



June 5, 2008

**Recounts Would be Less Likely Under a National Popular Vote for President Than Under the Current System**

There were 23 recounts among 7,645 statewide elections in the 26-year period from 1980 to 2006 — that is, one recount in 332 elections.\* The average change in the margin of victory was 272 votes for requested recounts and 276 votes for automatic recounts. The original outcome remained unchanged in 91% of the 23 recounts over this 26-year period. The probability of a recount drops as the size of the jurisdiction increases. Indeed, only two of the 23 recounts were in big states.

Under the current state-by-state system of electing the President, there are 51 separate opportunities for recounts in every presidential election. This is the reason why there have been five seriously disputed counts in the nation's 55 presidential elections (that is, 5 disputed counts among the 2,084 statewide counts involved in the nation's 55 presidential elections).

In contrast, if the President were elected from a single nationwide pool of votes, one would expect a recount once in 332 elections — that is, once in 1,328 years.

**(1) The possibility of recounts only comes to mind in connection with presidential elections because the current system has repeatedly created situations in which the vote is extremely close in certain states, but not at all close on a nationwide basis.**

No one has ever suggested that the possibility of a recount constitutes a reason why state governors and other officials should not be elected by a popular vote. The topic of recounts only comes to mind in connection with presidential elections only because the current system repeatedly produces artificial crises.

The 2000 presidential election was an artificial crisis created because of Bush's lead of 537 popular votes in Florida. Gore's nationwide lead was 537,179 popular votes (1,000 times larger). Given the miniscule number of votes that are ever changed in recounts (averaging only 274 votes), there would have been no recount in Florida or any other state in 2000 if the national popular vote had controlled the outcome. Indeed, no one (except almanac writers and trivia buffs) would have cared that one of the candidates had a 537-vote margin in Florida.

There was a recount, court case, and reversal of the original outcome in Hawaii in 1960. Kennedy ended up with a 115-vote margin in Hawaii in an election in which his nationwide margin was 118,574.

Samuel Tilden's 3% lead in 1876 was a solid victory in terms of the national popular vote (similar to Bush's solid percentage lead in the 2004 election). However, an artificial crisis was created because of the razor-thin margins of 889 votes in South Carolina, 922 in Florida, and 4,807 in Louisiana.

**(2) The current state-by-state winner-take-all system is not a firewall that helpfully isolates problems to particular states, but the cause of fires.**

The 51 separate vote pools used in the current winner-take-all system regularly create artificial crises in elections in which the vote is close in particulate states, but not at all close on a nationwide basis. The 51 separate vote pools are not a helpful firewall, but the cause of fires.

If anyone is genuinely concerned about recounts, then a single national pool of votes is the way to drastically reduce the likelihood of recounts and eliminate the artificial crises repeatedly produced by the current system.

**(3) An extremely close nationwide count would almost inevitably be accompanied by similarly close statewide results.** Critics of a national popular vote have argued that there could be an extremely close nationwide count in the future.\*\* Indeed, one can expect a close nationwide count once in every 332 presidential elections (1,328 years). However, even in that rare situation, there would also almost inevitably be one or more states with razor-thin popular vote margins. Thus, both systems would also have to grapple with the closeness of that election.

**(4) A national popular vote cannot prolong resolution of a presidential election into January.** The U.S. Constitution, existing federal and state statutes, and legal precedents guarantee “finality” in presidential elections according to a strict overall schedule. This schedule would apply to a presidential election conducted under the National Popular Vote legislation in the same way as it applies to an election conducted under the current system.

All counting, recounting, and judicial proceedings must necessarily be tailored to fit inside the existing constitutional schedule. In particular, the Constitution specifies that the Electoral College must meet on the same day throughout the United States (and this date has been set to be in mid-December by federal statute). The U.S. Supreme Court has ruled that all vote counting, recounting, and judicial consideration must be conducted so as to reach a “final determination” prior to the constitutionally-established date for the meeting of the Electoral College. In particular, the U.S. Supreme Court has made it clear that the states are expected to make their “final determination” six days before the Electoral College meets (the so-called “safe harbor” date established by federal law).

