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Question of Congressional Consent for the "Agreement Among the States to Elect the President by National Popular Vote"

The question has been raised as to whether congressional consent is required for the proposed interstate compact entitled the "Agreement Among the States to Elect the President by National Popular Vote."

The short answer (explained in greater detail below) is that, under prevailing U.S. Supreme Court rulings, congressional consent would not be required for the National Popular Vote compact. However, because there will undoubtedly be litigation about this aspect of the compact, National Popular Vote is working to introduce a bill in Congress for congressional consent.

As a matter of practice, most modern-day compacts are silent as to the role of Congress in bringing the compact into effect. For example, the Multistate Tax Compact (the subject of the leading and most recent case on congressional consent) specified that the compact would come into effect when seven or more states enacted it. The National Popular Vote compact follows this prevailing practice and is silent as to the role of Congress in bringing the compact into effect.

Congressional consent is usually considered by Congress after the compact is enacted by the requisite combination of states (although there have been occasional instances when Congress granted consent earlier). National Popular Vote is currently acquiring sponsors to introduce a bill in Congress, with the hope that Congress will pass the bill after the compact is enacted by states representing a majority of the country's electoral votes. National Popular Vote is also hoping that Congress might conduct an informational hearing on the compact as early as 2009.

The U.S. Supreme Court has ruled that any action taken by Congress in connection with a compact implies consent to the compact. The 23rd Amendment specifies the District of Columbia's electors shall be "appoint[ed] in such manner as the Congress may direct." Our proposed federal bill would be one in which Congress grants consent to the compact on behalf of the District of Columbia (and thereby grants "implied consent" to the overall compact). An additional reason why "implied consent" seems especially appropriate for this compact is that explicit congressional consent is generally interpreted as converting the terms of the compact into federal law. However, the National Popular Vote compact deals with a power that belongs exclusively to the states.

Congressional consent (expressed or implied) can be conferred by a majority vote in both the U.S. House and Senate and approval of the President (or enactment by a two-thirds majority if the President vetoes the bill).

Article I, section 10, clause 3 of the Constitution provides:

> "No state shall, without the consent of Congress, ... enter into any agreement or compact with another state...."

Although this language may seem straight-forward, the U.S. Supreme Court has ruled, in both 1893 and 1978, that the Compacts clause can "not be read literally." In deciding the 1978 case of *U.S. Steel Corporation v. Multistate Tax Commission* (434 U.S. 452), the Court wrote:

> "Read literally, the Compact Clause would require the States to obtain congressional approval before entering into any agreement among themselves, irrespective of form, subject, duration, or interest to the United States."
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> "The difficulties with such an interpretation were identified by Mr. Justice Field in his opinion for the Court in [the 1893 case] *Virginia v. Tennessee*. His conclusion [was] that the Clause could not be read literally [and this 1893 conclusion has been] approved in subsequent dicta."

Specifically, the Court's 1893 ruling was in the case of *Virginia v. Tennessee* (148 U.S. 503):

> "Looking at the clause in which the terms 'compact' or 'agreement' appear, **it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.**" [Emphasis added.]

The state power involved in the National Popular Vote compact is specified in Article II, Section 1, Clause 2 the Constitution:

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors…."

In the 1892 case of *McPherson v. Blacker* (146 U.S. 1), the Court wrote:

> "The appointment and mode of appointment of electors belong **exclusively** to the states under the constitution of the United States" [Emphasis added.]

The National Popular Vote compact does not "encroach upon or interfere with the just supremacy of the United States" because there is no federal power whatsoever in the area of awarding of electoral votes in the first place—much less federal supremacy.

The 1978 case of *U.S. Steel Corporation v. Multistate Tax Commission* dealt with a compact that specified that it would come into force when any seven or more states enacted it. The compact was silent as to the role of Congress. The compact was submitted to Congress for its consent. After encountering fierce political opposition from various business interests concerned about the more stringent tax audits anticipated under the compact, the compacting states proceeded with the implementation of the compact without congressional consent. U.S. Steel challenged the states' action. In upholding the constitutionality of the implementation of the compact by the states without congressional consent, the U.S. Supreme Court applied the interpretation of the Compact Clause from its 1893 holding in *Virginia v. Tennessee*, writing that:

> "the test is whether the Compact enhances state power quaod the National Government."

