

Report for Congress

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Congressional Authority to Standardize National Election Procedures

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Summary

Events surrounding the 2000 Presidential election have led to increased scrutiny of voting procedures in the United States, including efforts to establish national standards for issues such as the administration of voter registration, balloting, tabulating and reporting election results. This report focuses on the constitutional authority and limitations relevant to Congress standardizing these and other election procedures. A policy evaluation of these different options is, however, beyond the scope of this report.

The Congress' authority to regulate a particular election may vary depending on whether that election is for the Presidency, the House, the Senate, or for state and local positions. Further, there may be variation in whether a particular aspect of elections, such as balloting procedures, is amenable to regulation. Consequently, evaluating the authority to establish uniform election procedures would appear to require an examination of a variety of different proposals and scenarios.

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. Federal authority to also regulate federal elections, however, is specifically provided for in the Constitution. There are two main provisions at issue – Article I, §4, cl. 1, which provides Congress the authority to set the “Times, Places and Manner” of congressional elections, and Article II, §1, cl. 4, which provides that Congress may designate the “Time” for the choosing of Presidential Electors.

Congress' power is at its most broad in the case of House elections, which have historically always been decided by a system of popular voting. 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 choosing Senators.” The power of Congress to regulate Presidential elections, is not, however, as clearly established as the power over House and Senate elections. As noted above, the text of the Constitution provides the Congress only the limited power to designate the “Time” of the choosing of Presidential Electors. The case law on this issue is, however, ambiguous, and Congress's regulatory authority over presidential elections seems to be more extensive than might appear based on the text of Article II, §1, cl. 4.

The Constitution does not grant the Congress general legislative authority to regulate the manner and procedures used for elections at the state and local level. The Congress, however, does have authority under the Civil War Amendments, the 19th, 24th and the 26th Amendments to prevent discrimination in access to voting, and has exercised that power extensively over state and local elections, as well as federal elections. The Congress also has expansive authority to spend money for the general welfare, and allocation of such grant monies could be conditioned on compliance by state or local officials with national standards for election procedures.

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Congressional Authority to Standardize National Election Procedures

Background

Events surrounding the 2000 Presidential election have led to increased scrutiny of current voting procedures in the United States. For instance, efforts have been made to establish national standards for the administration of voter registration, balloting, tabulating or reporting election results. This report focuses on the constitutional authority and limitations that are relevant Congress standardizing these and other procedures. A policy evaluation of these and other proposals, however, is beyond the scope of this report.

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. Further, there may be variation in whether a particular aspect of an election, such as balloting procedures, is amenable to congressional regulation. Consequently, the authority for Congress to establish standardized election procedures would appear to require an evaluation of a variety of different proposals and scenarios.

Various proposals have been made regarding standardizing election procedures, including:

- Establishing uniform procedures for registration of voters
- Standardizing mail-in and absentee balloting
- Establishing a uniform closing time for polls
- Establishing multiple day elections
- Standardizing the number and accessibility of polling stations
- Standardizing ballot design and technology
- Regulating supervision of voting
- Standardization of vote counting, compilation and publication of results
- Allocating electoral votes within state based on popular votes

Relevant Constitutional Provisions

The authority of Congress to legislate regarding these various issues in different types of elections would appear 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 choosing Senators.

Article II, §1, cl. 4

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

House 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. Federal authority to regulate congressional elections is specifically provided for in the Constitution. 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.¹ As noted above, Article I, §4, cl. 1 states that the Congress may determine “the Times, Places and Manner” for such elections. The Supreme Court and lower courts have interpreted the above language 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 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.² 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

¹ 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”

² *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>]).

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.³

Consequently, it would appear that the Congress would have broad authority to implement the various proposals listed above as regards House elections.

Senate Elections

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.” As originally drafted, this language would have limited the authority of the Congress to designate where state legislatures would meet for such votes. This deference to the prerogatives of state legislatures would appear to be obsolete now that all Senate elections are decided by popular vote. However, nothing in the 17th Amendment explicitly repealed this restriction, and the meaning of the clause could apply to congressional regulation of establishment of the sites for popular voting.

