



Date: Wednesday, January 31, 2007

To: Ilir Zherka, Executive Director – D.C. Vote

From: Rob Richie, Executive Director

Re: Evaluation of the Potential Impact of the District of Columbia Fair and Equal House Voting Rights Act on the 2008 Presidential Election

OVERVIEW

FairVote is a non-partisan, non-profit organization. In this memo we respond to the potential partisan impact of the District of Columbia Fair and Equal House Voting Rights Act (hereafter, DC VRA).

The Basic Facts: The DC VRA would grant Utah an additional U.S. House seat in the 2008 and 2010 elections before the next reapportionment. This additional seat would result in Utah gaining another electoral vote in the 2008 presidential election, thereby eliminating the chance of a tie in the Electoral College by creating an uneven number of total electoral votes, absent faithless electors. When the Electoral College is tied, the president is then elected by the U.S. House, with the delegation of each state casting one vote regardless of size. The U.S. Senate elects the vice-president separately.

Impact on the 2008 Electoral Vote -- A One-Vote Gain for Republicans: Looked at through a partisan lens, the DC VRA virtually guarantees that the Republican presidential ticket will gain another electoral vote in 2008 because of Utah's strong Republican leanings. An election resulting in a 269-269 electoral vote tie under today's apportionment would no longer be possible, instead being decided by 270 to 269. After 2008, the DC VRA would continue to prevent an electoral vote tie, but we cannot measure its impact on presidential outcomes because we cannot know which state will gain the extra U.S. House seat it creates. By virtually eliminating the chance of a future Electoral College tie, however, the DC VRA meets a clear public interest value, given the potential instability coming with such a controversial U.S. House vote and the highly questionable process of each state casting one vote regardless of population.

Impact on the Outcome of the 2008 Presidential Election – Almost Certainly None: A Republican gain of one electoral vote will only affect the outcome of the 2008 presidential election in the highly unlikely event of three circumstances, *all of which* would have to be true:

- an historically close presidential election in the popular vote: *odds at least six to one against*
- a division of states in this close election resulting in a 269-269 tie: *odds at least 33 to one against*
- Democrats in January 2009 being able to win support for their presidential candidate from 26 of the 50 U.S. House delegations as elected from different states in November 2008: *odds at least two to one against in a year with an historically close presidential election*

This memo explains the *very long odds* (see appendix) against this set of circumstances – a result that would happen at most once in the next 1,600 years of elections. Balanced against this remote possibility are the concrete realities that the DC VRA would provide the District with a House Member fully empowered to vote in all U.S. House votes for the first time in history and that the nation would avoid having a presidential election thrown into the chaos of a vote in Congress due to an Electoral College tie.

FULL DISCUSSION

What impact would District of Columbia Fair and Equal House Voting Rights Act (DC VRA) have on the number of Presidential Electors?

The DC VRA would create one more electoral vote. Under Article II, Section 1 of the U.S. Constitution, the number of Presidential Electors is established as follows: “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the state may be entitled in the Congress.” Congress has fixed the size of the U.S. House at 435 by the *Apportionment Act of 1911*, but the body has the power to increase this size.

Should the DC VRA become law, there is little doubt that it would be unconstitutional to increase the size of the U.S. House without increasing the number of presidential electors. Since the District of Columbia’s number of electors would not change under the plan (because it would receive three electoral votes under both the 23rd Amendment and under the DC VRA), the result would be that Utah would temporarily gain one elector in the 2008 election cycle. After the 2010 apportionment, the additional elector would be granted to whichever state earned it based on its population, with an unknown partisan impact that is reviewed in more detail later in the memo.

There are two immediate consequences. First, this additional electoral vote for Utah would virtually eliminate the possibility of a tie in the Electoral College (after passage of the DC VRA, a tie only could happen if a “faithless elector” who was pledged to vote with the majority instead chose to abstain or vote for a third candidate) and second, it would result in an additional Republican elector in 2008, given Utah’s heavy Republican electorate. An election that would result in an exact 269-269 tie in the Electoral College under the current system – thereby sending the election to the House of Representatives to decide, with each state’s congressional delegation receiving one vote, and a winner needing the votes of an absolute majority of state delegations – would instead be won by 270 to 269.

How likely is it that an Electoral College tie will result in a Democratic victory?

