XIII.

CONGRESSIONAL AUTHORITY TO REGULATE WHEN VOTES CAN BE COUNTED

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MEMORANDUM

To: **National Commission on Federal Election Reform**

From: **Daniel Ortiz, Coordinator, Task Force on Legal and Constitutional Issues**

Re: **Congressional Authority to Regulate When Presidential Votes Can Be Counted**

Date: **June 28, 2001**

Can Congress prevent the states from counting presidential votes before a certain time?

Yes, Congress can regulate the time when the states can count presidential votes. Although Congress very likely has the power to regulate the time of counting presidential votes directly, it certainly can regulate the timing indirectly through its power to regulate the time of counting congressional ballots and its power to attach conditions to any federal election spending.

Until last year, it was clear that Congress had very broad power to regulate presidential elections directly. In *Burroughs v. United States*, for example, the Supreme Court rejected the view that Article I, section 2's explicit grant of power to Congress to "determine the Time of chusing the Elector[s] and the Day on which they shall give their Votes" excluded other powers not mentioned. 290 U.S. 534, 544 (1934)("So narrow a view of the powers of Congress in respect of the matter is without warrant."). In particular, the Supreme Court held, Congress could regulate the process of selecting presidential electors in order to prevent violence, fraud, and corruption:

> While 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.

Id. at 545; *accord Ex parte Yarbrough*, 110 U.S. 651, 657-58 (1884)("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, of corruption, and of fraud, is a proposition so startling as to arrest attention and demand the gravest consideration."). Thus, it was settled law that Congress could legislate somewhat beyond setting the time of choosing electors and the day on which the Electoral College would vote. Under this broad view, Congress would almost certainly have the power to prevent the states from counting presidential votes before a certain time, particularly if its aim was to protect the integrity of the electoral process in western states.

Last year, however, in *Bush v. Palm Beach County Canvassing Board*, 121 S.Ct. 471 (2000)(per curiam)(*Bush I*), and *Bush v. Gore*, 121 S.Ct. 525 (2000)(per curiam)(*Bush II*), the Court suggested that Congress's power might not be so broad. In *Bush I*, the Florida Supreme Court had ordered Florida's Secretary of State to accept the results of recounts that she believed too late under Florida law. In reaching its conclusion that the Florida statutes required the Secretary to accept these recount results, the Florida Supreme Court "relied in part upon the right to vote set forth in the Declaration of Rights of the Florida Constitution . . .." *Bush I*, 121 S.Ct. at 473. The United States Supreme Court found this reliance extremely troubling. Believing that Article II, section 1 might not allow the state constitution to circumscribe the legislative power in this way, it unanimously remanded the case back to the Florida Supreme Court for a clarification of the basis of its decision. It avoided deciding this issue until it was sure the Florida Supreme Court's ruling presented it.

When the case returned as *Bush II*, seven individual justices decided the issue. Four justices explicitly decided that a state constitution *could* limit a state legislature's power to select presidential electors, 121 S.Ct. at 539 (Stevens, J., dissenting)(Ginsburg and Breyer, JJ., joining)("[Article II, section 1] does not create state legislatures out of whole cloth, but rather takes them as they come—as creatures born of, and constrained by, their state constitutions."); *id*. at 549 (Ginsburg, J., dissenting)(Stevens, Souter, and Breyer,

JJ., joining)("a State may organize itself as it sees fit"); *id*. at 552 (Breyer, J., dissenting)(Stevens, Ginsburg, and Souter, JJ., joining)("[N]either the text of Article II itself nor the only case … that interprets Article II … leads to the conclusion that Article II grants unlimited power to the legislature, devoid of any state constitutional limitations, to select the manner of appointing electors."); three justices explicitly indicated a state constitution *could not* limit this power, *id*. at 534 (Rehnquist, C.J., concurring)(Scalia and Thomas, JJ., joining)("Art. II, § 1, cl. 2 … conveys the broadest powers of determination and leaves it to the legislature exclusively to define the method of appointment.")(internal quotation marks and citations omitted); while two justices were silent on the issue. In short, the litigation over the presidential election created doubt where none existed before. The extent to which a state legislature's power over the selection of presidential electors can be controlled is now somewhat unsettled. Although *Bush I* and *Bush II* specifically raised the issue only of whether a state constitution could circumscribe this power, their outcome raises even more doubt about Congress's authority to circumscribe it. If, as at least three justices believe, a state constitution—the law that defines the state's fundamental political organization—cannot circumscribe a state legislature's power to appoint electors, then *a fortiori* the United States Congress should not be able to.

