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Executive Branch Power to Postpone Elections

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Summary

Because of the continuing threat of terrorism, concerns have been raised about the potential for terrorist events to occur close to or during the voting process for the November 2004 elections. For instance, the question has been raised as to whether a sufficiently calamitous event could result in the postponement of the election, and what mechanisms are in place to deal with such an event. This report focuses on who has the constitutional authority to postpone elections, to whom such power could be delegated, and what legal limitations exist to such a postponement.

Traditionally, all voting — whether federal, state or local — occurs in local precinct polling places, and state or local authorities have a significant role in regulating such voting. Congress, however, also has authority to regulate elections, and that authority may vary depending on whether the election is for the Presidency, the House, the Senate, or for state or local offices. While the Executive Branch has significant delegated authority regarding some aspects of election law, this authority does not currently extend to setting or changing the times of elections.

Under a variety of possible scenarios that could arise as a result of a terrorist attack before or during an election, either the Congress or the states might pass legislation which would affect the timing of these elections. The suggestion has been made, however, that the Executive Branch might have some role in determining whether an election is to occur or whether it can be cancelled. While the Executive Branch does not currently have this power, it appears that Congress may be able to delegate this power to the Executive Branch by enacting a statute.

Contents

Background	1
Relevant Constitutional Provisions	2
House and Senate Elections	2
Presidential Elections	4
State Elections	5
Executive Branch Power Over Elections	5

Executive Branch Power to Postpone Elections

Background

Because of continuing threats of terrorism, questions have been raised about the potential for terrorist events to occur close to or during the voting process for the November 2004 elections. For instance, the question has been raised as to whether a sufficiently calamitous event could result in the postponement of the election, and what mechanisms are in place to deal with such an event. While the current date of November 2 could be changed by statute, the legal and practical implications of this change would vary depending on the particular circumstance under which such postponement arose. This report focuses on who has the constitutional authority to postpone elections, to whom such power could be delegated, and what legal limitations exist to such a postponement.

In evaluating any such proposals, an initial question to be asked is which elections will be affected. Traditionally, all voting — whether federal, state or local — occurs in local precinct polling places, and state or local authorities have a significant role in regulating such voting. Congress, however, also has authority to regulate elections, and that authority may vary depending on whether the election is for the Presidency, the House, the Senate, or for state or local offices. While the Executive Branch has significant delegated authority regarding some aspects of election law, this authority does not currently extend to setting or changing the times of elections.

Under a variety of possible scenarios that could arise as a result of a terrorist attack before or during an election, either the Congress or the states might pass legislation which would affect the timing of these elections. The suggestion has been made, however, that the Executive Branch might have some role in determining whether an election was to occur or whether it could be cancelled. While the Executive Branch does not currently have this power, it appears that Congress may be able to delegate this power to the Executive Branch.

Relevant Constitutional Provisions

The authority to postpone an election would appear to be a natural corollary of the power to set the time for an election. The authority to set the date of elections appears to derive principally from two constitutional provisions.

Article I, §4, cl. 1

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Article II, §1, cl. 4

The Congress may determine the Time of chusing the [Presidential] Electors, and the Day on which they shall give their votes; which Day shall be the same throughout the United States.

The text of the Constitution does not appear to contain a constitutional role for the Executive Branch in such decisions.

House and Senate Elections

Although the Constitution is silent on various aspects of the voting process, the Constitution seems to anticipate that states would be primarily responsible for establishing election procedures for congressional elections.¹ However, in the case of setting the time for House and Senate elections, Congress has superseded the states' authority and has set the time for the election of Members and Senators by statute. Members of the House are to be elected the Tuesday next after the 1st Monday in November, in every even numbered year,² while Senators are to be elected at the same time as House Members.³

It would appear that, under Article I, §4, cl. 1, Congress would have broad authority to postpone elections so as to account for emergency situations. The Supreme Court and lower courts have interpreted the language of Article I, § 4, cl. 1 to mean that Congress has extensive power to regulate most elements of a congressional election. For instance, the Supreme Court has noted that the right to

¹ This power is at its most broad in the case of House elections, which have historically always been decided by a system of popular voting. U.S. Const. Art. I, §2, cl. 1 states “[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States” Unlike House elections, Senate elections were, until ratification of the 17th Amendment, decided not by popular vote, but by a vote of the state legislatures. This helps explain why congressional power over Senate elections, while almost as broad as it is for House elections, contains one exception — that Congress may not regulate “the Places of chusing Senators.”