By gaining one vote in an Electoral College that currently has a total of 538 votes, Republicans obviously would gain a slight *mathematical* boost. But it is highly improbable that the DC VRA would give Republicans any *real* advantage in the 2008 elections, the only cycle where the tie-breaking elector would be guaranteed to be Republican. For an electoral tie (which would occur under the status quo assuming the DC VRA is *not* enacted) to result in a Democratic victory, *all* of the following conditions would almost certainly have to be true – **odds that we generously calculate at no better than 400 to one.**

- 1) ***The presidential election would need to be historically close, one decided by a popular vote margin of less than 600,000 votes:*** Close presidential elections in either the popular vote or the Electoral College in fact are rare. Although the 2000 election is in our recent memory, fewer people know that Al Gore’s popular vote margin that year of some 543,000 votes was the second closest popular vote margin in any presidential election since the 19th century. Gore’s four-vote defeat in the Electoral College was by far the closest Electoral College result in modern history.

Indeed, two candidates have each won at least 42% of electoral votes in only three of the last 27 presidential elections: Woodrow Wilson's re-election in 1916 and George Bush's two wins in 2000 and 2004. Even when the nation has a relatively close election, as we have had in 2000 and 2004, they usually are followed by elections with more comfortable margins of victory, such as Kennedy's narrow popular vote win in 1960 being followed by Johnson's 1964 landslide and Carter's relatively close win in 1976 being followed by Ronald Reagan's comfortable win in 1980.

FairVote cautiously puts the odds of an historically close election in 2008 as six to one.

2) **Against extraordinary odds, states would have to be won in a way that results in a tie:**

In 2004, John Kerry lost the national popular vote by more than three million votes, but he would have secured a tie in the Electoral College with an increase of fewer than 38,000 popular votes spread across three states: New Mexico, Iowa and Nevada. This seemingly near miss gives a certain plausibility to the chance for an Electoral College tie, but it is misleading in several respects.

- First, John Kerry's margin of defeat in the popular vote in Nevada was 2.59%, which in fact was greater than his national popular vote margin of defeat of 2.46%. To reverse his defeat in Nevada, Kerry almost certainly would have required a much closer election nationally—indeed, the numbers suggest he probably would have needed to win the national popular vote by at least 0.14%.
- Second, given that Kerry's margin of defeat in Ohio was a smaller percentage than in Nevada, the national rise in Kerry's share of the popular vote necessary for him to win Nevada would have been more likely to contribute to a victory in Ohio and an absolute victory than an Electoral College tie. Looking ahead, recent election outcomes in Ohio (where Democrats easily won races for governor and senator by an average victory margin of 17% in 2006) and in Nevada (where Republicans won races for governor and senator by an average victory margin of 9% in 2006) suggest that a Democratic win in Ohio in 2008 is more likely than a Democratic win in Nevada.
- Third, other states are likely to shift to some degree with new candidates. Every shift makes it that less likely the votes will breakdown in just a way that they result in a 269 to 269 tie. In 2004, two Ohio professors who looked at the full range of possible results in the final handful of the closest states found that the odds of a tie were remote. When 17 swing states were seen as being in play in the summer, they found only 1.5% of the 1,969 possible outcomes resulted in tie scenarios. Even by late October, when they only treated Florida, Ohio, Wisconsin, Iowa, Minnesota, New Mexico and New Hampshire as swing states, they only found four tie scenarios out of 128 possible outcomes — or 3.1 percent.

[Source: <http://washingtontimes.com/national/20041027-115156-9178r.htm>]

FairVote cautiously puts the odds of an electoral vote tie in a nationally close election as 33 to one.

3. The Democratic candidate would need to win an absolute majority of delegations in the U.S. House as elected in November 2008: The method of choosing a president in the event of an Electoral College tie is one of the most remarkably undemocratic features in the U.S. Constitution. In January 2009, every newly elected U.S. House delegation (meaning the House members elected in November 2008 rather than the current chamber) would cast one vote, regardless of its number of Members. After the 2004 elections, the Republicans had a large, two-to-one edge in control of delegations, but Democratic gains in 2006 flipped a number of states; Democrats now make up the majority in 26 delegations going into 2008.