Arguably, if Congress attempted to establish legislation regulating where states must establish polling sites for Senate elections, such legislation might run afoul of this provision. On the other hand, for practical purposes, most states, if subjected to federal regulation for House elections establishing the location of polling place, would be likely to follow such directions for Senate elections occurring at the same time, if no other reason than administrative convenience.

Presidential Elections

The power of Congress to regulate Presidential elections is not as clearly established as the power over House and Senate elections. First, the text of the Constitution provides a more limited power to Congress in these situations. Whereas

³ 285 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).

Article I, §4, cl. 1 allows regulation of the “time, place and manner” of congressional elections, Article II, §1, cl. 4 provides only that Congress may determine the “time” of choosing presidential electors. Further, 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.⁴ Consequently, principles of federalism might incline the Supreme Court to find the appointment of presidential electors less amenable to federal regulation. The exception to this would be congressional authority under the Civil War Amendments (13th, 14th and 15th); these powers are addressed in the following section on regulating state and local elections.

The case law on this issue is ambiguous, although Congress’ regulatory authority over presidential elections does seem to be more extensive than it might appear based on the text of the Constitution. For instance, the 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*,⁵ 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 departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.⁶

A question arises, however, whether *Burroughs*, which involves the regulation of third parties to elections, can be distinguished from the regulation of states directly regarding their administration of presidential elections. In *Burroughs*, the Court distinguished the legislation under consideration (regulation of political committees) from legislation more directly dealing with state appointment of electors, noting that:

The congressional act under review seeks to preserve the purity of presidential and vice presidential elections. Neither in purpose nor in effect does it interfere with the power of a state to appoint electors or the manner in which their appointment shall be made. It deals with political committees organized for the

⁴ 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.”

⁵ 290 U.S. 534 (1934). *See also* Buckley v. Valeo, 424 U.S. 1, 67, 91 (1976)(upholding regulation of campaign financing by the Federal Election Campaign Act of 1971).

⁶ 290 U.S. at 544-545.

purpose of influencing elections in two or more states, and with branches or subsidiaries of national committees, and excludes from its operation state or local committees. Its operation, therefore, 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.⁷

Under this language, procedures within the province of states, such as the allocation of electors by a state, would appear to fall outside of the doctrine established in *Burroughs*. Although the Court was not asked to evaluate whether Congress had the power to establish the manner in which the presidential electors were appointed, the language above would appear to indicate that the Court in *Burroughs* had not intended its decision to extend Congress' authority to regulate presidential elections so that it was coextensive with the power to regulate congressional elections.

Surprisingly, however, three United States Courts of Appeal, relying on *Burroughs*, reached precisely the opposite result. In upholding the validity of congressional regulation of registration procedures for federal elections under the National Voter Registration Act of 1993 (Motor Voter Act),⁸ three federal circuits appeared to find that the Congress had the same authority to regulate presidential elections as it did House and Senate elections.⁹ However, of the three opinions, two made only passing references to the issue, and only the Seventh Circuit discussed it at any length. In *ACORN v. Edgar*, Chief Judge Posner of the Seventh Circuit wrote that:

Article I, §4 [providing authority over congressional elections]. . . makes no reference to the election of the President, which is by the electoral college rather than by the voters at the general election; general elections for President were not contemplated in 1787. . . . But these turn out not to be [a] serious omission[] so far as teasing out the modern meaning of Article I, §4 is concerned. Article II provides [congressional authority over the Time of choosing Electors.] Article II, §1 . . . has been interpreted to grant Congress power over Presidential elections coextensive with that which Article I, §4 grants it over congressional elections. *Burroughs v. United States*, 290 U.S. 534 (1995).¹⁰

It should be noted that the federal registration standards developed under Motor Voter could probably have been decided under Congress' power over congressional elections, so that the reasoning of these cases would not appear essential to their holdings. These broad holdings, however, do stand as some of the few modern interpretations of Article II, §1, cl. 4 and *Burroughs*.¹¹ Those cases' interpretations,

⁷ 290 U.S. 543-544.

