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## COULD TERRORISTS DERAIL A PRESIDENTIAL ELECTION?

*Jerry H. Goldfeder*\*

*Whereas postponing an election in the aftermath of a terrorist attack would demonstrate weakness, not strength, and would be interpreted as a victory for the terrorists . . . . Resolved, That it is the sense of the House of Representatives that . . . the actions of terrorists will never cause the date of any presidential election to be postponed . . . .*<sup>1</sup>

### INTRODUCTION

While the 2004 United States presidential election was held without the terrorist attack that many people feared, as election day approached, a gnawing feeling gripped lawyers working on behalf of President Bush and Senator Kerry.<sup>2</sup> After all, this was the first U.S. presidential election since the World Trade Center and Pentagon attacks in 2001, and the train bombing in Madrid several days before Spain's own national election was fresh in their minds.<sup>3</sup> Legal issues had to be researched; plans had to be made. Unfortunately, there appears to have been very little planning for this possibility.<sup>4</sup>

Although scholars from the Washington D.C.-based American Enterprise Institute have addressed some of the repercussions a terrorist

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1. H.R. 728, 108th Cong. (2004). The Resolution passed 419-2.

2. *E.g.*, Robert Block, *What if . . . Could the Federal Election be Postponed?*, WALL ST. J., Oct. 26, 2004, at B1.

3. *E.g.*, Keith B. Richburg, *Madrid Train Blast Kills at Least 190; 10 Bombs Detonate Almost at Once*, WASH. POST, Mar. 12, 2004, at A1.

4. Steven F. Huefner, Assistant Professor of Law at Moritz College of Law of Ohio State University, attempted to raise awareness of the problem. *See Withstanding election day Terrorism*, at [http://www.moritzlaw.osu.edu/electionlaw/elections\\_pres02.html](http://www.moritzlaw.osu.edu/electionlaw/elections_pres02.html) (last visited May 29, 2005).

attack would have on presidential succession,<sup>5</sup> there appears not to have been even a “white paper” published by Congress or any agency of the executive department of the United States government relating to the impact of an attack during or immediately preceding a presidential election. On one hand, this lack of planning is understandable: elections in the United States, even presidential elections, are held and regulated by states and municipalities.<sup>6</sup> The federal government, aside from several roles mandated by the Constitution and a limited number of statutes, plays almost no role in conducting our nation’s elections.<sup>7</sup> Thus, there is no standing agency that normally studies or regulates the administration of elections.<sup>8</sup> On the other hand, it is unfathomable that after the September 11 attacks—which occurred during a mayoral primary election in New York City—neither Congress nor the executive branch acted to safeguard regularly scheduled elections, including that of president.

This failure is especially appalling considering the response to the World Trade Center attack was to cancel the election in progress. Not once in our nation’s history has a presidential election been canceled or postponed—for any reason, including during the civil war—but, somehow, the idea of ensuring that no enemy would prevent the disruption of the 2004 election was entertained for only a fleeting moment, but never implemented.<sup>9</sup> We may have dodged a bullet last year, but the problem has not disappeared.

This Essay will explore the authority of the United States Congress to rectify this substantial hole in our nation’s constitutional system. Given the state-driven regulation of American elections, I will first explore how

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5. See generally John C. Fortier & Norman J. Ornstein, *If Terrorists Attacked Our Presidential Elections*, 3 ELECTION L.J. 597 (2004); Christopher Lee, *A Scenario Where Doubts Linger; Despite Plans, Some Doubt Government’s Ability to Provide Services in Emergency*, WASH. POST, June 22, 2004, at A15.

6. See, e.g., *Storer v. Brown*, 415 U.S. 724, 730 (1974). “[T]he States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates.” *Id.*

7. See *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 568 (6th Cir. 2004) (per curiam) (noting that the states are the primary regulators of federal, state, and local elections) (citing *Storer*, 415 U.S. at 730); see also *Williams v. Rhodes*, 393 U.S. 23, 29 (1968).

8. There are two notable exceptions: the Federal Election Commission polices campaign finance, see 2 U.S.C. § 437c (2005) (establishing the Federal Election Commission and granting it the power to regulate the financing of presidential election campaigns), and the Department of Justice monitors compliance with the Voting Rights Act, see 42 U.S.C. § 1973a (2005).

9. See generally *Could November Election be Delayed?*, CHI. SUN-TIMES, July 12, 2004, at 4 (reporting that U.S. Homeland Security Officials were considering ways to delay the election in the event of a terrorist attack).

various states and municipalities have responded to extraordinary circumstances on or immediately before an election. This has occurred infrequently, but often enough to reveal that state law is woefully ambiguous as to how governmental agencies or elected officials may respond to such emergencies. Because I am predominantly concerned about presidential elections, I will also look at how federal law affects this “doomsday scenario.” Finally, I will recommend what the United States Congress can—and should—do.

### I. SEPTEMBER 11, 2001

The nature of the problem becomes apparent by examining the governmental response to the extraordinary attack on September 11. It was Primary Election Day across New York State, including a Democratic party primary for mayor of the City of New York, other city-wide and borough-wide offices, and fifty-one City Council seats. The polls opened at 6 a.m., and were scheduled to remain open until 9 p.m. The attack, which began at 8:46 a.m. and ultimately destroyed the Twin Towers, rendered several polling places located near the World Trade Center dangerous and inaccessible. Amidst the unprecedented turmoil that grew throughout the city that horrific morning, decisions about the pending election had to be made.

At about 9:15 a.m., the Executive Director of the New York City Board of Elections attempted to reach Governor Pataki, but could not locate him.<sup>10</sup> In the meantime, the Board of Elections counsel contacted New York Supreme Court Justice Steven Fisher, who had been appointed several weeks earlier by the state’s Office of Court Administration to supervise the 2001 New York City elections. Judge Fisher issued an Order canceling the election.<sup>11</sup> Eventually, the Governor was found, and he then

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10. As campaign counsel to Mark Green, a leading candidate (and eventual Democratic party nominee) for Mayor in the September 11 primary election, the author, upon learning that the second Tower was hit, called the Executive Director of the New York City Board of Elections, Daniel De Francesco. Mr. De Francesco advised the author that he had earlier placed a call to the Governor’s office, but was told that the Governor’s whereabouts were not known. Telephone conversation with Daniel De Francesco, Executive Director, New York City Board of Elections (Sept. 11, 2001).

11. See Joel Siegel, *Mayoral Primary’s Not Even Secondary: Elections Indefinitely Postponed*, DAILY NEWS (New York), Sept. 12, 2001, at 59. Counsel for the four candidates competing in the Democratic party primary election for mayor, including the author, as well as representatives of good-government groups, and the bi-partisan New York City Board of Elections, had been meeting regularly for approximately six months prior to the September 11 primary. The goal was to avoid, or at least minimize, the kinds of procedural irregularities that occurred during the previous year’s presidential election. This

issued an Executive Order suspending the election in light of the obvious emergency.<sup>12</sup>

Whether Justice Fisher had the authority to cancel the municipal elections is open to question, but no one challenged his order on that day or afterward. He defended his action on the ground that the polling places were no longer fully staffed by Board of Elections personnel and police, as required by law.<sup>13</sup> Thus, as a result of police abandoning their election posts for the World Trade Center, procedural safeguards for the election disappeared.<sup>14</sup>

Whether the Governor could simply have issued an Executive Order canceling the election is also uncertain. Ignoring the specific provision of the election law that addressed postponing a vote during a disaster,<sup>15</sup> Governor Pataki relied upon plenary powers to temporarily suspend the election.<sup>16</sup> He halted primaries statewide, although the disruption was centered in New York City and there was no evidence that voting could not proceed in the rest of the state.<sup>17</sup> In the aftermath of the attacks, the Governor's action was, like Justice Fisher's, officially unchallenged.

Despite the lack of clarity provided by New York law and the questionable legality of the executive and judicial responses to the election crisis caused by the attack, the New York legislature, like the United States Congress, has not enacted any statutory protections in anticipation of future attacks. Put another way, although the trauma was probably the single most important reason that normally litigious New York election lawyers did not challenge the Governor's wholesale cancellation of the election throughout the state, these scarring events did not sufficiently command the

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extraordinarily cooperative effort resulted in an agreement whereby the New York State Office of Court Administration, the body that administers the judiciary in the state, would appoint a judge to directly supervise election issues in order to resolve procedural difficulties expeditiously. Supreme Court Justice Steven Fisher was so appointed. See Siegel, *supra*.

12. N.Y. COMP. R. & REGS. tit. 9, § 5.113 (2001).

13. Dahlia Lithwick, *How Do You Cancel an Election?*, SLATE, Sept. 12, 2001, at <http://slate.msn.com/id/1008278> (last visited May 29, 2005).

14. See *id.*

15. The election law states that such a postponement is to be determined by a county or state board of elections. N.Y. ELEC. LAW § 3-108 (McKinney 2005).

16. See N.Y. EXEC. LAW § 29-a (McKinney 2005). “[T]he governor may by executive order temporarily suspend specific provisions of any statute, local law, [or] ordinance . . . during a state disaster emergency if compliance with such provisions would prevent, hinder or delay action necessary to cope with the disaster.” *Id.*

17. Adam Nagourney, *A Day of Terror: The Elections; Pataki Orders Postponement of Primaries Across State*, N.Y. TIMES, Sept. 12, 2001, at A8. “Primaries were being held in most of the 62 counties in New York . . .” *Id.*

attention of New York public officials to enact more suitable legislation.<sup>18</sup>

Consequently, were another extraordinary event to prompt cancellation of an election in New York State, there would still be absolutely no statutory guidance as to the practical questions that might ensue. For instance, could a mayor or town supervisor act on his own to call off a local election without the blessing of the governor? Would votes already cast before disaster struck be counted, or would those voters be allowed to vote on the postponed election day?<sup>19</sup> Does either the New York State Board of Elections or the New York City Campaign Finance Board, the governmental agency that regulates public matching funds for New York City municipal candidates, have the authority to alter contribution and expenditure limits as a result of an unanticipated expanded election season?<sup>20</sup> If some voting records were destroyed, would “same-day registration” be permitted so that voters would not be disenfranchised?<sup>21</sup>

## II. HOW STATES HAVE ADDRESSED THE PROBLEM

Although states are the primary regulators of elections, they have not been diligent in enacting appropriate prophylactic statutes for emergency situations. The emergency need not be a terrorist attack; after all, there have been floods, snowstorms, hurricanes, and electrical outages that have crippled cities from time to time. Several of the largest states—California,

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18. Jill Gardiner, *Extra Security Likely at Polls*, N.Y. SUN, Nov. 2, 2004, at 1. After *Bush v. Gore*, 531 U.S. 98 (2000), it is not clear whether New York retains the “dubious distinction of generating half the country’s election litigation.” Gardiner, *supra*.

19. The votes cast on the morning of September 11 were nullified. Those voters were able to cast another ballot at the postponed election two weeks later. This decision was announced on September 13, 2001 by Governor Pataki and the state’s legislative leaders. Their press release stated, *inter alia*:

Under the legislation agreed to by the Governor and the Legislature, the new primary elections will take place on September 25, 2001. Any votes cast on September 11th will not be counted, but all absentee ballots duly and properly cast will continue to be valid and will be counted.

Press Release, Office of the Governor of the State of New York, Governor, Legislature Announce New Primary Election Date (Sept. 13, 2001), *available at* [http://www.state.ny.us/governor/press/year01/sept13\\_4\\_01.htm](http://www.state.ny.us/governor/press/year01/sept13_4_01.htm).