But even if a vote for a president were to take place today, it is far from certain that the Democratic candidate would win. They almost certainly could not win votes from more than 25 states. When one party has an advantage in a House delegation, its Members might be expected to vote for the presidential candidate of its party, but there is no guarantee that they will do so. As it turns out, South Dakota's Democratic congresswoman Stephanie Herseth in 2004 pledged to South Dakota voters that in the event of the presidential election being sent to the House, she would vote the way her state had voted – which would be certain to be a Republican in a nationally close year. (Source http://markschmitt.typepad.com/decembrist/2004/11/in_defense_of_h.html)

When no candidate wins an absolute majority of states, the Constitution is not clear on who becomes president. Quite likely the presidency would remain vacant, and then on January 20th it would go to the vice-president elected by the newly elected U.S. Senate, where the results would be unknown – and where current vice-president Dick Cheney would cast any tie-breaking vote.

It is critically important to note that it would be a new Congress, the one elected in November 2008, rather than the current Congress that would decide a tie. For Democrats to not only retain their edge in House delegations, but in fact pick up a new delegation (as necessary to have a real chance at a vote for the Democratic candidate in 26 state delegations), it likely would require having a national partisan comparable to the 54%-46% advantage they had in the 2006 elections. In the event of such an election, however, the Democratic candidate for president would almost certainly cruise to an easy victory in the popular vote and in the Electoral College, making the question of a tie completely irrelevant. On the other hand, if the national electorate returns closer to the 50% -50% division that is a pre-condition for an Electoral College tie, House Democrats are unlikely to have the votes in the House necessary to elect their preferred candidate.

Indeed, given that the current Democratic Party majority depends on Democrats winning in Republican-leaning districts, its Members would put themselves in serious political jeopardy in 2010 by automatically voting for their party's candidate rather than how their district and their state voted. Note that the Republican presidential candidate is likely carry about thirty states in a nationally even presidential race, meaning that Democrats in House delegations in at least six states would need to be voting against how their state – and often their district – voted.

Consider Indiana as one example. After picking up three U.S. House seats in 2006, Democrats now hold a 5-4 majority of Indiana's congressional delegation. The state is certain to be won by a Republican in a close presidential year in 2008, however, and the three newly-elected Democrats

all represent districts where the Republican presidential candidate will likely win by more than 10%. Not only will it be a challenge for all of these new Democrats to win in 2008 (yet necessary for Democrats to maintain their control of the state's delegation), but it would be even tougher for them all to be re-elected in 2010 if they were seen as having acted in a highly partisan way in voting for a Democratic candidate for president who lost in their state and in their district.

If one puts South Dakota in the Republican column no matter what happens with Congresswoman Herseth's re-election effort – a logical conclusion given her 2004 pledge – then Democratic control is down to 25 delegations. Of those delegations, several are at risk in a nationally even year: Democrats have only a one-seat edge (meaning only one Democratic loss switches the state to Republican control) in such states as Colorado, Iowa, New Jersey, Tennessee and West Virginia and have a two-seat edge (meaning one seat change makes the state a tie and unlikely to cast a decisive vote for president) in states like Arkansas, Maine, Minnesota, New Hampshire and Wisconsin. Other states like Pennsylvania (where Democrats must defend several new seats that they won in taking a majority of the state's delegation) could easily be in play as well.

Thus, a Democratic presidential candidate's win in the House would be far from assured, given that we cannot predict what will happen in the 2008 congressional elections and given that Democrats likely need to hold all their current delegations as well as gain control of one new state. Furthermore, Democrats in Republican-leaning districts who vote for the Democratic presidential candidate may well risk their own career and their own control of the U.S. House in 2010, when many Democratic incumbents from Republican-leaning districts would face potentially angry voters in mid-term elections – mid-terms where the governing party historically suffers setbacks.

FairVote cautiously puts the odds of Democrats having a clear ability to elect a Democratic candidate for president in a U.S. House vote in January 2009 after a nationally dead-even election as two to one against.

Putting this estimate with the odds calculated in the first two categories provides our final estimation of the odds of the District of Columbia Fair and Equal House Voting Rights Act directly contributing to a Republican victory in the 2008 presidential race as approximately 400 to one – or, in other words, one chance in 1,600 years of presidential elections.

Would an additional Republican electoral vote affect campaign strategy in 2008?

