Is the NPV Compact Now DOA?

"INQUIRING MINDS NEED TO KNOW"

by Joseph DeMaio, ©2019

Appellate Case: 18-1173 Document: 010110215652 Date Filed: 08/20/2019 Page: 1

FILED
United States Court of Appeals
Tenth Circuit

August 20, 2019

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MICHEAL BACA; POLLY BACA; ROBERT NEMANICH,

Plaintiffs - Appellants,

v.

COLORADO DEPARTMENT OF STATE,

Defendant - Appellee.

INDEPENDENCE INSTITUTE; DAVID G. POST; DEREK T. MULLER; MICHAEL L. ROSIN; ROBERT M. HARDAWAY, Professor of Law,

No. 18-1173

(Aug. 31, 2019) — Earlier this year, your humble servant offered up a brief post addressing the Electoral College and the impact thereon by the efforts of several states – all governed by Democrat governors and Democrat-dominated state legislatures – to enter into what is known as the "National Popular Vote Compact, " or the "NPV" compact.

Briefly stated, under the terms of the agreement, the compact between and among the various states which had joined would provide for the "direct election" of a president and vice-president by binding or pledging all of a particular state's presidential "electors," as established in the Constitution, to cast their electoral votes for the candidate(s) who had received the majority of popular votes nationwide, regardless of the popular vote total in any particular elector's state.

If enough states possessed of 270 electoral votes signed on, the compact would go into effect and, regardless of the popular vote count in a particular state, all of the participant states' electoral votes would be required to go to the winner of the nationwide popular vote.

The viability of that proposed compact, however, now seems to be very much in doubt. Indeed, aside from the contents of your humble servant's prior post positing that the NPV compact idea is not only deceptive, it is likely unconstitutional, the U.S. Court of Appeals

for the Tenth Circuit has recently handed down a decision which just might plunge a dagger deep into the left ventricle of the NPV compact's heart. That decision, *Baca v. Colorado Department of State,* was handed down August 20, 2019.

The case primarily involves the question of whether a state elector of the Electoral College can be removed and replaced for failing to pledge and/or to cast his/her electoral vote for the presidential candidate garnering the most popular votes in that elector's state. Under Colorado law, the electors in question – Micheal …, not "Michael"… Baca, his wife Polly Baca and a third elector, Robert Nemanich – were under Colorado law subject to removal as electors by the Colorado Secretary of State for failing to cast their electoral votes for Hillary Clinton, winner of the popular vote in Colorado in 2016.

Mr. Baca wrote in and cast his vote for John Kasich and was removed for doing so, with his vote nullified by the Colorado Secretary of State. He was removed because Mr. Kasich was not the winner of the popular vote in Colorado, that person being Hillary Clinton. Seeing what had happened to him, both Polly Baca and Robert Nemanich voted, under written protest, for Hillary Clinton. The three impacted electors then filed suit. The U.S. District Court granted a motion to dismiss against them and they appealed to the Tenth Circuit Court of Appeals, which just issued the opinion in question.

The majority opinion is long (125 pages, with a 7-page dissent primarily addressing only the issue of mootness rather than the substantive issue), but contains some interesting and relevant holdings with regard to the Constitution, the Electoral College and how the Founders intended it to operate. The most critical – and as to the NPV compact, relevant – part of the decision, however, is found in the Conclusion (pp. 93-94), where the court states:

In summary, the text of the Constitution makes clear that states do not have the constitutional authority to interfere with presidential electors who exercise their constitutional right to vote for the President and Vice President candidates ***of their choice***.

The Tenth Amendment could not reserve to the states the power ***to bind or remove*** electors, because the electoral college was created by the federal Constitution. Thus, if any such power exists, it must be delegated to the states by the Constitution. But Article II contains no such delegation. Nor can the states' appointment power be expanded to include the power to remove electors or nullify their votes.

Unlike the President's right to remove subordinate officers under his executive power and duty to take care that the laws and Constitution are faithfully executed, the states have no authority over the electors' performance of their federal function to select the President and Vice President of the United States.

And a close reading of Article II and the Twelfth Amendment reveals that the states' delegated role is complete upon the appointment of state electors on the day designated by Congress. Once appointed, the Constitution ensures that ***electors are free to perform***

that federal function with discretion, as reflected in the Twelfth Amendment's use of the terms "elector," "vote," and "ballot." (Emphasis added)

This language seems clearly and unequivocally to articulate that the states – including an aggregation of states purporting to be acting as a group under a "compact" such as proposed under the NPV initiative – lack the power either to "bind" the electors to a particular candidate, including a candidate who garners a nationwide majority popular vote total, or to remove or punish those electors for failing to "toe the line."

