

Testimony of Daniel P. Tokaji

“The Elections Clause: Constitutional Interpretation and Constitutional Exercise”

Committee on House Administration

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It is an honor and a pleasure to have the opportunity to speak with you today about Congress’s power under the Elections Clause of Article I, Section 4 of the U.S. Constitution. My name is Daniel P. Tokaji, and I am the Fred W. & Vi Miller Dean and Professor of Law at the University of Wisconsin Law School, a position I have held since August 1, 2020. Before that, I was a law professor at The Ohio State University Moritz College of Law for 17 years. At Ohio State, I was the Charles W. Ebersold & Florence Whitcomb Ebersold Professor of Constitutional Law from 2014 until 2020, and Associate Dean for Faculty from 2018 until 2020. My C.V. is being submitted with this written testimony.

My primary area of research is Election Law, with a special focus on voting rights, electoral institutions, and democratic inclusion. I have published over 50 law review articles and other scholarly papers on these and related subjects. I am also co-author of *Election Law: Cases and Materials* (6th ed. 2017), and the author of *Election Law in a Nutshell* (2d ed. 2016). One of the topics of my research is the scope of Congress’s power under the Elections Clause of Article I, Section 4 of the U.S. Constitution. I teach courses in the fields of Election Law, Constitutional Law, Legislation and Regulation, and other areas. This testimony is offered solely on my own behalf, with my institutional affiliations provided for the purpose of identification only.

The subject of this hearing is the scope of Congress’s authority under the Elections Clause. In a word – one the U.S. Supreme Court has repeatedly used for 142 years – Congress’s power over congressional elections is “paramount.” *Ex Parte Siebold*, 100 U.S. 371, 384, 385, 386, 388 (1879). Under the unambiguous text of the Elections Clause and a long line of Supreme Court precedent, Congress has broad plenary authority to regulate the time, place, and manner of congressional elections. The most recent example is Justice Scalia’s opinion for seven justices in *Arizona v. Inter Tribal Council of Arizona* (“*ITCA*”), which reaffirmed the “broad” and “comprehensive” scope of the Elections Clause power. 133 S. Ct. 2247, 2253 (2013) (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)). As Professor Derek Muller puts it: “It is left purely to Congress’s discretion as to whether, and how, to regulate the time, places, and manner of elections.”¹ Congress may choose to take over regulation of this area entirely, to leave regulation to the states, or to have some combination of federal and state regulation of congressional elections,² as it has done throughout most of the nation’s history.

The remainder my testimony will provide background on what the Elections Clause means and how it has been construed by the Supreme Court. My testimony focuses primarily on judicial interpretations of the Elections Clause, mostly leaving the history of its adoption and congressional interpretations for others to address.

Before turning to judicial precedent, it is helpful to examine the text and purpose of the Elections Clause. Article I, Section 4, Clause 1 of the Constitution states:

¹ Derek Muller, *The Play in the Joints of the Election Clauses*, 13 ELECTION L.J. 310, 312 (2014).

² *Id.*

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Elections Clause thus allows states to prescribe rules for the conduct of congressional elections “only so far as Congress declines to preempt state legislative choices.” *Foster v. Love*, 522 U.S. 67, 69 (1997). The main reason for giving Congress broad power to “make or alter” rules governing congressional elections was to ensure that the states could not undermine the nascent national government. As Justice Scalia explained for the Court in *ITCA*: “This grant of congressional power was the Framers’ insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress.” 133 S. Ct. at 2253. Quoting the *Federalist Papers*, the Court observed that the federal government must be given “the means of its own preservation,” without which its existence would be at the mercy of state legislatures that “could at any moment annihilate it by neglecting to provide for the choice of a person to administer its affairs.” *Id.* (quoting *The Federalist No. 59*, 362-63 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). The Elections Clause was thus driven in part by a distrust of state lawmakers, as well as the Framers’ concern that Congress be a genuinely representative assembly.³

Congress has exercised its broad power to regulate federal elections on numerous occasions since the Constitution became the supreme law of the land. The 1842 Apportionment Act, requiring states to elect their congressional representatives from single-member districts, was an early exercise of Congress’s authority to displace state laws.⁴ After the Civil War, Congress exercised its constitutional authority under the Elections Clause to adopt the Enforcement Acts of 1870 and 1871, which protected the voting rights of recently freed African Americans.⁵ In more recent years, Congress has relied on its Elections Clause power to enact the National Voter Registration Act of 1993 (“NVRA”) and the bipartisan Help America Vote Act of 2002 (“HAVA”).⁶

