

An hourglass-shaped graphic with a globe in the top bulb and another globe in the bottom bulb. The hourglass is light blue and has a dark blue top and bottom. The globe in the top bulb is dark blue, and the globe in the bottom bulb is light blue. The text is centered within the hourglass.

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*Postponement and Rescheduling of Elections to Federal Office*

Jack Maskell, American Law Division

October 4, 2004

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# CRS Report for Congress

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## Postponement and Rescheduling of Elections to Federal Office

**October 4, 2004**

Jack Maskell  
Legislative Attorney  
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# Postponement and Rescheduling of Elections to Federal Office

## Summary

Because of the fear of possible terrorist attacks which could be directed at election facilities or voters in the States just prior to or during the elections in a presidential election year, attention has been directed at the possibility/authority to postpone, cancel or reschedule an election for federal office. The United States Constitution does not provide in express language any current authority for a federal official or institution to “postpone” an election for federal office. While the Constitution does expressly devolve upon the States the primary authority to administer within their respective jurisdictions elections for federal office, there remains within the Constitution a residual and superceding authority in the Congress over most aspects of congressional elections (Article I, Section 5, clause 1), and an express authority in Congress over at least the timing of the selections of presidential electors in the States (Article II, Section 1, clause 4). Under this authority Congress has legislated a uniform date for presidential electors to be chosen in the States, and a uniform date for congressional elections across the country, which are to be on the Tuesday immediately following the first Monday in November in the particular, applicable even-numbered election years.

In addition to the absence of an express *constitutional* direction, there is also no *federal law* which currently provides express authority to “postpone” an election, although the potential operation of federal statutes regarding vacancies and the consequences of a State’s failure to select on the prescribed election day (see 2 U.S.C. § 8, and 3 U.S.C. § 2) might allow the States to hold subsequent elections in “exigent” circumstances. It would appear that under Congress’ express constitutional authority over the timing of federal elections it could enact a federal law setting conditions, times and dates for rescheduling of elections to federal offices in the States in emergency or other exigent circumstances, and with the proper standards and guidelines could delegate the execution and application of those provisions to executive branch or State officials.

In addition to general contest, protest and challenge statutes whereby the results of elections to federal office are initially adjudicated in the States, a handful of States have provided in *State law* express authority to postpone or reschedule elections within their jurisdictions based on certain emergency contingencies. The States’ authority within the United States Constitution appears to be sufficient to enact legislation to deal with emergency and exigent circumstances concerning federal elections, as long as such laws do not conflict with federal law enacted under Congress’ superceding constitutional authority. Federal courts have thus generally interpreted federal law to permit the States to reschedule elections to *congressional* office when “exigent” circumstances have necessitated a postponement. There may, however, be different issues raised in the case of the election of presidential electors, as the federal statute regarding the “failure to make a choice” on the prescribed election day for presidential electors is different than that regarding congressional elections. This report will be updated as events warrant.

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# Postponement and Rescheduling of Elections to Federal Office

Because of the fear of possible terrorist attacks which could be directed at election facilities or voters in the States just prior to or during the elections in a presidential election year, attention has been directed at the possibility/authority to postpone, cancel or reschedule an election for federal office.

## Background

There is no provision in the United States Constitution which currently authorizes in express language any federal official or institution to “postpone” an election for federal office. The Constitution expressly devolves upon the States the primary authority to administer within their respective jurisdictions elections for federal office, with a residual and superceding authority within the United States Congress over most aspects of congressional elections (other than the place of choosing Senators),<sup>1</sup> and with express authority in Congress over at least the timing of the selections of presidential electors in the States.<sup>2</sup> As to the time set for holding elections under this express constitutional authority, Congress has legislated, originally in 1845, a uniform date for presidential electors to be chosen in the States,<sup>3</sup> and in 1872, a uniform date for congressional elections across the country,<sup>4</sup> which are to be on the Tuesday immediately following the first Monday in November in the particular, applicable even-numbered election years.

In addition to the absence of specific *constitutional* direction, there is also no *federal law* which currently provides express authority to “postpone” an election, although the potential operation of federal statutes regarding vacancies and the consequences of a State’s failure to select on the prescribed election day may allow the States to hold subsequent elections in “exigent” circumstances. A handful of States have provided in *State law* express authority to postpone or reschedule elections within their jurisdictions based on certain emergency contingencies, and others have provided general emergency provisions which might be applicable to election situations.

As to potential disruptions on election day, particularly in regard to the presidential election, some of the confused scenarios and proposed solutions appear to stem from a common misconception of the presidential election as being in the

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<sup>1</sup> Article I, Section 5, clause 1.

<sup>2</sup> Article II, Section 1, clause 4.

<sup>3</sup> 5 Stat. 721, ch. 1, January 23, 1845, now 3 U.S.C. § 1.