² 2 U.S.C. § 7.

³ 2 U.S.C. §1.

vote for Members of Congress is derived from the Constitution and that Congress therefore may legislate broadly under this provision to protect the integrity of this right.⁴ The Court has stated that the authority to regulate the “times, places and manner” of federal elections:

embrace[s] [the] authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved . . . [Congress] has a general supervisory power over the whole subject.⁵

Although the Congress has set the election date applicable to the 2004 election by statute, it would still appear to be within Congress’s power to change it. Thus, it would appear that Congress would have the power, by statute, to postpone the upcoming House and Senate elections.⁶

⁴ *Smiley v. Holm*, 285 U.S. 355 (1932) (Congress may delegate authority to draw member districts to state legislatures, exclusive of governor’s veto). For a history of Congressional regulation of federal elections, see Congressional Research Service, *Constitution of the United States, Analysis and Interpretation* 119 (1992) (available at [<http://www.loc.gov/crs/conan/art01/42.htm>]).

⁵ 285 U.S. at 366. *See Roudebush v. Hartke*, 405 U.S. 15, 24-25 (1972) (state’s authority to regulate recount of elections); *United States v. Gradwell*, 243 U.S. 476, 483 (1917) (full authority over federal election process, from registration to certification of results); *United States v. Mosley*, 238 U.S. 383, 386 (1915) (authority to enforce the right to cast ballot and have ballot counted); *In re Coy*, 127 U.S. 731, 752 (1888) (authority to regulate conduct at any election coinciding with federal contest); *Ex parte Yarbrough*, 110 U.S. 651, 662 (1884) (authority to make additional laws for free, pure, and safe exercise of right to vote); *Ex parte Clarke*, 100 U.S. 399, 404 (1879) (authority to punish state election officers for violation of state duties vis-a-vis Congressional elections). *See also* *United States v. Simms*, 508 F.Supp. 1179, 1183-85 (W.D. La.1979) (criminalizing payments in reference to registration or voting does not offend Tenth Amendment); *Prigmore v. Renfro*, 356 F.Supp. 427, 430 (N.D. Ala.1972) (absentee ballot program upheld as applied to federal elections), *aff’d*, 410 U.S. 919 (1973); *Fowler v. Adams*, 315 F.Supp. 592, 594 (M.D. Fla.1970), appeal dismissed, 400 U.S. 986 (1971) (authority to exact 5 percent filing fee for Congressional elections).

⁶ It would appear, however, that the Congress could not postpone elections indefinitely, as the Constitution requires that Members of the House of Representatives shall be chosen “every second year,” U.S. Const. Art. I, § 2, cl. 1, and Senators shall be chosen for terms of “six years.” U.S. Const., Amend. XVII. *See also* U.S. Const. Amend. XX (specifying that the terms of the President and Vice-President shall end January 20th and those of Senators and Representatives shall end January 3rd).

Presidential Elections

While the power of Congress to regulate Presidential elections is not as extensive as the power over House and Senate elections,⁷ Article II, §1, cl. 4 does provide that Congress may determine the “time” of choosing presidential electors. The Congress has established this date, by statute, as the “Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President.”⁸

Although the Congress does not have the explicit authority to regulate other aspects of Presidential elections beyond time, case law does indicate that the Congress may have powers extending beyond establishing the time of choosing the electors. For instance, the Supreme Court has allowed congressional regulation of political committees which seek to influence Presidential elections, arguing that such legislation is justified by the need to preserve the integrity of such elections. In *Burroughs v. United States*,⁹ the Supreme Court reasoned that:

[w]hile presidential electors are not officers or agents of the federal government, they exercise federal functions under, and discharge duties in virtue of authority conferred by, the Constitution of the United States. The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the department and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.¹⁰

The power of Congress to protect the integrity of the Presidential election, combined with its authority to set the time of election, would also seem to provide the Congress the power to postpone elections because of a national emergency.

