

# CRS Report for Congress

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## **Safeguarding Federal Elections from Possible Terrorist Attack: Issues and Options for Congress**

**October 27, 2004**

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# Safeguarding Federal Elections from Possible Terrorist Attack: Issues and Options for Congress

## Summary

Concerns have arisen that terrorist attacks near the November 2, 2004 federal election might be launched to disrupt voting and affect the outcome. As a result, questions have arisen about what might be done both to prevent such attacks and to respond to any that occur. Deliberations have centered largely around two questions: If a terrorist attack occurs, should the election be postponed, in whole or in part, and if so, by whom and under what authority? What steps should and are being taken to enhance security for the election?

Questions about election postponement include who has the constitutional authority, to whom could such power be delegated, and what legal limitations exist. Congressional authority to regulate elections may vary depending on what contest or contests are affected. The executive branch does not currently have authority to set or change the times of elections, a power reserved for Congress under the Constitution, although Congress may be able to delegate such authority. Either Congress or the states might also pass legislation in response to a terrorist attack that would change the timing of any elections that were affected.

Some states have enacted statutes providing for the temporary postponement of elections. Many state statutes also grant the Governor the power to suspend certain state laws during an emergency. Those statutes might also be able to be used to postpone the general presidential election in the state during an emergency. Actual postponement of elections has occurred in relatively few cases over the last 150 years. The best known recent examples are the New York state primary scheduled for September 11, 2001, and the Florida primary scheduled on September 1, 1992, shortly after Hurricane Andrew. In New York, the entire election was rescheduled; in Florida, only Dade County was rescheduled. In many other cases in the United States and other countries, elections have been held despite difficult situations arising from natural events or conflicts.

It is generally the responsibility of state and local governments to provide security at polling places. State and local laws regarding police presence vary, with some states prohibiting and others requiring it. Federal law prohibits the use of federal military forces at the polls except "to repel armed enemies of the United States." A recently released guide for state election-security planning recommends establishment of planning teams and preparation for a range of possible scenarios. Reactions of state and local officials have varied, with some intending to make as few visible changes as possible and others planning to increase police presence or even move polling places.

Whether Congress considers actions to safeguard elections may depend on events associated with U.S. elections or those in other countries. Among the options are to take no legislative action, to explicitly delegate authority to the executive branch to the extent permitted by the Constitution, to provide mechanisms for improved coordination, and to encourage early and absentee voting. All these options have some potential benefits but also significant potential disadvantages.

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# Safeguarding Federal Elections from Possible Terrorist Attack: Issues and Options for Congress

## Background

The terrorist bombings that occurred in Spain on March 11, 2004, before that country's national election, were considered by many to have had a significant impact on the outcome of that election.<sup>1</sup> Many observers believed that such was their intent. Concerns then arose that terrorist attacks in the United States near the time of the November 2 federal election could also be aimed at affecting the outcome of that election. In early July, news media began reporting such concerns from the Bush Administration and that the Department of Justice was considering the question of federal authority to postpone the election.<sup>2</sup> Subsequently, administration officials emphasized that the election would proceed as scheduled. For example, on July 13, Election Assistance Commission (EAC) Chairman DeForest Soaries released a public statement declaring "There are no circumstances that could justify the postponement or cancellation of a presidential election in the United States."<sup>3</sup>

However, the question of polling place vulnerabilities persists. As a result, questions have arisen about what responses might be taken both to prevent such attacks and respond to them should they occur. Deliberations have been affected not only by concerns about homeland security in the wake of the terrorist attacks of September 11, 2001, but also by the expected closeness of the presidential election and the resulting highly charged nature of the contest. Deliberations and debate have centered largely around two questions:

- If a terrorist attack occurred, should the election be postponed, in whole or in part, and if so, by whom and under what authority?
- What steps should and are being taken to enhance security for the election?

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<sup>1</sup> Whether the impact resulted from the fact of the bombings or the nature of the incumbent government's subsequent reaction remains in dispute.

<sup>2</sup> See, for example, Michael Isikoff, "Election Day Worries," *Newsweek*, 19 July 2004, p. 8.

<sup>3</sup> Election Assistance Commission, "Chairman Soaries' Statement Concerning the Status of the November Presidential Election," 13 July 2004, [[http://www.eac.gov/docs/Statement%20Concerning%20the%20November%20Election%20\\_%207-13-04%20\\_1.pdf](http://www.eac.gov/docs/Statement%20Concerning%20the%20November%20Election%20_%207-13-04%20_1.pdf)].

To address those questions, this report discusses constitutional authority and federal and state laws regarding the postponement of federal elections, as well as selected experiences with past elections, both in the United States and abroad. It also discusses federal authority regarding the security of polling places, and federal efforts specifically aimed at election security. It does not discuss broader efforts aimed at preventing terrorist attacks or other questions regarding the administration or integrity of the November 2004 election.

In the United States, elections are administered by state and local governments. While Congress has limited power to regulate federal elections, it has rarely exercised that authority except with respect to the question of enfranchisement of voters. However, in response to the problems arising from the November 2000 election for President, Congress enacted the Help America Vote Act of 2002 (HAVA). The act substantially enhanced the federal role in election administration, including the establishment of the EAC, a new, independent federal agency, to provide support and guidance to state and local election officials. The EAC does not, however, have any regulatory authority. HAVA establishes requirements for voting systems, voter registration, and other aspects of election administration. It does not specifically address issues relating to election postponement or polling place security, although some constitutional provisions and earlier legislation are relevant.

## Election Postponement

### Constitutional Authority and Federal Law

Basic questions relating to election postponement include who has the constitutional authority to postpone elections, to whom could such power be delegated, and what legal limitations exist to such a postponement.<sup>4</sup> Congress has authority to regulate elections, and that authority may vary depending on whether the election is for the Presidency, the House, the Senate, or for state or local offices. While the executive branch has significant delegated authority regarding some aspects of election law, that authority does not currently extend to setting or changing the times of elections.

Under a variety of possible scenarios that could arise as a result of a terrorist attack before or during an election, either Congress or the states might pass legislation that would affect the timing of those elections. The executive branch does not currently have that power, but Congress may be able to delegate that authority to the executive branch.

**Federal Elections.** The authority to postpone an election would appear to be a natural corollary of the power to set the time for an election. The authority to set the

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<sup>4</sup> For more detailed information on this topic, see (name redacted), *Executive Branch Power to Postpone Elections*, CRS Report RL32471, 14 July 2004, and (name redacted), *Postponement and Rescheduling of Elections to Federal Office*, CRS Report RL32623, 4 October 2004.

date of elections appears to derive principally from two constitutional provisions, Article I, §4, cl. 1, and Article II, §1, cl. 4. The text of the Constitution does not appear to contain a constitutional role for the executive branch in such decisions.

The Supreme Court and lower courts have interpreted the language of Article I, § 4, cl. 1 to mean that Congress has extensive power to regulate most elements of a congressional election.<sup>5</sup> It would appear that Congress would therefore have broad authority to postpone elections so as to account for emergency situations. Although Congress has set the election date by statute, it would still appear to be within Congress's power to postpone a House and Senate election.<sup>6</sup>

While the power of Congress to regulate presidential elections is not as extensive as its power over House and Senate elections,<sup>7</sup> Article II, §1, cl. 4 does provide that Congress may determine the "time" of choosing presidential electors. Although Congress does not have the explicit authority to regulate other aspects of presidential elections, case law does indicate that Congress may have powers extending beyond establishing the time of choosing the electors.<sup>8</sup> The power of Congress to protect the integrity of the presidential election, combined with its authority to set the time of election, would also seem to provide Congress the power to postpone elections because of a national emergency.

