political parties, electors soon became rubber stamps expected to vote along party lines. An effect of this was that electors voted for two men from their party, one for president and one for vice president, when the Constitution provided that the vice president would be the presidential candidate who received the second-most votes. Accordingly, in 1804, the Twelfth Amendment was adopted to prevent pairings of political adversaries by making the offices chosen separately.

Though deeply flawed, the institution managed to function effectively for most of American history, with a few exceptions. In the first decades, methods of selecting electors other than statewide popular election gradually fell out of use. Today, many voters assume this method is required by law, but this is not the case; states retain the ability to choose a different method. In one case, John Quincy Adams was elected in 1825 despite losing the popular vote to Andrew Jackson, exposing another undemocratic aspect of the institution, the House contingent election. When no candidate wins a majority in the electoral college, the House, with one vote per state delegation, chooses the president from among the top three finishers. (This might happen if there was a successful third-party candidate in 2008, which currently seems unlikely.)

Before 2000, the electoral college elected a popular vote loser twice in its history, in 1876 and 1888. However, due to less awareness of the electoral college mechanism, there was little public outrage; in 1888, contention centered around the selection of electors, not the electoral college itself. Grover Cleveland, the popular vote winner and electoral college loser, even said "it was mainly because the other party got more votes" when asked why he had lost the election (though he may have been referring to electoral votes).

As many have written before, the electoral college must be abolished for a multitude of reasons. Most importantly, it damages the democratic process by making the votes of voters in swing states more important than those in safe states. This is reflected in campaign spending and visits, which is bad for democracy. Also, the potential of a mismatch between the popular and electoral votes is dangerous because it ignores the will of the voters.

Proposals for Reform

Opinion polls have consistently indicated that public support for abolishing the electoral college is and has been very high. However, proposed constitutional amendments, most notably those introduced in the 1960s and '70s by Birch Bayh and Hubert Humphrey, have failed to pass, mainly due to misinformed Republican opposition in Congress (though it is unlikely that small states would be willing to vote for a constitutional amendment that does away with their supposed advantage). It would be virtually impossible to achieve a constitutional amendment abolishing the electoral college.

Recognizing the importance of somehow reforming the electoral college, the voting reform advocate organization FairVote is currently spearheading state legislation called the National Popular Vote Interstate Compact, developed by Dr. John Koza. It makes use of states' constitutional right to enact interstate compacts, agreements governing virtually every aspect of interstate relations. (Some examples of interstate compacts include the New York Port Authority, founded by a 1921 compact between New York and New Jersey, and the laws that allow extradition of criminal suspects to their home state in most states.)

The compact effects a *de facto* national popular vote by requiring member states to have electors vote for the national popular vote winner regardless of who the winner is in their state. The compact, passed by state governments like any other, only takes effect once states controlling a majority of electoral votes have ratified it. (The national popular vote calculation is made possible by an 1887 federal law that requires states to publish "certificates of ascertainment" giving the popular vote totals in their state. If there was no federal law in this area, there would be no way for states to independently determine the popular vote total.) In effect, the interstate compact is a *de-facto* national popular vote conducted within the framework of the electoral college, which avoids having to amend the constitution. Four states, New Jersey, Maryland, Illinois, and Hawaii, have adopted the compact, and more are likely to do so soon; it will probably be in force by 2016.

A De-facto Implementation by Candidate Agreement

Working within the electoral college mechanism by interstate compact is an ingenious method of achieving a *de facto* national popular vote without a constitutional amendment. However, the risk of a repeat of 2000 is, arguably, too great to wait until 2016. A *de facto* popular vote could be achieved in 2008 if the candidates were to publicly state they would only take office if they won the popular vote, endorsing the election of the national popular vote winner regardless of who would otherwise win the electoral college and calling for electors to vote for the national popular vote winner. Currently, voters select a whole slate of electors from one party; presumably, since the candidates have the support of and a high degree of control over their party, they could instruct the state parties to choose electors who pledge to vote for the national popular vote winner regardless of whether he or she was of the other party. This plan is effectively the same as the interstate compact, but achieved more informally, and likely not in a legally binding way.