20. The New York City Campaign Finance Board, which oversees municipal candidates who have “opted in” to the public matching funds program, decided, from its makeshift office after its regular downtown quarters were rendered unusable by the Trade Center attack, that no candidate could spend any money on campaigning from September 11 to the new primary day, two weeks later. New York City Campaign Finance Board Advisory Opinion 2001-12 (Sept. 20, 2001).

21. See Fortier and Ornstein, *Ballot Box Needs Some Backup Against Terrorism*, L.A. TIMES, Mar. 29, 2004, at B11.

Texas, Illinois, Pennsylvania, and Michigan for example—have no election emergency statutes, but rather general “state of emergency” provisions, similar to the one invoked by the Governor in New York in September 2001, allowing him to suspend New York law.<sup>22</sup>

But plenary executive powers do not provide the kind of guidance necessary to decide when or how to postpone an election. For instance, should there be a rule (or a rule of thumb) to call off an election when an attack occurs *before* election day? How long before election day must the attack occur, and what kind of circumstances must occur to call it off? Must a certain percentage of polling sites become inoperative for an election to be canceled? And, given the fact that many of the states’ election officials are partisan, and many elections for state or city executive positions are hotly contested, it is not an academic question as to who should make these decisions.

If an attack or disaster occurs *on* election day, as occurred on September 11 in New York, may those who have already voted either in person or by mail be permitted to cast another vote on the new election day? After all, if there is an attack, there is no question that the dynamic and important issues of the campaign will have been dramatically altered.<sup>23</sup> On the other hand, if a voter has chosen to mail in an absentee ballot, would it be fair to allow her to vote a second time? Here, the voter makes the choice to vote in advance of election day, and even in ordinary elections, events often change the campaign dynamic in the last few days of a race. Thus, why should someone who has chosen to vote early get a second chance?

If there is an attack in one part of a jurisdiction, say New York City, and there is a statewide election, why should voters in an unaffected area, such as Buffalo, be prevented from casting their ballots after the attack? And, in this example, if there is a statewide election and the election is postponed in only part of the state, should the state or municipality ensure that the votes already cast remain uncanvassed until the resumed election is complete?

Furthermore, if an election is canceled, would the incumbent officeholders retain their positions beyond the constitutional or statutory terms?<sup>24</sup> And, if so, under what authority?

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22. See CAL. GOV'T CODE § 8571 (West 2005); 20 ILL. COMP. STAT. 3305/7 (2005); MICH. COMP. LAWS § 30.405 (2005); 35 PA. CONS. STAT. § 7301(f)(1) (2005); TEX. GOV'T CODE ANN. § 418.016 (Vernon 2005). Two states, Ohio and New Jersey, have no emergency protection legislation at all.

23. See, e.g., Philip Lentz, *Election Day Attack On NY Unmakes Mayor Green; Sept. 11 Events Cast Giuliani as a Hero, Transfer His Aura to Free-Spending Mike*, CRAIN'S N.Y. BUS., Mar. 4, 2002, at 9.

24. After September 11, the term-limited Mayor Rudolph Giuliani proposed that his

In short, there are serious questions for election lawyers, elected officials and the public to ponder. Generalized emergency statutes offer no guidance, yet four years after the worst attack on our country, no state has any particularized procedures in place to address these practical and serious issues. This is not to say that states have not been able to deal with extraordinary circumstances when the need has arisen. Given the fact, however, that elections by their nature are often quite contentious, it is not surprising that in the few instances where an exercise of generalized powers has been invoked to postpone an election, there have been challenges to such actions in the courts.

In the New York 2001 example, the authority to cancel the election statewide was dubious, but the magnitude and shock of the attack probably discouraged anyone from challenging the Governor's order.<sup>25</sup> Historically, this is anomalous. During the past sixty years, there have been few instances of an election having been postponed, but such postponements brought court challenges. Reported cases of challenges to these actions demonstrate that courts applied flexible, pragmatic approaches, interpreting plenary statutory authority liberally and deferring to executive decision-making in the face of extraordinary circumstances.

#### A. Lewiston, Maine, 1952

In February, 1952, the City of Lewiston, Maine, pursuant to its city charter,<sup>26</sup> scheduled an election on the third Monday of the month for the offices of Mayor and members of the Board of Alderman. No election was held on that day, February 18, however, because the city was experiencing

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second four-year term of office, set to expire on December 31, 2001, continue an additional three months. Democratic front-runner Mark Green supported the idea; Fernando Ferrer, his opponent in the Democratic primary run-off election, opposed it. As a result, Green's previous strong support among white liberals who had fought Giuliani's policies during the previous eight years withered, permitting Green to only squeak out a victory over Ferrer. *See id.*

25. As mayoral candidate Mark Green's campaign lawyer, the author was familiar with the major actors in that election. To his knowledge, no effort was made to challenge the postponement of the primary election from September 11 to September 25. On the contrary, the postponement developed from a general consensus: in the afternoon and evening of the day of the attack, and during the next day or so, government officials, Board of Election personnel, and campaign personnel discussed how to reschedule the primary. Initial talks focused on a two-day postponement. Ultimately, considering the extent of the damage, the deep shock in the city, and the intervening Jewish High Holy Days, a two-week postponement was accepted by all players as reasonable. Not surprisingly, this consensus was reached rather quickly.

26. Art. II, § 1 of Chap. 8 of the Private and Special Laws of Maine 1939, amended by Ch. 86 of Private and Special Laws 1943.



the “most severe blizzard in a period of sixty years.”<sup>27</sup> The storm started the day before

and had so increased in severity by 8 a.m. on February 18, when the polls were to be opened, that all of the walks, streets and ways in the city were not passable by pedestrian or vehicle. Access to the polling places was impossible because of the storm. Wardens and ward clerks for most of the polling places were unable to report for duty at any time during the voting period between 8 a.m. and 7 p.m. The continued efforts of the city clerk during the day to obtain the presence of legal voters in most of the polling places . . . met with little success because voters were unable to get to the polling places. The city clerk himself found it impossible to deliver ballots to polling places. All transportation utilities throughout the city were unable to operate. Approximately three feet of snow, with drifts of greater depth, made industry, business, schools, and the opening of State, County, and Town offices impossible for the day. . . . By reason of this “snow-bound” condition that existed during all of February 18, 1952, no votes were cast at any polling place, although the number of registered voters in the city was 21,252. No election was, or could be, held because of the unprecedented storm.<sup>28</sup>

As a result, “municipal officers” of Lewiston called off the February 18 election—which, of course, had been effectively “nullified” by mother nature—and then gave notice for a re-scheduled election one week later, on February 25, 1952.<sup>29</sup>

The re-scheduled election was held, and 13,100 votes were cast.<sup>30</sup> No mayoral candidate received a majority, thus requiring, pursuant to the city charter, a run-off election on the first Monday in March.<sup>31</sup> Accordingly, on March 3, Roland L. Marcotte was elected mayor, and on March 17, he and the duly elected Aldermen were sworn in and took office.<sup>32</sup>

On behalf of the State of Maine, Attorney General Alexander A. LeFleur commenced an action in *quo warranto*, questioning Mayor Marcotte and his colleagues’ authority to act as city officials on the ground that the

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27. *State v. Marcotte*, 89 A.2d 308, 309 (Me. 1952).

28. *Id.*

29. *Id.* The court did not identify the “municipal officers” who made the decision to postpone the election and it is not clear that the same decision would have been made if fifty or one hundred voters had made it to the polls. Presumably, because the blizzard brought the city to a near stand-still, a few votes would not have made a difference. In that case, however, the court would have had to grapple with the issue of how to handle the votes that *had* been cast.

30. *Id.*

31. *Id.*

32. *Id.*

February 25 election was invalid.<sup>33</sup> Apparently having original jurisdiction in the matter, the Supreme Judicial Court of Maine dismissed the claim by the Attorney General, holding that the election was properly canceled and re-scheduled. Thus, the results of the re-scheduled elections were lawful, and the successful candidates could assume their respective public offices.

The *Marcotte* court reasoned that, absent “fault, mistake, carelessness, fraud, or design” to prevent the originally scheduled election, it would read the provision in the City Charter designating the third Monday in February as election day as “directory” rather than mandatory.<sup>34</sup> The court noted that the 1952 storm was “of such unusual proportions and such unexpected violence that it might well be considered that there was no election due to ‘an act of God.’”<sup>35</sup> Furthermore, there was neither constitutional nor statutory prohibition of a rescheduled election.<sup>36</sup> Thus, an election could be canceled in the event of an “unavoidable circumstance” such as the blizzard experienced by the people of Lewiston, and a new election day could be scheduled,<sup>37</sup> making the postponed election for mayor and Aldermen of the city of Lewiston valid.<sup>38</sup>

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33. *Id.* at 308. *Quo warranto* proceedings are now abolished in Maine. See *Lund ex rel. Wilbur v. Pratt*, 308 A.2d 554, 558 n.1 (Me. 1973).

34. See *Marcotte*, 89 A.2d at 311-12. There is support for this holding in the case law of other states. See generally *State ex rel. Sisson v. Felkner*, 336 S.W.2d 419, 421-22 (Mo. 1960) (holding that although time and place are generally considered “of the substance of an election,” many statutory provisions pertaining to such matters have been expressly held to be or treated as “directory,” at least “where the person or body charged with the duty of calling or holding the election has failed or refused to do so”); *Rainwater v. State ex rel. Strickland*, 187 So. 484 (Ala. 1939). *Rainwater* is often cited authoritatively for the proposition that even “fixed” election dates are “directory,” permitting officials to postpone voting under certain circumstances:

While it must be conceded that time, place and qualified electorate are the essential elements of a valid election, and that statutes specifying the date of holding an election are regarded ordinarily, as mandatory, nevertheless, we find many well considered authorities holding that statutes providing for periodical elections in municipalities are merely directory.

*Rainwater*, 187 So. at 486.

35. *Id.* at 312.; see also 6 AM. JUR. 3D *Proof of Facts* § 319 (2004) (describing the standards that a casualty or phenomenon must reach to qualify as an act of God).

36. *Id.*

37. *Marcotte*, 89 A.2d at 311.

38. Interestingly, the Attorney General, who brought the *quo warranto* proceeding, argued to the court that the municipal officers had no authority to reschedule the Lewiston election. See *Marcotte*, 89 A.2d at 311. He conceded, however, that a court of competent jurisdiction “might have compelled the officers to call a later election.” *Id.* The court rejected this argument, stating that, “It seems somewhat inconsistent that where no election is held due to an excusable mistake, or by an unavoidable circumstance, that the date of a later election may only be fixed by the Court in mandamus, although the officials are willing to act.” *Id.* (emphasis added).

