



**April 2, 2019**

**Oregon Progressive Party  
Position on Bill at 2017  
Session of Oregon Legislature:**

**SB 870: Support, with Other Law Needed**

Dear Committee:

The Oregon Progressive Party (OPP) supports this bill, which would enact the Interstate Compact for Agreement Among the States to Elect the President by National Popular Vote (NPV). But it is also absolutely necessary for Congress to adopt a law requiring that all states place all major party candidates on their presidential ballots.

The President of the United States should be chosen in an election in which every vote is equal. That is obviously not the case now. The ideal solution would be to amend the U.S. Constitution to abolish the Electoral College and choose the President by means of national popular vote. But the structure of the U.S. Senate (which parallels the Electoral College) makes that very unlikely.

But a problem with the NPV Compact needs to be addressed. Under the existing system, the most electoral votes that a single state can control is its own electoral votes. So damage from unscrupulous state conduct is limited. The NPV Compact has the potential for allowing unscrupulous conduct by one state (or a few states) to change the outcome of the presidential election. I have presented this point in my testimony about the NPV Compact to the Oregon Legislature several times over the past 5 years. I have not seen a refutation of it anywhere. At the end of this testimony is my review of the nearly nonexistent attempt of National Popular Vote, Inc., to refute it.

In the past, some states have kept major party candidates off of their

general election ballots, for whatever reason or excuse. Alabama excluded Harry Truman from its ballot in 1948 and Lyndon Johnson from its ballot in 1964. The important point is that states are not required by any federal law to place all major party candidates on their ballots. If any state were to exclude a major party candidate from its ballot, after implementation of the NPV Compact, the outcome of the national popular vote could be changed.

The NPV Compact (as set forth in SB 870), Article III, is written to allow each state to determine the number of popular votes for each candidate within that state and within each of the other states as well:

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.

\* \* \*

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.

Although the above wording is awkward, it appears to require that every state recognize the presidential vote count in every other state, as provided by the chief election official of each state.

If a state were to keep a major candidate off the ballot, there would apparently be no basis for any state election official to put more than zero in that candidate's "votes" column for that state. If Texas had kept Hillary Clinton off the 2016 ballot, she would not have received most or all of her

3.88 million votes there (depending on whether write-in votes for her would have been tallied). **That alone would have eliminated her national popular vote margin of 2.86 million votes.** If Florida had kept her off the ballot, she would have lost all or nearly all of her 4.50 million votes there. Simply keeping a major party candidate off its ballot (or otherwise refusing to count votes for such candidate) would enable one or more populous states to swing the entire presidential election, under the NPV Compact.

In 2000, Al Gore received 544,000 more votes nationwide than George W. Bush. That margin could be nullified under the NPV Compact by the decision of any one of about 30 states to exclude one major party candidate.

Excluding major candidates from the general election ballot is not impossible, as Alabama has demonstrated. Further, the Oregon Legislature in 2017 considered SB 888 and HB 2909, which would exclude from the Oregon primary ballot and general election ballot any candidate for President or Vice-President who has not (1) publicly disclosed his or her income tax return for the most recent year or (2) filled out the statement of economic interest required of Oregon candidates under ORS 244.060. Under the NPV Compact, such an Oregon exclusion would reduce the national popular vote total for the affected major candidate by about 1%. And, if Oregon can impose that exclusion, why can't Texas exclude any candidate who is "under FBI investigation" or who fails to support the Second Amendment? In national power politics, the potential for skulduggery cannot be disregarded.

The California Legislature in 2017 did pass a bill requiring disclosure of presidential candidate tax returns. It was vetoed by Governor Jerry Brown. A different governor might have signed it. Applied to the 2016 election, that would have reduced Donald Trump's national popular vote by 4.48 million. The New Jersey Legislature passed such a bill in 2017, but it was vetoed by Governor Chris Christie. Noted constitutional scholar Lawrence Tribe of Harvard Law School has written that such state laws, excluding major party candidates from Presidential ballots, are constitutionally valid.

Laws in other states could disqualify major national Presidential candidates from the state ballots for various reasons, such as:

- candidate's failure to maintain lifetime membership in the National Rifle Association
- candidate's failure to have run a successful business for a specified number of years

- candidate's current or past membership in a labor union
- candidate is under investigation for misuse of government email

The reason could be tailored by the state legislature to match the characteristics of the most prominent Presidential candidate disfavored by that legislature. And the state does not actually have to provide a reason for excluding a major party candidate from its ballot.

At present, Republicans control both houses in 31 state legislatures, and Democrats control 18. There are 34 states in which one party controls both houses and the Governorship. There is no federal law to prevent any state from altering its laws so that a major party candidate for President does not appear on its general election ballot or that votes for such candidate are not considered valid. If the Presidency of the United States is at stake, it is a realistic scenario that one or more of those states would act to tip the national popular vote balance and, under the NPV Compact, change the outcome of the Presidential election.

Without the NPV Compact, these states could not sabotage the Presidential election. In a deep Red state, the most damage that a state legislature can do now is to ensure that the state's electoral votes go to the Republican, which is very likely to happen anyway. The same is true in a deep Blue state, ensuring that its electoral votes go to the Democrat. With the NPV Compact, the saboteur states could determine the outcome of the entire Presidential election by changing the balance of the national popular vote.

National Popular Vote, Inc. contends that keeping a major party candidate off the ballot in a state would meet with such a harsh public reaction that it would not occur. See <http://archive.nationalpopularvote.com/pages/answers/section.php?s=32>. To me, that is wishful thinking. The reaction in a deep Red state to keeping the Democratic candidate off the ballot may not be harsh at all. Apparently the reaction of the public in Alabama in 1964 was not sufficient to prevent the state from excluding Lyndon Johnson from the ballot. The state senate of Maryland has passed a bill requiring that presidential candidates disclose their tax returns or be excluded from the general election ballot. Has there been a huge backlash against the Maryland Senate? Was there a huge backlash against the California Legislature in 2017, when it passed a bill requiring that? Was there a backlash against the New Jersey Legislature in 2017, where such a bill passed with 48-26 and 24-11 margins? I heard of no such backlashes.

National Popular Vote, Inc. then contends that "the Equal Protection Clause

of the 14<sup>th</sup> Amendment to the U.S. Constitution provides a strong legal basis for challenging any attempt to create a one-party state." But it provides zero explanation or documentation or case citations for that proposition. Similarly, it contends that "the Guarantee Clause of the U.S. Constitution provides an additional legal basis for challenging any attempt to create a one-party state." Again, they provide no explanation or documentation or case citations, except to an online article that does not at all support the proposition (and in fact argues that the NPV Compact itself is unconstitutional). Apparently those sections of the U.S. Constitution did not work in Alabama in 1964, and NPV Inc. states no reason to assume they would work in the future.

I believe that the NPV Compact needs to be amended to add this:

If a State fails to place all nationally-recognized major candidates for President on the general election ballot or fails to tally and report the votes cast for any such candidate, the national popular vote total, for the purposes of this Compact, shall exclude all votes from that State.

So, if a state were to exclude Hillary Clinton from the ballot (or not count her votes), then also none of the votes in that state for Donald Trump would be counted in determining the national popular vote winner. This would deter any state from excluding a major candidate from its ballot.