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Uniform Timing of Presidential Primaries

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OBSERVATION

UNIFORM TIMING OF PRESIDENTIAL PRIMARIES

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The United States Constitution says nothing about political parties or primary elections. It does not provide any nominating procedures for President and Vice President outside those provisions dealing with the Electoral College. Nor has Congress ever attempted to regulate the timing or procedures of the Presidential nominating process.

Various informal nominating devices have been developed in the past to fill this void. Such devices have included congressional caucuses, state-based legislative systems, and national political party conventions. The first two devices were abandoned long ago; the convention process, instituted in 1840, has survived, but has suffered from nonuniformity in delegate selection procedures and from minimal participation by rank-and-file party members.[1] Early in the twentieth century a movement began to reform the Presidential nominating process by instituting Presidential primaries. Florida established the first such primary in 1904, followed by Wisconsin in 1905 and Pennsylvania in 1906. By 1984, the most recent Presidential election year, thirty-three states as well as the District of Columbia and Puerto Rico held some form of Presidential primary.[2]

The flowering of the state-run Presidential primary system has not been without problems. States now compete to hold the earliest primary, which results in an ever-lengthening primary election period and increased costs and strains on the candidates. There are many other differences and variations in the manner of selecting and binding delegates to party conventions, ranging from elections to caucuses to mini-conventions. Some primaries, nonbinding in nature, serve only to reflect voter preferences for the Presidency.

There is one element in this Presidential nominating cacophony that Congress clearly has constitutional power to control. That element is the timing of Presidential primaries and caucuses, at least to the extent that such processes represent state action. Bills have been introduced in the 99th Congress that would establish a uniform and limited period of time in which states may hold primaries or other means of selecting candidates for the highest office in the

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1. *Presidential Nominating Process: Hearings Before the Subcomm. on Elections of the Comm. on House Administration*, 99th Cong., 2d Sess. 165 (1986) [hereinafter *Hearings*] (statement of Thomas M. Durbin, Legislative Attorney of the Congressional Research Service).

2. *Id.* at 166.

land. In my judgment, congressional control of the timing of such nominating processes is consistent with the relevant provisions of the Constitution.

Primarily, I shall address only one of the four proposals pending before Congress, the Udall Bill,[3] which proposes a nationally uniform ninety-day period in which to hold such primaries and caucuses. The other three bills would divide the nation into designated regions and allocate to each region a certain date within the ninety-day period on which to hold Presidential primaries and caucuses.[4] I do not believe that such a regional feature either adds to or subtracts from the constitutional considerations at stake in the Udall proposal. Accordingly, I concentrate here on the power of Congress in an election year to limit the period of time during which various states may hold Presidential primaries and caucuses.

The essence of the Udall proposal is that a presidential primary "may only be held" in the year of a presidential election and "during the period beginning on the second Tuesday in March and ending on the second Tuesday in June" of such year.[5] The Bill then defines the term "presidential primary" as "a primary, caucus, convention, or other means of selecting a candidate for the Office of the President of the United States, except that such term does not mean a national nominating convention of a political party."[6] Finally, the Bill authorizes the Attorney General of the United States to institute "any civil action for injunctive relief as may be appropriate to assure compliance with this Act."[7]

In explaining his proposal before the Task Force on Elections in 1984, Representative Udall explained:

> This bill would simply limit the selection of delegates to national nominating conventions to a 90-day period beginning with the second Tuesday in March and ending the second Tuesday in June. That is all it does. It does not overhaul the Presidential primary system; it does not violate the constitutional prerogatives of the States and parties to determine how to select Presidential nominees.
>
> It would make two small but important changes in the way we choose our Presidential candidates. First, the primary season would be limited to a specific period of time, eliminating the disproportionate influence of a few early primary States. Second, a shorter primary season would reduce the amount of campaign spending and relieve, to some extent, the boredom factor that is experienced by many vote[r]s over a prolonged campaign.[8]

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3. H.R. 1380, 99th Cong., 1st Sess. (1985). Representative Udall submitted an identical bill in the 98th Congress, H.R. 6054, 98th Cong., 2d Sess. (1984), on which the Task Force on Elections of the Committee on House Administration held hearings on September 19, 1984. *See Presidential Primaries: Hearings on H.R. 6054 Before the Task Force on Elections of the House Comm. on House Administration*, 98th Cong., 2d Sess. (1984) [hereinafter *Task Force Hearings*].