### B. Washington County, Pennsylvania, 1985

During the statewide election in Pennsylvania on November 5, 1985, rainy weather caused flooding along the Monongahela River in Washington County.<sup>39</sup> The county's election commissioners declared a state of emergency, and the governor proclaimed Washington County a disaster area.<sup>40</sup> At the request of the election board, the county's specially designated election judge, President Judge Gladden, suspended the election without conducting a hearing.<sup>41</sup> As a result of Judge Gladden's order, polls were closed in eleven election precincts "because of a state of 'emergency' created by extreme weather conditions that caused extensive flooding, loss of electricity, heat and water."<sup>42</sup> The election in these eleven precincts was re-scheduled for two weeks later.<sup>43</sup> A notice was sent out, but it did not "list the names of candidates vying for the various offices and failed to include the office of county controller as an office being contested."<sup>44</sup>

After the election, Patricia Beharry, the victorious controller, sought to reverse the orders of the election judge despite its lack of affect on her successful candidacy.<sup>45</sup> Ms. Beharry claimed, *inter alia*, that the Court of Common Pleas did not have authority to suspend the election in Washington County's eleven precincts; that doing so violated federal and state constitutional due process protections; and, in failing to specify the offices being contested, that the court violated the publication requirements for special elections.<sup>46</sup> The Commonwealth Court of Pennsylvania rejected these claims.<sup>47</sup>

The court noted that neither the Pennsylvania Constitution nor the state's election code "expressly provides any procedure to follow when a natural disaster creates an emergency situation that interferes with an election."<sup>48</sup>

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39. *See In re General Election—1985*, 531 A.2d 836, 838 (Pa. 1987).

40. *Id.*

41. In Pennsylvania, state law provides that each county has assigned to it an "Election Judge" for the purpose of administering the election and resolving issues that come before it. 25 PA. CONS. STAT. § 3046 (2004).

42. *General Election*, 89 A.2d at 838. Election judges in nearby counties chose not to close the polls assigned to them, casting doubt on the severity of the emergency. *Id.*

43. *Id.*

44. *Id.* at 839.

45. *See id.* at 838 (holding that the controller had standing to sue despite her victory, which was unaffected by the rescheduled election date).

46. *See id.*

47. *Id.*

48. *Id.*

The court was satisfied, however, that the state Election Code provided the election judge with authority to reschedule elections when “members of the electorate could be deprived of their opportunity to participate because of circumstances beyond their control, such as a natural disaster, and this would be inconsistent with the purpose of the election laws.”<sup>49</sup>

The court further said that it would have been more desirable if the notices announcing the rescheduled election day had listed the names of candidates vying for the various positions, but held that this was not a “special election” under the code, and, therefore, the notice was not required to contain this information.<sup>50</sup> Petitioner’s due process arguments were also rejected on the grounds that, “[w]ithout the court’s action, some voters, by reason of the elements, would have incurred the discrimination of disenfranchisement.”<sup>51</sup>

Finally, the court dismissed petitioner’s contention that the election judge “should have voided the entire county election and ordered the holding of an entirely new election countywide.”<sup>52</sup> This argument, although unsuccessful in the Pennsylvania case, raises two issues of general importance—one relating to voter eligibility, the other to canvassing. First, if voting must be postponed in some precincts, should voters in all precincts be able to cast their ballots on the postponed election day, even those who had already voted? If they are not permitted to vote again, is it fair to say that they have been disenfranchised in an election whose issues might be different than when they had originally cast their ballots? On the other hand, if they can vote on the postponed date, are not they given an unfair opportunity to vote twice? Second, if those who have already voted may not vote on the new election day, should election officials canvass the votes already cast prior to the postponed election day? If votes in unaffected areas are canvassed, might not those partial results affect the subsequent turnout and balloting in precincts where the voting had been postponed? The court did not address these exigencies, but it did limit the precedential effect of its decision, saying that “the remedy which the [lower] court applied in this case is not the proper one for all situations; . . . [but that] the court’s approach was a reasonable one in the circumstances

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49. *Id.* (citing 25 PA. CONS. STAT. § 3046 (2004), stating that on election day, “the court of common pleas of each county or a judge thereof” could make decisions about “matters pertaining to the election as may be necessary to carry out the intent of this act.”).

50. *Id.* (noting that special elections are held to fill vacancies in specific offices, which was not the case in this election).

51. *Id.*

52. *Id.* (holding that such a drastic remedy was not called for under the circumstances presented to the court).

of this case.”<sup>53</sup>

In the Maine and Pennsylvania cases, therefore, the courts applied a flexible, common sense approach. Statutes that provided generalized powers to election officials were interpreted broadly, and the courts inferred good faith by the actors involved. Because the suspension of voting and the subsequent rescheduling of election days did not appear to have any impact on the results of the elections, the courts had the luxury of rendering their respective decisions in the absence of outcome-determinative litigation. It is an obviously open question whether the Pennsylvania court’s analysis and ruling would have been the same if the votes from the eleven precincts in Washington County were dispositive in the county controller’s race. This question underscores why the Pennsylvania court insisted that its holding be narrowly construed.

Similarly, in *Marcotte*, the court was not presented with a claim that the election’s cancellation benefited or harmed any candidate; after all, the blizzard was overwhelming, total, and unambiguous. A less devastating storm, affecting only parts of the city, might very well have raised a host of questions, such as the ones raised above. Fortunately for the parties and the courts, however, those issues were not extant.

### C. Maryland, 1988

In January 1988, the Office of the Attorney General of the State of Maryland received an inquiry from Gene Raynor, the state administrator of elections, concerning the upcoming primary, scheduled for March 8, 1988. Raynor sought a formal opinion from the Attorney General “concerning the procedures to be followed by local boards of election in the event that severely inclement weather interferes with the operations of polling places on election day.”<sup>54</sup> The request was prompted by the “concern of local election officials that a snow storm might cause havoc on March 8, the unusually early date set for this year’s primary election.”<sup>55</sup>

The Attorney General replied:

Inclement weather ordinarily would not be a reason for any change in the conduct of the election. Neither the State Administrative Board of Election Laws nor any local election board has the power to alter the date or times prescribed by law for an election, on grounds of bad weather or for any other reason. However, if weather conditions were so severe that a substantial number of polling places in one or more jurisdiction [sic]

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53. *Id.* at 840.

54. 73 Md. Op. Att’y Gen. 136 (1988).

55. *Id.*

could not open, the Governor has the power to declare a state of emergency and suspend the provision of the Election Code that mandates the conduct of the primary election on March 8. Alternatively, a local election board might petition the circuit court of a county adversely affected by weather conditions to reschedule the election in that jurisdiction, but the court's authority to take that action is uncertain.<sup>56</sup>

In reaching his conclusion, the Attorney General reviewed the state's Election Code, the emergency powers of the governor, and the Pennsylvania flooding case, *In re General Election—1985*.<sup>57</sup> He noted that the Election Code prescribed the exact date and time in which the election should take place and found no provision in the Code that dealt expressly with the "adversities of inclement weather"<sup>58</sup> or that allowed for any change of election day, although he cited circumstances where electrical storms caused temporary power outages, leading local election officials to arrange for emergency lighting.<sup>59</sup>

On the other hand, the Attorney General said that the governor had the power to proclaim a state of emergency and that, in such circumstances, he may "[s]uspend the provisions of any statute, or of any rule or regulation of any State or local agency."<sup>60</sup> Thus, the governor "could suspend the provision of the Election Code mandating the March 8 primary date."<sup>61</sup> Such postponement, however, would trigger a "duty to direct alternative arrangements in lieu of the suspended provision, in order to achieve the objective of the suspended statute."<sup>62</sup>

Finally, the Attorney General advised that local boards of elections, rather than relying upon a governor who may or may not choose to exercise his or her general powers, might opt to seek relief directly from the courts. In providing a context for this possibility, he referenced *In re General Election—1985*, and distinguished Maryland's election law from Pennsylvania's, which, unlike the former, contains an express provision for judicial oversight of elections;<sup>63</sup> Maryland's law, however, did grant authority to the courts to redress acts or omissions relating to an election. Considering that provision, the Attorney General acknowledged the possibility that a court might have the power to postpone an election

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56. *Id.*

57. *Id.*

58. *See id.*

59. *See id.* at n.1 (noting that voting machines do not operate electronically).

60. *Id.* (citation omitted).

61. *Id.*

62. *Id.*

63. *Id.*

because of adverse conditions, but stopped short of endorsing that interpretation.<sup>64</sup>

In issuing his Opinion, the Maryland Attorney General was being appropriately conservative in his interpretation of state law. Perhaps he would have felt more comfortable about a court's powers had *State v. Marcotte* been brought to his attention.<sup>65</sup> The Maine statutory code considered by the *Marcotte* court resembled Maryland's—with its lack of an express judicial oversight provision—more than Pennsylvania's. Nevertheless, as we have seen, the *Marcotte* court exercised its authority to review the postponement of an election during an emergency.

The Attorney General's cautious response to the inquiry seems neither surprising nor inappropriate, considering the hypothetical question raised about the exercise of power in the face of emergency conditions. That said, his view is additional evidence of the inherent problems when there is an absence of clearly articulated election procedures during extraordinary circumstances.

### III. THE FEDERAL CONTEXT

I have been addressing the limited circumstances where highly unusual exigencies have prompted a state or municipality to cancel an election and reschedule it for a later time. Considering their infrequency, the opportunities for judicial gloss on the actions taken have been scarce. The analysis employed, and the lessons to be drawn in the context of a *federal* election, however, are somewhat different than we have seen in state or municipal elections. Yet, the central point of the relevant history and jurisprudence is the same: just as a state or municipal election date has been found to be directory rather than mandatory, a federal election's date is similarly not constitutionally fixed or incapable of being altered under certain conditions. The significance of this, of course, is that the United States Congress *can*, if the need arises, postpone federal election day.

#### A. Historical Perspective

Until the 1840s, the states conducted federal elections pursuant to their own regulations.<sup>66</sup> In the early days of the republic, some states appointed

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64. *See id.*

65. Given the text of his opinion, it is fair to infer that *State v. Marcotte* was not brought to his attention.

66. *See* Voting Integrity Project v. Keisling, 259 F.3d 1169, 1171 (9th Cir. 2001):

Until the 1840s, Congress left the actual conduct of federal elections to the diversity of state arrangements. In 1845, Congress provided that in presidential

presidential electors by popular vote and others did so through legislative action, and did so at different times.<sup>67</sup> The various methods employed by the states obviously played a role in the campaigns undertaken by candidates for president.<sup>68</sup> Likewise, candidates for the House of Representative were voted upon at different times in the several states, sometimes in different months.

These practices were reformed by Congress in 1845, when the day for election of presidential electors was also standardized,<sup>69</sup> and again in 1872, when the day for election of members of the House of Representative was made uniform.<sup>70</sup> Congressional debate regarding these proposals reveals the importance of uniform election days. During the 1844 debate on the election of the electoral college, Congress “considered and rejected the practice of multi-day voting [which was then] allowed by some states.”<sup>71</sup> In Virginia, for example, “it frequently happened that all the votes were not polled in one day.”<sup>72</sup> Advocates for reform strenuously argued that the “time must be uniform in the States” so as not replicate the “great frauds” that had allegedly occurred in the previous presidential election.<sup>73</sup>

Similarly, in the 1871-72 Congressional debates, multi-day voting was addressed explicitly, and rejected once again. “[T]he anarchy and terrorism resulting from massive voting fraud in ‘Bleeding Kansas’ by pro-slavery voters from Missouri crossing the [Kansas] border to counter pro-abolition voters from New England”<sup>74</sup> was fresh in the minds of many in Congress. Thus, a strong push for a uniform election day for representatives came from a desire to prevent “throwing voters across from one [state] into the other.”<sup>75</sup>

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election years “[t]he electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November.” Further changes for the election of Representatives, Senators, and the President and Vice President were legislated as part of Reconstruction in the 1870s.