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<sup>5</sup> 285 U.S. at 366. See *Roudebush v. Hartke*, 405 U.S. 15, 24-25 (1972) (state's authority to regulate recount of elections); *United States v. Gradwell*, 243 U.S. 476, 483 (1917) (full authority over federal election process, from registration to certification of results); *United States v. Mosley*, 238 U.S. 383, 386 (1915) (authority to enforce the right to cast ballot and have ballot counted); *In re Coy*, 127 U.S. 731, 752 (1888) (authority to regulate conduct at any election coinciding with federal contest); *Ex parte Yarbrough*, 110 U.S. 651, 662 (1884) (authority to make additional laws for free, pure, and safe exercise of right to vote); *Ex parte Clarke*, 100 U.S. 399, 404 (1879) (authority to punish state election officers for violation of state duties vis-a-vis congressional elections). See also *United States v. Simms*, 508 F.Supp. 1179, 1183-85 (W.D. La.1979) (criminalizing payments in reference to registration or voting does not offend Tenth Amendment); *Prigmore v. Renfro*, 356 F.Supp. 427, 430 (N.D. Ala.1972) (absentee ballot program upheld as applied to federal elections), *aff'd*, 410 U.S. 919 (1973); *Fowler v. Adams*, 315 F.Supp. 592, 594 (M.D. Fla.1970), appeal dismissed, 400 U.S. 986 (1971) (authority to exact 5 percent filing fee for congressional elections).

<sup>6</sup> It would appear, however, that Congress could not postpone elections indefinitely, as the Constitution requires that Members of the House of Representatives shall be chosen "every second year," U.S. Const. Art. I, § 2, cl. 1, and Senators shall be chosen for terms of "six years." U.S. Const., Amend. XVII. See also U.S. Const. Amend. XX (specifying that the terms of the President and Vice-President shall end January 20th, and those of Senators and Representatives shall end January 3rd).

<sup>7</sup> Despite modern state practice providing for popular voting for electors, the appointment of presidential electors was historically and remains today a power of the state legislatures. For instance, a state would still retain the authority to use an alternative method of choosing presidential electors besides popular elections.

<sup>8</sup> For instance, the Supreme Court has allowed congressional regulation of political committees which seek to influence presidential elections, arguing that such legislation is justified by the need to preserve the integrity of such elections. See *Burroughs v. United States*, 290 U.S. 534 (1934).

**State Elections.** Congress does not have general legislative authority to regulate the manner and procedures used for elections at the state and local level. Congress does have extensive authority under the Civil War Amendments,<sup>9</sup> the 19th Amendment,<sup>10</sup> the 24th Amendment,<sup>11</sup> and the 26th Amendment<sup>12</sup> to prevent discrimination in access to voting, and it has exercised that power extensively over state and local, as well as federal, elections.<sup>13</sup> However, absent some relationship to the issues addressed by these amendments, such as the postponement of a state election to deal with issues of discrimination, Congress would not appear to have the authority to regulate the time of the state elections.

**Executive Branch Power.** The executive branch does not appear to currently have the authority to establish or postpone the dates of elections at either the federal or state level even in an emergency.<sup>14</sup> The question arises, however, whether Congress could delegate power to the executive branch. Generally, under separation of power doctrine, Congress may delegate power to the executive branch so long as it includes standards so that a court can “ascertain whether the will of Congress has been obeyed.”<sup>15</sup> There is no apparent reason why this doctrine would not extend to the power of Congress to set the time of national elections.<sup>16</sup> Thus, as

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<sup>9</sup> U.S. Const., Amend. XIII (prohibiting slavery), Amend. XIV (due process and equal protection) and Amend. XV (voting rights).

<sup>10</sup> “The rights of citizens to vote shall not be denied . . . on account of sex.”

<sup>11</sup> “The rights of citizens to vote . . . shall not be denied . . . by reason of failure to pay a poll tax . . . .”

<sup>12</sup> “The right of citizens . . . to vote shall not be denied . . . on account of age.”

<sup>13</sup> See, e.g., Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973-1973bb-1 (1992)). For background on the Voting Rights Act, see (name redacted), *The Voting Rights Act of 1965: A Legal Overview*, CRS Report 91-736, 7 October 1991.

<sup>14</sup> It is possible, however, that the executive branch could make decisions that would make it difficult or impractical for a particular state or federal election to occur. For instance, a variety of situations could occur under which the executive branch might seek to limit the movement of citizens under its emergency powers. See Harold Relyea, *National Emergency Powers*, CRS Report 98-505, 23 September. However, exercise of such power would not appear to have the legal effect of delaying an election, nor would it vest the executive branch with the authority to reschedule the election. The legal resolution of an election during which significant numbers of persons fail to reach the polls due to the actions of the executive branch is beyond the scope of this report.

<sup>15</sup> *Mistretta v. United States*, 488 U.S. 361, 379 (1989).

<sup>16</sup> See *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 220-221 (1989). In *Skinner*, the Court rejected the argument that the Taxing Clause, U.S. Const., Article I, § 8, cl. 1, should be treated differently for purposes of delegation. “We discern nothing in th[e] placement of the Taxing Clause that would distinguish Congress’s power to tax from its other enumerated powers - such as its commerce powers, its power to ‘raise and support Armies,’ its power to borrow money, or its power to ‘make Rules for the Government’ - in terms of the scope and degree of discretionary authority that Congress may delegate to the Executive in order that the President may ‘take Care that the Laws be faithfully executed.’” But see Amy  
(continued...)



long as Congress set standards for the executive branch to implement such a postponement,<sup>17</sup> it would appear that Congress could enact a statute delegating to the executive branch the authority to postpone an election.

## State Laws

Some states have enacted statutes providing for the temporary postponement of elections within their respective jurisdictions for various reasons. State laws vary, but an examination of a selection of state statutes may be instructive. Relevant statutes are summarized for the following states: Florida, Georgia, Hawaii, Louisiana, Maryland, New York, and North Carolina. In the event of emergencies or disasters, it appears that these laws might provide for the postponement of the general presidential election within the state.<sup>18</sup> In addition, examples of state statutes that grant the Governor the power to suspend certain state laws during an emergency are included. Although these statutes do not mention elections, they might be able to be used to postpone the general presidential election in an emergency.

### Examples of State Statutes Regarding Emergency Election Postponement

Following are summaries of selected state laws that provide a mechanism for the postponement of certain elections. In the event of emergencies or disasters, it appears that these laws might provide for the postponement of the general presidential election within the respective state, its precincts, districts or counties:

**Florida.** The Governor may, upon issuing an executive order declaring a state of emergency or impending emergency, suspend or delay any election. The rescheduled election must be held within 10 days after the date of the delayed election or as soon as practicable thereafter. FLA. STAT. § 101.101.733 (2004).

**Georgia.** In the event the Governor declares that a state of emergency or disaster exists pursuant to state law or a federal agency declares that a state of emergency or disaster exists, the secretary of state is authorized to postpone the date

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<sup>16</sup> (...continued)

Keller, "Members Pan Election Idea," *Roll Call*, 13 July 2004) (quoting Yale Professor Jack Balkin to the effect that Article II provides that Congress, not the executive branch, may determine the date of presidential elections).

<sup>17</sup> Arguably, Congress would need to set standards for the cancellation of the existing date and then for the institution of a new date. Failure to provide such direction would raise issues of separation of powers. See *Clinton v. City of New York*, 524 U.S. 417, 443-444 (1998)(delegation standards requires establishment of triggering conditions, limited discretion as to whether to implement; standards may not allow President to substitute his own policy decision.)

<sup>18</sup> For more detailed information, see (name redacted), *State Election Laws: Overview of Statutes Regarding Emergency Election Postponement Within the State*, CRS Report RS21942, 22 September 2004.

of any election in the affected area. The secretary of state shall exercise the powers granted by this section of law carefully, and any such postponement or extension shall not exceed 45 days. GA. CODE ANN. § 21-2-50.1 (2004).