It is inconceivable that an additional Republican electoral vote would affect presidential campaign strategy in 2008. First, we already have shown how the odds against an electoral vote tie are low – at best one in 200. Second, even if the election were to result in a tie, the Democratic presidential candidate would have been foolhardy *to play for a tie*. As our review of the question of control of House delegations suggest, a Democrat in no way can bank on being able to win a majority in 26 of 50 U.S. House delegations – there are far too many wildcards to make that a reliable strategy rather than seeking an Electoral College majority. Third, the final set of swing states (such as Florida, Pennsylvania, and Ohio) and emerging swing states (such as Colorado and Virginia) will be the same whether Republicans have an additional electoral vote or not, and the candidates will do every thing they can to win every closely contested state. If Iowa were very much within reach, for example, but potentially unnecessary to win to

earn a tie, the Democratic candidate would still try to win Iowa just as much as they would try to win the close states where the Democratic candidate had a very slight advantage. Simply put, the Democratic candidate will focus on winning several potential swing states and newly-emerging swing states that were lost in 2004, rather than only focusing on the three states where victory in 2004 would have resulted in an electoral vote tie – a tie that in 2008 would have unknown partisan consequences.

What might be the impact of an uneven number of electoral votes in future Presidential elections?

The U.S. Constitution's mechanism for selecting a president in the wake of no candidate winning a majority of electoral votes is perhaps the least defensible feature in the entire document. In such an election, the identity of the new president would be in limbo until after the newly elected U.S. House is convened in January, and even then would only be clarified if one of the candidates could muster support in an absolute majority of state delegations. If no candidate succeeds, then there would be no president-elect. On the afternoon of Jan. 20, the current president's term would end, and the office would be declared vacant. The vice president – having just been selected by the U.S. Senate -- then would be elevated to the presidency rather than the presidential candidate who ran at the head of the ticket. As Yale law professor Akhil Amar wrote in 2000, "Our current systems of presidential selection and succession are a mess - various accidents and crises waiting to happen."

[Source: <http://www.slate.com/?id=1006401>]

As a result, avoiding such potential chaos should be seen as a highly positive value for the DC VRA, not a negative one. Looking through a partisan lens for future presidential elections, the DC VRA will give one electoral vote to a state that otherwise would not have that seat – and as of now, there in fact is a somewhat greater chance that this will help the Democratic presidential ticket by one electoral vote in 2012 than the Republican ticket. If the U.S. House size is maintained at 435 (for which, as an aside, there is no constitutional requirement and there is strong policy arguments to revisit, given the ever-increasing population in each congressional district), then five states are next in line to pick up seats. According to an analysis by Election Data Services of 2006 U.S. Census state population estimates, the five states that might benefit from the DC VRA creating a new U.S. House seat are two swing states (Missouri and Florida), two Democratic-leaning states (California and Massachusetts) and one Republican-leaning state (Texas). The five states whose "final seat" is most threatened by gains of population in other states and thus could benefit from the DC VRA are two Democratic-leaning states (California and Illinois), two battleground states (Ohio and Minnesota) and one Republican-leaning state (Georgia).

[Source: <http://www.edssurvey.com/images/File/2006ApportionmentPressReleaseTables.pdf>]

A note on how the National Popular Vote Plan for President could make this debate moot:

There is one more factor to consider: the National Popular Vote plan for president (source: www.nationalpopularvote.com) that would ensure that the candidate who wins the national popular vote in all 50 states and the District of Columbia would be guaranteed victory in the Electoral College. With the endorsement of groups like FairVote and Common Cause and former Members of Congress from across the political spectrum, National Popular Vote is pursuing a state-based approach. Its plan does not call for abolishing the Electoral College. On the contrary, it recognizes that the Constitution already grants states the power to make the Electoral College work for all Americans.

Under the Constitution, states have exclusive power --and indeed responsibility-- to award their own electors in accordance to the will of their citizens. In the 19th century, many legislatures simply appointed electors without holding elections. Most states today award all their electoral votes to the winner of the popular vote in their state, but Maine and Nebraska have chosen to award an electoral vote to the candidate who wins each of its congressional districts.

States could just as easily award them to the national vote winner in all 50 states and the District of Columbia. One state on its own is unlikely to make this choice, but if a group of states representing a majority of Americans and a majority of the Electoral College entered into a binding agreement to do so, then the nationwide popular vote winner would achieve an Electoral College victory every time – and making irrelevant the entire debate about the DC VRA’s impact on presidential elections. States in fact regularly enter into such interstate compacts. As one example, the Port Authority is a compact among New York, New Jersey and Pennsylvania.