The Supreme Court has consistently confirmed Congress’s broad and comprehensive authority to regulate congressional elections under Article I, Section 4 of the Constitution.⁷ In *Ex Parte Siebold* (1879), the Court repeatedly characterized Congress’s power over federal elections as “paramount,” in upholding provisions of the Reconstruction-era Enforcement Acts that regulated federal elections. 100 U.S. at 384, 385, 386, 388. Defendants in *Siebold* had been convicted of violating state laws in connection with a Maryland congressional election. In upholding Congress’s power to make violations of state law a federal offense, the Court declared that “Congress has plenary and paramount jurisdiction over the whole subject” of regulating congressional elections. *Id.* at 388. Of Congress’s authority over congressional elections, the Court wrote:

³ Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3873499.

⁴ Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 BOSTON U. L. REV. 317, 345-46 (2019).

⁵ *Id.* at 358-59.

⁶ Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 YALE L.J. FORUM 171, 177 (2019), available at <https://www.yalelawjournal.org/forum/the-elections-clause-and-the-underenforcement-of-federal-law>.

⁷ Nicholas Stephanopoulos, *The Sweep of the Electoral Power*, CONST. COMMENT. (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3715826.

It may be exercised as and when Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them. This is implied in the power to ‘make or alter.’

Id. at 384. Both the states and Congress can make laws on the subject, but the “paramount character” of congressional legislation on the subject means that state laws must give way to federal law. *Id.* at 386. *See also Ex Parte Clarke*, 100 U.S. 399, 403-04 (1879) (Congress had constitutional power to enact a law punishing state election officers for violating their duties under state laws with respect to a congressional election).

The Court has repeatedly affirmed the broad scope of Congress’s power to regulate congressional elections in the fourteen-plus decades since *Siebold*. In *Smiley v. Holm* (1932), the Court reiterated the expansive scope of congressional power under the Elections Clause, identifying examples of the topics over which federal election legislation may extend:

It cannot be doubted that these comprehensive words embrace authority to provide a *complete code for congressional elections*, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. And these requirements would be nugatory if they did not have appropriate sanctions in the definition of offenses and punishments. All this is comprised in the subject of ‘times, places and manner of holding elections,’ and involves lawmaking in its essential features and most important aspect.

285 U.S. 355, 366 (emphasis added). Although the greater constitutional power does not always include the lesser, it does here. As *Smiley* explained, Congress’s authority to “provide a complete code for congressional elections” embraces the power to regulate some aspects of those elections while leaving others to the states. Because Congress has “general supervisory power over the whole subject” of congressional elections, it may choose either to add to existing state regulations or to “substitute its own” for those enacted by states. *Id.* at 366-67 (quoting *Siebold*, 100 U.S. at 387).

Congress’s power under Article I, Section 4 includes primary as well as general elections. For a brief period in the early 20th Century, the Court understood the Elections Clause power *not* to reach primary elections, on the rationale that primaries were unknown to the Framers. Thus, in *Newberry v. United States*, 256 U.S. 232, 250, 258 (1921), the Court held that the Federal Corrupt Practices Act’s limitation on disbursements in congressional primary elections lay outside that power. That interpretation of the Elections Clause, however, was overruled two decades later in *United States v. Classic*, 313 U.S. 299 (1941). If the Elections Clause power did not extend to primary elections, the *Classic* Court reasoned, then Congress would be “left powerless to effect the constitutional purpose.” *Id.* at 319. Because primary elections are “a necessary step” in choosing members of Congress, they lie within the scope of the Elections Clause power. *Id.* at 320.

Although Congress’s power under the Elections Clause is exceptionally broad and deep, it is not unlimited. The authority to prescribe rules for the time, place, and manner of congressional elections does not encompass “the power to dictate election outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.” *U.S. Term Limits v. Thornton*, 514 U.S. 779, 833-34 (1995). Accordingly, the Court in *U.S. Term Limits* struck down a state law that precluded people who had served a prescribed number of terms in Congress from having their names put on the ballot in subsequent congressional elections. *Id.* at 835. Nor could a state disfavor congressional candidates who declined to

support term limits, by requiring a notation of that position on the ballot. *Cook v. Gralike*, 531 U.S. 510, 524-26 (2001). The authority to regulate the process by which congressional elections are conducted does not allow states to impose term limits or to disfavor candidates because of their position on a particular issue. Although *U.S. Term Limits* and *Cook* both involved the power of *states* (not Congress) the logic of these decisions suggests that this limitation would apply to comparable federal legislation.