*Id.*

67. See RICHARD J. ELLIS, *FOUNDING THE AMERICAN PRESIDENCY* 118 (1999). Massachusetts, the extreme example, employed seven systems of selecting electors in the first ten presidential elections. *Id.*

68. See JOHN FERLING, *ADAMS VS. JEFFERSON: THE TUMULTUOUS ELECTION OF 1800*, at 156 (2004).

69. See generally 3 U.S.C. § 1 (2005).

70. See generally 2 U.S.C. § 7 (2005).

71. *Voting Integrity Project v. Keisling*, 259 F.3d 1169, 1172 (9th Cir. 2001).

72. *Id.* at 1172 n.27 (citing CONG. GLOBE, 28th Cong., 2d Sess. 15 (1844)).

73. *Id.* at 1172-73 (citing CONG. GLOBE, 28th Cong., 2d Sess. 29 (1844)).

74. *Id.* (quoting ALBERT D. RICHARDSON, *BEYOND THE MISSISSIPPI: FROM THE GREAT RIVER TO THE GREAT OCEAN* 41 (1967)).

75. *Id.* (quoting CONG. GLOBE, 42nd Cong., 2d Sess. 112 (1871)).



On the other hand, “concern was expressed about the inconvenience of changing state constitutions and laws to accommodate a uniform national day.”<sup>76</sup> The difficult logistics of same-day voting provided added weight for its opponents, who claimed that “[i]t is an impossibility for the voters to all get together on one day [because] they are remote from the polls.”<sup>77</sup> Despite the critics, same day voting won out, with no accommodations to states then employing the practice of multiple-day voting.

### B. The Louisiana Open Primary

One hundred years after Congress required all states to vote for members of Congress on the same day, Louisiana created an “open primary” for Congressional elections. In the month of October, all candidates—regardless of party—would appear on a single ballot, and all voters would vote. If a candidate received a majority of the vote, that person won the congressional seat and there would be no vote held in November.<sup>78</sup> If no candidate received a majority, the top two vote-getters would take part in a run-off in November, on “federal election day.”<sup>79</sup>

A group of Louisiana voters challenged the procedure in federal court. After a dismissal at the district court level, the Court of Appeals for the Fifth Circuit reversed, finding the relevant election law unconstitutional. The United States Supreme Court affirmed.<sup>80</sup> The issue before the Court in *Foster* was whether the Louisiana election scheme complied with the federal statute mandating a uniform election day for the election of Representatives to Congress and United States Senators. Pursuant to the Elections Clause of the United States Constitution, “[t]he Times, Places and Manner of holding Elections for Senator 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.”<sup>81</sup> Thus, the Elections Clause “is a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices.”<sup>82</sup> As noted above, Congress had in fact acted, and set the date of the biennial election as the Tuesday

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76. *Id.* (quoting CONG. GLOBE, 42nd Cong., 2d Sess. 138-39 (1871)).

77. *Id.* at 1174 (quoting CONG. GLOBE, 42nd Cong., 2d Sess. 3408 (1872)).

78. *See Foster v. Love*, 522 U.S. 67 (1997).

79. *Id.*

80. *Id.*

81. U.S. CONST. art. I, § 4.

82. *Foster*, 522 U.S. at 69 (emphasis added) (citations omitted).

after the first Monday in November.<sup>83</sup>

The issue raised in *Foster* was not purely an academic matter: from 1978, when Louisiana's October open primary law went into effect, until the statute was challenged in *Foster* almost twenty years later, a run-off election had been held on federal election day in only nine of the fifty-seven contested elections for United States Representative and in only one Senate race.<sup>84</sup> Considering the meaning of "election," the Court ruled that a contested election of candidates that is "concluded as a matter of law *before* the federal election day, with no act in law or in fact to take place *on the date* chosen by Congress" clearly violated 2 U.S.C. § 7.<sup>85</sup> Although the Court rendered its decision based upon its reading of the plain meaning of the statute, it added that its "judgment [was] buttressed by an appreciation of Congress's object 'to remedy more than one evil arising from the election of members of Congress occurring at different times in the different States.'"<sup>86</sup> The Court noted:

As the sponsor of the original bill put it, Congress was concerned both with the distortion of the voting process threatened when the results of an early federal election in one State can influence later voting in other States, and with the burden on citizens forced to turn out on two different election days to make final selections of [members of Congress and President of the United States] . . . .<sup>87</sup>

Thus, according to *Foster*, an election to the United States Congress and the United States Senate was required to be held on federal election day. The election could not be concluded prior to that day.

### C. What About Absentee Ballots and Early Voting?

Although *Foster* prohibits the *conclusion* of federal elections prior to election day, *commencing* such elections before the first Tuesday after the first Monday in November is a different matter. For over a century, various states have permitted voting prior to election day through the use of absentee voting; today, all states provide some form of this.<sup>88</sup> Congress

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83. 2 U.S.C. §§ 1, 7 (2005).

84. *Foster*, 522 U.S. at 70 n.1.

85. *Id.* at 67-68 (emphasis added). The Court distinguished the Louisiana law from a situation where there is a "failure to elect" a Representative on election day because no candidate received a majority, thus triggering 2 U.S.C. § 8. *Id.*

86. *Id.* at 73 (quoting *Ex parte Yarbrough*, 110 U.S. 651, 661 (1884)).

87. *Id.*

88. *See generally* Voting Integrity Project v. Bomer, 199 F.3d 773 (5th Cir. 2001). "More than a century ago, some states began to allow absentee voting, and all states

itself has authorized such early voting,<sup>89</sup> looks upon the practice of early voting by absentee ballots “with favor,”<sup>90</sup> and has “*required* absentee voting [to be allowed] in certain circumstances.”<sup>91</sup>

States have also enacted “early voting” statutes that permit voters to visit polling places before election day. Despite their similarity to state and federal laws permitting or requiring absentee balloting, early voting practices met initial challenges. A Texas early voting law granting voters an unrestricted right to vote up to seventeen days early survived review by the Fifth Circuit.<sup>92</sup> The court held that as long as Congressional elections are “consummated” on the statutorily-imposed federal election day, then early voting is permissible because “‘election’ meant ‘the combined actions of voters and officials mean to make a final selection of an office holder[;]’ [a]llowing some voters to cast votes before election day does not contravene the federal election statutes because the final selection is not made before the federal election day.”<sup>93</sup>

The court identified several important considerations. First, while Texas allowed early voting, the polls were open on federal election day and no election results were released until the votes were tabulated.<sup>94</sup> Second, the court noted parallels to the universal use of absentee voting by the states that permit voters to cast ballots prior to federal election day but does not hasten the conclusion of the election.<sup>95</sup> Third, the court underscored the importance of protecting voting rights, and noted that it could not “conceive that Congress intended the federal election day statutes to have the effect of impeding citizens in exercising their right to vote.”<sup>96</sup> Finally, the early voting statute did not promote the “primary evils” that Congress

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currently provide for it in some form.” *Id.* at 776 (citing Edward B. Moreton, Jr., *Voting by Mail*, 58 S. CAL. L. REV. 1261, 1261-62 (1985)); *see also* Griffin v. Roupas, 385 F.3d 1128, 1131 (7th Cir. 2004). That court reviewed states’ absentee balloting procedures and noted that some states found “that the drawbacks of absentee voting are so far outweighed by the interest in increasing voter turnout that every registered voter should be allowed to vote by absentee ballot.” *Id.* Oregon has gone the farthest, making all voting by mail; other states balance concerns about fraud and turnout by permitting limited classes of voters to cast absentee ballots. *Id.*

89. *Voting Integrity Project*, 199 F.3d at 776 n.79.

90. *Id.*

91. *Id.* at 777 (emphasis in original) (noting that the Voting Rights Act Amendments of 1970, the Uniformed and Overseas Citizens Absentee Voting Act, and other provisions require states to provide and accept absentee ballots from certain classes of voters).

92. *Id.* at 776.

93. *Id.* (quoting *Foster v. Love*, 522 U.S. 67, 71 (1997)).

94. *Id.* at 775-76. In fact, the court noted, “Texas law makes it illegal for election officers to reveal any election results before the polls close on election day.” *Id.* at 777.

95. *Id.*

96. *Id.*

sought to discourage by creating a federal election day: “distortion of the voting process [would be] threatened when the results of an early federal election in one state can influence later voting in other States, and . . . the burden on citizens forced to turn out on two different election days to make final selections of federal officers in presidential election years . . . .”<sup>97</sup> Thus, like absentee balloting, early voting procedures were deemed permissible because the election is consummated on federal election day—not before.

#### D. After Federal Election Day

As we have seen, therefore, courts developed a framework to analyze when and how voters may cast ballots *prior* to federal election day. Under certain limited circumstances, courts also have permitted voting for federal officers *after* federal election day. In Georgia, the 1980 redistricting plan required, pursuant to the Voting Rights Act, pre-clearance by the Department of Justice or approval by a federal District Court.<sup>98</sup> Litigation over the redistricting plan resulted in a ruling that the proposed Congressional district lines violated Section 5 of the Voting Rights Act.<sup>99</sup> As election day approached, a controversy developed over whether the elections should proceed as scheduled, based upon unlawful district lines.<sup>100</sup> The court held that Georgia was not required to conduct congressional elections on these flawed lines in its fourth and fifth districts on November 2, 1982, the scheduled federal election day, and could hold the vote afterward.<sup>101</sup> The court in *Busbee* construed the federal election statute “to mean that where exigent circumstances arising prior to or on the date established by [2 U.S.C. § 7] preclude holding an election on that date, a state may postpone the election until the earliest practicable date.”<sup>102</sup>

Cognizant of its extraordinary holding and the irregularity of the situation, the court took pains to address the State of Georgia’s objections. Georgia’s primary argument claimed the court lacked authority to postpone an election based on the district lines: federal law<sup>103</sup> permits elections on days other than federal election day if the office becomes vacant (upon the death of the officeholder, for instance) but does not authorize postponing a

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97. *Id.* (quoting *Foster*, 522 U.S. at 73).

98. Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c (2005).

99. *Busbee v. Smith*, 549 F. Supp. 494 (1982).

100. *Id.*

101. *Id.* at 526.

102. *Busbee*, 549 F. Supp. at 525.

103. 2 U.S.C. § 8 (2005).

federal election to a later date.<sup>104</sup> The State further argued that, because the Congressional seats would remain occupied until the officeholders' terms expired on January 3, 1983 the statute created no authority to hold elections for those offices prior thereto.<sup>105</sup>

The court rejected the State's arguments, holding that 2 U.S.C. § 8 provided that, if there were a "failure to elect" a Member of Congress on election day, then the State could fix an alternative, later date for the election. In doing so, the court acknowledged that although the statute's drafters could not have foreseen "a 'failure to elect' engendered by a Section 5 injunction, interpreting that phrase as encompassing such a failure does no violence to Congress' intent."<sup>106</sup> Pointedly, the court added that "Congress did not expressly anticipate that a natural disaster might necessitate a postponement, yet no one would seriously contend that Section 7 would prevent a state from rescheduling its congressional elections under such circumstances."<sup>107</sup>

*Busbee* was affirmed without opinion by the Supreme Court,<sup>108</sup> and stands for the proposition that a *federal* election may be postponed by a state under extraordinary circumstances. Although the court did not define the parameters of such circumstances (besides illegal district lines), it left the door open for the same relief under other, unanticipated situations, such as a "natural disaster."<sup>109</sup> Notwithstanding the federal statute requiring federal elections to be held on a specified day,<sup>110</sup> "no one would seriously contend" that "exigent circumstances" could prevent a state from postponing a scheduled election. Despite its reference to natural disasters, *Busbee*, more importantly, demonstrates that postponement does not require a freak natural occurrence on or immediately preceding election day like those experienced by the voters of Lewiston, Maine and Washington County, Pennsylvania. The *Busbee* court's injunction relied on the principle that it is preferable to postpone an election than to hold an illegal one.

