

THE STATE OF NORTH DAKOTA
SENATE GOVERNMENT AND VETERANS AFFAIRS COMMITTEE

SB 2271: An Act relating to withholding vote totals for presidential elections
February 11, 2021

Submitted By: Tara Ross
Author of *Enlightened Democracy: The Case for the Electoral College* and
Why We Need the Electoral College

Overview

The Electoral College is under attack, and this legislative body can do something about it. Adoption of SB 2271 would be an important first step in protecting America's unique presidential election system from the latest anti-Electoral College movement.

The Electoral College is Under Attack

- A California-based group, National Popular Vote, asks states to sign an interstate compact giving presidential electors to the winner of the national popular vote.
- Fifteen states plus D.C. have signed the compact. Those states hold 196 electors among them. Only 74 more electors are needed to reach the goal of 270.
- The compact will effectively eliminate the Electoral College with the support of only a minority of states.

North Dakota can defend itself

- North Dakota legislators are responsible for the appointment of the state's presidential electors.
- Federal reporting requirements in 3 U.S.C. § 6 are vague and require only “the canvass or other ascertainment” supporting the appointment of electors.
- The goal of withholding vote totals is to confuse NPV's efforts to tabulate a national popular vote, without which the compact fails.

The Electoral College is worth protecting

- *The Benefits of Federalism.* Presidential candidates must build national coalitions of voters. Historically speaking, those who build the broadest coalitions win. The process discourages an overfocus on one region, state, or special interest group.
- *Moderation and Compromise.* As a matter of history, the Electoral College has encouraged Americans to work together, across state lines. A direct election system tends to fracture the electorate, as it does in countries like France.
- *Stability and Certainty in Elections.* The Electoral College typically produces quick and certain outcomes. Any problems are isolated to one or a handful of states. Fraud is minimized because it is hard to predict where stolen votes will matter.

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Testimony

The Electoral College is under attack, and this legislative body can do something about it. Adoption of SB 2271 would be an important first step in protecting America's unique presidential election system from the latest anti-Electoral College movement.

The Electoral College is Under Attack

A California-based group, National Popular Vote ("NPV"), has been working to undermine the Electoral College. NPV asks states to sign an interstate compact known as the National Popular Vote interstate compact. By the terms of the compact, all participating states agree to give their presidential electors to the winner of the national popular vote, regardless of the outcome within their own borders. The compact goes into effect when states holding 270 electors—enough to win a presidential election—have signed. Implementation of the compact would effectively eliminate the Electoral College, without the bother of a constitutional amendment.

NPV has so far convinced 15 states plus the District of Columbia to approve its plan. Those jurisdictions hold 196 electoral votes among them, which means the compact is just 74 electors short of its goal. In other words, NPV is on track to eliminate the Electoral College with only a minority of states supporting its proposal. The formal constitutional amendment process, by contrast, requires approval from a supermajority of states before such radical change can be made.

North Dakota can defend itself

Fortunately, the structure of the Constitution gives North Dakota tools with which to defend itself. North Dakota legislators maintain primary control over North Dakota's election. The Constitution deliberately creates a decentralized process in which each state is responsible for itself. The decentralized process is its own contribution to the system of checks and balances that distinguish our Constitution.

North Dakota can act as a check on other states when they arrogantly assume that a minority of states can overhaul the presidential election system, without so much as asking the remaining majority of states what they think.

The idea behind SB 2271 admittedly sounds odd at first: The legislation would withhold North Dakota's popular vote totals at the end of a presidential election. Those numbers wouldn't be released until after the meetings of the Electoral College (assuming they aren't needed for a recount). The goal of the legislation is to confuse NPV's ability to generate a national popular vote total. Without that tally, the NPV compact fails.

As state officials, you know that there is no official national tally because American presidential elections are conducted state-by-state. NPV's compact instead assumes that it can rely on an "official statement" from any other state regarding the number of popular votes in that state. Such official statements are to be treated as "conclusive."

SB 2271 creates confusion where NPV seeks hard numbers. How can NPV tally numbers that it does not have? NPV might be tempted to ignore North Dakota in generating its national tally, but the wording of its compact should prevent it.

Importantly, that compact specifically requires its participants to "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" (emphasis added).

Finally, federal reporting requirements should not prevent North Dakota from taking such action, despite the protests of NPV. Federal law is vague, asking for only "the canvass or other ascertainment" supporting the appointment of electors. The federal provisions read as they do because no one in Washington D.C. is authorized to control the manner in which North Dakota selects its electors. You, as legislators, can even select those electors directly, without reference to a popular vote. Thus, federal provisions cannot be any more specific than they are.

SB 2271 is just one idea when it comes to confusing the vote totals for NPV's purposes. States could take many other actions, such as reverting to an earlier form of ballot in which voters cast separate votes for each individual presidential elector. Whatever North Dakota chooses, though, it does have power to push back on the large states that have haughtily assumed that they can dictate a form of presidential election to their smaller neighbors.

The Electoral College is worth protecting

The Constitution seeks to reconcile two seemingly irreconcilable goals: The Founders wanted the people to govern themselves, but they also wanted to protect minority interests. A simple democracy would not accomplish this objective: Bare or emotional majorities can too easily

outvote and tyrannize minority groups—even very large, reasonable ones. An old analogy notes that a simple democracy is like two wolves and a sheep voting on what’s for dinner.

The sheep doesn’t feel good about being eaten just because it got a chance to vote!

The Founders sought to create something better than this type of simple democracy. They created a Constitution with many safeguards: We have separation of powers, presidential vetoes, a bicameral Congress, and supermajority requirements to do things like amend the Constitution. The Electoral College is one of these safeguards, intended to protect our liberty.

The Electoral College continues to help our country in many ways: It encourages coalition-building and motivates candidates to reach out to a wide variety of voters. It penalizes those who rely upon isolated pockets of support in one region, one state, or among voters in one special interest group. It encourages moderation and compromise from political parties and their candidates. Finally, the state-by-state election process isolates voting problems to one or a handful of states, making it much harder to steal elections.

If this is true, then what is happening lately? No one seems very interested in reaching out to voters and building diverse coalitions, as the Electoral College requires.

We’ve been here before. The country has been divided and angry. We’ve had series of close presidential elections in which it seemed that coalition-building was a thing of the past. In the years after the Civil War, the Electoral College proved its ability to heal just this sort of division.

Consider the political landscape as it existed back then: Democrats were strong in the South, but they didn’t have enough electoral votes in those states to win a presidential election. In the meantime, Republicans were in the opposite situation: They were strong in the North and the Northwest. They had enough electoral votes to win without southern support, but just barely. In other words, both political parties had incentives to earn the support of new voters. Both parties were forced to reach a hand across the political aisle—pretty much whether they wanted to or not. Over time, the incentives inherent in the presidential election process helped to heal some of the divide between North and South.

The incentives today are the same. The first party to realize its mistakes and to once again focus on coalition-building will also begin winning presidential elections in landslides. In a country as large and diverse as our own, such incentives are healthy and necessary if we are to regain our footing. Eliminating the Electoral College will simply undermine our ability to heal.

Conclusion

North Dakota is a sovereign state with complete control over its own method of elector allocation. I urge you to use your power to protect the Electoral College by approving SB 2271. America’s unique presidential election process is an important part of the Constitution’s checks and balances. It should be preserved.