In addition, in almost all states, independent state statutes impose separate (typically earlier) deadlines for finalizing the count in presidential elections. The U.S. Supreme Court has ruled that state election officials and the state judiciary must conduct recounts within the confines of existing state election laws.

It may be argued that this schedule established by the U.S. Constitution may sometimes rush the count (and possibly even create injustice); however, there can be no argument that the schedule established by the Constitution exists; that the existing constitutional schedule guarantees “finality” prior to the meeting of the Electoral College in mid-December; and that this same constitutional schedule would govern the National Popular Vote compact.

**(5) All states are currently prepared to handle the logistics of conducting a recount in their state.** Recounts are not an unimaginable horror or logistical impossibility, but a contingency for which every state is fully prepared to handle after every statewide election. Moreover, the pre-arranged personnel and resources necessary to conduct a recount are indigenous to each state. A state’s ability to conduct a recount inside its own borders is unrelated to whether or not a recount may be occurring in another state.

**(6) Neither the current system nor the National Popular Vote compact require or permit any state to get involved in judging the election returns of other states.** Current federal law (the “safe harbor” provision) specifies that a state’s “final determination” of its presidential election returns are “conclusive” (if done in a timely manner and in accordance with laws that existed prior to election day). The National Popular Vote compact requires each state to similarly treat as “conclusive” each other state’s “final determination” of its vote totals.

**(7) Arguable shortcomings about automatic” recounts and “requested” recounts apply to both the current system and a national popular vote.** Automatic recounts (which are currently available in about half the states) occur whenever the initial count is moderately close (commonly within 0.5%). They are “automatic” in the sense they occur in the absence of any specific complaint or any particular reason to doubt the correctness of the original count. The government pays the costs in such automatic recounts. In most states, various additional boards, election officials, law enforcement officials, and courts have independent authority to order a recount if they believe one is warranted. Requested recounts occur when a disappointed candidate asks for a recount. However, when a requested recount does not change the outcome, the candidate is typically required to pay costs. Even if one argues that existing recount procedures are not sufficiently favorable to disappointed candidates in some situations in some state, these existing procedures (with their arguable shortcomings) already apply to presidential elections conducted under the current system.

Moreover, existing state and federal laws are not permanently frozen and could be (and probably would be) reviewed and updated if a new system were implemented.

**(8) Political mischief may occur under both the current system and a national popular vote.** Under the current system, manipulation can affect the national outcome by, for example, overzealously or selectively purging voter rolls, placing insufficient or defective voting equipment into the other party’s precincts, imposing overly stringent identification requirements, voter intimidation, etc. The use of the butterfly ballot in one county in Florida cost Gore an estimated 6,000 votes — far more votes than the 537 popular votes that Gore needed to carry Florida and win the White House. However, even a mistake of this magnitude would have been a mere footnote if a nationwide count were used (where Gore’s margin was 537,179).

Such mischief is not, however, uniquely associated with either the current system or a national popular vote. In fact the current state-by-state system increases the incentive for mischief and fraud in closely divided “battleground” states.

**(9) Problems with the current system are not rare.** Critics of a national popular vote sometimes dismiss the problems with the current system as being “rare.” In fact, the problems only seem rare because presidential elections are only conducted every four years.

In 55 presidential elections, the current system for electing the President has failed to elect the candidate receiving the most popular votes nationwide in four elections. This 4-in-55 failure rate is equivalent to a 1-in-14 failure rate, or 7%. Given that half of all presidential elections are landslides (with more than 10% spread between the candidates), the failure rate for non-landslide elections is about 1-in-7.

The current state-by-state winner-take-all system generates disputes frequently because every election provides 51 separate opportunities for a recount and dispute. This is the reason why there have been five seriously disputed state counts in the nation’s 55 presidential elections.

In contrast, there would be a single pool of votes in a nationwide popular vote for President. One would therefore expect a recount once in 332 elections — that is, once in 1,328 years.

A shift of a handful of votes in one or two states would have elected the second-place candidate in five of the last 12 presidential elections.