Every state in the nation this year will debate legislation about joining the agreement, as state legislators from all 50 states have pledged to introduce the plan in 2007 or 2008; already, the Colorado state senate passed the plan on January 24. FairVote expects the National Popular Vote legislation to pass in several states in 2007. Because the agreement only goes into effect when the number of participating states yields a majority of 270 electoral votes, the odds of it being in place in 2008 are small. At the same time, they are significantly higher than the odds of an Electoral College tie in 2008. Any poll will tell you that the vast majority of Americans favor electing the president by national popular vote over the remarkably dysfunctional current Electoral College system. By this September we should know whether the NPV plan is more likely to be in place by 2008 or whether we will have to wait until 2012. Regardless, FairVote believes that 2008 is likely to be the last state-by-state election for president in our nation’s history.

Conclusion:

Democrats in the U.S. House face a momentous choice. They can join with leading Republicans in awarding Washington, D.C. a voting representative in the U.S. House, thereby giving full voting rights in the House to our nation’s capital and to its people who happen to be among the most loyal Democrats in the nation. Or Democrats can use the flimsy excuse of the highly remote chance that the DC VRA would tip the presidential 2008 election to maintain the highly undemocratic and morally repugnant status quo.

APPENDIX: Calculating the Odds

This memo sets the overall odds that Utah's prospective additional electoral vote will affect the outcome of the 2008 presidential election as approximately 400 to one. The odds were calculated based on the following conditions all having to be true. My analysis sets the odds against each actually occurring:

- an historically close presidential election in the popular vote: (*odds at least six to one against*)
- a division of states in this close election resulting in a 269-269 tie: *odds at least 33 to one against*
- Democrats in January 2009 being able to win support for their presidential candidate from 26 of the 50 U.S. House delegations as elected in November 2008: (*odds at least two to one against*)

The overall odds of 400 to one against all these conditions taking place are derived by multiplying the odds of each one of them occurring. First, the results of both a close election and one that results in a tie is one in 198 (one in six multiplied by one in 33 equals one in 198). Second, the fact that the odds of a tie vote being able to be decided for a Democrat by a majority of state delegations are two to one against making the overall odds of 398 to one, which is rounded up to 400 to one.

A historically close presidential election: In the modern era (defined as elections in the 20th and 21st century), there have been only three elections where two presidential candidates have won at least 42% of electoral votes. That means that in 24 of 27 elections, one candidate won a landslide in the electoral vote. These three elections were Woodrow Wilson's re-election in 1916 and George W. Bush's two wins in 2000 and 2004. Three out of 27 elections produces odds of one in nine. Because our two most recent elections have been competitive, the odds have been increased slightly to one in six. That increase is in fact a generous estimate given that the electorate seems likely to have a clear opinion about the incumbent party in 2008, just as it did in lopsided electoral vote elections in 1980, 1984, 1988, 1992 and 1996. Note that popular vote margins are rarely very close -- only once (in 1960) has the popular vote been decided by less than a half million votes in the modern era -- and close elections are often followed by less competitive elections, as the electorate makes a judgment about the incumbent party that pushes the results away from a 50%-50% division.

A close election results in a tie: As explained in the memo, the odds of a close election resulting in a breakdown of states that would result in a tie being 33 to one come from the most cautious estimate that we found in searching mathematicians' calculations of the odds of a tie when looking at the final set of swing states late in the 2004 presidential election campaign.

A Democratic presidential candidate winning a majority of House delegations: The two-to-one odds against a Democratic presidential candidate winning a majority of 26 House delegations in a nationally close election derive from the following facts. 1) Even with its current bare majority of 26 House delegations, a Democratic candidate would be unlikely to win a majority of 26 current delegations because of Congresswoman Herseth's pledge to vote as her state votes -- which is certain to be Republican. 2) If the presidential race is historically close, the Democrats in the 2008 House races almost certainly will face a tougher electorate for them than in 2006, when they were preferred by 54% of voters. In such a nationally even election, it is more likely that Democrats would lose delegations than win the additional delegation necessary to control 26 delegations for a Democratic candidate.