<sup>4</sup> 17 Stat. 28, ch. 11, § 3, February 2, 1872, now 2 U.S.C. § 7.

nature of a national referendum. The presidential election, however, is in reality a series of State (and District of Columbia) elections for presidential electors from that State (or jurisdiction) that the Congress has mandated, since 1845, to be held on the same day throughout the country. Consonant with the States' authority over the administration and procedural aspects of elections to federal office within their jurisdictions, is the initial responsibility for resolving issues of challenges and recounts in those elections. This authority and these procedures may be relevant in the case of disruptions, insurrection or violence at the polling places on election day which could conceivably cast into question the efficacy and legitimacy of a particular election result in that jurisdiction.

It should be emphasized that while the States have the initial authority, or the "first cut" at resolving disputes and recounts in their respective jurisdictions regarding elections to federal office, the Constitution expressly provides that the final authority over the elections and returns of its own Members lies exclusively in each House of Congress.<sup>5</sup> As to the elections for presidential electors, the Constitution expressly gives to the Congress the task of counting the electoral votes for President.<sup>6</sup> Implicit within this explicit authority to count the electoral votes has been the practical necessity to determine which electoral votes to count. While Congress has established procedures and rules for counting the electoral votes and resolving disputed lists of electors,<sup>7</sup> Congress has, by statute, specifically given the States a "safe harbor" time within which to formally resolve presidential electoral disputes, prior to the meeting of the Electoral College in December, which then would be considered "conclusive" upon the Congress in counting those electoral votes for President.<sup>8</sup>

## Timing of Federal Elections

The United States Constitution does not require a uniform election date in the States for elections to the House or Senate, or for the selection of presidential electors.<sup>9</sup> Rather, this has been done by Congress by the enactment of federal law.

The Constitution, while declaring in the "Times, Places and Manner" clause (Article I, Section 4, clause 1) that the States have the general authority over the administration of even federal elections within their respective jurisdictions, expressly provides that the Congress may supercede any State provision regarding, among other things, the timing of congressional elections, and further provides that Congress may establish the time for the election of presidential electors in the States

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<sup>5</sup> Article I, Section 5, cl. 1.

<sup>6</sup> Constitution, Amendment XII, amending Article II, Section 1, cl. 3.

<sup>7</sup> *See generally*, the Electoral Count Act of 1887, 24 Stat. 373, ch. 90, February 3, 1887; now 3 U.S.C. §§ 5 *et seq.*

<sup>8</sup> 3 U.S.C. § 5.

<sup>9</sup> The Constitution does require that the date for the presidential electors to give their votes for President and Vice President be on the same day (Article II, Section 1, clause 4), and Congress has set that time for the first Monday after the second Wednesday in December next following the November election. 3 U.S.C. § 7.

(Article II, Section 1, clause 4). Under these authorities, Congress has established uniform dates for the general elections to federal office within the States, which now are mandated to be held on the first Tuesday next following the first Monday in November in the appropriate even-numbered years.

It was not until 1845 that a uniform date for electing presidential electors in the States was mandated by Congress.<sup>10</sup> Before then, the timing for selecting presidential electors could and did vary from State to State. Congress in 1844 and 1845 was, however, concerned about the allegations of fraud and corruption in the previous election (1840) for electors for President and Vice President in several States. It was asserted that some of the particular misconduct in that election appeared to have been encouraged, in part, because the States had differing dates for the presidential election, which allowed the alleged movement of populations and voters to key States having later elections (described as “pipelaying”).<sup>11</sup> Congress sought to eliminate such opportunities for fraud and corruption by establishing a uniform day throughout the country for selecting the electors for President and Vice President, while assuring that those States that required an absolute majority to elect could continue to hold a run-off for presidential electors if needed in an election on a subsequent date.<sup>12</sup>

The uniform date for congressional elections in the States was not established by the Congress until 1872.<sup>13</sup> In first enacting this legislation, the Congress appeared to be concerned primarily with two factors, that is, the potential undue and unfair influence on elections in some States that earlier results and elections in other States may routinely have; and the burden on voters who in some States would have to go to the polls twice for two different general elections to choose federal officers in presidential election years.<sup>14</sup>

## Current Federal Authority to Postpone

As noted, the United States Constitution does not provide any express authority to any federal official or institution to postpone an election for federal office in a particular State, or in all of the States. Specifically, there is no current constitutional authority residing in the President of the United States, nor the executive branch of

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<sup>10</sup> 5 Stat. 721, Ch. 1, January 23, 1845; *see now* 3 U.S.C. §§ 1 and 2.

<sup>11</sup> *Congressional Globe*, 28<sup>th</sup> Cong., 2d Sess., at 350, March 6, 1844 (Mr. Duncan); *see* Levy and Fisher, *The Encyclopedia of the American Presidency*, Volume 2, “Election, Presidential, 1840,” at p. 446.