Eleven years later, the United States District Court of Georgia expanded this interpretation. In *Public Citizen, Inc. v. Miller*,<sup>111</sup> the court, relying on *Busbee*, held that an election for the United States Senate that was

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104. *Busbee*, 549 F. Supp. at 525.

105. *Id.*

106. *Id.* at 526.

107. *Id.*

108. *Busbee v. Smith*, 459 U.S. 1166 (1983).

109. *Id.*

110. See 2 U.S.C. § 7 (2005).

111. *Public Citizen, Inc. v. Miller*, 992 F.2d 1548 (11th Cir. 1993).

inconclusive on the scheduled federal election day could be concluded three weeks later. At the time, Georgia law required candidates to receive a majority of the votes cast. In the absence of a majority, the state required a run-off election. Supporters of the candidate who won an initial plurality, but lost in the run-off, commenced an action alleging that the run-off election, held three weeks after federal election day, was void because it contravened 2 U.S.C. § 7.

The court held that because no candidate had won a majority of the votes cast on election day, the State of Georgia “fail[ed] to elect” a United States Senator, citing the *Busbee* court’s recognition that “federal law contemplates occasional departures from Section 7’s dictates.”<sup>112</sup> The court noted that a state could not by design *create* the “exigent” circumstances required to circumvent the federal statute that requires same-day voting for Congress,<sup>113</sup> but that Georgia’s “majority vote” statute was not such an improper design. “A plurality outcome in the general election [on election day] is similar to an election postponed due to natural disaster or voided due to fraud in that each is contemplated, yet beyond the state’s ability to produce.”<sup>114</sup>

*Public Citizen*, like *Busbee*, thus demonstrates a flexible approach to extending elections beyond the federal statutory date. The decisions stand for the proposition that exigent circumstances, even if not unforeseen, allow a state, if not acting by design or fraud or in bad faith, to postpone or allow a subsequent conclusion of a federal election. While the Supreme Court of the United States has not expressly written on the subject, its affirmance of *Busbee* adopts this as the law. This approach is consistent with the few state cases described above where states have postponed local elections as a result of exigent circumstances.

As with state or municipal elections, however, the federal context similarly offers no concrete guidelines as to what constitutes an exigent circumstance. While leaving such determinations to the wisdom of public officials with oversight by the judiciary has apparently proved successful to date, it remains troublesome that federal election statutes, like state and local ones, are bereft of any required or suggested direction as to how to define “exigent” or “extraordinary” for the purpose of postponing an election. Indeed, there are also no federal procedures relating to the implementation of postponed elections where some voters have already cast their ballots, where only part of the affected Congressional district or

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112. *Id.* (quoting *Busbee*, 549 F. Supp. at 524-25).

113. *Id.*

114. *Id.*

state has been impacted by the disaster, or whether to canvass votes already cast in order to preserve their integrity. In short, although certain circumstances permit legal postponements of federal elections, like their state or local counterparts, these situations are fraught with ambiguities and potential problems.

#### IV. The Presidency

Having reviewed how states may alter elections under extraordinary circumstances, albeit with dubious authority to do so and without anything approaching rigorous procedural protections, and having analyzed how federal statutes govern the alteration of congressional election days, I come to the question that prompted this inquiry. In the face of a terrorist attack on the United States, can a scheduled presidential election be postponed, and, if so, by whom and by what authority?

A devastating meteorological or other natural disaster is highly unlikely to impact the entire United States all at once. The odds are even greater that this could happen on election day in a presidential election year—or a day or two before. Unfortunately, the odds of a terrorist attack affecting a great part of the continental United States do not seem as unlikely. Had the attack on September 11 been wholly successful, planes would have crippled lower Manhattan and much of Washington D.C., including the White House or Capitol Hill.<sup>115</sup> Reports of Al Qaeda's original plan for that attack called for ten planes to be hijacked and rammed into buildings in as many cities,<sup>116</sup> certainly an event that could have crippled the United States. Whatever successes there have been in the subsequent War on Terror, there is no doubt of the desire of certain elements to attempt future terrorist attacks against the United States. Indeed, during the 2004 presidential campaign, Republicans and Democrats alike warned that "another terrorist attack" was "inevitable."<sup>117</sup>

It did not happen in 2004. Can it happen in 2008? In 2004, the Chair of the United States Election Assistance Commission wrote to the Department of Homeland Security discussing the idea of postponing the last presidential election in case there was a terrorist attack and pointing out that no agency or governmental body had authority to do so.<sup>118</sup> Amidst the resulting hue and cry, its attempt to prepare a plan even for this remote

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115. Douglas Jehl & Daniel Johnston, *Threats and Responses: The Hijackers*, N.Y. TIMES, June 17, 2004, at A1.

116. *Id.*

117. Calvin Sims, *Poll Finds Most Americans Have Not Prepared for a Terrorist Attack*, N.Y. TIMES, Oct. 28, 2004, at A19.

118. See *Could November Election be Delayed?*, *supra* note 9.

exigency was apparently shelved,<sup>119</sup> but the problem, although now out of sight, has not been eliminated.

Perhaps the outcry against even proposing a plan in case the unthinkable occurred was because Americans did not want to consider this as the election approached. Couple that with an abiding distrust of a President who ascended to the office through the Supreme Court's Order stopping the re-count in Florida,<sup>120</sup> and it became undesirable to think about circumstances that might postpone the 2004 election. Indeed, the House of Representatives, in a strongly worded Resolution, left no doubt about where it stood.<sup>121</sup> The defiant statement, which passed on July 24, 2004 by the overwhelming vote of 419-2, essentially warned potential terrorists of American resolve: nothing was going to prevent our regularly scheduled presidential elections from going forward.

The fact that Americans have reacted so negatively to a perfectly appropriate attempt at preparedness is certainly explainable. But, especially after the terrorist attack in Madrid just a few days prior to its March 2004 national elections, this ostrich-like defiance is not acceptable. So what are our options? And what are the existing constraints?

#### A. The Electoral College System is State-Driven

The United States Constitution and federal statutes grant the several states dominant decision-making authority in presidential elections. This is consistent with and reflective of the primal political forces that shaped our republic. The records of the Constitutional Convention reveal powerful tensions between what were already traditional state prerogatives and a nascent drive toward nationalism.

Nowhere was this predilection for state-driven governance more telling than in the creation of two uniquely American institutions—the United States Senate and the electoral college. The Founders grappled with the creation of a chief executive for several months.<sup>122</sup> They were deeply divided as to whether there should be one person at the helm of the new country or perhaps three,<sup>123</sup> as well as how long the executive's term should be and whether the office should be term-limited.<sup>124</sup> The thorniest

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119. It is not wholly clear that exigency preparation did indeed cease. If the administration continued to think about and plan for an election day attack, the public was not apprised.

120. *See generally* Bush v. Gore, 531 U.S. 98 (2000).

121. H.R. 728, 108th Cong. (2004).

122. *See* ELLIS, *supra* note 67, at 63-96.

123. *See id.* at 31-34.

124. *See id.* at 97-100.



issue they confronted, however, was how the executive should be selected. Should he be chosen by the governors of the various states, elected by Congress, or directly voted upon by the people?<sup>125</sup>

The idea of an “electoral college” was raised numerous times during the debates, only to be repeatedly defeated.<sup>126</sup> The college was originally envisioned as consisting of persons who were accomplished and respected, but the idea did not garner much support.<sup>127</sup> Finally, after several hot summer months in Philadelphia, and after the Connecticut compromise resulted in the creation of a House of Representatives and Senate, the idea seemed to catch hold.<sup>128</sup> Resistant to a direct election, and worried about the executive’s dependence on the Congress if it chose him, the Founders chose a third way—a “college” of electors whose number would neatly reflect the total of Congressmen and Senators, but to avoid legislative control, would not include members from either body.<sup>129</sup> The Convention ensured local control over the process by mandating that the states would decide who became members of the electoral college and how they were to be selected.

Indeed, if there were any doubt about the supremacy of the states in the presidential election process, it was put to rest by the Supreme Court decision in *McPherson v. Blacker*.<sup>130</sup> In *McPherson*, the Court affirmed the Michigan Supreme Court’s dismissal of a challenge to that state’s procedure for choosing presidential electors. Pursuant to 1891 Michigan legislation, presidential electors consisted of a combination of eleven “district” electors, chosen by the voters of their respective districts, as well as a “western district at-large” elector and an “eastern district at-large” elector, each chosen by the voters of designated districts in their part of the state.<sup>131</sup> The scheme was challenged based upon the claim that presidential electors had to be elected on a general, statewide ticket.<sup>132</sup>

The Supreme Court held that the Constitution gives the states absolute authority to decide how presidential electors were to be chosen.<sup>133</sup> The Court then gave a brief recounting of states’ various methods in several presidential elections, including direct selection by the state legislature

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125. *See id.* at 63-66.

126. *Id.* at 112.

127. *Id.* at 78.

128. *Id.* at 69.

129. *Id.* at 64-65.

130. 146 U.S. 1 (1892).

131. *Id.* at 4-7.

132. *Id.* at 25.

133. *Id.* at 34.

(sometimes by concurrent ballot, other times in joint session); by popular vote on a general, state-wide ticket; by popular vote on a district-by-district basis; by popular vote on a mixed general ticket and district voting system; and by popular vote on a district-by-district election of electors, who, in turn, elected at-large electors.<sup>134</sup> The Court noted that, although there had been efforts to amend the Constitution to require the various states to have a “uniform mode of choice,” none had succeeded.<sup>135</sup>

Furthermore, although the Court observed that the political system did not reflect the Founders’ apparent desire to have presidential electors “exercise a reasonable independence and fair judgment in the selection of the chief executive” because electors “were [now] chosen simply to register the will of the appointing power in [support] of a particular candidate,”<sup>136</sup> the *MacPherson* Court could find “no reason for holding that the power confided to the states by the constitution ha[d] ceased to exist because the operation of the system had not fully realized the hopes for those by whom it was created.”<sup>137</sup>

In short, the Supreme Court left no doubt whatsoever that, absent an amendment to the United States Constitution, the electoral college is, was, and always will be a state-driven system, despite its singularly unique function of electing a national leader.

### B. Shackled By Our History and Jurisprudence

Given our state-driven election system, it is not surprising that even in the two presidential elections that can be fairly characterized as long, drawn-out constitutional crises, the outcomes, though rendered by national institutions, were determined by state law, thus reinforcing our republic’s powerful historical preference for avoiding a national approach to a presidential election crisis. This was true in 1876, and again in 2000.

#### 1. 1876 and the Electoral Count Act

The 1876 Tilden-Hayes election was an electoral college deadlock. It was fairly clear that Democrat Samuel J. Tilden, Governor of New York, had a majority of the popular vote.<sup>138</sup> What was not clear was the winner

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134. *Id.* at 33.

135. *Id.* at 34-35.

136. *Id.* at 36.