There are several possible barriers to implementation of this plan which would have to be dealt with. First, the candidates would have to be convinced that the benefits of the plan outweigh the cost of spending political capital on an issue not at the forefront of most Americans' minds; they would have to think that the need to implement a *de facto* national popular vote is real and urgent, and that doing so does not give one candidate an unfair advantage. If the candidates are smart, they will realize that the country can't afford to have a repeat of 2000. In that election, controversy over the counting of the vote obfuscated the effect of the electoral college. Ballot uncertainty in Florida, which necessitated a high degree of subjectivity in vote counting, ultimately led to the United States Supreme Court effectively deciding the election in favor of George W. Bush by stopping recounts which later studies indicated would have made Al Gore the winner. The controversy over the counting of the vote took much of the focus away from the electoral college, which deserved just as much blame. Also, in 2000, people weren't as aware of the workings of the electoral college. There is no reason to think that it is not possible that if the popular vote winner was elected president in 2008 there would be much more serious discontent, given that partisans on both sides believe much more is at stake than was in 2000.

It is obviously to both candidates' advantage to avoid a recurrence of the 2000 election. It may seem that it would not be, because they would prefer to be elected president without a popular vote majority than not to be elected at all. However, if the electoral college or the switch to a national popular vote campaign did not provide a partisan benefit to either candidate, then each candidate would have an equal chance of their own popular vote victory being stolen by the electoral college. In general, reform of the electoral college should not be a partisan issue, because its failure to make every vote equal affects all voters equally. Many Republicans oppose reform because they think the electoral college benefits small states due to the two non-proportional electors, but it does

not, because only competitive states receive attention. Many Republicans, considering the 2000 election, also think the electoral college is a strategic advantage to the Republican candidate, balancing the geographical concentration of Democratic votes.

However, the 2004 election is evidence against this claim, and shows that the electoral college mismatch could easily strike either party. Mindful of criticism after the 2000 election, Bush made it a priority to win a clear victory in the popular vote, and did so, receiving 3.3 million more votes than Kerry and 286 electoral votes. Yet, had 59,393 votes in Ohio switched to Kerry, he would have won the electoral college and the presidency. (Also, a combination of 21,822 votes in Iowa, New Mexico, and Nevada switching to Kerry would have resulted in an electoral college tie and Bush's likely selection by the House of Representatives in the contingent election.) A study by FairVote found that, even if Bush had maintained the state-by-state proportion of his support, had he won the popular vote by less than 425,000 votes—close to Gore's 2000 popular vote margin—he would have lost the electoral college.

In the specific case of the 2008 election, however, it is likely that the switch to a national popular vote campaign would benefit Barack Obama more than John McCain. In general, it can be legitimately claimed that the switch to a national campaign would benefit Democratic candidates. The principle method of campaign resource allocation today is television advertising, and since Democratic voters tend to be more concentrated in and near major media markets (cities), this would increase the efficiency of Democratic campaigns. However, any benefit Democrats might receive is small, because it is not significantly more difficult to campaign for a single rural vote than it is for a single urban vote. (In any case, the benefit of a national popular vote in making every vote equal would far outweigh any partisan advantage.)

Another potential benefit to the Democratic candidate in 2008 is a result of the Democratic Party's current advantage in fundraising and organization. It is likely that the electoral college tends to make the weaker candidate in that regard more competitive by decreasing the size of the arena that actually matters to only the swing states; in a smaller population slice, where face-to-face campaigning can be employed more, the electoral college could increase the chances of the weaker candidate. Thus, if there was a de facto national popular vote, Barack Obama might have a significant advantage in not having to concentrate on a few states, and being able to spend the massive amount of money he raises on attracting votes and increasing his base's turnout in the whole country.