<sup>12</sup> *Congressional Globe*, 28<sup>th</sup> Cong., 2d Sess., at 14, December 9, 1844 (Mr. Hale); *Congressional Globe*, *supra* at 21, December 11, 1844 (Mr. Duncan); *see* 5 Stat. 721, Ch. 1, January 23, 1845, now 3 U.S.C. § 2.

<sup>13</sup> 17 Stat. 28, ch. 11, § 3, February 2, 1872, now 2 U.S.C. § 7.

<sup>14</sup> *Note* discussion by Supreme Court in *Foster v. Love*, 522 U.S. 67, 73-74 (1967), and in legislative history, *Congressional Globe*, 42 Cong., 2d Sess., at 141, December 14, 1871.

Government, to postpone, cancel, or reschedule elections for federal office in the various States.<sup>15</sup> There might certainly be some potential emergency powers inherent in the President of the United States, as well as those delegated by statute, but there is no precedent for such powers being applied with respect to elections held in the various States for presidential electors,<sup>16</sup> authority over which, as to the procedures and methods, has been expressly delegated in the Constitution to the States.<sup>17</sup> It is possible that some scenarios could be imagined, however, where attacks, disruptions and destruction are so severe and so dangerous in certain localities, particularly in crowded urban areas, that the President under a rule of necessity may look to protect the public safety by federalizing State national guard and restricting movement and activities in such areas which would obviously affect the ability to conduct an election at those sites.<sup>18</sup>

Unlike the President, Congress does have explicit constitutional authority over elections to federal office which is of an express, residual nature concerning congressional elections,<sup>19</sup> and a broad implicit authority recognized by the Supreme Court to legislate to protect the integrity and proceedings of presidential elections,<sup>20</sup> as well as *express* authority over the date of the selection of presidential electors.<sup>21</sup> Congress could, therefore, pass legislation regarding dates, and emergency postponements and/or rescheduling times for elections to federal offices. The courts have recognized an expansive authority in the Congress to “provide a complete code” for federal elections within the States, including presidential elections, and, within the parameters of the specific dates for the length and terms of federal offices established within the Constitution, could exercise its legislative discretion with regard to emergency scheduling and rescheduling.<sup>22</sup> As noted by the Supreme Court

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<sup>15</sup> See discussion in CRS Report RL32471, *Executive Branch Power to Postpone Elections*, by Kenneth R. Thomas.

<sup>16</sup> See discussion of emergency powers generally, in CRS Report 98-505, *National Emergency Powers*, by Harold C. Relyea.

<sup>17</sup> Article II, Section 1, clause 2: “Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors ....”

<sup>18</sup> Note discussion of historic uses of emergency powers and rule of necessity, particularly the use of authority by President Lincoln in the Civil War era, in “Emergency Powers,” by Harold C. Relyea, appearing in *Separation of Powers - Documents and Commentary*, Katy J. Harriger, ed., pp. 80- 97 (2003). There may also certainly be, of course, serious political implications for a President to exercise inherent or implied “emergency” powers to affect the timing, and thus possibly the turnout and outcome, of an election in which that President himself is a candidate for re-election.

<sup>19</sup> Article 1, Section 4, clause 1; *Smiley v. Holm*, 285 U.S. 355 (1932); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 799, 832-833 (1995).

<sup>20</sup> *Burroughs and Cannon v. United States*, 290 U.S. 534, 544-545 (1934).

<sup>21</sup> Article II, Section 1, clause 4.

<sup>22</sup> *Smiley v. Holm*, *supra* at 366-367 [congressional elections]; *Ex parte Yarbrough*, 110 U.S. 651, 657-658 (1884) [congressional elections]; *Burroughs and Cannon*, *supra* [presidential elections]; *Buckley v. Valeo*, 424 U.S. 1, 13-14, *see* n.16 (1976) [presidential and

(continued...)



earlier in our history with regard to Congress' authority over the conduct of elections for federal office in the States:

That a government whose essential character is republican, whose executive head and legislative body are both elective ... , has no power by appropriate laws to secure this election from the influence of violence ... is a proposition so startling as to arrest attention and demand the gravest consideration.

If this government is anything more than a mere aggregation of delegated agents of other States and governments, each of which is superior to the general government, it must have the power to protect the elections on which its existence depends from violence and corruption.<sup>23</sup>

Furthermore, in theory, Congress could also enact a law delegating to the executive certain authority in this area regarding emergency rescheduling.<sup>24</sup> However, as a policy matter, and under Article I, Section 4, clause 1, and Article II, Section 1, clause 2, Congress has traditionally allowed the States, within the framework of the federal constitutional and statutory mandates, to exercise the substantive control over the procedures and administrative details of elections within their own respective jurisdictions, and the States have then generally further devolved immediate administrative and supervisory control over many election procedures to local and county authorities within their jurisdictions. This policy has generally recognized the principle that because of the varying political cultures, practices and traditions across the nation, and from State-to-State, that operational authority over most of the election mechanics is more efficiently left to the States and localities.