137. *Id.*

138. WILLIAM H. REHNQUIST, *CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876*, at 99 (2004).

of the electoral vote.<sup>139</sup> There were four states that held the balance of power: Florida, Louisiana, South Carolina, and Oregon. In Florida, which reprised its pivotal role in presidential elections some 125 years later, about 50,000 votes had been cast.<sup>140</sup> Votes were reported by the various counties to a State Canvassing Board, and, on the “face of the returns,” Tilden led Republican Rutherford B. Hayes by “only 80-some votes.”<sup>141</sup> The Canvassing Board, however, which had two Republicans and one Democrat, had the authority and “discretion to exclude returns that were ‘irregular, false, or fraudulent.’”<sup>142</sup> Exercising this discretion, sometimes unanimously and sometimes by a 2-1 vote along party lines, the Canvassing Board concluded that Hayes had won the state by forty-five votes.<sup>143</sup>

In Louisiana, Tilden appeared to have won the state by between 8000 and 9000 votes.<sup>144</sup> The State Returning Board, which had the ultimate decision-making authority as to the victor, was “not one to inspire confidence in the Democrats.”<sup>145</sup> The law required that the Returning Board have five members with both parties represented, but there was only one Democrat on the Board, and he resigned prior to the 1876 election.<sup>146</sup> The president of the Board had been Governor of Louisiana during Reconstruction, but had been removed as governor “for dishonesty.”<sup>147</sup> He remained on the Returning Board, however, and his three Republican colleagues were likewise “not held in high regard by impartial observers.”<sup>148</sup> After taking testimony during twelve public sessions, the Board “rejected more than 13,000 Democratic [ballots]” and only 2500 Republican votes.<sup>149</sup> Unsurprisingly, Hayes was declared the winner.

South Carolina saw “illegal voting by both white Democrats and black Republicans.”<sup>150</sup> The Board of Canvassers certified Hayes as the winner.<sup>151</sup> The courts held the members of the Board in contempt, fined

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139. *Id.* at 98.

140. *Id.* at 104.

141. *Id.*

142. *Id.*

143. *Id.* at 104-05.

144. *Id.* at 106.

145. *Id.* at 107.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 108.

150. *Id.*

151. *Id.* at 109.

them, and locked them up in the county jail.<sup>152</sup> Nevertheless, Hayes prevailed.

It was accepted by both sides that the presidential electors pledged to Hayes had won in Oregon.<sup>153</sup> One of the Republican electors, however, was not eligible to serve because he was a “fourth-class postmaster and received an annual salary of \$268.”<sup>154</sup> There was no disagreement about the postmaster’s ineligibility, but Democrats and Republicans differed on how to interpret the state law governing how vacancies were to be filled. Republicans urged that the remaining electors should choose a replacement.<sup>155</sup> This, of course, would have resulted in another Republican elector. Democrats, on the other hand, argued that the candidate for elector with the next highest vote total should be elected.<sup>156</sup> This interpretation would have led to another vote for Tilden.

Needless to say, each presidential candidate needed every vote he could get. With respect to Florida and Louisiana, “the Democrats could forcefully argue that a large part of the public thought that Tilden had carried both of the states, and he should not lose them both on what fairly might be thought to be the actions of politically biased Republican returning boards.”<sup>157</sup> In Oregon, however, the Democratic position was “clearly contrary to state law.”<sup>158</sup> Thus, both sides were “playing a no-holds-barred game.”<sup>159</sup> Although each party was exploiting these states’ laws to its own advantage, the Republicans were more effective in controlling the election machinery, and thus were able to deliver their electoral votes to their standard-bearer, Rutherford B. Hayes.

While the House of Representatives certainly could have constitutionally elected the president because no candidate appeared to have won an electoral college majority,<sup>160</sup> the prevailing uncertainty of the results in these four states, the almost certain existence of voting fraud, and the presence of violence on the streets by angry partisans, contributed to a very unstable political situation. Thus, members of Congress were apparently reluctant to exercise their constitutional prerogative to elect a president as

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152. *Id.*

153. *Id.*

154. *Id.* at 110; *see also* U.S. CONST. art. II, § 1 (prohibiting any “person holding an office of trust or profit under the United States” from serving as a presidential elector).

155. REHNQUIST, *supra* note 140, at 110.

156. *Id.*

157. *Id.* at 112.

158. *Id.*

159. *Id.*

160. *See* U.S. CONST. amend. XII.

their forebears had done in earlier times.<sup>161</sup> Consequently, they created an *ad hoc* solution, which acted as a buffer to shield them from a decision that was bound to be unpopular: a special Electoral Commission comprising of five congressional Democrats, five congressional Republicans, and five Supreme Court Justices.<sup>162</sup> Ultimately, this Commission rendered a decision, which Congress ratified: Hayes was elected, and pledged to serve only one term (he was mocked throughout his tenure as “Rutherfraud” Hayes). Tilden conceded and the republic’s business went forward.<sup>163</sup> Succession in the presidency was uninterrupted, and political stability of a sort existed.

As a result of this presidential crisis, however, Congress enacted the Electoral Count Act, which codified a variety of procedures and deadlines to deal with the kind of uncertainty that existed in 1876 and avoid another *ad hoc* solution. One of the reforms is the “Safe Harbor Provision” found in 3 U.S.C. § 5:<sup>164</sup>

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.

This provision essentially directs states to establish laws and procedures to determine controversies and contests relating to the casting and counting of votes for presidential electors. So long as the state follows its procedures in a timely manner, the statute renders the state’s judicial or regulatory determination of the outcome dispositive, and not subject to further

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161. The last time the House determined the outcome of a presidential election was in 1824 when John Quincy Adams defeated Andrew Jackson. *See* ELLIS, *supra* note 67, at 115.

162. *See* REHNQUIST, *supra* note 140, at 5.

163. Several months after the Commission selected Hayes as president, Governor Tilden was addressing a group of supporters at a political gathering in New York City. Responding to their obvious upset at the results of the election, and the calls in some quarters for resort to arms, Tilden sought to reassure them: “If my voice could reach throughout our country and be heard in its remotest hamlet, I would say: Be of good cheer. The Republic will live. The institutions of our fathers are not to expire in shame.” *Id.* at 210 (quoting ALEXANDER CLARENCE FLICK, SAMUEL JONES TILDEN 412 (1963)).

164. (2005).

challenge by Congress. Thus, if the state meets the deadline, its slate of electors reside in a “safe harbor,” untouchable by those counting the electoral votes, the Congress.

While this might appear to be couched in terms of Congressional power with regard to the counting of electoral votes, it actually reinforces the dominance of the states—they would dispose of vote challenges according to their own laws, and, if done by a certain date, Congress’s role in counting the electoral votes would be essentially ministerial. Indeed, even if the dispute occurs in a state whose electoral votes will determine the overall outcome of the election, if the state resolves the controversy according to laws put in place prior to federal election day, that decision is final, and Congress is off the hook.

Similarly, if there are competing slates of electors, the Electoral Count Act provides for a state-driven solution.<sup>165</sup> While Congress resolves controversies as to which slate represents the state’s electoral votes, the decision is made based upon the laws of the state in question.<sup>166</sup> There is no federal standard controlling how electors are elected (presuming, of course, that they are actually elected), or how the votes electing them are to be cast or counted. So even if the Reform Act had been in effect in 1876, Congress would have done what the Commission did—analyze the vote totals pursuant to the state laws of Louisiana, Florida, South Carolina, and Oregon, each of which was different.

But it gets better. If both houses of Congress do not agree on how to interpret state law when deciding between or among competing slates of electors, then Congress simply looks to the governor of that state: “[I]f the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted.”<sup>167</sup> Put another way, if Congress deadlocks, it is up to the governor to decide who won his or her state’s electoral vote, and Congress must defer to that determination.

Thus, the federal statute governing presidential elections, enacted on the heels of the 1876 presidential imbroglio and meant to avoid another Tilden-Hayes situation, was, despite the corrupting impact state proceedings had on the outcome, guided by state laws and prerogatives. For better or worse, this was consistent with, and continued, our historical tradition.

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165. *See generally* 3 U.S.C. § 15 (2005).

166. *Id.* “[T]he two Houses, acting separately, shall concurrently decide [which] is supported by the decision of such State so authorized by its law . . .” *Id.* (emphasis added).

167. *Id.*

## 2. 2000, HAVA, and 2004

One hundred and twenty-five years after the Tilden-Hayes crisis and the passage of the Electoral Count Act, another presidential election crisis arose. This time the dispute was governed by a statutory framework with time lines and procedures; an *ad hoc* institution would not be required to settle whether Governor Bush or Vice President Gore had won the presidency.

Unlike the Tilden-Hayes re-canvass, the whole world could watch the Bush-Gore aftermath, but as in 1876, it was *state law* that determined the outcome. Indeed, under Florida law in 2000, the sixty-seven counties' canvassing boards had independent authority to decide whether a voter had actually cast a ballot for president, and for whom.<sup>168</sup> Guided by a state law that directed canvassers to analyze the "intent of the voter," each board inspected punch cards with hanging chads, dimpled chads, and the like.<sup>169</sup> Unfortunately, the Florida legislature had not spelled out what criteria ought to be employed in this deliberative process, as had the state of Texas, for example.<sup>170</sup> Thus, the various boards relied on their own respective interpretations of the "intent of the voter" statute.<sup>171</sup> Consequently, for example, the standard used by election personnel in Broward County was different than in Dade or Volusia County. Worse, the standard within some counties seemed to change from one day to the next.<sup>172</sup>

As such, though this was about electing the President of the United States, the decision-making process for thirty-six days after election day was centered on how to count votes *under Florida law*. And even though the United States Supreme Court eventually ruled that the recount procedure violated the Equal Protection Clause of the United States Constitution, Governor Bush's 537 winning margin had nevertheless been cast and re-canvassed *under Florida law*. Moreover, the Supreme Court's decision not to direct the recount process to go forward pursuant to procedures that could pass constitutional muster was also based upon Florida law (at least, according to the Supreme Court's view):<sup>173</sup> the Court

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168. ABNER GREENE, UNDERSTANDING THE 2000 ELECTION: A GUIDE TO THE LEGAL BATTLES THAT DECIDED THE PRESIDENCY 34 (2001).

169. *Id.* at 32.

170. *Id.* at 35-38. An irony of how the Bush and Gore forces attempted to interpret Florida's "intent of the voter" statute was how each sought to refer to or seek distance from the Texas law, the only analogous statute in the union that provided indicia of intent with great specificity. That law, of course, had been signed by then-Governor George W. Bush. *Id.* at 36.

171. *Id.* at 34.

172. *Id.* at 71-71.

173. *See Bush v. Gore*, 531 U.S. at 98, 110-11 (2000).

decided not to remand and permit Florida to fashion acceptable recount rules because it interpreted state law as requiring a final count in time to be impervious to Congressional challenge under 3 U.S.C. § 5.<sup>174</sup> Thus, the Supreme Court concluded that Florida's desire to have its electoral votes unchallenged in Congress trumped a complete, accurate, and constitutionally acceptable recount under Florida law. Because the Court rendered its decision on December 12, 2000,<sup>175</sup> the "safe harbor" date under 3 U.S.C. § 5 that permitted Florida's presidential electoral college slate to be presumptively free from challenge by the House of Representatives, the clock had simply run out for Florida to promulgate a constitutionally acceptable recount procedure. Put another way, the United States Supreme Court held that the State of Florida's express desire to have its delegation unchallengeable overrode any federal interest in having a constitutional standard of vote-counting.

Once again, a national institution, this time the venerable Supreme Court like the extra-constitutional Electoral Commission of 1877, decided a presidential election, and, again, did so based upon its interpretation of state law. One may question the Supreme Court's motives or even its interpretation of state law as it pertained to Florida's alleged preference for a finalized count to qualify for safe harbor protection,<sup>176</sup> but there is no denying the fact that the Supreme Court rendered a decision based upon its interpretation of state law, even though the result determined a presidential election.