Given the current political environment (with five consecutive non-landslide elections since 1988, and another one expected in 2008), the prediction of “the coming debacle in the Electoral College” made by the 1992 book *Wrong Winner* should be taken seriously.

**(9) Both the current system and the National Popular Vote compact are based on winning a plurality, as opposed to absolute majority.** The National Popular Vote bill implements the almost universal practice, namely that the candidate with the most votes wins.

Critics of a national popular vote sometimes complain that the National Popular Vote bill does not require a majority of the popular vote. However, under the current system, no state requires that a presidential candidate receive anything but a plurality of the popular votes in order to receive the state’s electoral votes. Despite the fact that no candidate received a majority of the popular votes in three of the last four presidential elections, there has been no demand for change from the general public, state or national legislators, or political commentators. Moreover, a change to majority voting would raise numerous related issues, including whether to conduct a run-off election (or introduce some new form of voting), how to conduct the run-off, the advantage run-offs would give to candidates who are capable of quickly raising money for a second nationwide campaign, the lower turnouts associated with run-offs, and the administrative costs and difficulties of running an additional election on short notice.

If there is widespread demand for majority voting and run-off elections at some future time, such changes can be implemented at any time.

**(11) The current system has major shortcomings.** The shortcomings of the current system stem from the winner-take-all rule that awards all of a state’s electoral votes to the candidate who receives the most popular votes in each state.

One shortcoming of the current system is that a candidate can win the Presidency without winning the most popular votes nationwide. In five of the last 12 presidential elections, a shift of a relatively small number of votes in one or two states would have elected the presidential candidate who lost the popular vote nationwide. A shift of 60,000 votes would have elected Kerry in 2004, even though President Bush was ahead by 3,500,000 votes nationwide.

Another shortcoming is that candidates have no reason to poll, visit, advertise, organize, or pay attention to the concerns of states where they are safely ahead or hopelessly behind. Candidates concentrate their attention on a small handful of closely divided “battleground” states. This means that voters in the vast majority of the states are ignored in presidential elections. In 2004, candidates concentrated over two-thirds of their money and campaign visits in just five states; over 80% in nine states; and over 99% of their money in just 16 states.

The *New York Times* reported (May 11, 2008) that both major political parties are already in agreement that there will be only 14 “battleground” states in 2008 (involving only 166 of the 538 electoral votes). In other words, three-quarters of the states will be ignored under the current system in the 2008 election. Four big states — Michigan (17), Ohio (20), Pennsylvania (21), and Florida (27) — contain over half of the electoral votes that will matter in 2008 (85 of the 166). Five average-sized states — Colorado (9), Minnesota (10), Wisconsin (10), Washington (11),

Virginia (13) — account for over a third of the electoral votes that will matter in 2008 (53 of the 166). Only one-sixth of the electoral votes that will matter in 2008 (28 of 166) are possessed by the small states or medium-small states — New Hampshire (4 electoral votes), New Mexico (5), Nevada (5), Iowa (7), and Oregon (7).

Although it is sometimes argued that the current system enhances the influence of small states, the fact is that only one of the 13 smallest states (New Hampshire) will matter in the 2008 general election. In fact, the current system enhances the influence of those big states that are also closely divided “battleground” states — Michigan (17), Ohio (20), Pennsylvania (21), and Florida (27).

*Washington Post* columnist David Broder accurately (albeit undiplomatically) referred to the 36 non-battleground states as “unimportant” “throwaway” states (May 7, 2008).

\* Fair Vote. 2007. *Survey and Analysis of Statewide Election Recounts 1980-2006*. Available at <http://www.fairvote.org/reports/?page=1786&articlemode=showspecific&showarticle=2736> .

\*\* Loy, Brendan Loomer, “Count Every Vote -- All 538 of Them” (September 12, 2007). Loy paper available at SSRN: <http://ssrn.com/abstract=1014431> . National Popular Vote’s comments on Loy’s paper are available at <http://www.nationalpopularvote.com/pages/factchecker.php>