

California Senate Standing Committee on Elections and Constitutional Amendments  
AB 459  
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I write to warn you of dangers and problems associated with AB 459 and to encourage you to vote against it. I had planned to appear before you but, when your hearing was postponed, I was unable to reschedule my trip to Sacramento. I am formerly a Distinguished Professor of Public Policy and Law at Pepperdine University and now a Research Fellow at the Hoover Institution. I have authored several commentaries on the National Popular Vote Bill, most recently in the context of AB 459 itself in the San Francisco Chronicle (April 12, 2011).

#### I. AB 459 Violates Principles of Federalism Embedded in the U.S. Constitution

The U.S. Constitution does not establish a pure democracy but rather a federal republic. The genius of a republic is that, while every element of it is not purely democratic, several checks and balances and intentional balances of power work together to make certain that the “cool deliberate sense of the community” is carried out. (Federalist 63). Roles are assigned to both the people and to states. For example, the U.S. House of Representatives is based upon population and is referred to as “the people’s House” but the U.S. Senate is based upon state representation. Similarly in electing a president, there is a role for the people (the popular vote) and a role for states (the electoral vote). Indeed, the Constitution does not even establish a national election but rather 51 separate state elections (including the District of Columbia). (U.S. Constitution, Article II, Section 1).

By requiring state electors to vote for the winner of the national popular vote, not the state popular vote, AB 459 eviscerates the electoral system of the Constitution. Unfortunately it does not do so in a straightforward and transparent way, with a constitutional amendment, but by means of a clever end-run, through an interstate compact. This is arguably unconstitutional on its face, and at a minimum violates the clear intent of the founders and the Constitution. It seeks to remove a key element of the federal republic that was carefully crafted and has successfully sustained our government for more than 200 years.

## II. By Essentially Eliminating the Electoral System, AB 459 Will Create a Number of Problems in Elections

Besides the fact that it is part of the federal republic, the elector system provides a number of benefits to the conduct of elections that will be lost if AB 459 and the National Popular Vote bill are enacted.

First, it changes the way candidates campaign. Presently candidates move around the country, visiting a number of so-called battleground states (some of which change each election) in search of key electoral votes. With a national popular vote, candidates will be incentivized to campaign in large population centers and through the media.

Second, under the electoral system, contested elections and subsequent recounts are generally limited to one or two states. Under a national popular vote, we will see national recounts with significant increases in expense and lengthy periods of uncertainty. Votes must be cumulated and counted at some level, and doing so state by state makes sense.

Third, other nations with only a national popular vote see a larger number of candidates, including candidates with little support, fragmenting the vote and rendering it more difficult for a winning candidate to have a majority of the votes cast.

## III. If Reform is Needed, the Maine/Nebraska Approach Makes More Sense Than AB 459 and Is Constitutional

The primary concern of AB 459 proponents seems to be making California presidential elections more competitive and attracting more engagement by candidates, and the culprit in all this seems to be the winner-takes-all aspect of electoral voting. But both Maine and Nebraska have demonstrated there is another approach, which is within each state's powers under the Constitution: allocating electoral votes by Congressional district. This would make elections more competitive, since candidates would be competing across the congressional districts of the state for individual electoral votes, while also honoring the Constitution's electoral process and keeping electoral votes tied to California's voters, not those of other states. If members of the legislature are convinced that reform is needed, this would be a preferable next step from almost any point of view.

## IV. The Interstate Compact Element of AB 459 is Questionable Constitutionally

Serious constitutional questions have been raised about the use of an interstate compact to effectuate the National Popular Vote Bill. At a minimum, it appears such a law would need to be approved by the U.S. Congress. There are also questions whether

this actually qualifies as an interstate compact, and whether the interest of non-compacting states would be adversely affected.

## CONCLUSION

When asked what kind of government the founders had established, Benjamin Franklin is said to have responded: “A republic, if you can keep it.”

AB 459 and the National Popular Vote bill will undermine the carefully constructed federal republic and violate the intent, and even the letter, of the U.S. Constitution, all accomplished through an end-run and not even through a straightforward and transparent Constitutional amendment. It will also adversely affect elections in significant ways that have not been sufficiently studied or understood. Further, there is a reform readily available that could accomplish many of the goals of the proponents of AB 459 without violating the Constitution. I therefore urge members of the Committee to vote against AB 459.