**TESTIMONY OF WILLIAM G. ROSS IN OPPOSITION TO THE NATIONAL POPULAR VOTE INTERSTATE COMPACT (NPVIC)**

My name is William G. Ross. I am the Albert P. Brewer Professor of Law and Ethics at the Cumberland School of Law of Samford University in Birmingham, Alabama, where I have taught since 1988. My courses include Constitutional Law and American Constitutional History, subjects about which I have published various books and academic articles. More biographical information is available on my website at Cumberland. I respectfully offer this testimony before the Joint Standing Committee on Veterans and Legal Affairs of the Maine State Legislature in opposition to LD 1330 and LD 1384, authorizing Maine to join the National Popular Vote Interstate Compact (NPVIC).

Although it is understandable that many Americans want to replace the Electoral College with direct popular election of the President, the National Popular Vote Interstate Compact (NPVIC) is a poor remedy. It is my opinion that NPVIC is unconstitutional, and doubts about its constitutionality probably would generate lawsuits that would either delay its implementation or result in its invalidation by the U.S. Supreme Court. Rather than opting for this constitutionally dubious end-run around the U.S. Constitution, opponents of the Electoral College should either pursue the straight-forward remedy of a constitutional amendment or seek a compromise remedy by enacting legislation in their states to do what Maine already has done – abolish the winner-take all system with a procedure that assigns two electoral votes to the state winner and permits the winning candidate in a congressional district to receive the electoral vote of that district even if that candidate has not carried the state.

NPVIC rests on a questionable constitutional foundation, Article II, Section I of the Constitution, which provides that states shall appoint electors "in such Manner as the Legislature thereof may direct." While the plain language of this text appears to provide legislators with plenary authority over the method of selecting electors, this provision of the Constitution, like all parts of the Constitution, must be read in context and in conjunction with the rest of the document.

The principal constitutional impediment to NPVIC probably is the so-called "Compact Clause" in Article I, Section 10 of the Constitution, which provides that "No State shall, without the Consent of Congress…enter into any Agreement or Compact with another State." Although the U.S. Supreme Court has concluded that the Compact Clause does not require Congress to consent to compacts that affect only the internal affairs of compacting states, it has indicated in *U.S. Steel Corporation v. Multistate Tax Commission* (1978) that the Compact Clause requires Congress to consent to an agreement that "would enhance the political power of the member States in a way that encroaches upon the supremacy of the United States" or "impairs the sovereign rights of non-member states."

Advocates of the compact contend that it would not need congressional authorization because it would not encroach upon national supremacy. But while the compact might not literally interfere with the supremacy of the federal government, the compact would powerfully affect the federal government because it could change the outcome of a presidential election. It also would involve more than merely the internal affairs of the states since it would interfere

with the federalist structure of the Constitution's procedure for electing a president. The equal representation of every state in the Senate is an integral part of the fabric of the Electoral College insofar as it gives every state an electoral vote that is the total of the number of both its senators and its representatives. Although the compact would not violate the letter of the Constitution since it would retain the Electoral College and would not alter the method by which electoral votes are assigned or change the number of electoral votes that any state has, it would jettison the federalist structure of the Electoral College to the extent that the popular vote rather than the votes of individual states would determine the outcome. The compact's reduction of the Electoral College to an empty shell therefore would thwart the intention of the Framers of the original Constitution and the framers of the Twelfth Amendment, which reformed the Electoral College in 1804, since the Constitution clearly contemplates that electoral votes will be cast individually by the states rather than by the states as collective or compacting entities. Although this present procedure permits (but does not require) individual states to select their electors on the basis of popular vote, it does not authorize the election of the president by any kind of national popular vote.

The U.S. Supreme Court has made clear that states may not enact legislation that interferes with the federalist structure of the Constitution, even when the Constitution does not expressly prohibit such legislation and even when a literal interpretation of the Constitution could support such legislation. In *U.S. Term Limits, Inc. v. Thornton* (1995), the Court held that states could not limit the terms that United States representatives could serve, even though the Constitution does not prohibit such limitations, because representatives are officers of the federal government.