It should be noted, and as discussed in more detail in following sections, that there are existing provisions under current federal law regarding a failure of a State to make a selection on the prescribed election day with regard to both congressional elections (2 U.S.C. § 8) and presidential elections (3 U.S.C. § 2), which have traditionally left the details of such decisions up to the States.

## **State Authority Over Election Procedures and Administration**

### **State Authority Under United States Constitution.**

There is under our federal system of shared sovereignty a division of jurisdiction and authority which occurs in the case of elections to federal office under the

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<sup>22</sup> (...continued)  
congressional elections].

<sup>23</sup> *Ex parte Yarbrough*, 110 U.S. 651, 657-658 (1884).

<sup>24</sup> Although Congress has the express constitutional authority over these aspects of federal elections, Congress could delegate, with the appropriate standards, the authority to regulate such elections to the executive branch, which would administer and execute the particular federal laws enacted, such as it has done with respect to the conduct and regulation of the financing of federal elections to the Federal Elections Commission, an executive agency. *Note* generally, discussion in CRS Report RL32471, *supra*, of the required standards for delegation as set out in *Mistretta v. United States*, 488 U.S. 361, 379 (1989); *Skinner v. Mid-American Pipeline*, 490 U.S. 212 (1989); *Clinton v. City of New York*, 524 U.S. 417, 443-444 (1998).

provisions of the United States Constitution. In the first instance, the *terms* of federal offices and the *qualifications* of candidates eligible for federal offices are established and fixed by the agreement of the States within the instrument which created those offices, that is, the United States Constitution, and are thus unalterable by the Congress alone or by any State unilaterally.<sup>25</sup> The Constitution expressly provides, however, that the individual States have the authority to *administer* elections for federal congressional office, while providing that Congress may generally supercede any such regulations.<sup>26</sup> The Supreme Court has described this “Times, Places and Manner” clause of Article I, Section 4, as a “default provision; it invests the States with responsibility for the mechanics of congressional elections ... but only so far as Congress declines to pre-empt state legislative choices.”<sup>27</sup> The State legislatures have express authority over the “manner” in which presidential electors in their State are to be chosen.<sup>28</sup> Within certain constitutionally prescribed parameters, the States are also responsible to establish the qualifications for voting in their States in federal elections.<sup>29</sup> Finally, as to its own Members, the Constitution provides that each House of Congress expressly retains the authority to be the final judge of the results of their elections and constitutionally prescribed qualifications,<sup>30</sup> and the Congress, in joint session, is assigned in the Constitution the duty to count the electoral votes for President and to declare the winner.<sup>31</sup>

Under the States’ “Times, Places and Manner” authority in the Constitution, the States may promulgate a broad range of regulatory and administrative provisions over the mechanics and procedures even for federal elections within their States regarding such things as forms of the ballots, “ballot access” by candidates (including new party or independent candidates), voting procedures, and the nominating and electoral process generally, to prevent election fraud, voter confusion, ballot overcrowding, the proliferation of frivolous candidates, and to facilitate proper election administration.<sup>32</sup>

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<sup>25</sup> *Powell v. McCormack*, 395 U.S. 486 (1969); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *Cook v. Gralike*, 531 U.S. 510 (2001).

<sup>26</sup> Article I, Section 4, cl. 1.

<sup>27</sup> *Foster v. Love*, 522 U.S. 67, 69 (1997), citing to *Storer v. Brown*, 415 U.S. 724, 730 (1974), and *Roudebush v. Hartke*, 405 U.S. 15, 24 (1972).

<sup>28</sup> Article II, Section 1, clause 2.

<sup>29</sup> The qualifications to vote in congressional elections in a particular State must be the same as the qualifications to vote for the most populous House in the State legislature, and meet other federal standards, such as age and absence of discrimination. *Note* Article I, Section 2, clause 1; Article II, Section 1, clause 2; 14<sup>th</sup>, 15<sup>th</sup>, 17<sup>th</sup>, 19<sup>th</sup>, 24<sup>th</sup> and 26<sup>th</sup> Amendments.

<sup>30</sup> Article I, Section 5, cl. 1. In addition to judging the elections and returns of its own Members, each House is expressly authorized to judge the “qualifications” for office of the Members-elect in those elections, that is, the age, citizenship and inhabitancy in the State of the Members-elect seeking to be seated. *Note Powell v. McCormack, supra.*

<sup>31</sup> Constitution, Amendment XII.

<sup>32</sup> *Storer v. Brown*, 415 U.S. 724 (1974). Legitimate “ballot access” procedures, as well as administrative requirements, reasonable filing deadlines, and party affiliation rules, are generally considered within the State’s purview to “regulate[ ] election *procedures*” to serve (continued...)