**Hawaii.** If the extent of damage caused by any natural disaster is such that the ability of voters to exercise their right to vote is substantially impaired, the chief election officer may require the registered voters of the affected precinct(s) to vote by absentee ballot and may postpone the election in the affected precinct(s) for no more than 21 days, provided that the postponement does not affect the election, tabulation or distribution of results for those precincts, districts, or counties not designated for postponement. HAW. REV. STAT. § 11-92.3 (2003).

**Louisiana.** Upon issuance of an executive order declaring a state of emergency or impending emergency, the Governor may suspend or delay any election. The Governor shall take such action only upon certification by the secretary of state that such a state of emergency exists. As chief election officer of the parish, a clerk of the court may bring to the attention of the secretary of state any difficulties occurring in his parish due to natural disasters. If any delays or suspensions are authorized by the Governor, the delayed election day shall resume or be rescheduled as soon thereafter as is practicable. LA. REV. STAT. § 18:401.2 (2004).<sup>19</sup>

**Maryland.** In the event of a state of emergency, declared by the Governor in accordance with law, that interferes with the electoral process, the emergency proclamation may provide for the postponement, until a specific date, of the election in part or all of the state. MD. CODE ANN. [Elections] § 8-103 (2003).

**New York.** A county board of elections, or the state board of elections with respect to an election conducted in a district in the jurisdiction of more than one county board of elections, may determine that, as the direct consequence of fire, earthquake, tornado, explosion, power failure, act of sabotage, enemy attack or other disaster, less than 25% of the registered voters of any city, town or village, or if the city of New York, or any county therein, actually voted in any general election. Such a determination shall be subject to approval by the state board of elections. If the state board of elections makes such determination, it shall notify the board of elections with the jurisdiction in that county that an additional day of election shall be held. Thereafter, the county board of elections shall set a date for an additional day for voting in the county, city, town or village affected by the statement, which

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<sup>19</sup> The Louisiana election emergency statute begins with the following statement of findings: “Due to the possibility of an emergency or common disaster occurring before or during a regularly scheduled or special election, and in order to ensure maximum citizen participation in the electoral process and provide a safe and orderly procedure for persons seeking to qualify or exercise their right to vote, to minimize to whatever degree possible a person’s exposure to danger during declared states of emergency, and to protect the integrity of the electoral process, it is hereby found and declared to be necessary to designate a procedure for the emergency suspension or delay and rescheduling of qualifying, absentee voting in person, and elections.” LA. REV. STAT. § 18:401.2 (2004).

shall not be more than twenty days after the original date of the general election. NY [Elections] LAW § 3-108 (Consol. 2004).

**North Carolina.** The executive director, as chief state elections official, may exercise emergency powers to conduct an election in a district where the normal schedule for the election is disrupted by any of the following: a natural disaster, extremely inclement weather, an armed conflict involving U.S. armed forces or mobilization of those forces, including the state National Guard and reserve components. In exercising those emergency powers, the executive director shall avoid unnecessary conflict with the provisions of this chapter of law. N.C. GEN. STAT. § 163-27.1 (2004).

## Examples of State Statutes Granting Emergency Powers

Some states statutes authorize the Governor to suspend certain state laws in the event of an emergency. While these statutes do not specifically mention elections, it might be possible for them to be used to postpone the general presidential election, within the respective state, its precincts, districts or counties, in the event of an emergency or disaster. While not an exhaustive list, the following summaries are provided as examples of these types of state laws:

In Arizona, the Governor has the power in a “state of war emergency” to suspend statutory procedures for conduct of state business, or the orders or rules of any state agency, to facilitate mitigation of the effects of the emergency.<sup>20</sup> The California Governor has similar powers for either a state of war emergency or a state of emergency.<sup>21</sup> Similar powers are afforded the Governor of Illinois in the event of a declared disaster, for a period not to exceed 30 days,<sup>22</sup> and to the Governor of Indiana, with the proviso that the general assembly may terminate the state of emergency at any time.<sup>23</sup> The Governor of Michigan may exercise similar powers upon declaring a state of disaster or a state of emergency,<sup>24</sup> as may the Governor of Tennessee.<sup>25</sup> Texas and West Virginia have similar provisions.<sup>26</sup>

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<sup>20</sup> ARIZ. REV. STAT. ANN. §§ 26-303(A)(1), 301(15)(2004).

<sup>21</sup> CAL. GOV'T CODE ANN. §§ 8571, 8558(a), (b)(2004).

<sup>22</sup> 20 ILL. COMP. STAT. ANN. § 3305/7(a), 3305/4 (2004)

<sup>23</sup> BURNS IND. CODE ANN. §§ 10-14-3-12(a),(d); 10-14-3-1 (2004)

<sup>24</sup> MICH. COMP. LAWS ANN. §§ 30.405(1)(a); 30,402(e),(h)(2004).

<sup>25</sup> TENN. CODE ANN. §§ 58-2-107; 58-2-101(4),(6)(2004).

<sup>26</sup> TEX. GOV'T CODE §§ 418.016; 418.004(1)(2004); W. VA. CODE §§ 15-5-6(g); 15-5-2(h)(2004).

## Examples from State Elections

To identify examples of election postponements, CRS conducted a text search of digitized images of the *New York Times* and *Washington Post*<sup>27</sup> for the period 1860 to 2004, supplemented by other sources including books and periodicals such as Congressional Quarterly's *Weekly Report*. Several examples of postponements of federal *primary* elections or local elections were found.<sup>28</sup> The reasons for postponement included natural disasters, severe weather, and, in the case of the September 11, 2001 New York primary election, a terrorist attack. No instance was found in which a *general* federal election was postponed or delayed, although it is not possible to categorically rule out that possibility, especially for small areas, such as precincts, where a weather event or a technical problem such as a power failure may have come into play. The examples described include instances in which elections either have been or could have been postponed because of unusual circumstances in the United States, as well as several illustrative cases from other countries.

**New York Primary Election on September 11, 2001.** According to press reports, elections officials in the New York City region began closing the polls by mid-morning on September 11, 2001. *Newsday* reported that the “Suffolk Democratic elections commissioner, who made the decision with Republican counterpart Barbara Barci [said] ‘we just looked at each other and decided this was the right thing to do.’”<sup>29</sup> Barci cited Section 3-108 of the New York election law giving elections officials the power to postpone an election in the event of “fire, earthquake, tornado, explosion, power failure, act of sabotage, enemy attack or other disaster.”<sup>30</sup> *Newsday* further reported that the Nassau county elections commissioner also closed the polls, because among other things, “many school districts were closing their buildings, which would affect our polling places.”<sup>31</sup> In the borough of Queens, New York Supreme Court Justice Stephen W. Fisher issued an oral order the morning of September 11, 2001, calling off the election in New York City. Fisher, who had been previously appointed by the Chief Administrative Judge to “handle all citywide election-related issues, said he acted to preserve the ‘integrity’ of the electoral process after being ‘besieged’ by telephone requests from the New York Board of Elections and the campaigns of the four Democratic mayoral candidates.”<sup>32</sup> New York Governor Pataki signed an executive order about noon on September 11,

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<sup>27</sup> ProQuest Information and Learning Company maintains a database “that contain[s] electronically scanned facsimile reproductions” of materials including the historical *Washington Post* and *New York Times*. Our search of this database covered the period from 1860 to 2002.

<sup>28</sup> This and the following two sections are drawn from David Huckabee, “Deciding to Postpone Elections: Domestic and International Examples,” CRS Congressional Distribution Memorandum, 17 August 2004, available by request.

<sup>29</sup> Rick Brand, “Primary vote postponed statewide, Nassau and Suffolk among first to cancel,” *Newsday*, 12 September 2001, p. W23.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> “Primary Election Are Cancelled,” *New York Law Journal*, 12 September 2001, p. 3.