The Court's most recent – and arguably most important – explication of the Elections Clause's scope is Justice Scalia's majority opinion in *Arizona v. ITCA*. That case concerned a provision of the NVRA requiring that state's "accept and use" a uniform federal registration form. Arizona argued that this provision should be interpreted narrowly, so as to allow the state to impose a proof-of-citizenship requirement that the federal form did not require. 133 S. Ct. at 2254. Arizona further argued that, without this narrowing construction, the NVRA would exceed Congress's authority under the Elections Clause. *Id.* at 2257. The Court rejected this argument, noting that the usual presumption against federal pre-emption of state laws does *not* apply to legislation enacted under the Elections Clause. As Justice Scalia explained, "[t]here is good reason for treating Elections Clause legislation differently" from laws enacted under other constitutional powers. *Id.* at 2256. When Congress legislates under the Elections Clause, "it *necessarily* displaces some element of a pre-existing legal regime erected by the States." *Id.* at 2257 (original emphasis). In addition, the federalism concerns that arise when Congress pre-empts state are not as strong when Congress regulates congressional elections. *Id.* While states historically enjoyed broad police powers over other matters, their regulation of congressional elections has always been subject to congressional revision or reversal. *Id.* The *ITCA* Court thus reaffirmed Congress's "paramount" authority to regulate congressional elections, whether by providing for a complete federal code governing those elections or by selectively overriding state laws. *Id.* at 2253-54.

Under these precedents, Congress enjoys broad plenary authority to regulate congressional elections under Article I, Section 4. That said, there is one significant area as to which there remains some uncertainty as to the scope of congressional power vis-à-vis the states. While the Elections Clause gives Congress broad power to regulate the *time, place, and manner* of conducting congressional elections, it does not say that Congress may determine the qualifications for voting in those elections. Under the Qualifications Clauses of Article I, Section 2 and Article I, Section 3 (as amended by the Seventeenth Amendment), voters in congressional elections are to have the qualifications for voting in the larger chamber of the state legislature. As a general matter, then, states determine the qualifications for voting in congressional elections, while Congress has the ultimate power to determine the rules governing the time, place, and manner of those elections.

The difficult question is where Congress' power to set time, place, and manner regulations ends and the states' power to set qualifications begins. In *ITCA*, the majority noted that it would raise "serious constitutional doubts if a federal statute precluded a State from obtaining information necessary to enforce its voter qualifications." 133 S. Ct. at 2258-59. The NVRA did not raise such doubts, since states still had the means to ensure that their qualifications were enforced. *Id.* at 2259. So *ITCA* does not definitively resolve the tension between Congress's power to dictate the time, place, and manner of federal elections and states' power to set qualifications. But it does suggest that constitutional tension would arise if and only if a federal law sought to displace a state rule that are "necessary" to enforce state-prescribed qualifications.

That in turn raises the question: What exactly is a qualification? As Professor Muller has explained, a "qualification" is "generally tethered to some concept of who may participate in the political

process, such as capacity or responsibility.”⁸ Thus, requirements that voters be of a certain age, have the requisite mental capacity, or be citizens are qualifications. On the other hand, registration and identification requirements are not qualifications, though they may be “means of enforcing qualifications.”⁹ It bears emphasis that serious constitutional questions would arise only if federal law purports to displace a state rule that is *necessary* to enforce qualifications. So long as states can enforce their qualifications through other means without running afoul of federal law, there is no conflict between Congress’s Elections Clause power and states’ general authority to set qualifications for voting.

In sum, Supreme Court precedent confirms that the Elections Clause means what it says. Congress has broad power to “make or alter” rules governing the time, place, and manner of congressional elections. That includes the authority to override specific state election laws, or to write a comprehensive code governing the entire process for conducting congressional elections. States generally have authority to set qualifications for voting in state legislative elections, which in turn presumptively determine who can vote in congressional elections. But federal laws governing the process for conducting congressional elections fall squarely within the scope of the Elections Clause power, and a serious constitutional question in this realm would arise only if Congress attempted to pre-empt a state rule that is “necessary” to enforce qualifications. While I do not address specific legislative proposals in this written testimony, I would be happy to answer any questions that committee members might have and look forward to discussing this important topic with you.

⁸ Muller, *supra* note 1, at 316 n.82.

⁹ *Id.* See also Daniel P. Tokaji, *Responding to Shelby County: A Grand Election Bargain*, 8 HARVARD L. & POL’Y REV. 71, 106 (2014), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2387516.