The Court also noted that the compact did not

> "authorize the member states to exercise any powers they could not exercise in its absence."

Of course, there is always the possibility that the U.S. Supreme Court might change the legal standards concerning congressional consent contained in its 1893 and 1978 rulings. Some have argued, for example, that congressional intervention in what would otherwise be an exclusively state matter should be required on the grounds that the compacting states might exert some kind of adverse "political" effect on non-compacting states.

It is not clear what this adverse "political" effect might be, given that the National Popular Vote compact treats votes cast in all 50 states and the District of Columbia equally. However, the more important point is that it has always been the case that one state can exert an effect on the value, in a political sense, of a vote cast in another state, because of the first state's choice of the manner of appointing its presidential electors. For example, the use by a closely divided battleground state, such as Florida, of the winner-take-all rule diminishes the political value of the votes cast by citizens in the two-thirds of the states that are not battleground states. Because of the use by battleground states of the winner-take-all rule, presidential candidates concentrate their polling, visits, advertising, and organizing and attention on the concerns of battleground states, while ignoring the concerns of the remaining states. In 2004, for example, candidates concentrated over two-thirds of their money and campaign visits in just five states (spending the largest amount in Florida); over 80% in nine states; and over 99% of their money in just 16 states. The use of the winner-take-all rule by the closely divided battleground states marginalizes voters in the spectator states.

Florida could, of course, eliminate this affect on other states by changing its method of awarding its electoral votes. For example, if Florida awarded its electoral votes by congressional district, presidential candidates could then simply ignore all of Florida (except for its competitive 2nd, 10th, 18th, and 22nd districts). However, we believe that, under the Constitution, Florida is under no obligation to make such changes. Indeed, it is inherent in the grant by the U.S. Constitution to each state of the power to choose the method of appointing its presidential electors that one state's decision may have a political impact on other states.

The U.S. Supreme Court has already declined to act in response to a complaint concerning the political impact of one state's choice of the manner of appointing its presidential electors on another state. In 1966, Delaware led a group of 12 predominantly low-population states (North Dakota, South Dakota, Wyoming, Utah, Arkansas, Kansas, Oklahoma, Iowa, Kentucky, Florida, Pennsylvania) in suing New York in the U.S. Supreme Court, arguing that New York's decision to use the winner-take-all rule effectively disenfranchised voters in the 12 plaintiff states. The pleadings are found at http://www.nationalpopularvote.com/pages/misc/de_lawsuit.php. New York's (defendant) brief is especially pertinent. Despite the fact that the case was brought under the Court's original jurisdiction, the Court declined to hear the case (presumably because of the well-established constitutional provision that the manner of awarding electoral votes is exclusively a state decision).

The fact that the 1966 case was initiated by predominantly small states reflects the political reality (and recognition by the small states) that each state's bonus of two electoral votes is an illusory benefit to the small states in presidential elections. Only one of the 13 smallest states (and only 5 of the 25 smallest states) are battleground states in presidential elections. The political reality is that 12 of the 13 smallest states are almost totally ignored in presidential elections because they are politically non-competitive in presidential elections. Six states (Idaho, Montana, Wyoming, North Dakota, South Dakota, and Alaska) regularly vote Republican, while six others (Rhode Island, Delaware, Hawaii, Vermont, Maine, and DC) regularly vote

Democratic. These 12 states together contain 11 million people. Because of the two electoral-vote bonus that each state receives, these 12 non-competitive small states have a 40 electoral votes. However, Ohio has 11 million people and has “only” 20 electoral votes. As we all know, the 11 million people in Ohio are the center of attention in presidential campaigns, whereas the 11 million people in the 12 non-competitive small states are irrelevant. In the real world of presidential politics, 20 is far greater than 40. Nationwide election of the President would make each of the voters in the 12 smallest states as important as an Ohio voter.

The question of congressional consent is discussed in considerably greater detail in the book *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote* (available to be read or downloaded, for free, at www.every-vote-equal.com, or available for purchase from www.Amazon.com).