4. The three regional-type proposals are the Bennett Bill, H.R. 251, 99th Cong., 1st Sess. (1985); the Nelson Bill, H.R. 3542, 99th Cong., 1st Sess. (1985); and the Levin Bill, H.R. 4453, 99th Cong., 31st Sess. (1986). A copy of all four bills may be found in *Hearings, supra* note 1, at 2-18.

5. H.R. 1380, 99th Cong., 1st Sess. § 1 (1985).

6. *Id.* § 2.

7. *Id.* § 3.

8. *Task Force Hearings, supra* note 3, at 6.

A co-sponsor of the Udall Bill, Representative Conte, has further stated that "this legislation does address three negative aspects of the Presidential selection process: The exaggerated role of the early primaries, the length of the campaign, and the cost of the campaign."[9]

The proposed legislation is fully consonant with the principles and provisions of the Constitution. It represents an exercise of congressional power to enact laws deemed "necessary and proper" for carrying into execution the vested power of Congress to "determine the Time of chusing the [Presidential] Electors."[10] It invades no exclusive power of the states; indeed, the states have neither the power nor the capacity to determine what is necessary to implement this timing determination. Nor does the proposed legislation, which deals only with the timing of the primaries and caucuses that lead to the choosing or election of the electors, implicate any First Amendment rights of speech or association that may attach to political parties or individual voters.

The Constitution deals with the timing of federal elections in only two respects: (1) article I, section 4 gives Congress power to regulate the "Times," as well as the "Places and Manner," of holding elections for Senators and Representatives;[11] (2) article II, section 1, clause 4 vests in Congress the power to 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."[12]

We are concerned here, of course, only with the latter provision, "the Time of chusing the [Presidential] Electors." But it is significant that the Framers, when dealing with the time for electing either the Congress or the electors, gave the final power over time selection not to the states but to Congress—the one body capable of assuring any degree of uniformity among the states in the timing of federal elections. In addition, the reference in article II, section 4 to the day for casting the votes of the electors as "the same throughout the United States" is some indication that the Framers recognized the need for national uniformity in setting the time for selecting a President.

The article II reference to the time of choosing Presidential electors does not address specifically the modern phenomenon of state primaries and caucuses that precede the selection and formation of the electoral college. We therefore must assume, as the Supreme Court in *United States v. Classic*[13] assumed with respect to the primary elections that precede congressional elections, that the

9. *Task Force Hearings, supra* note 3, at 8.

10. U.S. CONST. art. II, § 1.

11. *Id.* art. I, § 4. Pursuant to that vested authority, Congress has provided: "The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to the Congress commencing on the 3d day of January next thereafter." 2 U.S.C. § 7 (1982). The time for election of Senators is directly related to the time for electing Representatives. *Id.* § 1.

12. U.S. CONST. art. II, § 1. Congress has provided that "The Electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November, in every fourth year succeeding every election of a President and Vice President." 3 U.S.C. § 1 (1982). As to the day on which Electors vote, see *id.* § 7.

13. 313 U.S. 299 (1941).

Framers "did not have specifically in mind the selection and elimination of candidates for [the Presidency or the electors] by the direct primary any more than they contemplated the application of the commerce clause to interstate telephone, telegraph and wireless communication, which are concededly within it."[14] But, as the *Classic* opinion continued,

> in determining whether a provision of the Constitution applies to a new subject matter, it is of little significance that it is one with which the framers were not familiar. For in setting up an enduring framework of government they undertook to carry out for the indefinite future and in all the vicissitudes of the changing affairs of men, those fundamental purposes which the instrument itself discloses. Hence we read its words, not as we read legislative codes which are subject to continuous revision with the changing course of events, but as the revelation of the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government. . . . If we remember that "it is a Constitution we are expounding," we cannot rightly prefer, of the possible meanings of its words, that which will defeat rather than effectuate the constitutional purpose.[15]