2001, halting the elections statewide,<sup>33</sup> and the State Board of Elections notified local elections boards within 30 minutes of the Governor's order.<sup>34</sup>

Initial reports of how the suspended primary would be conducted when voting resumed suggested that votes cast on September 11 would be counted. On September 11, 2001, the counsel for the state Republican Committee said that votes cast before the election was stopped would count.<sup>35</sup> This interpretation appears to comport with New York election law regarding postponement of general elections (see above), which states in part, "in any election district in which voting machines were used upon the original day of voting, they shall be used for the additional day for voting. The original seal on such machines shall not be removed nor shall the machines be unlocked until the opening of the polls on the additional day for voting" (NY [Elections] LAW § 3-108(3)).

The primary, rescheduled for September 24, 2001, was not treated like a general election, and votes cast on September 11 were not counted. On September 13, the legislature and the Governor agreed to a new procedure in which "any votes cast on September 11<sup>th</sup> [would] not be counted, but all absentee ballots duly and properly cast" would continue to be valid and counted on September 25, 2001.<sup>36</sup>

On the eve of the rescheduled primary, the *New York Times* reported complaints from many candidates that little had been done to publicize the new date, as well as concerns about lack of voter awareness that votes cast at the polls on September 11 would not be counted.<sup>37</sup> Media sources also reported little or no post-9/11 campaigning.

The *Gotham Gazette* also reported problems in lower Manhattan for voters and candidates on the rescheduled primary day. The city Board of Election's main office was without telephones and electricity for a period after the attack, and there were no polling places west of Broadway. To vote, persons who would have voted at those locations were required to request absentee ballots that had to be postmarked by September 24, 2001.<sup>38</sup>

**Florida September 1, 1992 Primary Election (Hurricane Andrew).** Dade County Florida Commissioners directed the county attorney to file a federal lawsuit seeking to delay a statewide primary election because of extensive damage

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<sup>33</sup> George E. Pataki, *State of New York Executive Order No. 113.1*, 11 September 2001.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*

<sup>36</sup> Governor George Pataki, "Governor, legislature announce new primary election date," Press Release, 13 September 2001. See also *McKinney's 2001 Session Laws of New York*, vol. 1 Chapt. 298 and vol. 2 Chapt. 298-LM.

<sup>37</sup> Jonathan P. Hicks, "Treading gingerly on the campaign trail," *New York Times*, Sept. 23, 2001, p. A50.

<sup>38</sup> Mark Berkey Gerard and Lara Naaman, "New York's new primary day," 24 September 2001, [<http://www.gothamgazette.com/iotw/newelection>], visited 15 July 2004.

resulting from Hurricane Andrew (which hit Dade County on August 24, 1992), because approximately 200 polling places in the county were “inaccessible, badly damaged or destroyed.”<sup>39</sup>

The primary, scheduled for September 1, included local and state races as well as U.S. House and Senate primaries. Governor Lawton Chiles had said he lacked the legal authority to postpone the election, contradicting Florida secretary of state Jim Smith who “contended that Chiles’ emergency powers gave him authority to delay the election for up to a week.”<sup>40</sup>

On August 29, at the request of county officials, Dade County Circuit Judge Leonard Rivkind ordered that elections in the county be postponed a week.<sup>41</sup> He also ordered elections supervisors in seven other counties to seal the results in multi-county and statewide races until September 8, when the rescheduled Dade County primary was to be held.<sup>42</sup> Judge Rivkind’s order to delay elections in Dade County was upheld by a unanimous Florida Supreme Court on August 31, but the court ruled that the judge could not control elections supervisors in other counties, so his order to seal the elections results in those counties was reversed. The *New York Times* reported on September 1 that federal District Court Judge Michael Moore had not taken action on the county’s federal law suit,<sup>43</sup> so the statewide primary was held on schedule.

Conditions for voting in Dade County on September 8 varied widely. In the Miami area and northward, electricity had been restored by September 6, and most businesses had reopened.<sup>44</sup> But in the Homestead and Florida City area, which received the brunt of the storm, thousands of people were living in school buildings<sup>45</sup> and approximately 30,000 National Guard and active-duty armed forces personnel were assisting with the clean-up.<sup>46</sup>

The military also assisted with the election by setting up temporary polling facilities in tents because numerous polling places had been destroyed by the

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<sup>39</sup> “County is filing suit in effort to postpone election in Florida,” *New York Times*, 27 August 1992, p. A14.

<sup>40</sup> Tom Fiedler, “Storm or no, election will be held [;] local officials’ pleas to delay get no response,” *Miami Herald*, 27 August 1992, p. 1B.

<sup>41</sup> “September election delayed a week in storm-hit county,” *New York Times*, 30 August 1992, p. A22.

<sup>42</sup> “Orderly voting amid chaos,” *Miami Herald*, 1 September 1992, p. 38A.

<sup>43</sup> “Florida’s election to proceed,” *New York Times*, 1 September 1992, p. A13.

<sup>44</sup> Deborah Sontag, “Life on the fringes of ruin makes a cautious comeback,” *New York Times*, 7 September 1992, p. A1.

<sup>45</sup> “South Florida staggers to normality,” *New York Times*, 8 September 1992, p. D13.

<sup>46</sup> “Most Florida storm victims regain power and water,” *New York Times*, 13 September 1992, p. E2.

hurricane.<sup>47</sup> Active-duty personnel were not present at the polling places during the September 8 primary election because of prohibitions on the use of troops at polling places (see section on polling-place security below). Active-duty soldiers were bivouacked at one of the polling places, and the military kept the troops away after having sought an advisory opinion from the U.S. Department of Justice.<sup>48</sup>

**Hawaii September 19, 1992 Primary Election (Hurricane Iniki) Held on Schedule.** Fewer than three weeks after Hurricane Andrew, a major hurricane struck the Hawaiian island of Kauai on September 11, 1992. Kauai suffered extensive damage from the hurricane to its older, lightly constructed buildings and electrical power grid. The Hawaii National Guard helped civilian authorities with the clean-up,<sup>49</sup> and the guard played an important role in the primary election held in Kauai on September 19, 1992.

According to Dwayne D. Yoshina, Hawaii's chief election officer, the state's response to the devastation to the island of Kauai wrought by Hurricane Iniki was governed by two main factors: First, the Lieutenant Governor, who was the state's chief election official, concurred with the election staff's philosophical approach that there was little that should cause an election to be postponed. Second, the primary did not fall on the day of the hurricane, but came eight days later.

Mr. Yoshina said that the election staff recommended to the Lieutenant Governor that normal conditions should be restored as soon as possible. Although damage to Kauai was heavy, there were enough intact structures to hold elections. National Guard personnel assisted elections officials by delivering ballots and erecting tents to serve as emergency precincts where buildings were not usable. Kauai's centralized ballot counting facility was closed down because the island had no electrical power, so the National Guard airlifted the ballots to Oahu to be counted.<sup>50</sup>

**Maine September 13, 1954 General Election (Hurricane Edna) Held Despite Damage.** In contrast the Hurricane Andrew experience, two hurricanes that struck the state of Maine prior to the 1954 general election caused extensive damage but did not cause an delay of the election.

The 1954 general election in Maine for federal and state offices was held on September 13.<sup>51</sup> Two days earlier, Hurricane Edna had struck the state with 80-mile-an-hour winds and eight inches of rain, causing widespread destruction and eight

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<sup>47</sup> Associated Press, "Hurricane-delayed election puts black woman in House," *New York Times*, 9 September 1992, p. A14.

<sup>48</sup> Thomas R. Lujan, "Legal Aspects of Domestic Employment of the Army," *Parameters*, U.S. Army War College, autumn 1997, p. 83. Troops were kept away even though the prohibition is for general and special elections, not specifically primaries. Also, it does not apply to National Guard troops under state control.

<sup>49</sup> *Ibid.*, p. 82.