The NPVIC is further vulnerable under the Compact Clause because it would interfere with the interests of states that did not subscribe to it. Advocates of NPVIC tend to deny that the compact would interfere with the rights of these states because an election's outcome would be based upon the total number of votes in all states, including non-participants. The compact, however, would deprive such states of their ability to help to determine (or even *to* determine, if the electoral vote of one state would tip the election) the outcome of a presidential election on the basis of electoral votes cast individually by the states rather than collectively based upon a national popular vote. Since this would constitute a virtual abolition of the Electoral College, non-compacting states would be denied their right to participate in a constitutional amendment process to determine whether the nation should make such an important alteration in its method of selecting its president.

The Guarantee Clause of Article IV, Section 4 of the Constitution, which declares that the "United States shall guarantee to every State in this Union a Republican Form of Government," is yet another constitutional impediment to the NPVIC. This contention is closely related to NPVIC's violation of the Compact Clause, for it is based upon the theory that the virtual substitution of a national vote for a state-by-state vote would interfere with the federalist structure of the Constitution. The NPVIC would deprive voters in the non-compacting states of a republican form of government because the states that join the compact would determine the outcome of an election in a manner to which the non-compacting states had not consented.

Another objection to the compact is that it fails to take account of how the compacting states would determine which candidate won the national popular vote. Since the national popular vote in many presidential elections has been very close, any election of the president by such a vote could require recounts in all fifty states and the District of Columbia. The specter of recounts on such a colossal scale has provided a perennial policy argument against the abolition of the Electoral College since a close electoral vote typically would require recounts in only one state or a small number of states. The compact's failure to provide any procedure for recounts would generate obvious practical problems and it likewise could create problems under the Equal Protection Clause of the Fourteenth Amendment since procedures for recounts would virtually guarantee protracted and acrimonious litigation in all fifty states and the District of Columbia that would likely resemble the confusing, contentious, and rambunctious recount litigation in Florida following the 2000 presidential election.

Although the U.S. Supreme Court last year in *Chiafalo v. Washington* re-affirmed the broad power of states to prescribe laws for the selection of presidential electors in its decision permitting states to require each elector to vote for the candidate who won the popular vote in the elector's state, that decision does not, in my opinion, suggest that the states may constitutionally enter into NPVIC insofar as *Chiafalo* involved only internal state voting procedures rather than an interstate compact that has a national effect on the manner in which presidents are selected. Indeed, from a policy standpoint, *Chiafalo* removes one of the popular objections to the Electoral College. By allowing the states to prohibit "faithless" electors, *Chiafalo* helps to prevent perhaps the most undemocratic feature of the Electoral College.

The feature of the compact that seems most likely to encourage a nightmare of litigation, however, is the apparent lack of any certain means of ensuring that states would actually abide by the compact if this meant awarding their electoral votes to a candidate that a majority of legislators in a state opposed, a prospect that would almost inevitably occur in at least some states in at least some elections. Since the compact is an extra-constitutional arrangement even if the Supreme Court found that it is not actually unconstitutional, there is a significant chance that states which subscribe to it would refuse to abide by it if it helped to elect a controversial candidate who was opposed by a large majority of the voters in their state, notwithstanding the compact's prohibition on withdrawal within six months before the president's inauguration. Suppose, for example, that a conservative Republican won a small plurality of the national popular vote but was resoundingly defeated in, say, Massachusetts, California, and New York (states that already have ratified the compact) and would lose in the Electoral College but for the compact. Is it really realistic to suppose that the legislators in those and other states that the Democrat carried would be willing to invoke the compact to enable the Republican to become the president? Indeed, it seems more realistic to suppose that any Republican or Democratic legislature ever would be willing to hand the presidency to the opposing party when the Electoral College, which would remain fully operative even with the compact in force, could thwart such an election. Any defection from the compact that altered the outcome of an election would likely trigger litigation as tortuous as that which provoked *Bush v. Gore* after the 2000 election.

Indeed, there are so many formidable constitutional and practical objections to the NPVIC that the compact almost surely would provoke complex and protracted litigation that would make *Bush v. Gore* seem almost tame by comparison. The Supreme Court's determination

of yet another presidential election also could undermine public confidence in the Court's impartiality, and the Court might not find a way to resolve the issues that would prevent their recurrence in later elections. The constitutional amendment process provides the only sound and durable way to ensure the popular vote of the president. And Maine's procedure for enhancing the importance of popular votes offers a sound and constitutional middle ground for ameliorating the "winner take all" aspect of the Electoral College and making the allocation of electoral votes correlate more closely with the popular vote.

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