It seems reasonable to conclude that the switch to a national popular vote campaign would benefit Obama, so McCain would seemingly be unlikely to support the de facto national popular vote by candidate agreement. However, the agreement could be bundled with a public financing agreement, which both Obama and McCain have talked of. McCain has indicated to Obama that he wants to seriously discuss it, and Obama has said his only concern is assuring that neither party can go back to spending private contributions after pledging to accept only public financing. Bundling the agreement with public financing is a realistic method of adoption because it provides a benefit to both McCain and Obama. The critical factor behind this strategy is that Obama has the greater risk of winning the popular vote but losing the electoral college because of he might lose the crucial swing states of Florida and Pennsylvania while winning the popular vote. Recent general election polls in a matchup between Obama and McCain indicate that Obama holds a slim lead nationally, but McCain beats him by five to ten percentage points in Florida and Pennsylvania. Clinton, on the other hand, currently has a modest lead in those states against McCain, polls indicate.

If Obama cannot win Pennsylvania and Florida, he will likely be unable to win an electoral college majority. Therefore, a de facto national popular vote is to his benefit. Bundling the de facto national popular vote with public financing is in the interest of both candidates; it allows both to bolster their reformer credentials by accepting public financing, it benefits McCain by limiting Obama's spending, and it benefits Obama by preventing the significant possibility of a 2000 repeat in McCain's favor.

- What about the possibility of uncooperative state parties and faithless electors?

The candidate agreement plan depends upon the candidates being able to persuade the state parties to cooperate. What if they do not cooperate? Since states let the party that wins the statewide popular vote choose that state's electors (normally dedicated party members), the plan depends on the willingness of those parties to instruct their electors to vote for the candidate of the other party. Some may be unwilling to do this, and pledged electors might balk anyway, but the plan can fortunately succeed regardless. Assuming that any result where there would be a mismatch between the electoral college and popular vote would be very close in the electoral college, only a handful of states following the plan can ensure its success. In fact, the interstate compact's provision that it only takes effect when states controlling a majority of the electoral votes have ratified it is an unnecessary hindrance, because even if only a handful of states acted upon the interstate compact, there is no way it could have a negative effect, and it could still change the outcome for the better in the case of a mismatch. There is no reason to have the compact take effect only when it controls 270 electoral votes, because 270 electoral votes might not correspond to

a majority of popular votes, and because states should exercise their ability to have electors vote for any candidate if it corresponds with the national will as determined by the popular vote.

- What about third party candidates?

The entry into the race of Michael Bloomberg or another credible third party candidate would have been interesting. While not impossible, it is highly unlikely that he could manage to win an electoral college majority outright, because it would probably require close to 40% of the vote. The candidate agreement plan, which might seem strange to the public in a two-person race, could, with three candidates, seem to be a reasonable way to ensure the third party candidate a fair chance of winning the presidency if he received a simple popular vote plurality.

Ralph Nader is commonly criticized for losing the election for Gore in 2000 by achieving a vote total in Florida greater than Bush's margin of victory. While Nader is unlikely to receive enough support to make him relevant, it is possible that this would reoccur; it should also be considered whether, under the candidate agreement plan, it would be more likely that Nader would receive a national vote total greater than the margin of victory between McCain and the Democratic nominee, if McCain were to win less than 50% of the vote. If this outcome is more likely under the candidate agreement plan than under the electoral college, then this might be a disadvantage of the candidate agreement plan, because such an outcome is certainly undesirable.

- Could the candidate agreement be made legally binding?

Under the law pertaining to presidential succession, when the president resigns, his successor, the vice president, may choose a new vice president, as Gerald Ford chose Nelson Rockefeller in 1974 after Richard Nixon's resignation. In theory, the candidates and their vice presidential candidates could sign a legally binding contract in which they would agree, in the event of the election of the popular vote loser (presumably resulting from the noncooperation of state parties or electors), to resign and instruct their vice president to appoint the other party's presidential candidate as vice president, and then then himself to resign, thus bringing the popular vote winner into office. This may be a question for constitutional law scholars to explore further.