

# LEGAL SERVICES

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## MEMORANDUM

March 8, 2017

**SUBJECT:** Bill ratifying an interstate compact to elect the President and Vice-President of the United States by national popular vote, and making related statutory changes (Work Order No. 30-LS0658\A)

**TO:** Representative Jonathan Kreiss-Tomkins  
Attn: Stephanie Gilardi

**FROM:** Alpheus Bullard *LAB*  
Legislative Counsel

This memo accompanies the bill described above. The bill is a reintroduction of HB 348 (Work Order No. 29-LS1441\A) with one change.

1. Change. This draft uses the exact terminology of the compact.
2. Constitutional issues. The Compact Clause of the United States Constitution<sup>1</sup> requires Congress to consent to certain compacts among the states. The United States Supreme Court has interpreted the clause to require Congressional consent to an interstate compact if the compact encroaches on federal supremacy.<sup>2</sup> The question then is whether the compact's potential or actual effect (if enacted by a sufficient number of states) on the balance of power between states to determine the outcome of a vote in the electoral college, amounts to an encroachment on federal supremacy. The answer to this question is not clear.

If Congressional approval of the compact were to be held to be constitutionally required under the Compact Clause, it is also not clear when that approval would be required.

This approach is a novel process and does not appear to be clearly unconstitutional. However, if the compact were to become the object of litigation, I cannot predict how a court would rule.

If I may be of further assistance, please advise.

TLAB:dls  
17-195.dls  
Attachment

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<sup>1</sup> Art. II, Sec. 1.

<sup>2</sup> "Looking at the clause in which the terms "compact" or "agreement" appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." *United States Steel Corp.*, 434 U.S. 452, 468 (1978) quoting *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893).