<sup>50</sup> Telephone conversation with Dwayne D. Yoshina and Rex Quidilla, July 28, 2004.

<sup>51</sup> Maine did not change its election day to conform with the rest of the nation until 1960.

deaths.<sup>52</sup> Hurricane Edna had arrived two weeks after Hurricane Carol's 75-mile winds hit the state on August 31.<sup>53</sup>

The *New York Times* reported on the eve of the election that newspapers in Maine "were apprehensive" over impacts of the storm on the election. Turnout had been expected to be about 250,000 persons, but cleanup operations were expected to interfere with voting. Also there were widespread power outages in the more populous southern Maine towns and cities,<sup>54</sup> with many blocked roads and highways.<sup>55</sup>

Although widespread, the damage was apparently not serious enough to prompt suggestions to postpone the elections. Maine's early elections often engendered nationwide interest as commentators would speculate whether "as Maine goes" so would the nation. Thus, the *New York Times* reported that "newspaper editors, too, were apprehensive lest election returns would be delayed by interruptions in telephone service."<sup>56</sup> The storm's impact on turnout apparently was minimal because the combined vote in the gubernatorial election was more than 248,000.<sup>57</sup>

**Other Weather-related Election Delays.** Those found include events with localized and statewide impacts, for example:

- On November 5, 1965, Washington County Pennsylvania, suspended an election in eleven precincts because of flooding conditions.<sup>58</sup>
- New Jersey postponed school board elections in February 1978 because of a major snow storm.<sup>59</sup>

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<sup>52</sup> "Eight dead in Maine; losses enormous," *New York Times*, 13 September 1954, p. 13.

<sup>53</sup> John H. Fenton, "Hurricane pelts Maine candidates," *New York Times*, 1 September 1954, p. 23.

<sup>54</sup> "Eight dead in Maine," p. 13.

<sup>55</sup> John H. Fenton, "Voters of Maine go to polls today," *New York Times*, 13 September 1954, p. 1.

<sup>56</sup> Ibid.

<sup>57</sup> John H. Fenton, "Cross is blamed by Maine G.O.P.," *New York Times*, 15 September 1954, p. 22.

<sup>58</sup> "Pennsylvania court upholds emergency power to suspend, reschedule election." *Election Administration Reports*, 26 October 1987, p. 3.

<sup>59</sup> Joseph F. Sullivan, "Crews clearing Jersey highways battle in vain against driven snow," *New York Times*, 7 February 1978, p. 42.



- Elections were postponed in 49 counties by the Texas secretary of state in 1980 under the Governor’s emergency authority because of Hurricane Allen.<sup>60</sup>
- As a result of the extended clean-up effort required in the weeks after Hurricane Hugo, officials in Isle of Palms, South Carolina sought to delay the November 7, 1989 municipal elections.<sup>61</sup>

## Foreign Elections Sometimes Held Under Difficult Conditions

Research by CRS suggests that elections in other countries sometimes are held under conditions that might severely suppress turnout in the United States. Some examples of foreign elections held in difficult conditions are described below.

**Colombia 1990.** Colombians went to the polls in 1990, under a threat of violence from drug traffickers. Cesar Gaviria Trujillo, who ran on a strong anti-drug platform, was elected after a nine-month campaign in which three presidential candidates had been killed, and after numerous bombings in public places.<sup>62</sup>

**Peru 1991.** In 1992, the *New York Times* reported that Shining Path guerilla activities had resulted in formation of peasant militias to counter the Shining Path’s brutality. The *Times* reported that although the terrorists’ activities had “prevented valid elections from being held in 42% of Peru’s 498 electoral districts” in 1991, those districts accounted for only 7% of the country’s total population.<sup>63</sup>

**Cambodia 1993.** In the weeks preceding the Cambodian election in 1993, many observers anticipated widespread violence at the polls.<sup>64</sup> The six-day voting period, which began on May 23, was supervised by a 22,000-member U.N. peacekeeping force — reportedly the biggest peacekeeping operation in U.N. history.<sup>65</sup> On the eve of the first day of voting, an opposition party headquarters had been attacked with grenades, killing at least one man, prompting U.N. officials to warn that polling places might become the targets of the Khmer Rouge.<sup>66</sup> By the end of the voting period, the *New York Times* reported that the Khmer Rouge, who had opposed the election, had “surprised United Nations officials by delivering thousands

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<sup>60</sup> “Hurricane travels toward Texas coastline,” *New York Times*, 9 August 1980, p. 5.

<sup>61</sup> “South Carolina coast spared from new dangers,” *New York Times*, 18 October 1989, p. D28.

<sup>62</sup> James Brooke, “Strong drug foe wins in Colombia by a wide margin,” *New York Times*, 28 May 1990, p. A1.

<sup>63</sup> James Brook, “Roadblock on the Shining Path: angry peasants,” *New York Times*, 26 May 1992, p. A4.

<sup>64</sup> Philip Shenon, “Cambodia factions use terror tactics in crucial election,” *New York Times*, 10 May 1993, p. A1.

<sup>65</sup> Philip Shenon, “Hope and violence as Cambodian election begins,” *New York Times*, 23 May 1993, p. A1.

<sup>66</sup> *Ibid.*

of Cambodians from territory under the rebels' control to vote in at least three of the nine provinces in which they have a sizable presence."<sup>67</sup> Despite the threats of violence, the *Times* reported estimates that more than 90% of Cambodia's 4.7 million eligible voters had voted.<sup>68</sup>

**Bosnia 1996.** The Organization for Security and Cooperation in Europe (OSCE) postponed municipal elections in Bosnia twice in 1996 and once in 1997. The municipal elections set for September 14, 1996, were postponed "because of widespread irregularities in registration,"<sup>69</sup> but the general elections went on as scheduled under the supervision of the OSCE.<sup>70</sup> Municipal elections were again postponed in October 1996, "because of 'continuing political problems in municipalities across Bosnia,'"<sup>71</sup> and again in March 1997, "in order to better organize teams of international monitors and to raise additional money to pay for the election."<sup>72</sup> Bosnian municipal elections were held on September 13, 1997, under OSCE supervision and under the protection of NATO peacekeeping forces.<sup>73</sup>

**Taiwan, 1996.** China conducted a series of missile tests and joint army and naval exercises in March 1996, according to *New York Times* reporting, "to discourage aspirations for independence on [Taiwan] and to intimidate its 21 million people in the two weeks before its first presidential election."<sup>74</sup> Although there was no reported discussion of delaying the election, Beijing's military actions and communique were widely regarded to be an effort to influence Taiwanese voters.<sup>75</sup> During this period of elevated tension between China and Taiwan, the United States sent two aircraft carrier battle groups to the region.<sup>76</sup>

The New China News Agency announced that "from March 18 to 25, 1996, the Chinese People's Liberation Army will conduct joint ground, naval and air exercises

<sup>67</sup> "Khmer Rouge puzzle: softer strategy," *New York Times*, 28 May 1993, p. A3.

<sup>68</sup> Ibid.

<sup>69</sup> Mike O'Connor, "In one town, delaying Bosnia vote is bitter news," *New York Times*, 29 August 1996, p. A3.

<sup>70</sup> Chris Hedges, "Bosnia holds vote with few reports of real violence," *New York Times*, 15 September 1996, p. A1.

<sup>71</sup> Chris Hedges, "Bosnia municipal elections face new postponement as Serbs balk," *New York Times*, 23 October 1996, p. A1.

<sup>72</sup> Philip Shenon, "Municipal elections again postponed in Bosnia," *New York Times*, 7 March 1997, p. A4.

<sup>73</sup> Chris Hedges, "Bosnians vote, but animosity is unrelenting," *New York Times*, 14 September 1997, p. A1.