The States' procedural and administrative authority over elections within their jurisdictions, including elections to federal office, includes the initial authority over election contests, protests and recounts. As noted by the Supreme Court in *Roudebush v. Hartke*, even though the Constitution expressly gives each House of Congress the final authority over the elections and returns of its own members (Article I, Section 5), a State may adopt contest and recount provisions as one of the "safeguards which experience shows are necessary in order to enforce the fundamental right involved."<sup>33</sup> The Court noted there:

Indiana has found, along with many other States, that one procedure necessary to guard against irregularity and error in the tabulation of votes is the availability of a recount. ... A recount is an integral part of the Indiana electoral process and is in the ambit of the broad powers delegated to the States by Art. I, § 4.

It is true that a State's verification of the accuracy of election results pursuant to its Art. I, § 4, powers is not totally separable from the Senate's power to judge elections and returns. But a recount can be said to "usurp" the Senate's function only if it frustrates the Senate's ability to make an independent final judgment. A recount does not prevent the Senate from independently evaluating the election any more than the initial count does. The Senate is free to accept or reject the apparent winner in either count, and, if it chooses, to conduct its own recount.<sup>34</sup>

As to the presidential election, the State legislatures are granted express authority over the manner in which presidential electors are to be chosen. Article II, Section 1, clause 2. Although there remains continued controversy over the Supreme Court's ruling in *Bush v. Gore*,<sup>35</sup> where a federal court intervened to stop a State ordered recount of the vote for presidential electors in Florida in 2000, the Court's *per curiam* opinion left intact and affirmed, at least in theory, a State legislature's authority under the United States Constitution to enact protest or contest statutes and provisions regarding elections for presidential electors, although the implementation of that procedure as directed by the Florida courts was found by a majority of the Supreme Court to be violative of the equal protections and due process requirements

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<sup>32</sup> (...continued)

the State interest of "protecting the integrity and regularity of the election process....," and are not considered impermissible additional qualifications for federal office. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-835 (1995), comparing legitimate "ballot access" provisions as in *Storer v. Brown*, *supra*, with impermissible additional qualifications for federal office, such as individual State-imposed term limits. Requirements for "ballot access," in addition to the requirement that they impose no substantive, new qualifications to federal office, must not violate equal protection provisions of the Constitution by impermissibly discriminating against new or independent candidates, nor impermissibly infringe upon First Amendment rights of voters to associate freely and express their political opinions through support of their chosen candidates. *Jenness v. Fortson*, 403 U.S. 431 (1971); *Bullock v. Carter*, 405 U.S. 134, 145 (1972); *Williams v. Tucker*, 382 F. Supp. 381, 387-388 (M.D.Pa. 1974).

<sup>33</sup> 405 U.S. 15, 24-25 (1972).

<sup>34</sup> *Id.* At 25-26.

<sup>35</sup> 531 U.S. 98 (2000).

of the United States Constitution.<sup>36</sup> The primacy under the United States Constitution of the States' legislatures in establishing the mechanisms for appointment of presidential electors and in fashioning recount and protest statutes was also emphasized by the Supreme Court in the decision preceding *Bush v. Gore*, that is, *Bush v. Palm Beach County Canvassing Board*,<sup>37</sup> which had remanded back to the State courts the issue of the recount proceedings in the Florida presidential election of 2000.

### **Authority Under State Law to Postpone or Reschedule.**

There are several State provisions which currently purport to give to certain specified State officials the authority to “postpone” or to reschedule an election within the State, prior to the holding of an election, for a number of emergency and exigent circumstances.<sup>38</sup> Furthermore, other States may have general emergency powers which might be used, and might be broad enough, to allow the Governor or other State executive official to take action which may effect a postponement of an election. Because of the increased awareness of the threat from terrorists and terrorist organizations, State legislatures may in the future consider the adoption of additional provisions which set out the considerations and circumstances for the declaration of a postponement and/or rescheduling of an election within their jurisdiction, including elections to federal offices.

### **Conformance With Federal Law.**

Does a State law or order instituting a rescheduling of an election to federal office within that State impermissibly affect the date of such election in contravention of the federal laws that have established election day for federal offices to be the first Tuesday after the first Monday in November?

**Congressional Elections.** The federally established date for elections for federal office, while it is clearly mandatory and not merely advisory, may not necessarily be an “absolute,” such that no election *subsequent* to that date could be or should be recognized. In fact, as noted, the federal statutory scheme in the case of congressional elections specifically provides for the contingency of a “vacancy” in the State delegation, whether that vacancy is caused by death, resignation or incapacity, or by a “failure to elect at the time prescribed by law,” by authorizing another time for the election to be prescribed by State law:

**2 U.S.C. § 8. Vacancies** The time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether

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<sup>36</sup> The Court found that “it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work,” in formulating specific standards for and overseeing manual recounts, which would necessitate that the proceedings would not be completed by the State statute’s deadline. *Bush v. Gore*, *supra* at 110.