⁸ 42 U.S.C. §§1973gg *et seq.*

⁹ *ACORN v. Edgar*, 56 F.3d 791 (7th Cir. 1995); *Voting Rights Coalition v. Reno*, 60 F.3d 1411, 1414 (9th Cir. 1995); *ACORN v. Miller*, 129 F.3d 833, 836 n.1 (1997).

¹⁰ 56 F.3d at 793.

¹¹ Further support for this position is seen in *Oregon v. Mitchell*, where Justice Black wrote “. . . it is the prerogative of Congress to oversee the conduct of presidential and
(continued...)

however, would appear to be at odds with the limiting language of *Burroughs* quoted previously.¹²

Resolution of this issue may ultimately be important to any determination of whether proposals to standardize election procedures could be specifically applied to presidential elections. Where congressional and presidential election procedures are likely to overlap, such as requirements for absentee balloting, uniform closing times, multiple day elections, number and accessibility of polling stations, *etc.*, regulation of congressional elections may be for practical purposes sufficient. However, where the issue at hand is unique to presidential elections, *e.g.* allocation of electors based on popular vote, the resolution of this issue may become essential.

State and Local 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, however, does have extensive authority under the Civil War Amendments,¹³ the 19th Amendment,¹⁴ the 24th Amendment,¹⁵ and the 26th Amendment¹⁶ to prevent discrimination in access to voting, and it has exercised that power extensively over state and local, as well as federal, elections.¹⁷ Thus, to the extent that national ballot standards could be established as a means to avoid disenfranchisement, regulation of state and local elections could be established.

Such power does, however, have limits. For instance, the Fourteenth Amendment provides that states shall not deprive citizens of "life, liberty or property" without due process of law nor deprive them of equal protection of the

¹¹ (...continued)

vice-presidential elections and to set the qualifications for voters for electors for those offices. It cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections." 400 U.S. 112, 124 (1970)(upholding federal statute lowering minimum age for voters). Although Justice Black wrote the opinion of the Court, no other Justice joined this portion of his opinion, as the other Justices instead focused on Congress' power under the 14th Amendment.

¹² In fact, a careful reading of *Burroughs* reveals that the opinion is not even an interpretation of Article II, § 1 at all (as presumed in the ACORN case and by Justice Black in *Oregon v. Mitchell*), but rather an interpretation (albeit uncited) of Article I, § 8, cl. 18, the Necessary and Proper Clause. *See* quoted text accompanying note 6.

¹³ U.S. Const., Amend. XIII (prohibiting slavery), Amend. XIV (due process and equal protection) and Amend. XV (voting rights).

¹⁴ "The rights of citizens to vote shall not be denied . . . on account of sex."

¹⁵ "The rights of citizens to vote . . . shall not be denied . . . by reason of failure to pay a poll tax"

¹⁶ "The right of citizens . . . to vote shall not be denied . . . on account of age."

¹⁷ *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).

laws, and section 5 of that Amendment provides that the Congress has the power to legislate to enforce its provisions. Thus, in *Katzenbach v. Morgan*,¹⁸ the Court held that §5 of the Fourteenth Amendment authorized Congress not just to enforce the provisions of the Fourteenth Amendment as defined by the courts, but to help define its scope. In *Katzenbach*, the Court upheld a portion of the Voting Rights Act of 1965 which barred the application of English literacy requirements to persons who had reached sixth grade in a Puerto Rican school taught in Spanish.

In *Flores v. City of Boerne*,¹⁹ however, the Court limited the reach of this authority. In *Flores*, the Court struck down the Religious Freedom Restoration Act (RFRA)²⁰ as beyond the authority of Congress under §5 of the Fourteenth Amendment. RFRA, passed in response to the 1990 Supreme Court case of *Oregon v. Smith*,²¹ was an attempt by the Congress to reinstate the compelling governmental interest test which had been used to challenge the application of generally applicable laws to religious institutions.