<sup>74</sup> Edward A. Gargan, "With Taipei vote two weeks away, Beijing steps up its pressure," *New York Times*, 8 March 1996, p. A1.

<sup>75</sup> Ibid.

<sup>76</sup> Seth Faison, "China says Taiwan election shows that voters oppose separation from the mainland," *New York Times*, 24 March 1996, p. A16.

in and over the sea area” in the northwest Taiwan Strait.<sup>77</sup> The *New York Times* reported on March 17, 1996 that “since the first missile landed just north of the Taiwanese port of Keelung, China has vilified ... [Taiwan President Lee Teng-hui], accusing him of harboring desires for independence and urging Taiwan’s voters to reject him in the voting booth.”<sup>78</sup> That strategy was apparently not successful, because Lee Teng-hui received 54% of the total votes cast in the election. The *Times* reported that “Beijing appeared to achieve the opposite of its intended result. Many Taiwan voters rallied to Mr. Lee, they said, precisely because China threatened so blatantly.”<sup>79</sup>

## Factors Governing Decisions to Postpone Elections

The domestic and international examples of elections that were either postponed, or held under difficult conditions, suggest there may be circumstances where a general election might be postponed in the United States. Congress, in theory, could exclude Members who had not been elected on the first Monday after the first Tuesday in November, through its Constitutional power to examine the credentials of its Members provided by Article 1 §5, cl. 1. Although there are examples of Members being seated who were elected in general elections held on days other than the day set by statute, no cases were found where Congress has failed to seat a delegation that was elected on a different day.<sup>80</sup>

Congress and the courts historically have allowed states some flexibility in conducting federal elections, despite uniform election day requirements. The following examples suggest that postponing an election for a catastrophic event would not necessarily lead to controversy.

**The Uniform Election Day in November.** When a uniform election day for Congress was established in 1872,<sup>81</sup> several states did not adhere to the new law. In 1878, a *New York Times* editorial listed West Virginia, North Carolina, California, and Colorado as states seeking exemptions to uniform election day requirement.<sup>82</sup> In 1875, Congress included a “grandfather” clause granting states a possible exemption from the uniform election day requirement in an omnibus appropriations

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<sup>77</sup> Patrick E. Tyler, “China says maneuvers will last through Taiwan’s elections,” *New York Times*, 16 March 1996, p. A5.

<sup>78</sup> Edward A. Gargan, “In Taiwan, few admit to worries about China,” *New York Times*, 17 March 1996, p. A4.

<sup>79</sup> “China says Taiwan election,” p. A16.

<sup>80</sup> See U.S. Congress, Senate Committee on Rules and Administration, *United States Senate Election, Expulsion and Censure Cases from 1793 to 1990*, Doc. No. 103-33, 103<sup>rd</sup> Cong., 1<sup>st</sup> session, by Anne M. Butler and Wendy Wolf, and *House of Representatives Exclusion, Censure and Expulsion Cases from 1789 to 1973*, Joint Committee on Congressional Operations, Committee Print, 92<sup>nd</sup> Cong., 1<sup>st</sup> session.

<sup>81</sup> 2 U.S.C. §7.

<sup>82</sup> Untitled Editorial, *New York Times*, 11 June 1878, p. 4.

act.<sup>83</sup> This provision apparently was the basis for Maine’s September general elections for Congress. The state adopted the November national election day in 1960.<sup>84</sup> The laws establishing the same November election day for appointing presidential electors had no similar exemptions for states with different election days.<sup>85</sup>

**Louisiana’s Open Primary.** Louisiana adopted a unique “open primary” system that became effective for the 1978 election. The open primary was held in October of general election years. All candidates, regardless of their party affiliation, appeared on the same ballot. If no candidate received a majority of the vote in a race, a run-off election was held between the two candidates receiving the most votes on the federal general election day in November. This Louisiana practice ended in 1997, by court, not congressional, action.

In 1997, a unanimous U.S. Supreme Court held that Louisiana’s open primary violated the law requiring congressional elections to be held on the national election day.<sup>86</sup> In *dicta*, however, Justice Souter’s opinion for the court appeared to recognize a state might be permitted to deviate from the requirements in some circumstances. A footnote provides that “this case thus does not present the question of whether a State must always employ the conventional mechanics of an election. We hold today only that if an election does take place, it may not be consummated prior to a federal election day.”<sup>87</sup>

**Early Voting.** State and federal law has long provided for voting before the national uniform federal election day for voters who expect to be absent on election day, citizens residing outside the United States, and U.S. armed services personnel. The requirements for obtaining absentee ballots have become very easy in many states in recent decades.

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<sup>83</sup> See “An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and seventy-six, and for other purposes,” 18 Stat. 371. Section 6 provides, “that section twenty-five of the Revised Statutes prescribing the time for holding elections for Representatives to Congress, is hereby modified so as not to apply to any State that has not changed its day of election, and whose constitution must be amended in order to effect a change in the day of the election of State officers in said State.” 18 Stat. 400.

<sup>84</sup> “Maine elects to go with rest of nation,” *New York Times*, 10 September 1957, p. 1.

<sup>85</sup> 5 Stat. 721 provides “that the electors of President and Vice President shall be appointed in each State on the Tuesday next after the first Monday in the month of November of the year in which they are to be appointed: *Provided*, That each State may by law provide for the filling of any vacancy or vacancies which may occur in its college of electors when such college meets to give its electoral vote: *And provided, also*, when any State shall have held an election for the purpose of choosing electors, and shall fail to make a choice on the day aforesaid, then the electors may be appointed on a subsequent day in such manner as the State shall by law provide.”

<sup>86</sup> *Foster v. Love*, 522U.S. 67 (1997).

<sup>87</sup> *Ibid*, note 4.

For example, voters in Oregon approved a ballot measure in 1998 directing elections to be conducted by mail, replacing traditional polling-place elections. Ballots are automatically sent to each registered voter two weeks prior to an election. The ballots can be returned by mail or in person, but they must be received by 8:00 pm on election night.<sup>88</sup> In Oregon, therefore, the November general election date is the *end* of an election period, not a single day as envisioned in federal law. Oregon is the only state that has essentially eliminated the traditional precinct-based polling place, but most states have liberalized their laws so voters may vote early if they choose to do so.

Early voting often incorporates a combination of liberal absentee voting regulations, which allow voters to request absentee ballots without meeting specific requirements such as absence from home, with special polling places (often open for many days) that may include traditional polling places, such as schools, as well as nontraditional locations, including shopping malls.

The Texas early voting program was challenged in 2000 as a violation of the uniform election day statute (2 USC §7). The Voting Integrity Project, Inc. and several Texas registered voters had failed to convince a U.S. District Court that Texas's practice permitting unrestricted early voting in federal elections was preempted by general election day requirements of federal law. The U.S. Court of Appeals for the Fifth Circuit concluded, "because the election of federal officials in Texas is not decided until Texas voters go to the polls on federal election day, we conclude that the Texas early voting scheme is not inconsistent with federal election laws."<sup>89</sup> Certiorari was denied when the case was appealed to the U.S. Supreme Court.<sup>90</sup>

**A Federal Election May Be Postponed Because of the Voting Rights Act.** Although completing the election process before the November general election day has not found favor in the courts, under certain circumstances, courts have recognized that a federal general election may be postponed. In 1981, the state of Georgia adopted a congressional redistricting plan that was not sanctioned by the U.S. Attorney General pursuant to §5 of the Voting Rights Act.<sup>91</sup> The state's revised redistricting plan was eventually approved, but the approval came so late in 1982 that the Attorney General objected to the election schedule because it would not allow the parties to field candidates who would have enough time "for voters 'to make a reasoned selection among candidates' [thus the schedule] 'would impact unfairly on black voters of the Atlanta area.'"<sup>92</sup>

The scheduling problem was still unresolved when the matter came before the U.S. District Court for the District of Columbia on August 24, 1982 — ten weeks

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<sup>88</sup> Secretary of State Bill Bradbury, *Voting in Oregon*, [Pamphlet] 10 February 2000.