It has been the rule since the inception of the Republic that electors are free to "vote their conscience," even if that means casting their ballot for someone other than the "winner" of the popular vote in the elector's state. These so-called "faithless" or "Hamilton Electors" – taking the name from Alexander Hamilton and his views articulated in Federalist 68 – adhere to the proposition that their individual consciences alone should guide them in their selection of the person who should serve the nation as its president. It has happened at least 167 times in the past (*see Baca* at 100).

Thus, while Mr. Baca in the Colorado case was improperly removed and his vote for John Kasich discarded because he would not and did not vote for Hillary Clinton, the same rule should hold true for an elector purportedly "bound" by the terms of a "compact" claiming to dictate to him/her a requirement that he/she vote for the candidate who on a national, as opposed to state-by-state, basis secured the most popular votes. The Tenth Circuit seems clearly to state that any such "agreement" imposed by a state or consortium of states purporting to dictate how the electors will vote would be declared unconstitutional.

The case has been remanded back to the District Court for proceedings "consistent with [the] opinion." Because of the impact of the decision, it is not unlikely that the issue will eventually come before the U.S. Supreme Court by whichever party loses at the lower court level. Whether the Supreme Court will accept review, of course, is another question, as is the question of whether the impact of the case on the NPV would be addressed. The Supreme Court has on other occasions "evaded" considering or answering hot-topic or difficult questions such as this.

In this regard, as noted in your faithful servant's prior post on the topic, the Congressional Research Service has not been silent on the issue. Apart from criticisms of the CRS "products" addressing the "natural born Citizen" clause of the Constitution regarding presidential eligibility, it has produced a "Report" (CRS Report No. 43823) analyzing the NPV initiative here.

With a few notable exceptions discussed below, the Report is generally unbiased, unlike the reports and memoranda it has previously concocted on the natural born Citizen issue. The CRS "NPV" Report, initially issued Dec. 12, 2014 and re-issued as modified and revised Oct. 25, 2018, is entitled "The National Popular Vote (NPV) Initiative: Direct Election of the President by Interstate Compact."

As an update, P&E readers should note that on May 9, 2019, the CRS further revised the prior 2018 version of the Report to bring it more up-to-date. In the process, the CRS deleted and added some language to the report suggesting that recent "public polling" seemed to be shifting in favor of states joining the NPV bandwagon.

Specifically, in the 2018 version of the Report, the CRS had stated (in footnote 29 of the Report) that "[a]t the time of this writing [*i.e.*, Oct. 25, 2018], it appears that no major survey research organization has sampled public opinion on the NPV plan as opposed to general support for direct election." In the revised, May 9, 2019 version of the Report, that sentence is deleted and a revised footnote (renumbered footnote 31) discloses that a more recent March 27, 2019 *Politico/Morning Consult* poll existed and concluding that support for the NPV was growing.

That poll, conducted March 22-24, 2019, is 20 pages long and poses over 100 questions, many of which seem clearly to be calculated to paint President Trump, his job rating and policies, along with many other Republicans (as well as some Democrats) in far less than an objective or positive light.

In fact, several of the questions – posed in a poll taken in 2019, no less – even go so far as to dredge up, 28 years after the fact, the purported "fairness" of then-Senator Joe Biden's presiding as Chairman of the Senate Judiciary Committee during the 1991 hearing on the confirmation of Supreme Court Justice Clarence Thomas. *See* pp. 11-12 of the poll. It is difficult to see these questions as other than being intended to undercut or diminish support for Joe Biden's current presidential candidacy.

These types of surveys are sometimes called "push polls," where the wording of the question is designed to elicit a particular answer. Such polls are not unlike the tactic used by lawyers when asking trial witnesses "leading questions" (*i.e.*, questions which suggest the answer being sought) in courts. While a judge can sustain an objection to a leading question, unless a reader or respondent to a poll question realizes he/she is being led, there is no one to act as a judge.

One of the several ways to spot a "push poll" question is if it begins by using the words "as you may know…," suggesting that you are an astute student of current events because you are already aware of the purportedly "factual truth" that will follow. A push poll will then preface the question to be answered with phrases like "in light of the foregoing" or "knowing this…," similarly implying that you are a member of the *cognoscenti*. Read the whole *Politico/Morning Consult* polling document for yourself to get an idea of how "objective" you think it is.