⁷ Despite modern state practice providing for popular voting for electors, the appointment of presidential electors was historically and remains today a power of the state legislatures. For instance, a state would still retain the authority to use an alternative method of choosing Presidential Electors besides popular elections. U.S. Const. Art. II, §1, cl. 2 provides that “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: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”

⁸ 3 U.S.C. § 1.

⁹ 290 U.S. 534 (1934),

¹⁰ 290 U.S. at 544-545.

State Elections

Congress does not have general legislative authority to regulate the manner and procedures used for elections at the state and local level. The Congress does have extensive authority under the Civil War Amendments,¹¹ the 19th Amendment,¹² the 24th Amendment,¹³ and the 26th Amendment¹⁴ to prevent discrimination in access to voting, and it has exercised that power extensively over state and local, as well as federal, elections.¹⁵ However, absent some relationship to the issues addressed by these amendments, such as the postponement of a state election to deal with issues of discrimination, the Congress would not appear to have the authority to regulate the time of the state elections.

Executive Branch Power Over Elections

The Executive Branch does not appear to currently have the authority to establish or postpone the dates of elections at either the federal or state level in the event of an emergency situation.¹⁶ The question arises, however, whether the Congress could delegate such power as it does have to the Executive Branch. Generally, under separation of power doctrine, Congress may delegate power to the Executive Branch so long as it includes standards so that a court can “ascertain whether the will of Congress has been obeyed.”¹⁷ There is no apparent reason why this doctrine would not extend to the power of Congress to set the time of national elections under either Article I, §4, cl. 1 (House and Senate) or Article II, §1, cl. 4 (Presidential Electors).¹⁸ Thus, as long as the Congress set standards for the

¹¹ U.S. Const., Amend. XIII (prohibiting slavery), Amend. XIV (due process and equal protection) and Amend. XV (voting rights).

¹² “The rights of citizens to vote shall not be denied . . . on account of sex.”

¹³ “The rights of citizens to vote . . . shall not be denied . . . by reason of failure to pay a poll tax”

¹⁴ “The right of citizens . . . to vote shall not be denied . . . on account of age.”

¹⁵ See, e.g., Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973-1973bb-1 (1992)). For background on the Voting Rights Act, see Whitaker, L. Paige, *The Voting Rights Act of 1965: A Legal Overview* (CRS Report 91-736A).

¹⁶ It is possible, however, that the Executive Branch could make decisions that would make it difficult or impractical for a particular state or federal election to occur. For instance, a variety of situations could occur under which the Executive Branch might seek to limit the movement of citizens under its emergency powers. See Harold Relyea, *National Emergency Powers*, CRS Rep. 98-505 GOV (May 13 2004). However, exercise of such power would not appear to have the legal effect of delaying an election, nor would it vest the Executive Branch with the authority to reschedule the election. The legal resolution of an election during which significant numbers of persons fail to reach the polls due to the actions of the Executive Branch is beyond the scope of this memorandum.

¹⁷ *Mistretta v. United States*, 488 U.S. 361, 379 (1989).

¹⁸ See *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 220-221 (1989). In *Skinner*, the
(continued...)

Executive Branch to implement such a postponement,¹⁹ it would appear that Congress could enact a statute delegating the authority to postpone an election to the Executive Branch.

¹⁸ (...continued)

Court rejected the argument that the Taxing Clause, U.S. Const., Article I, § 8, cl. 1, should be treated differently for purposes of delegation. “We discern nothing in th[e] placement of the Taxing Clause that would distinguish Congress’ power to tax from its other enumerated powers — such as its commerce powers, its power to ‘raise and support Armies,’ its power to borrow money, or its power to ‘make Rules for the Government’ — in terms of the scope and degree of discretionary authority that Congress may delegate to the Executive in order that the President may ‘take Care that the Laws be faithfully executed.’” *But see* Amy Keller, *Members Pan Election Idea*, Roll Call (July 13, 2004) (quoting Yale Professor Jack Balkin to the effect that Article II provides that Congress, not the Executive Branch, may determine the date of presidential elections).

¹⁹ Arguably, the Congress would need to set standards both for the cancellation of the existing date, and then for the institution of a new date. Failure to provide such direction would raise issues of separation of powers. *See* *Clinton v. City of New York*, 524 U.S. 417, 443-444 (1998) (delegation standards requires establishment of triggering conditions, limited discretion as to whether to implement; standards may not allow President to substitute his own policy decision.)