The *Classic* Court read article I, section 4 in conjunction with article I, section 2, which states that members of the House shall be "chosen every second Year by the People of the several States."[16] Read together, these sections reveal one of "the great purposes which were intended to be achieved by the Constitution as a continuing instrument of government."[17] That purpose, said the Court, is to secure "a free choice of representatives by the people [by authorizing] Congress to regulate the manner of [such] elections."[18] Thus, when a state, exercising its privilege in the absence of congressional action, changes the mode of choice from a single step (a general election) to a two-step procedure (a primary and then a general election) and thereby makes "the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice,"[19] Congress has power under section 4 to regulate the "Times, Places and Manner" of holding primary elections in the several states. In sum, the authority given Congress by section 4 "includes the authority to regulate primary elections when, as in this case, they are a step in the exercise by the people of their choice of representatives in Congress."[20] This regulatory power ensues despite the absence in section 4 of any specific reference to primary elections.

The *Classic* decision also identifies an additional and affirmative source of congressional power to regulate primary elections in light of the "great purpose" of article I, section 4.[21] That source is the necessary and proper clause, which

14. *Id.* at 316.
15. *Id.*
16. U.S. CONST. art. I, § 2.
17. *Classic*, 313 U.S. at 316.
18. *Id.* at 317.
19. *Id.* at 318.
20. *Id.* at 317.
21. *Id.* at 320.

endows Congress with power to make "all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[22] By virtue of this clause, Congress has whatever legislative power it deems "necessary and proper" to carry into execution its vested regulatory power over congressional elections under sections 2 and 4 of article I. Congressional regulations respecting such primary elections thus reflect what Congress deems "necessary and proper" to effectuate the constitutional promise of "the free choice by the people of representatives in Congress."[23]

As Justice Black wrote in *Oregon v. Mitchell*,[24] citing the *Classic* decision, "the power of Congress to make election regulations in national elections is augmented by the Necessary and Proper Clause."[25] The result is that sections 2 and 4 of article I, when read in tandem with the necessary and proper clause, consistently have been viewed by the Supreme Court as constitutional authority for providing, by legislation,

> 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.[26]

The critical and controlling factor that emerges from the Court's broad treatment of Congress' powers respecting congressional elections is that the Court employs the same constitutional analysis—the same broad treatment of vested congressional power—in dealing with article II, section 1. For that reason, there is no doubt in my mind that Congress has constitutional power to enact a law, such as proposed in the Udall Bill, to establish a nationally uniform period of time in which to hold primaries, caucuses, and conventions, which have become integral parts of the article II, section 1 process of choosing presidential electors.

The key Supreme Court decision in this respect is *Burroughs v. United States*,[27] which mirrors the later *Classic* decision in its constitutional analysis.

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22. U.S. CONST. art. I, § 8, cl. 18; *see* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 420 (1819) (adopting a broad interpretation of the federal government's authority under the necessary and proper clause).

23. *Classic*, 313 U.S. at 316.

24. 400 U.S. 112 (1970).

25. *Id.* at 120.

26. Smiley v. Holm, 285 U.S. 355, 366 (1932). Section 4 of article I allots to the states the power to regulate and prescribe the times, places, and manner of holding elections for Senators and Representatives; U.S. CONST. art. I, § 4, but section 4 then provides that "Congress may at any time make or alter such Regulations." *Id.* It is from the latter provision that Congress is vested with power to enact "a complete code for congressional elections." *Id.* As explained by James Madison, state regulations might violate the principles of equality or deprive the people of the right of suffrage, and "it was judged proper that it should be remedied by the general government." 3 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 367 (1876). Indeed, Madison indicated the intent was to have regulations that would be "uniform throughout the continent." *Id.*

27. 290 U.S. 534 (1934).