In light of the 2000 voting problems, Congress enacted the Help America Vote Act ("HAVA").<sup>177</sup> One might have assumed that given the vote counting crisis in Florida, and the political firestorm that it created, Congress might have legislated sweeping reforms of the way presidents are elected. Consistent with and reflective of our state-driven electoral system, however, the major election reforms pertaining to presidential and other federal elections were largely left to the states.

For example, because so many voters were turned away in 2000 as a result of questions about their eligibility, HAVA mandated the use of "provisional ballots" that allow a person to cast a ballot subject to later verification of registration.<sup>178</sup> But the use, design, method of distribution,

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174. (2005); *Bush*, 531 U.S. at 110-11.

175. *See Bush*, 531 U.S. at 110-11.

176. *See* GREENE, *supra* note 171, at 122-33. Professor Greene argues that the Supreme Court "goofed" in this regard. *Id.* at 122.

177. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of 42 U.S.C.).

178. *See* 42 U.S.C. § 15482(a) (2005).



and counting of provisional ballots would be dictated by state election laws.<sup>179</sup> Similarly, responding to the punch card debacle, HAVA provides federal grants for new voting technologies.<sup>180</sup> Here, too, the states retained jurisdiction; each state may decide what kind of voting system to purchase and use.<sup>181</sup> One of the most troubling aspects of the 2000 Florida voting process was that there were different technologies throughout the state, and each system had its own error rate.<sup>182</sup> Nevertheless, HAVA not only permits different states to use different voting technologies for a presidential election, but also allows a state to use different systems in its several counties.<sup>183</sup> As a result, we saw in 2004 a variety of voting systems throughout the country, with most states lacking a uniform system even within their own borders.<sup>184</sup>

In addition to different voting technologies, other election features vary among the states, including the existence and implementation of re-count statutes; the eligibility of felons; the identification voters need at polling places; and registration procedures and deadlines.<sup>185</sup> In short, a crazy quilt of decentralized election laws dictates how presidential electors are elected, and thus who the winner is in the election of inarguably the most powerful person on the planet.

Anticipating that the various state laws and directives might result in adverse results, numerous groups commenced lawsuits in 2004 prior to election day seeking orders that would force states to implement their procedures in a manner that broadened the franchise—in effect, to

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179. *Id.* § 15482(a)(4).

180. *See id.* § 15301.

181. *Id.*

182. *See, e.g.*, Stephen Ansolabehere & Charles Stewart III, Caltech/MIT Voting Tech. Project, *Residual Votes Attributable to Technology*, 67 POL. 365 (2001) (analyzing the relative effectiveness of various voting technologies and noting that replacing punchcard ballots with optically scanned-ballots would have resulted in 500,000 more countable votes for president in 2000).

183. *See* 42 U.S.C. § 15481(a)(6) (2005).

184. *See The e-Book On Election Law: An Online Reference Guide*, at [http://moritzlaw.osu.edu/electionlaw/ebook/part4/equipment\\_machines.html](http://moritzlaw.osu.edu/electionlaw/ebook/part4/equipment_machines.html) (last visited Jun. 10, 2005) (listing the voting technologies used in every state).

185. *See, e.g.*, *Voting Rights for Citizens with Felony Convictions*, at <http://www.demos-usa.org/page15.cfm> (last visited May 14, 2005); *Recounts and Other Remedies*, at [http://moritzlaw.osu.edu/electionlaw/ebook/part5/procedures\\_recount](http://moritzlaw.osu.edu/electionlaw/ebook/part5/procedures_recount) (last visited May 14, 2005); *Provisional balloting nationwide*, at <http://moritzlaw.osu.edu/electionlaw/ebook/part5/provisional02.html> (last visited May 14, 2005); *Crashing the Parties: A New Report from The Century Foundation on the Nader Campaign and the Debate over Ballot Access*, *The Century Foundation* (Sept. 20, 2004), available at [www.tcf.org](http://www.tcf.org).

federalize voting procedures consistent with the alleged intent of HAVA.<sup>186</sup> Arguing generally that HAVA was enacted to increase voting, not to limit it, various plaintiffs urged the courts, for example, to expand the use of provisional ballots. But, in two of the most hotly contested states in the 2004 election, Ohio and Florida, the courts ruled that, despite the general thrust of HAVA, the votes for presidential electors, provisional ballots included, must be counted in conformity with state law.<sup>187</sup>

Following the 2004 election and the numerous court rulings placing HAVA implementation squarely with the states, some efforts were commenced to mitigate state-driven shackles and to implement broader, nationalized reform. For example, legislation has been introduced in the United States Congress that would preempt state law in a number of significant areas, including felon enfranchisement, verifiable paper trails, presumptively acceptable voter registrations, and same day registration.<sup>188</sup> Still, the basic foundational premise among many experts and commentators remains<sup>189</sup> that American presidential elections are state affairs, administered and regulated by each of the fifty states and the District of Columbia. It seems, then, after almost two hundred and twenty years since the birth of the republic, the more things change, the more they stay the same.

### C. *The Constitutional and Statutory Scheme*

Although there is an historical and statutory preference for a state-driven election system, our constitutional framework does provide an overlay of Congressional power. The constitutional provision relating to the election

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186. *See, e.g.*, American Federation of Labor and Congress of Industrial Organizations v. Hood, 885 So.2d 373 (Fla. 2004); Sandusky County Democratic Party v. Ohio Democratic Party, 339 F. Supp. 2d 975 (N.D. Ohio 2004); Bay County Democratic Party v. Land, 347 F. Supp. 2d 404 (E.D. Mich. 2004).

187. *Id.*

188. *See generally* Count Every Vote Act of 2005, S.450, 109th Cong. (2005).

189. In March 2005, prominent election lawyers and academics from both sides of the aisle assembled as The Century Foundation's Post-2004 Working Group on Election Reform. Despite the expertise of the individuals involved, the group's mission does not appear to challenge the state-driven framework:

The group will assess the key provisions of HAVA, analyze the ways in which they were implemented in 2004, and provide guidelines for how they ought to be implemented by the states in the future. In addition, the working group will analyze how states are preparing to comply with HAVA requirements . . . [and] provide the best policy options for states to meet these mandates . . . .

Press Release, Century Foundation, The Century Group Assembles Working Group to Help States Improve Voting Process (Mar. 23, 2005), *available at* <http://www.tcf.org/list.asp?type=PR&pubid=52>.

of president provides that “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[.]”<sup>190</sup> and that “[e]ach state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors.”<sup>191</sup> The states were thereby given the power to determine *how* to choose electors who will select the President of the United States, but Congress was given the authority to make two choices: first, to decide whether to enact legislation as to when presidential electors would be chosen; second, to decide whether to enact legislation as to when the presidential electors would cast their ballots for president. The constitution, therefore, requires only that the members of the electoral college cast their ballots for president on the same day. Congress, on the other hand, may alter “election day” as it sees fit. Indeed, we have already seen that, until 1845, states selected their electors at different times. In that year, Congress enacted legislation directing when voters must cast ballots for presidential 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.”<sup>192</sup> In fact, even the federal statute that includes a requirement for the election of presidential electors on the same day includes another provision that acknowledges the possibility of multiple-day voting. The relevant statute, 3 U.S.C. § 2, includes a “savings clause”: “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.”<sup>193</sup> Had the constitution required that Congress direct each state to hold elections for the electoral college on the same day, it could not have enacted the savings clause.

Moreover, on one occasion, Congress expressly granted states the power to elect presidential electors over several days. In the early 1870s, the United States enacted electoral reforms amidst the political turmoil from

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190. U.S. CONST. art. II, § 1.

191. *Id.* Congress was not required by the Constitution to compel each state to choose its electors on the same day—only the day of voting *by the electors*. A careful reading of Article II, section 2, clause 3 of the Constitution reveals that the second clause, prescribing the “same throughout the United States,” refers to and modifies the “Day” on which the presidential electors cast their ballots for president—not the “Time” when the people or the state legislatures elect the presidential electors. Congress was, therefore, compelled to set the same day for the presidential electors to elect a president and vice president, but not the same day for choosing the electors.

192. 3 U.S.C. § 1 (2005).

193. 3 U.S.C. § 2.

ongoing Reconstruction.<sup>194</sup> The legislation included one extraordinary exception: for the 1872 presidential election only, *if a state so chose*, its voters were permitted to cast ballots for presidential electors for “the number of days required.”<sup>195</sup> This, too, would have been impossible if the constitution required same-day voting for presidential elections.

Thus, despite our historical tradition of voters casting ballots for presidential electors on a uniform federal election day (albeit with an increasing trend by states to allow early voting and more liberal absentee balloting), as well as our constitutional deference to state decision-making in electoral matters, our history and constitutional framework gives Congress the right to alter that practice should the need arise. Congress may, consistent with our history and federal statutes, allow the states to make the decision as to whether to take advantage of that option—as it did in 1872. Or, even if Congress is loath to permanently “nationalize” our presidential elections, should a uniquely national crisis erupt, Congress has the power and could require the states to employ alternative dates and procedures for voting for the electoral college.

#### V. CAN CONGRESS STEP UP TO THE PLATE ON TERRORISM?

Given Congress’s power to legislate a response to the potential chaos that a terrorist attack can have on a presidential election, the pertinent question remains: Does Congress have the political will to legislate national electoral reform and address the unthinkable? To answer a question with another question: Can Congress afford not to?

##### A. Failing to Act is No Longer an Option

As the House Resolution passed on July 24, 2004 demonstrates, there is a strong sense by governmental officials that terrorists must not be permitted to interfere with our way of life, and, in particular, our electoral process. It is extraordinary that the House of Representatives nearly unanimously concluded that no federal election should ever be postponed in case of an attack. One can interpret this defiant Resolution in many ways, but it must be understood in context. A review of related legislation demonstrates that there is not a total unwillingness to “think the unthinkable.” After all, in the very next session, the House passed a bill to permit a relatively speedy process for special elections to the House in the event of a massive killing of one hundred or more members of Congress.<sup>196</sup>

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194. CONG. GLOBE, 42nd Cong., 2d Sess. 3408 (1872)).

195. *Id.*

196. *See* Continuity in Representation Act of 2004, H.R. 2844, 108th Cong. § 2(b)(4)(A)

And legislation has been introduced to allow a president-elect to recommend potential national security and cabinet level appointees so that the Senate may confirm them prior to or immediately upon the new president taking office.<sup>197</sup> This proposal is intended to preserve “continuity of governmental operations in the wake of a catastrophic terrorist attack.”<sup>198</sup>

We have seen that, while it is constitutionally a state prerogative to choose the method of electing presidential electors, Congress can and did exercise its choice to set the date of when electors are chosen. It did so in the 1840s, and with one exception in 1872, has required that all states choose the electors on the same day. Thus, irrespective of how the electors are chosen, the entire country consummates its voting for the electoral college on one day. Moreover, as we have also seen, when an election for Congress has not been concluded on election day, the federal statute’s “savings clause” has permitted, and courts have directed, post-election day voting. There is an analogous savings clause for the electoral college. Though it has never been invoked, Congress has delegated to the states the same power to establish procedures for post-election day voting in presidential elections<sup>199</sup> as it has in Congressional elections.<sup>200</sup> There is, therefore, no reason that the states could not do so should exigent circumstances prevent the conclusion of voting for presidential electors on election day.

