

National Popular Vote  
House Bill 175

Testimony of Nevada Legislative Counsel Bureau attorney Kevin Powers. Filed in support of passage of the National Popular Vote Compact.

In this Testimony and response to questions from the legislative committee, Kevin Powers discusses two important issues.

- 1) Would the NPV Compact violate Article 2, Section 1 of the US Constitution dealing with presidential electorates, and
- 2) Does the NPV Compact violate Article 1, Section 10 of the US Constitution known as the Interstate Compact Clause,

First, the Nevada Legislative Attorney determined that "each State DOES have the power to direct how its presidential electors are appointed." (Powers Testimony at page 2). He concludes that passage of the NPV Compact does not violate Article 2, Section 1.

Next on the issue of the Compact Clause, Powers asked the question - "would the interstate (NPV) Compact be subject to congressional consent." (Id at Page 2)

Powers concludes that it is up to Congress to determine if Consent is needed prior to the Compact going into effect. Powers concludes that the Compact does not violate Article 1, Section 10 of the US Constitution. (Id at page 3)

This document is presented in support of passage of the National Popular Vote Compact in Alaska - House Bill 175, hearing before the Alaska House State Affairs Committee, Thursday, March 23, 2017 in Juneau, Alaska.

This testimony is transcribed from a legislative hearing conducted in the State of Nevada on 3/22/2017 concerning adoption of the NPV Compact in that state.

Begin STATEMENT OF Kevin Powers, Nevada Legislative Counsel Bureau Attorney

Kevin Powers: This office's view on the constitutionality of this proposed interstate compact. And what is becoming commonplace, is I have to warn you that this will require the committee's indulgence, because it will take me some time. . . . DISCLAIMER

With regard to this particular interstate compact, there's several issues that arise under the U.S. Constitution. One, as mentioned under Article 2, Section 1, that deals with presidential electors, and also under Article 1, Section 10, which is known as the Interstate Compact Clause. Before getting into each of those, though, it would be helpful if I provide a viewpoint as to how this office approaches a constitutional question, and determining whether or not a piece of legislation is constitutional, in our opinion.

First, obviously, we turn to the plain language of the Constitution. And then we also turn to see whether there's any judicial decision that interprets that plain language and is directly on point. If there's no judicial decision directly on point, then we have to turn to the rules of constitutional construction and ascertain the intent of the framers. And then ultimately we must come up with a determination whether or not this legislation is more likely than not constitutional.

Turning first to the presidential electors clause in Article 2, Section 1 of the U.S. Constitution, In this case, the plain language provides that "Each states shall appoint in such manner as the legislature thereof may direct , a number of electors to elect the President of the United States

That language has been interpreted in a few U.S. Supreme Court cases, but none of those cases are directly on point, and specifically deal with the states in an interstate compact choosing their electors not from within their state and the result of their state election, but looking to outside the state, and evaluating the national popular vote. So in the absence of that directly on point case from the U.S. Supreme Court, or even any lower federal courts, we're left with the rules of constitutional construction and the intent of the framers, where you examine the history of the framing of the U.S. Constitution. The rules of constitutional construction require that the Constitution should not be read in isolation, but every part of the Constitution has to be read together and harmonized.

In addition, when the U.S. Supreme Court looks at the history underlying a constitutional provision, it analyzes the overall goal of the framers in putting together what was essentially a compromise among sovereign states, and to achieve that compromise there were tradeoffs between smaller states and large states to achieve ultimately a consensus to form what is now the U.S. Constitution.

Taking all of that into consideration, we finally must analyze all of that using the presumption of constitutionality, and that presumption is that every statute enjoys a presumption of constitutionality and it will be declared invalid only if it clearly violates the Constitution.

So, with all of that in mind, it's the opinion of this office, with regard to Article 2, Section 1 and the presidential electors 'clause, that each state DOES have the power to direct how its presidential electors are appointed. And then, in the absence of any directly on point U.S. Supreme Court case telling us the states CANNOT look outside of their state to exercise their power of appointment under Article 2, Section 1, we must fall back on the presumption of constitutionality. And therefore it is the opinion of this office, that in the absence of such direct judicial precedent, this legislation is more likely than not, constitutional under Article 2, Section 1 of the United States Constitution.

Turning then to the Compact Clause, in Article 1, Section 10. That provides no state shall without the consent of congress enter into any agreement or compact with another state.

On its face, it seems to apply to every agreement or contract between the states, but in fact, it does not, as interpreted by the U.S. Supreme Court. It only applies to those contracts between states or interstate agreements which tend to increase the political power of a state at the expense of federal supremacy, or which otherwise affect negatively the federal sphere. This is another area where we simply don't have a federal case directly on point and the presumption of constitutionality would come into play. The threshold question is, would this interstate compact be subject to congressional consent. Based on the nature of the interstate compact, there's controversy out there and disagreement among legal commentators and professors of law and others as to whether or not this compact would in fact be subject to the congressional consent provision of the Compact Clause. Assuming that it is, then, of course, it would be up to Congress to determine whether or not to approve the interstate compact. Even if Congress did approve the interstate compact, you'd still have the Article 2, Section 1 U.S. constitutional issue, so the Compact Clause issue wouldn't entirely resolve the constitutional question.

Ultimately, though, again, in the absence of U.S. Supreme Court cases directly on point, we must fall back to the presumption of constitutionality. So, it is the opinion of this office that this piece of legislation is more likely than not constitutional in the absence of any other contradictory judicial precedent on this particular issue.

Anderson: I've heard the 12<sup>th</sup> Amendment referenced twice, and as far as I know, that's just the procedures for the Electoral College itself, not how states award electors. Can you comment as to the applicability of the 12<sup>th</sup> Amendment, because we've heard that several times today.

Powers: That you Mr. Anderson. And you are correct. The provision dealing with the power of the legislature to appoint in such manner as the legislature may direct the electors, remains in Article 2, Section 1 of the U.S. Constitution. The parts of Article 2, Section 1 that were replaced by the 12<sup>th</sup> Amendment are beyond that in the section, and as you said, it governs the procedure once the states have appointed and selected their electors thereafter. So the 12<sup>th</sup> Amendment is not directly applicable here. It's Article 2, Section 1 of the United States Constitution.

While I have the mike, Madam Chair, I'm going to indulge one other thing. It's a statutory legal issue, so therefore I believe it is appropriate to address.

The individuals testifying mentioned there will no longer be a process for selecting electors in the law, if this compact is enacted. That is actually incorrect. Although this bill amends parts of chapter 298 of NRS, it does not amend every section of Chapter 298 or NRS. So those sections will remain in place. In particular NRS 298.035 provides for the selection of nominees and alternates for presidential electors by the major and minor political parties and the independent candidates. So the process in the state for selecting who are the electors

will remain the same even if this piece of legislation is passed by the legislature. So that process will still be in place.

In addition this bill adjusts the Uniform Faithful Presidential Electors Act. And in this case, the persons who are then become electors, under this bill, have a duty to sign a pledge that they will vote according to the presidential slate who wins the national popular vote. So, that is also addressed in this legislation. In particular in the amendment in the bill in section 3 to NRS 298.045. (Nevada Legislation)