Burroughs dealt with an application of the Federal Corrupt Practices Act of 1925[28] to political committees organized for the purpose of improperly influencing the elections for Presidential electors in two or more states. In holding that Congress has vested authority under article II, section 1 to regulate such practices, *Burroughs* rejected a narrow reading of section 1 that would have confined congressional power to the literal language—to determining "the Time of chusing the Electors, and the Day on which they shall give their Votes." The Court held that such a literal and narrow reading of section 1 was "without warrant."[29]

Most importantly, the *Burroughs* Court, read this constitutional language as vesting in Congress the power to preserve the purity of presidential and vice presidential elections, even as to matters impugning the integrity of the election process that might occur before the date established by Congress for "chusing the Electors." As the *Burroughs* Court explained,

> 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 departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.[30]

The *Burroughs* opinion concluded by stating:

> The power of Congress to protect the election of President and Vice President from corruption being clear, the choice of means to that end presents a question primarily addressed to the judgment of Congress. If it can be seen that the means adopted are really calculated to attain the end, the degree of their necessity, the extent to which they conduce to the end, the closeness of the relationship between the means adopted and the end to be attained, are matters for congressional determination alone.[31]

Thus, by reading article II, section 1 in conjunction with the necessary and proper clause, the Court was able to interpret the language of section 1 as vesting vast power in the Congress to preserve the integrity and the purity of the Presidential election processes. As the Court more recently noted in *Buckley v. Valeo*,[32] *Burroughs*, along with *Classic*, stands for the proposition that "Con-

28. Federal Corrupt Practices Act of Feb. 28, 1925, ch. 368, 43 Stat. 1053, 1070 (1925), *repealed by* Act of June 25, 1948, ch. 645, § 21, 62 Stat. 683, 862 (1948), *and* Pub. L. No. 92-225, § 405, 86 Stat. 1, 20 (1972).

29. *Burroughs*, 290 U.S. at 544.

30. *Id.* at 545.

31. *Id.* at 547-48.

32. 424 U.S. 1 (1976).

gress has power to regulate Presidential elections and primaries."[33]

The conclusion respecting the Udall Bill is inescapable. In establishing a uniform period of time in which to hold primaries, caucuses, and conventions, all of which have been built into the process leading to the day set aside for "chusing the Electors," Congress would be exercising part of its vested power under article II, section 1 to preserve the integrity and purity of the Presidential selection process. It is for Congress alone to determine if a shorter primary period is appropriate or necessary to that end. It is also solely for Congress to determine whether a few very early State primaries create a disproportionate influence on the process leading to the ultimate election of Presidential electors.

There are, of course, ultimate constitutional limits to any act dealing with the presidential election processes, just as there are constitutional limits to any legislation passed by Congress. But those limits are reached only if a proposal, such as the Udall Bill, encroaches on some area reserved by the Constitution for action by the states, or violates some specific guarantee of individual rights, such as those embraced by the First Amendment. Neither type of constitutional limitation is involved in the Udall proposal.

By setting a nationally uniform primary period, this proposal, to use the words of the *Burroughs* opinion, "is confined to situations which, if not beyond the power of the state to deal with at all, are beyond its power to deal with adequately. It in no sense invades any exclusive state power."[34] Fifty states cannot deal adequately with the problem of establishing a nationally uniform period for holding Presidential primaries, caucuses, and conventions.

I am aware of no First Amendment rights of speech or associations that may be asserted as a barrier to establishing such a uniform period. Political parties and individual voters certainly have various constitutionally protected rights.[35] Without detailing those rights, it is fair to say that none guarantees any political party or voter the right to be heard at a particular time in a Presidential primary season, or at least during an especially early part of the season that Congress has found to be deleterious to the effective functioning of the Presidential selection process. And if there be any arguable impact on such rights, that impact is certainly minimal and incidental.

In summary, the Udall Bill and the other three related bills before Congress are constitutional. Enactment of these bills would represent an exercise by Congress of its vested powers under article II, section 1 and under the necessary and proper clause to preserve and protect the integrity and efficiency of the Presidential election process. The constitutional predicate of that conclusion is that the primaries, caucuses, or conventions are conducted by the states pursuant to some state law, practice, or other form of state action, and are thereby a part of

33. *Id.* at 90.

34. *Burroughs*, 290 U.S. at 544-545.

35. For a discussion of some of the constitutional restraints that states may encounter in seeking to regulate political party nominating methods, see Weisburd, *Candidate-Making and the Constitution: Constitutional Restraints on and Protections of Party Nominating Methods*, 57 S. CAL. L. REV. 213 (1984).

the entire process that culminates in the popular selection of the President of the United States.