<sup>89</sup> *Voting Integrity Project v. Bomer*. 199 F.3d 773, 774 (5th Cir. 2000).

<sup>90</sup> Cert. denied, *Voting Integrity Project v. Bomer*. 199 F.3d 773, 774 (5th Cir. 2000), 530 U.S. 1230, (2000).

<sup>91</sup> 42 U.S.C. §1973c.

<sup>92</sup> *Busbee v. Smith*, 549 F. Supp. 521 (1982).

before the general election scheduled for November 2, 1982. Georgia had argued that 2 U.S.C. §7 required the state to adhere to the uniform national election day, so a primary had been scheduled for the Atlanta congressional districts (numbers 4 and 5) for August 31, with the general election to follow on November 2

The District Court rejected Georgia’s argument, because (1) the provisions of the Voting Rights Act would prevail because it was enacted later than the statute setting a uniform election day; and (2) 2 USC §8 recognized that there might be a failure to elect a Representative on the prescribed general election day because, there might be “a vacancy, *whether such vacancy is caused by a failure to elect at the time prescribed by law*, or the by the death, resignation, or incapacity of a person elected [emphasis in §8 excerpt added by the District Court].”<sup>93</sup> The District Court opined that “although the 42<sup>nd</sup> Congress could not have anticipated 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>94</sup> The case, *Busbee v. Smith*, was appealed to the U.S. Supreme Court, which affirmed the district court’s decision without an opinion.<sup>95</sup>

In contrast to Justice Souter’s *dicta* in *Foster v. Love*, 522 U.S. 67 (1997), noted above, recognizing the possibility that there might be circumstances where states might deviate from the “conventional mechanics” of the electoral process, the district court’s *dicta* 15 years earlier more specifically addressed the possibility of postponing elections for disasters. Judge Edwards noted “by way of analogy, 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>96</sup>

**The Civil War Amendments.** Implementation by Congress of the 14<sup>th</sup> and 15<sup>th</sup> Amendments provides examples of its reluctance to entertain credential challenges to state delegations because state laws or practices may violate federal law. Section 2 of the 14<sup>th</sup> Amendment has an enforcement provision that, had it been used, might have significantly changed civil rights history in America. Section 2 provides, in part:

When the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, *the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State* [emphasis added].

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<sup>93</sup> Ibid., p. 525.

<sup>94</sup> Ibid., p. 526.

<sup>95</sup> 459 U.S. 1166 (1983).

<sup>96</sup> *Busbee v. Smith*, p. 526.

Despite the disenfranchisement of African Americans in the South after Reconstruction, no state ever had its representation in the House of Representatives reduced by this provision.<sup>97</sup> Congress eventually enacted the Voting Rights Act of 1965 to address the disenfranchisement of African Americans that occurred in the region during the last quarter of the 19<sup>th</sup> century and continued until the 1960s.<sup>98</sup>

## Concluding Observations About Election Postponement

The presumption that elections are held on schedule in the United States is a strong one. The fact that federal elections were held in the United States during the Civil War,<sup>99</sup> and every other war, declared or undeclared, since that time is often cited as a rationale for the principle that federal elections should not be postponed. The postponements discussed above suggest, however, that there are events that may cause election administrators to consider interrupting or postponing a general election regardless of that presumption. These include peril to life and extensive damage to infrastructure. The examples suggest that if a state or locality decided that a catastrophe required the interruption or postponement of the general election for the Presidency and Congress, Congress would tend to accept the delay, so long as the rescheduled elections were held before the date in December when the electoral college casts its ballots, and the beginning of the next Congress, respectively. If a catastrophic event were to occur on election day, state and local officials in the affected areas might do as the Suffolk County New York elections officials did on September 11, 2001. They could “decide ... this [is] the right thing to do,”<sup>100</sup> and postpone the election.

Reliance on modern technology may make elections potentially more vulnerable to disruption today than in the past. When Hurricane Dora struck Georgia in 1964, the *New York Times* reported that “voters finished casting ballots in the Georgia primary election by the light of hand flashlights.”<sup>101</sup> Maine’s voters were able to cast ballots in the 1954 general election even though there were widespread power outages. Hand-counted paper ballots and lever machines require no electricity. Today’s electronic voting systems may fail without a reliable electrical supply — even though most have battery back-ups. Electricity is also used for counting ballots and performing other election-administration tasks. For example, an estimated 80% of votes in 2004 will be counted with the aid of computers. Thus, a major

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<sup>97</sup> An effort to not seat the entire Mississippi delegation, because of the disenfranchisement of African American voters, failed at the beginning of the 89<sup>th</sup> Congress when the House adopted H.Res. 1, providing for administering the oath to the Mississippi Representatives. An election contest based on the same premise also did not succeed. See U.S. Congress, House, *Deschler’s Precedents*, H. Doc. 94-661, 94<sup>th</sup> Cong., 2<sup>nd</sup> session, vol. 2, Chapt. 8 §5.6, p.864.

<sup>98</sup> Congress implemented this section of the 14<sup>th</sup> Amendment in 1872. See 2 U.S.C. §6.

<sup>99</sup> However, federal elections were held only in states that had not sought to secede from the Union.

<sup>100</sup> Brand, “Primary vote postponed.”

<sup>101</sup> Associated Press, “Hurricane lashes two Florida cities,” *New York Times*, 10 September 1964, p. 1.

interruption of the electrical power in a state or region may require the postponement of an election, depending on when the outage occurred, how long it lasted, and what voting systems were in use. The relative size of the electorate underscores the reliance on technology, as large numbers of voters could be affected by technology failures, and voting by paper ballot may no longer be an option in densely population areas. In 1952, about 62 million voters cast ballots in the presidential contest compared with 105 million in 2000; the transition to faster, more efficient voting methods was driven largely by the growth of the electorate, as well as longer ballots (initiatives and referenda, for example), language requirements, and the desire for speed in reporting results.

## Security at the Polling Place

There are about 180,000 voting precincts in the United States.<sup>102</sup> Just as elections are administered by state and local governments, it is also generally the responsibility of those governments to provide security at the polling places for those precincts.

The use of the military for domestic purposes has been a concern since the colonial period. After the Civil War, laws were enacted limiting the role of U.S. military forces in domestic activities. The best known is the Posse Comitatus Act of 1878.<sup>103</sup> However, a law enacted a decade earlier, in 1865, specifically prohibits the use of the military at the polls except in the event of an attack:

Whoever, being an officer of the Army or Navy, or other person in the civil, military, or naval service of the United States, orders, brings, keeps, or has under his authority or control any troops or armed men at any place where a general or special election is held, unless such force be necessary to repel armed enemies of the United States, shall be fined under this title or imprisoned not more than five years, or both; and be disqualified from holding any office of honor, profit, or trust under the United States. This section shall not prevent any officer or member of the armed forces of the United States from exercising the right of suffrage in any election district to which he may belong, if otherwise qualified according to the laws of the State in which he offers to vote.<sup>104</sup>

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<sup>102</sup> Data are from the Election Reform Information Project [<http://www.electionline.org>] and Election Data Services [<http://www.electiondataservices.com>]. The number of precincts is not identical to the number of polling places. In particular, in some cases, more than one precinct may be accommodated by a single polling place.

<sup>103</sup> For more information, see Jennifer Elsea, *The Posse Comitatus Act and Related Matters: A Sketch*, CRS Report RS20590, 19 May 2003; and (name redacted) *The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law*, CRS Report 95-964, 1 June 2000.

<sup>104</sup> 18 USC §592. The original statute also permitted military personnel to “to keep peace at the polls” (13 Stat. 37). Military and civilian government employees are also expressly prohibited from interfering in elections by other sections of this title (18 USC §§593 — 595).