No state, however, has used its authority to legislate parameters as to when or how to exercise such power should the need arise. This omission may have been unremarkable prior to September 11, but the continuing failure after the attack is, at the very least, surprising. Were there to be an attack on or right before a presidential election, the affected states would presumably exercise their powers under 3 U.S.C. § 2 by relying upon general plenary powers relating to emergencies. Indeed, in its Resolution against the postponing of a federal election in the face of a terrorist attack, the House of Representative said that “there is no reason to believe that the men and women who administer elections in jurisdictions across the nation would be incapable of determining how to react to a terrorist attack.”<sup>201</sup>

But, all good intentions aside, in the absence of any preemptive federal legislation as to *how* to proceed under these circumstances, some states

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(2004).

197. H.R. Res. 775, 108th Cong. (2004).

198. *Id.*

199. *See* 3 U.S.C. § 2 (2005).

200. *See* 2 U.S.C. § 7 (2005).

201. H.R. 728, 108th Cong. (2004).

might choose to suspend the election during an emergency and some might not. If there is another attack in the financial center of New York City on election day, for example, the governor of Ohio may determine that there is no reason to suspend voting in his state. On the other hand, if Amtrak trains are blown up outside Cleveland, Miami, Atlanta, and Las Vegas, would the governors of New York and California, assuming they had the powers to make the decision, feel comfortable insisting that the voting in their states proceed? What criteria would each of these governors rely upon in making their decision?

If an attack were leveled against only New York and Washington, D.C., which together total only thirty-six electoral college votes, would the remaining states continue the election, and if an electoral majority were reached, would it count? A majority could be obtained without those traditionally Democratic votes, but could voters from New York and D.C. persuade a federal court to enjoin the casting of ballots by presidential electors in the remaining state capitols? New York and D.C. would have several weeks (from the first Tuesday after the first Monday in November until the second Wednesday in December) to complete the postponed election. But if they were not able to, because all voting records in Democratic New York City were destroyed, and a Republican state legislature refused to permit same-day registration, could New York successfully enjoin the casting of the ballots by the electoral college in December on the ground that *all* presidential electors were constitutionally required to vote on the same day? Unfortunately, even in the face of another attack on the United States, partisan politics might come into play.

Substitute Florida in 2000 for the New York and D.C. example. Assume terrorists attack polling sites in Miami Beach, Ft. Lauderdale, and Boca Raton by suicide bombers on election day. Governor Jeb Bush inspects the damage where poll workers are killed and all registration records are incinerated. He personally visits the many condo communities where lives have been lost, and demonstrates his deep and heartfelt sympathies for the survivors. But he also allows the presidential election to proceed in the rest of the state. After the polls close, the electoral college vote in the rest of the nation is tight as a drum, with neither side winning a majority and Florida deciding the outcome. When the votes are finally counted in Florida (including those that were cast early in the morning in the three decimated cities), then-Governor George Bush wins Florida by some 20,000 votes. Perhaps Jeb Bush considers postponing the election in the three affected counties, but decides that the re-creation of registration records would take at least six months, and does not think that the country could wait to resolve the presidential election. Accordingly, he certifies the Republican slate of electors pledged to his brother.

Open to question is whether Jeb Bush would have had the authority to continue the election in the rest of the state? One might argue that the Pennsylvania flooding case<sup>202</sup> supports his position. One might also argue that the absence of any specific federal or state law regarding exigent circumstances in a presidential election prevents him from halting the election in the rest of the state. On the other hand, could the Democrats fairly claim that that the voters of Florida had “failed to elect” their presidential electors in that three counties had lost their opportunity to vote? And, if so, could the balloting in the various state capitols on December 18, 2000 be enjoined if destroyed voting records prevented a postponed election day so soon after the attack?

If the hypothetical terrorist attack occurred in Republican-leaning counties rather than in the Democratic-leaning communities as suggested above, could Governor Bush postpone the election in those affected counties while the rest of the state continued to vote? Based upon the Pennsylvania case, perhaps he could, but political considerations might very well persuade him to call off the election in the entire state, and then the *Republicans* might be the ones seeking to enjoin the electoral college vote. The issue, of course, is whether it is possible to eliminate an outcome-determinative political calculation in such decision-making, or is it simply inevitable for politics to come into play?

The problem with these scenarios, of course, is that decisions of whether and how to respond to an exigent circumstance, even one as catastrophic and far-reaching as an attack on the homeland during a presidential election, are left to the states, with no clear federal or state guidelines.

It gets worse. If these hypotheticals are modified to include attacks in several states, some states might choose to postpone the election in part of a state, but not in other parts of the state. Some may choose to postpone the voting throughout the state. Some may choose to simply accept the vote totals without completed voting in the damaged areas. Unless various states chose to consult and agree, the adopted procedures could vary, and even the dates of postponed election days may not be the same from state to state.

Obviously, we are indeed fortunate that these “nightmare scenarios” have not occurred. The closest we have come is the postponed mayoral election in New York City on September 11, 2001. If an attack disrupted a future presidential election, the chances of litigation would almost certainly be higher. After all, the shock and surprise of another attack would not be

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202. See generally *In re General Election—1985*, 531 A.2d 836 (Pa. 1987); *supra* Part II.B.

as great as it was on September 11; and the stakes and partisan emotions could not be more intense than during a race for the White House.

While it is certainly understandable, from a political and emotional perspective, for Congress to take a defiant stand against the possibility of an attack against our electoral process, one need not be an alarmist to conclude that it is quite irresponsible not to act prophylactically. As a constitutional matter, Congress has the authority to set the date of the voting and has done so in a manner that acknowledges the possibility that voting on election day might not be complete. Instead of permitting the state-driven electoral system to dictate what would happen in the event of a crisis—which could result in disparate solutions by the affected states, and a possible constitutional crisis surrounding the composition of whatever electoral college was elected—Congress should exercise its authority as well as its responsibility to enact a uniform set of procedures to determine when and how to proceed in the face of extraordinarily exigent circumstances such as a terrorist attack on or immediately before a presidential election.

There is no question that we are burdened by our history. For Congress to act in this way would no doubt be viewed as a break from our long tradition of delegating these issues to states, but the potential constitutional chaos that might ensue requires a new approach. The chance of terrorism or a major natural disaster occurring on or immediately before our quadrennial election day is extremely remote, but prudence dictates action.

### **B. The Time is Ripe; Some Suggestions**

A special Congressional task force should be appointed to study the issue. Hearings should be convened, inviting constitutional and election law scholars, state and federal elected officials, political scientists, state election administrators, and citizens. Legislation should be proposed and debated.

The time is ripe. We have recovered from September 11, 2001, and held a presidential election. Significantly, the next presidential election will have no incumbent running for re-election, and no vice president seeking the presidency. As such, the tension of partisanship, ever present when formulating electoral procedures, is somewhat reduced. And, of course, it is better to design rules and guidelines in the absence of emergency or necessity.

There is no talismanic solution, but I have several suggestions.

#### *1. Congressional Action*

When the President of the United States gives the State of the Union to a



joint session of Congress each January, at least one cabinet Secretary stays away to ensure presidential succession should there be a massive attack on the Capitol. Obviously, the odds of this occurring are marginal, but caution dictates preparedness to ensure continuity of our government.

Similarly, Congress should, every four years, appoint an Extraordinary Presidential Election Contingencies Committee. Its members would consist of representatives of the candidates of the major parties and any independent candidate or minor party polling at least ten percent of the popular vote or qualifying for matching campaign funds. Anticipating extraordinarily exigent circumstances such as a terrorist attack or a widespread natural disaster on or immediately preceding election day, this Committee would set certain guidelines as to how to proceed. Should such an attack occur, the Committee would immediately decide whether the election should go forward, if any state or part thereof should postpone its voting, and, if so, when, and any other relevant procedural matters. The Committee would be directed to consult with the governors of the various affected states, and the presidential and vice presidential candidates.

This kind of Committee's biggest advantage is its centralized authority—or national perspective—a single body with decision-making authority should the unthinkable occur. The various candidates' interests would be taken into account, and, theoretically, the higher national interest would be determinative. The election would not rely upon various states making potentially contradictory decisions based upon a hodge-podge of state laws. The drawback is that the Committee is similar to the extra-legal Electoral Commission Congress appointed to resolve the Tilden-Hayes election in 1876.

Better yet, then, rather than having Congress delegating its authority on such a weighty and extraordinary matter to an *ad hoc* group reminiscent of the 1876 Commission, Congress could appoint its own bipartisan leadership as the Committee. In this case, Congress would be affirmatively assuming responsibility for the timing and procedures of the presidential election during extraordinarily exigent circumstances. This would be preferable because the United States Congress would be assuming its historical and constitutional role in electing the president and vice president of the United States, albeit under different circumstances than our Founders contemplated. Yet Americans would no doubt accept the authority and competence of the Congress to exercise this power.

Better still, Congress ought to enact permanent procedures that address this exigency, providing guidelines as to how decisions should be made, and by whom. As such, Congress would be taking the initiative and establishing a national response to a national emergency, rather than

leaving the constitutional crisis to be “managed” by the various states.

## 2. Guidelines

If and when Congress decides to assume its responsibilities regarding a possible terrorist attack on the United States during or immediately preceding a presidential election, it should set forth specific guidelines as to how to proceed. Just as Congress grappled with what ultimately became the Twenty-Fifth Amendment to the Constitution regarding issues of a disabled president and vacancies in the office of vice presidency, here, too, a legislative solution will not come easily or quickly. Nevertheless, there are certain issues that must be addressed.

Here are some suggestions to guide decision-making, offered as model legislation:

(a) the election for presidential electors should be postponed only in those counties in a state where extraordinary exigent circumstances have interfered with the voting process;

(b) for the purpose of this guideline, “interfered with the voting process” should include, but not be limited to:

(i) destruction of voting machine(s), registration rolls, or ballots cast;

(ii) prevention of voters’ access to polling site(s);

(iii) widespread loss of communication;

(iv) compromised integrity of polling site(s), or

(v) unsafe conditions.

(c) should the voting of a county be postponed, only those voters whose ballots have been compromised should be allowed to cast a new vote at the postponed election date; all votes that have been cast prior to the postponement of an election, as long as the integrity of the ballot has not been compromised, should be considered inviolate;

(d) should the voting of a county be postponed, there should be no canvassing of the ballots of that state for president or any other public office until all votes are cast at the postponed election; further, in the states where the election is not postponed, there should be no canvassing of the ballots for president or any other public office until the votes are all cast at the postponed election in the states that are affected; and,

(e) all voting equipment and all votes cast, whether in counties where the election is postponed or in other counties in the affected state where voting is postponed, as well as in unaffected states, should, at the close of the polls on election day, be impounded and placed under the jurisdiction of the highest court of the state or their representatives until all postponed election

day voting is completed.

Although I believe that these suggestions are fair and sensible, they are merely a starting point for Congress, and, I hope, an incentive for Congress to begin the process of enacting a national procedure to protect our electoral system.

#### CONCLUSION

If the attack on the World Trade Center had occurred ten months earlier, on November 7, 2000, the United States would have been totally unprepared as to whether or how to conduct the presidential election of 2000. When there was an attack during the New York City Mayoral primary election in 2001, the unique shock of the event dwarfed any concern about postponing that election or the procedures to be followed. Having already lived through that trauma, however, and having watched Spain's voters become overwhelmed by a terrorist attack immediately before its national election, Americans would no doubt find it unacceptable should such an attack disrupt a presidential election and create the kind of chaotic constitutional crisis that is likely to occur without any plan in place.

Congress has the power and responsibility to fix this. It should.