<sup>37</sup> 531 U.S. 70 (2000)

<sup>38</sup> See CRS Report RS21942, *State Election Laws: Overview of Statutes Regarding Emergency Election Postponement Within The State*, by L. Paige Whitaker.

such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.

The Supreme Court of the United States has found that the day established in 2 U.S.C. § 7 for electing Senators and Representatives in the States is a mandatory date, and that a State’s statutory scheme may not permissibly allow the “election” of such a federal official at an election held *prior* to the first Tuesday after the first Monday in November date. Thus, the Louisiana election provisions which designated as “elected” to Congress an open primary winner who received at least a majority of the votes cast in that primary election held prior to the general election, was found to be a violation of the federal law setting the general election date.<sup>39</sup> States that allow “early voting” in federal elections, however, have not been found by federal courts to be holding a prior election in violation of the federal statute since it was found that the election would not be “consummated” before election day, or that such ballots would not be officially counted or tallied before election day.<sup>40</sup>

Federal courts interpreting the federal statutes regarding the timing of elections to Congress have noted that the States’ scheme for elections must be in general conformance with the date prescribed by federal law, at 2 U.S.C. § 7, and may not routinely allow the election on an earlier date, but that certain “exigent” circumstances may permit the holding of an election for federal office at a *subsequent* time under 2 U.S.C. § 8.<sup>41</sup> The Federal court in the District of Columbia in *Busbee v. Smith*, in a case affirmed by the United States Supreme Court, found that an exigent circumstance, such as the State of Georgia’s reapportionment plan being refused preclearance by the Justice Department under the Voting Rights Act of 1965 because of “discriminatory effects,” allowed for an election to federal office in two congressional districts to be held on a subsequent date:

...[W]here exigent circumstances arising prior to or on the date established by [2 U.S.C.] section 7 preclude holding an election on that date, a state may postpone the election until the earliest practicable date. In this case, for example, Georgia will “fail[ ] to elect at the time prescribed by law” because its purposefully discriminatory conduct prevented it from securing Section 5 approval for constitutionally required changes in its voting procedures. As a result, we believe, that [2 U.S.C.] section 8 permits a reasonable postponement of the elections in the Fourth and Fifth Congressional Districts.<sup>42</sup>

This reasoning, as noted later by another federal court, would allow for the postponement of an election, and the holding of the election for federal office in the State at a later date, for a number of possible “exigent” circumstances, including

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<sup>39</sup> *Foster v. Love*, 522 U.S. 67 (1997).

<sup>40</sup> *Voting Integrity Project, Inc. v. Bomer*, 199 F.3rd 773 (5<sup>th</sup> Cir. 2000); *Millsaps v. Thompson*, 96 F.Supp.2d 720 (E.D.Tenn. 2000).

<sup>41</sup> *Busbee v. Smith*, 549 F.Supp. 494 (D.D.C. 1982), *aff’d*, 459 U.S. 1166 (1983); *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821, 830 (N.D.Ga. 1993), *aff’d*, 992 F.2d 1548 (11<sup>th</sup> Cir. 1993).

<sup>42</sup> *Busbee v. Smith*, *supra* at 525.

“natural disasters” such as hurricanes, tied votes, or fraud. This federal court in Georgia found that the State’s statutory requirement that a candidate to be elected receive a majority, and not merely a plurality, of votes in the general election, was such an exigent circumstance that could require the holding of a subsequent run-off election for Senator to be held on November 24, after the earlier November general election mandated by 2 U.S.C. § 7 resulted in no candidate receiving a majority of the votes:

The court in *Busbee* acknowledged that 2 U.S.C. § 8 allows States, under certain circumstances, to hold elections at times other than those prescribed by section 7. *Id.* at 524-25. In addition to the circumstances it specifically enumerates — death, resignation, personal incapacity — section 8 allows states to reschedule elections “where *exigent* circumstances arising prior to or on the date established by section 7 preclude holding an election on that date.” *Id.* at 525. The court offered natural disasters, and the parties to the instant suit offer fraud and a tie vote as examples of ‘exigent’ circumstances warranting state rescheduling.<sup>43</sup>

***Elections for Presidential Electors.*** The election for presidential electors presents somewhat different issues than those elections for congressional office, as the language of the federal statutes for *presidential* electors varies from the language governing *congressional* elections. The statute concerning the timing and scheduling for congressional elections provides expressly that when there is a vacancy caused by death, resignation or incapacity, or when “such vacancy is caused by a failure to elect at the time prescribed by law,” then a subsequent election may be scheduled. This language appears to be broad enough and, as noted above, has been interpreted by federal courts to actually permit a temporary postponement and rescheduling of a congressional election. The federal statute for presidential elections, however, expressly states that “[w]henever any State has held an election for the purpose of choosing electors,” but fails to “make a choice on the day prescribed by law,” then the electors may be selected on a subsequent day in the manner established by the legislature of the State:

**3 U.S.C. § 2. Failure to make choice on prescribed day** Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.

Does the wording of 3 U.S.C. § 2 mean that the authority of the States to reschedule an election for presidential electors is contingent upon the State actually having “held an election for the purpose of choosing electors”? If so, then under this theory no *prior* postponement and rescheduling would be permitted State-wide, even a postponement for natural disasters such as an impending hurricane, or the destruction shortly prior to the elections of a number of polling places, since it would conflict with the federally scheduled time in 3 U.S.C. § 2.