Even under this narrow view, however, Article II, section 1 likely gives Congress the power to set the time when presidential votes should be counted. The section expressly grants Congress two powers: the power to determine (i) the time of "choosing" electors and (ii) the day the electors should cast their votes. Although there is no judicial precedent even remotely on point and no helpful legislative history, the commonsense ("plain") meaning of "choosing" strongly argues in favor of Congress having this power. In ordinary speech, we clearly use "choosing" to refer to the casting of votes but we just as clearly use it sometimes to include their counting as well. In fact, we often go further to use the term to include not only the casting and counting of ballots, but also the announcement of the results. We do not, for example, say that the Academy of Motion Picture Arts and Sciences has chosen its Academy Award winners when just the voting is complete or even when the accountants have counted the ballots, but only later when the results are publicly announced. In politics, moreover, the winners are not chosen until any post-election contests are over. Thus, any prior phase of the election that bears on the ultimate choice should be considered part of the "choosing" as well. For these reasons, Congress's express power to determine the time of choosing of electors should encompass setting the time when presidential ballots can be counted.

Even if Congress cannot directly regulate the timing of counting presidential ballots, however, it can certainly regulate their counting indirectly by regulating the time of counting congressional ballots in the same election. Under the Elections Clause, Congress has plenary power to regulate the "times, places, and manner" of congressional elections. In its most recent decision discussing this clause, the Supreme Court stated that "in our commonsense view [the] term ['Manner of holding Elections'] encompasses matters like '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.'" *Cook v. Gralike*, 121 S. Ct. 1029, 1038 (2001)(quoting Smiley v. Holm, 285 U.S. 355, 366 (1932)). The term certainly sweeps broadly enough to encompass the time of counting of votes for a congressional election. And since presidential elections are held at the same time as congressional elections, barring the states from counting or handling congressional ballots or machinery until a certain time would effectively stop them from counting presidential ballots as well—at least with respect to most existing voting technologies.

Congress could also condition the receipt of any federal funds related to elections upon state agreement not to count presidential votes until a certain time**.** In *South Dakota v. Dole*, the Supreme Court identified three key limitations on the scope of the spending power: (i) the exercise of the spending power must be in pursuit of "the general welfare"; (ii) the congressional regulation must be unambiguous so that states understand the choice they are making in agreeing to receive the funds; and (iii) the conditions on the federal funds must be related to the purposes of the federal spending. 483 U.S. 203, 207 (1987). A congressional grant of funds for the states to improve their voting technologies, poll worker training, or voter education would certainly be in pursuit of the general welfare. And Congress could easily make unambiguous the condition that presidential votes not be counted before a certain time. That would be a simple matter of legislative drafting. Such a condition would also be related to the purposes of the federal spending. Both aim to improve the election process. In sum, the spending power certainly allows Congress to lay down this condition for the states to receive federal election funds.

Nothing, of course, requires the states to accept the federal bargain. They can, if they want, simply walk away from the offer. And, for those that do, Congress's condition has no bite. They can continue to count presidential votes whenever they want. The effectiveness of the spending power, then, depends not so much on Congress's constitutional authority as on the attractiveness of the overall bargain it proposes.

Although Congress clearly has the power to set the time of counting presidential votes—either directly or indirectly—one small issue remains. Would Congress's exercise of this authority in order to prevent media from forecasting results in some states before polls had closed in others violate the First Amendment? The answer is no. Although the First Amendment grants great protection to the press once it has acquired information, it gives the press little right against the government to provide it with information it does not make available generally. *Pell v. Pecunier*, 417 U.S. 817 (1974); *Saxbe v. Washington Post Co*., 417 U.S. 843 (1974). In particular, no case has ever held that the First Amendment requires the government to structure activities other than trials in such a way as to generate information for the press. Without such a right, there is no first amendment claim here.