The *Flores* case arose when the City of Boerne denied a church a building permit to expand, because the church was in a designated historical district. The church challenged this action, asserting that the city had not demonstrated a compelling interest in applying its zoning legislation to the church as required by RFRA. In striking down RFRA, the Supreme Court held that there must be a "congruence and proportionality" between the injury to be remedied and the law adopted to that end. RFRA focused on no one area of alleged harm to religion, but rather broadly inhibited the application of all types of state and local regulations to religious institutions. Since the Court found no pattern of the use of neutral laws of general applicability to disguise religious bigotry and animus against religion, it found RFRA to be an overbroad response to a relatively nonexistent problem.

Similarly, it might be difficult to justify an overall regulation of state and local elections based on the Fourteenth Amendment, absent a strong showing of systemic disenfranchisement of voters. Rather, *Flores* would seem to dictate that the Congress would need to establish narrow proposals showing that particular voting procedures threatened constitutional rights, and that the legislation was a congruent and proportional response to such threat.

For instance, the question has been raised as to whether the recent case of *Bush v. Gore*,²² which found Equal Protection concerns regarding the disparate treatment of voters, would support congressional legislation to standardize voting technologies and procedures. A close examination of that case, however, would seem to indicate that the Supreme Court did not intend to significantly extend the application of the

¹⁸ 384 U.S. 641 (1966).

¹⁹ 521 U.S. 507 (1997).

²⁰ 42 U.S.C. §2000bb *et seq.*

²¹ 494 U.S. 872 (1990)(neutral generally applicable laws may be applied to religious practices even if the law is not supported by a compelling governmental interest).

²² 121 S. Ct. 525 (2000).

Equal Protection Clause, and consequently the Court may not be amenable to the expansion of congressional authority in this area.

In *Bush v. Gore*, a dispute arose regarding, among other things, how to count punch-card election ballots where the paper “chads” had not been fully dislodged. The Supreme Court held that the failure of the Florida Supreme Court to set standards for evaluating these ballots violated the Equal Protection Clause of the 14th Amendment. On its face, this would appear to make it more likely that Congress could pass legislation under §5 of the 14th Amendment to avoid these or similar problems. Under the previously discussed case law, such laws would be valid if Congress could establish that disparity in the use of voting technologies and procedures has historically resulted in violations of the Equal Protection Clause.²³

In fact, it would be likely that Congress could establish a record of disparity in the application of voting technologies and procedures, as states have historically delegated authority over elections to lesser subdivisions such as electoral districts. These subdivisions, in turn, choose voting methods and procedures appropriate to their size, density and budget, with only general guidance from the state legislatures. Thus, significant variations in voting technologies and procedures probably do occur in most states. There is language in *Bush v. Gore*, however, which would make it unlikely that such variations would be found to be a violation of the Equal Protection Clause. In essence, this language appears to limit the holding in *Bush v. Gore* to only those election procedures that are under the control of a judicial officer.

“The recount process, in its features described here, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstance, for the problem of equal protection in election processes generally presents many complexities The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards. When a court orders a statewide remedy, there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness be satisfied.”

Based on the above language, disparity in voting procedures is only likely to rise to the level of constitutional violation when such disparate procedures are under the authority of single judicial officer, such as during a recount. It is not clear that the Congress could establish a history of voting discrimination in these circumstances. Nor is it likely that the Court would find significant intrusions on state or local election district authority to set technology or procedure standards to be proportionate and congruent to such violations as have existed. Consequently, it would appear that the impact of the case of *Bush v. Gore* on the issue of congressional authority over elections would be minimal.

²³ See *University of Alabama v. Garret*, 148 L. Ed. 2d 866 (2000).

Spending Power

The Congress has expansive authority to spend money for the general welfare, which would encompass making monies available to state and local governments to modify their election procedures.²⁴ Further, the allocation of such grant monies could be conditioned on compliance by state or local officials with national standards for election procedures.²⁵ Such grant conditions need not be limited by the authority of Congress discussed above to directly legislate on the issue, but could address election procedures regardless of whether they were for the House, Senate, Presidency, state or local elections.²⁶

²⁴ U.S. Const., Art. I, §8, cl. 1. provides that “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States. . . .”

²⁵ *South Dakota v. Dole*, 483 U.S. 203 (1987)(Congress may condition grants to states based on criteria related to the underlying grant scheme).

²⁶ 483 U.S. at 208-09.