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<sup>43</sup> *Public Citizen, Inc. v. Miller*, 813 F. Supp. 821, 830 (N.D.Ga. 1993), *aff’d*, 992 F.2d 1548 (11<sup>th</sup> Cir. 1993).

Certainly, if a scheduled election is being held when terrorist or other types of attacks are conducted on voting places, destroying certain polling places in various precincts and disrupting the election generally in a State, then the power of the State to find under its general election contest and challenge procedures that the results of the election, because of such disruptions, are not viable or valid, and that, either a new election, or a continuation of the election (whereby those people who were not certified by election officials as having already voted could come to vote at a subsequent time), would appear to be in conformance with federal law, both at 2 U.S.C. § 8 (for congressional elections), as well as 3 U.S.C. § 2, in the case of the election of presidential electors. In such cases, the State had clearly “held an election,” but a choice was not necessarily made because the State has determined that the results could not fairly be ascertained.

However, if there is a disruption just *prior* to an election, could an election for presidential electors not be held, that is, be postponed and rescheduled in a particular State and still be in conformance with 3 U.S.C. § 2? There is no clear and definitive authority on this question, nor do there appear to be specific legal precedents bearing upon this issue. Even though the purpose in 1845 of this particular provision at 3 U.S.C. § 2, regarding the subsequent choosing of electors, was clearly to allow those States that required an absolute “majority” in a general election to be “elected” to hold a subsequent run-off election if no candidate’s electors received such a majority,<sup>44</sup> the language itself may be open to broader interpretation.

It may be contended on the one hand, that the express constitutional authority of the State legislatures over the selection of presidential electors at Article II, Section 1, clause 2, which language allows the State legislatures to enact statutory schemes to protect the validity of their elections for presidential electors in the State, including fashioning protest or contest procedures, may be consonant with such an authority in the legislature itself to temporarily postpone or to authorize by State law the postponement and rescheduling of State-wide elections by the State executive in certain emergency circumstances. One of the major points made by the Supreme Court in both the earlier *Palm Beach County* case, and the latter *Bush v. Gore* decision, was the primacy of the state legislatures’ role in the manner of the selection of presidential electors.<sup>45</sup> Although clearly the concepts of “time” and “manner” of election are not necessarily synonymous,<sup>46</sup> this constitutional provision and the Supreme Court’s deference to the State legislatures may arguably give some credibility to the States’ attempts to statutorily prescribe a system whereby emergency procedures may be implemented with respect to all State-wide elections, including the general elections for federal office, which provide that such elections, while certainly *scheduled* for the federally prescribed date, because of such

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<sup>44</sup> *Congressional Globe*, 28<sup>th</sup> Cong., 2d Sess. at 14, December 9, 1844 (Rep. Hale of New Hampshire); see amendment at *Congressional Globe*, *supra* at 21, December 11, 1844 (Mr. Duncan); note also debate at *Congressional Globe*, *supra* at 30-31, December 13, 1844.

<sup>45</sup> *Bush v. Palm Beach County Canvassing Board*, *supra* 76-77; *Bush v. Gore*, *supra* 104-105; see specifically *McPherson v. Blacker*, 146 U.S. 1 (1892).

<sup>46</sup> *Foster v. Love*, *supra* at 72.

emergency and exigent circumstances need to be rescheduled, postponed or continued at a subsequent time.

Furthermore, it may be noted that in addition to Article II, Section 1, clause 2 of the Constitution, the federal law at 3 U.S.C. § 5, which was part of the original Electoral Vote Count Act of 1887, provides the State legislatures with further statutory authority to finally and conclusively resolve within the State protests, challenges and contests of the election of presidential electors. One of the purposes of the original 1887 statute regarding counting of the electoral votes was to substantially devolve upon the States the burden for resolving conflicts over the election, selection and appointment of those states' own electors for President and Vice President.<sup>47</sup> As noted by the Supreme Court, this statute at 3 U.S.C. § 5:

... creates a "safe harbor" for a State insofar as congressional consideration of its electoral votes are concerned. If the state legislature has provided for final determination of contests or controversies by a law made prior to election day, that determination shall be conclusive if made at least six days prior to said time of meeting of the electors.<sup>48</sup>

Clearly, there is an understanding that the States were intended to have the principal and initial responsibility for resolving the conflicts, arguments, controversies and difficulties involved in the processes of electing presidential electors.