Whether this statute applies to the National Guard, as well as federal troops, may depend on whether Guard units are serving under the authority of state Governors or the President.<sup>105</sup>

State and local laws regarding police at polling places vary. For example, in Pennsylvania, police are required to remain at least 100 feet from a polling place unless summoned.<sup>106</sup> By contrast, in New York City, at least one police officer is assigned to each polling place.<sup>107</sup> Public opinion regarding police presence also varies, with some tension between those who believe that it enhances security and therefore facilitates voting, and those who believe that it can intimidate voters and suppress turnout.

To assist states in security planning in the context of the terrorist threat, the National Association of Secretaries of State and the National Governors Association, in collaboration with other organizations and consultation with the U.S. Department of Homeland Security (DHS), have prepared a general guide for state election-security planning.<sup>108</sup> It recommends that states create a planning team consisting of key policymakers with security, response, and election responsibilities. The team should identify reactions to a range of scenarios, including the current situation, raised threat levels, and incidents both before and on election day. Contingency plans for those scenarios should address specific issues relating to communication and coordination, authority and responsibility, and public information. The authors stress that such planning is important not only with respect to possible terrorist attack, but also in the event of natural disasters impacting the election.

The question of the level of risk of terrorist attack associated with the November 2 election has been the subject of some controversy.<sup>109</sup> The reactions of state and local officials have varied, with some intending to make as few visible changes as possible and others planning to increase police presence or even move polling places.<sup>110</sup>

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<sup>105</sup> Doyle, CRS Report 95-964, p. 41 — 43.

<sup>106</sup> 25 P.S. § 3047.

<sup>107</sup> NY [Elections] LAW § 8-104(6).

<sup>108</sup> National Association of Secretaries of State and others, *Overview: Election Security Planning for States*, 24 September 2004, available at [<http://www.nass.org/Security%20Planning%20Guide.pdf>].

<sup>109</sup> See, for example, Spencer S. Hsu and Jo Becker, “Election Day Anti-Terrorism Plans Draw Criticism,” *Washington Post*, 6 October 2004; David Johnston and Don Van Natta, Jr., “Little Evidence of Qaeda Plot Timed to Vote,” *New York Times*, 23 October 2004.

<sup>110</sup> Jason B. Grosky, “Town May Cut Most Polling Places,” *The Eagle-Tribune*, 22 September 2004; Kevin Johnson, “Election Warning Causes Anxiety,” *USA Today*, 7 October 2004, p. A12; Michael D. Shear, “Terror Threat Complicates Election Plans in Region,” *Washington Post*, 15 October 2004, p. A1.

## Impact of Early and Absentee Voting

An increasing number of states permit voters to cast ballots in person before election day (early voting) or to mail in ballots (absentee voting) without providing a specific, approved reason (this is sometimes called “no excuse” voting).<sup>111</sup> Increasing numbers of voters have been casting ballots using these alternative systems in recent elections, and that trend is expected to continue. Use of them can mitigate concerns about security, in at least two ways. First, it can reduce the impact on the election of any attack or other emergency that would affect polling places. For example, Oregon votes entirely through mail-in balloting, so there are no polling places to attack.<sup>112</sup> Second, to the extent that it reduces the number of voters who go to the polls, it can make providing security for them much easier. It is not clear whether security concerns among voters will cause higher numbers than usual to use these alternative methods in the current and future elections.

## Options for Congress

Whether Congress considers taking any actions to enhance election security may depend to significant degree on events associated with the November 2004 election or elections in other industrialized nations. However, some observers argue that even in the absence of any immediate problems, consideration of legislative options would be prudent given both the likelihood that concerns about terrorist attacks will continue and that natural disasters are always possible on or near election day, among them weather events such as major storms, and earthquakes or volcanic eruptions. Among the options Congress might consider are the following:

**Take No Action.** State and local jurisdictions, after all, have primary responsibility for elections under the U.S. system of government. While HAVA gives the federal government some specific responsibilities in election administration, it gave the new agency it created, the EAC, no regulatory authority. As described in this report, states already have considerable authority to provide security for elections and to postpone them if necessary. HAVA also arguably concentrates responsibilities for election administration at the state as opposed to the local level of government. In the absence of specific problems requiring a federal solution, it may be most appropriate to not attempt to modify those responsibilities.

It can also be argued that a decentralized approach enhances security in that it can make targeting by terrorists more difficult and provide a broader range of defenses than a centralized approach. In addition, Congress could respond to any specific emergency after the fact, as New York state did after September 11, 2001,

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<sup>111</sup> According to the Election Reform Information Project, 35 states currently practice early voting, and 25 permit “no excuse” absentee voting, with 23 providing both (electionline.org, *Election Preview 2004: What’s Changed, What Hasn’t, and Why*, 19 October 2004, [<http://www.electionline.org/site/docs/pdf/2004.Election.Preview.Final.Report.pdf>]).

<sup>112</sup> Presumably, counting locations could still be targets, but they are generally not public areas and would be much easier to secure.

and that might permit the most effectively tailored response. However, a decentralized approach can itself create problems in at least two ways. First, the resultant diversity of procedures can lead to variations in vulnerability that potential attackers might identify and exploit. Second, it can make effective coordination more difficult in the event of a national emergency related to an election.

**Delegate Authority for Safeguarding Elections to the Executive Branch.** As discussed earlier, Congress may be able, within constitutional limits, to delegate authority to the executive branch to postpone an election in response to an emergency. Further, Congress could direct the executive branch to assist states in providing security for elections through the EAC, DHS, or even the military. However, since security of the polling places has traditionally been controlled by state and local authorities, the degree to which the Constitution would allow Congress to direct or supplant these functions may be at issue. To the extent such actions are constitutionally permissible, they could create the capability of quick, decisive response in the case of a threat or attack. However, such an approach would likely also raise concerns about the risk of politicization of such actions and the concentration of executive power over a central component of the machinery of democracy.

**Treat Security as an Aspect of Continuity of Government.** Some observers have proposed that elections are essentially an element of critical government infrastructure and as such should be considered as part of the developing framework to ensure continuity of government (COG) and continuity of operations (COOP) in the event of a crisis or emergency.<sup>113</sup> However, so far, election administration has been at best a peripheral element of legislative discussion about such a framework.

**Provide Mechanisms for Improved Coordination among States on Election Security.** The guidelines issued by the National Association of Secretaries of State and other organizations urge coordination within states and between individual states and the federal government. One option for congressional action would be to provide either the EAC or DHS with specific capability and responsibility to facilitate coordination among states on election security, without providing authority to the agency for such security. In the case of the EAC, such capability would presumably be in keeping with the Commission's current responsibilities as a clearinghouse for information about election administration.

**Encourage Early Voting and Absentee Voting.** If all ballots in the United States were cast by mail, there would of course be no need for polling place security. If the time over which votes are cast were sufficiently spread out, the potential for impact of a specific event on an election would be lower. Since both these forms of voting are increasing in the United States, Congress might consider

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<sup>113</sup> For information about COG and COOP, see (name redacted), *Continuity of Operations (COOP) in the Executive Branch: Background and Issues for Congress*, CRS Report RL31857, 31 March 2004; and (name redacted), *Continuity of Government: Current Federal Arrangements and the Future*, CRS Report RS21089, 3 June 2004.

encouraging that increase to facilitate election security. However, these methods of voting are not without problems. Some argue that early voting can significantly change the nature of elections by effectively spreading election day over several weeks. Such changes, some say, may not be beneficial in sum. Absentee balloting has also been criticized as being more vulnerable to fraud and abuse than voting in person. Nevertheless, such concerns might be addressed through measures targeted to meet them.

None of the options discussed above appears to be without potential problems and concerns. The 109th Congress may chose to examine these issues more closely to determine what, if any, legislative action should be taken.

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