Those elements aside, the CRS "updated" report glosses over the fact that the phraseology of the poll seems to be calculated to denigrate President Trump and his policies. The questions relating to the NPV compact are buried among the scores of others in the polling document. In contending that a growing number of people seemed to be warming to the idea of the direct election of a president by popular vote as opposed

to the existing Electoral College method established in the Constitution, the poll asked two questions, the details of which can be accessed here.

The first question (POL # 11, p. 7 of the poll) asked was: "As you may know, the winner of the presidential election is determined by the Electoral College, in which states are allocated electoral votes based on the number of senators and representatives in Congress. These votes are cast by electors for the winner of the popular vote in the state, where the candidate with the highest number of electoral votes wins the election. Knowing this, do you believe presidential elections should be based on the Electoral College or the national popular vote?" Thus worded, the poll results were that 50% of the respondents favored direct election over retention of the Electoral College, which was supported by only 34%, with 16% responding "don't know" or "no opinion."

The second question (POL # 12, p. 7 of the poll) asked was: "As you may know, a dozen [*sic*] states have signed onto the National Popular Vote Interstate Compact, an agreement that requires states to award their Electoral College votes to whomever wins the most votes nationwide. Knowing this, do you think the United States should… [k]eep the Electoral College and the current way we elect presidents [or] [h]ave states award their Electoral College votes to whomever wins the most votes nationwide[?]" Thus worded, the results were 33% to retain the Electoral College, 43% to use the NPV compact approach, and 23% responding "don't know" or "no opinion."

The CRS Report describes these polling results thusly (*see* CRS Report at fn. 188 and accompanying text): "The findings of the March 27, 2019, *Politico/Morning Consult* survey cited earlier in this report arguably suggest that greater public knowledge of [the] NPV might spur popular support for the compact. This then might contribute to further momentum if additional states were to join, particularly populous ones like Florida (29 electoral votes), Georgia (16 electoral votes), and Ohio (18 electoral votes) where the compact was under active consideration in 2019."

Thus, the wording of the CRS Report, while not overtly "lobbying" for additional states to join in the campaign to adopt the NPV, seems to posit that, if the public became more aware of the NPV, it could "spur popular support for the compact." And with more public support for the compact, "this might contribute to further momentum" for additional states deciding to join.

The two major problems with this approach, however, are that it first ignores altogether the "push poll" nature of the *Politico/Morning Consult* "survey" and its questionable impartiality. Moreover, while the Report does not mention, understandably, the *Baca* decision – the report was issued May 9, 2019, well before the decision in *Baca* – the central question must be asked: when will the CRS determine to issue another revised CRS Report 43823 specifically updating it by citing and analyzing the *Baca* decision, which, dare I say, eviscerates the entire foundation of the NPV compact? Will that CRS revised report come in time for the electorate and the state legislatures to make an informed decision before 2020 on whether to hop aboard a sinking ship?

Interestingly, the website for the National Popular Vote, Inc. states that it is a "501(c)(4) non-profit corporation whose specific purpose is to *study, analyze and educate the public* regarding its proposal to implement a nationwide popular election of the President of the United States." (Emphasis added). One wonders how long it will take for that website to "educate the public" on the *Baca* decision and what its impact on the NPV compact drive might be. The smart money is on the likelihood that lawyers – perhaps even at Perkins Coie – and NPV supporters are even now busily concocting reasons why the decision will have no effect on the viability of the initiative. Stay tuned… time will tell.

One also wonders when the next *Politico/Morning Consult* poll will be taken where the following question will be included: "A federal appeals court recently held as unconstitutional a Colorado law allowing a state elector of the Electoral College to be removed and the elector's vote cancelled because the elector refused to cast his ballot in favor of the presidential candidate garnering the most popular votes in that state's 2016 general election. The court held that the elector could neither be legally bound by nor removed under the state law for 'voting his conscience' rather than voting for the person garnering the most popular votes in the Colorado 2016 general election. Assuming the foregoing to be true, would you still favor entering into the multistate National Popular Vote compact, where the votes of the electors from the signatory states totaling 270 electoral votes would be pledged and required to be cast for the winner of the nationwide total popular vote for president, but with the risk that the compact could be declared unconstitutional?"

Inquiring minds need to know. Soon.