Thus, it is possible to argue that to harmonize the provisions for elections to federal office, that is specifically the provisions for subsequent congressional elections at 2 U.S.C. § 8 and the presidential provisions at 3 U.S.C. § 2, along with the authority devolved upon the States in 3 U.S.C. § 5, that it would be logical to read the federal statutes as permitting a postponement and an election on a subsequent date for both Congress and presidential electors under the State's current laws when necessitated by emergency and exigent circumstances in the particular State and, as long as the matter is resolved in time, such resolution would be conclusive on Congress in counting the presidential electoral votes. Such a supposition might be bolstered somewhat by the alternative, that is, that the federal law could work to disenfranchise the voters of a particular State when that State believes it is necessary to temporarily postpone the regularly scheduled State-wide elections because of some extraordinary and disastrous event in the State.

While providing possible support for the State legislature's authority to develop a scheme which could include postponement of elections for presidential electors in times of emergency, this argument of expanded State authority might not necessarily give any additional weight to an implied or inherent authority of the State Executive

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<sup>47</sup> Pierce and Longley, *The People's President, The Electoral College in American History and the Direct Vote Alternative*, at p.105 (revised edition 1981).

<sup>48</sup> *Bush v. Gore*, *supra* at 77-78.



or the State courts to do so, absent an express delegation in law from the legislature.<sup>49</sup>

Finally, as a policy matter there has been some consternation over allowing any State to postpone or otherwise reschedule an election for federal office. The grounds for any such postponement or rescheduling, as well as any express, implied or inherent authority, would have to be examined initially under State law and procedure, and no blanket statement could be made with respect to the interpretation in all of the States. Furthermore, there appears to be little legal or factual precedent to apply to such circumstances. Remembering that the presidential election is not necessarily in the nature of a national referendum, but is rather 51 simultaneous State/District elections for presidential electors, however, it may be asked as a matter of policy whether or not an event that occurred earlier in the State, or an event that occurs in a different State, would or should be enough to trigger a postponement of an election in any particular State as a matter of good public policy. It has been argued that a violent disruption of an election in Manhattan, New York City, should not necessarily affect, or at least could not predictably affect, an election in Manhattan, Kansas. Various commentators have noted that on the fateful day of September 11, 2001, despite the events unfolding in Manhattan in New York City, Pennsylvania, and in Arlington, Virginia, a primary election for federal congressional office, a contested congressional primary, on the South Shore of Massachusetts reportedly drew a larger than normal number of the voting age population.<sup>50</sup> Problems and disruptions in one State may not necessarily or predictably affect the viability of the results in another.

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<sup>49</sup> Note discussion of State legislatures' plenary power in this area, in *McPherson v. Blacker*, *supra*, and *Bush v. Palm Beach Canvassing Board*, *supra* at 76-78, as well as concurring opinion of minority of three Justices in *Bush v. Gore*, *supra* at 111-122.

<sup>50</sup> *Congressional Quarterly Weekly Report*, at 2111, September 15, 2001.

## Appendix: Constitutional and Federal Statutory Provisions

### Congressional Elections.

**Article I, Section 2**, clause 1. The House of Representatives shall be composed of Members chosen every second year by the people of the several States ....

**Article I, Section 2**, clause 4. When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

**Amendment Seventeen.** The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years ....

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

**Article I, Section 4**, clause 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 I, Section 5**, clause 1. Each house shall be the Judge of the Elections, Returns and Qualifications of its own Members ....

### Presidential Elections.

**Article II, Section 1.** The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, 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 ...<sup>51</sup>

**Article II, Section 1**, clause 4. The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their votes; which Day shall be the same throughout the United States.

**Amendment XII.** The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, ... and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States,

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<sup>51</sup> See also the 23<sup>rd</sup> Amendment granting to the District of Columbia the right to select presidential electors equal to the number of Representatives and Senators to which the District would be entitled had it been a State.

directed to the President of the Senate; — The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted ....

## Dates of Federal Office Terms.

**Amendment XX, Section 1.** The terms of the President and Vice President shall end at noon on the 20<sup>th</sup> day of January, and the terms of Senators and Representatives at noon on the 3<sup>rd</sup> day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

## Current Federal Statutory Provisions.

**2 U.S.C. § 1. Time for election of Senators** At the regular election held in any State next preceding the expiration of the term for which any Senator was elected to represent such State in Congress, at which election a Representative to Congress is regularly by law to be chosen, a United States Senator from said State shall be elected by the people thereof for the term commencing on the 3d day of January next thereafter.

**2 U.S.C. § 7. Time of election** 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. § 8. Vacancies** The time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.

**3 U.S.C. § 1. Time of appointing electors** 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. § 2. Failure to make choice on prescribed day** Whenever any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the electors may be appointed on a subsequent day in such a manner as the legislature of such State may direct.

**3 U.S.C. § 5. Determination of controversy as to appointment of electors** If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the

Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.