Constitutionality of S.213: A Bill Providing for Ranked Choice Voting for Military and Overseas Voters in Presidential Primary Elections

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February 1, 2018

I. Introduction

My name is Peter Teachout. I am a Professor of Constitutional Law at Vermont Law School. I am here today to testify on constitutional aspects of S.213, a bill which would authorize and direct the Secretary of State to prepare and distribute special "Ranked Choice" early voting ballots for military and overseas Vermont voters in presidential primary elections "to rank their choice of candidates in case a candidate withdraws by the time of the primary." For reasons set out below, it is my judgment that the bill as proposed presents no serious constitutional problems and, if challenged, would likely be upheld by the courts.

II. Purpose and Limited Application of the Proposed Bill

A. Purpose of S.213

Federal law requires states to provide their military and overseas voters with ballots at least 45 days before any federal election. Compliance with this 45-day requirement can pose problems in two circumstances.

First, in states that require runoff elections in case no candidate receives a majority of the votes, new ballots need to be printed and distributed for the runoff election if one is required. Printing and distributing new ballots to overseas voters in advance of the runoff election would require great delay and make compliance with the 45-day requirement virtually impossible.

Second, if between the time the original ballots are distributed and the primary election is held in a particular state, one or more of the candidates listed on the original ballot drops out, the overseas voter might cast a vote for a candidate no longer in the running and that vote would not be counted. Since primary elections for President are staggered in this country, it is not uncommon for candidates who do poorly in the early primaries to drop out before subsequent primaries are held. In this case, the overseas voter would be placed at a disadvantage to the local voter who is in a position to cast his or her vote for just those candidates still remaining in the race.

Since ranked choice voting allows the overseas voter to indicate his or her second and third choices according to order of preference, ranked choice voting ensures that the votes of military and overseas voters will be counted even if their first choice candidate drops out of the race before the state's primary is held. It equalizes as it were the voting advantage and influence of remote and local voters.

In response to the problems identified above, at least five states have used ranked choice ballots for military and overseas voters for various state and federal elections. In states that require runoffs in case no candidate receives a majority of the votes, normally two ballots are distributed to the overseas voter: a standard ballot, on which voters select one candidate as in regular elections; and a "ranked ballot," which allow voters to rank as many candidates as they want in order of preference. If a runoff is not required, only the first ballots are counted. But if a runoff election is required, the "ranked ballots" are opened and the vote counted for the highest ranked candidate competing in the runoff. The experience of these states with use of ranked choice ballots for overseas voters has generally been successful.

Where runoff elections are not required by state law, and the problem is that one or more candidates on the original ballot drop out before the primary, the distribution of two separate ballots is not necessary. In that case, distributing ranked choice ballots in the first instance helps ensure that the votes of overseas and military voters will be counted. It serves to place the remote voters on an equal footing in this respect with local voters who are in a position to cast votes only for those candidates still remaining in the race.

B. Limited Application of S.213

It is important to note, and constitutionally significant, that S.213 would require distribution of ranked choice early voting ballots to military and overseas voters only for primary elections of the President of the United States. Since election to federal office is involved, the constitutionality of the measure is governed by federal, not state, constitutional law.

Second, considering the ranked choices of overseas and military voters would come into play only "in case a candidate withdraws by the time of the primary." If there is no withdrawal, the overseas voter's primary vote will be counted exactly the same as a local voter's. In that case, there would be no consideration of, or weight given to, the overseas voter's second or third (or other ranked) choices.

III. Constitutional Requirements

A. Article II, Section 1, Paragraph 2:

The most directly relevant provision in the U.S. Constitution governing elections of the President is Article II, authorizing states to appoint Electors to the Electoral College. Under the Constitution, the President is not elected by popular vote, but rather by majority vote of Electors appointed to the Electoral College. How those Electors are to be appointed is provided in Article II, Section 1, Paragraph 2:

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed as an Elector."

As this provision makes clear, state legislatures have almost unlimited discretion in determining how the states' Electors are appointed. Both the appointment of the Electors and directives as to how they are to cast their votes in the Electoral College are matters left to the discretion of the states.

This is a point that needs to be stressed. The U.S. Constitution does not require that the electors from a state cast their votes for the candidate who has received the most votes in the state. It is illustrative to note in this respect that Vermont has entered a compact with other states agreeing that, when the compact becomes effective, the Electors from Vermont will cast their votes for the candidate for President who receives the most popular votes nationally, whether or not that candidate received the most votes in the State of Vermont. The compact is not yet effective; it will become effective once the states entering the compact together hold a majority of electoral votes (270 of 538). But this should suffice to illustrate that the U.S. Constitution does not direct or limit the way Electors from a state are appointed or how they should cast their votes for President. That is left to the discretion of state legislatures under Article II, Section 1, Paragraph 2. Whatever the result of the primary or general popular election for President in a state, the state retains discretion to determine how Electors are appointed and how they are to cast their votes.

Other provisions in Article II govern the process by which Electors cast their votes in the Electoral College, but, with two exceptions,[1] neither of which is applicable here, there are no other provisions in the U.S. Constitution directly governing the conduct of primary or general elections for President within a state.

B. Equal Protection and Due Process Considerations

When I say above that, to the extent Article II of the U.S. Constitution governs, state legislatures have "virtually unlimited discretion" in determining how a state's electors to the Elector College are appointed, that does not mean that there are no federal constitutional constraints on the conduct of primary and general elections for President or for other federal

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[1] The first is the 24th Amendment which provides:

> "Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."

The other is the 26th Amendment which provides:

> "Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age."

Since the limitations imposed by these Amendments are not directly relevant to consideration of S.213, they need no further discussion here

office. Any system establishing a right to vote in primaries must comply with basic equal protection and due process considerations embodied in the 14th Amendment. There is, for example, the constitutional requirement of "one person, one vote" established by the Court in the Baker v. Carr case, 369 U.S. 186 (1962).

If, for example, a state decided to count only the first 50,000 votes cast for President in a primary and then awarded primary victory to the person who received a majority of those votes, that would be clearly unconstitutional. But that clearly is not what is involved here. Under the proposed bill, every voter would continue to have his or her vote counted and counted equally in primary elections for President. In fact, as noted above, S.213 is designed to ensure, to the extent possible, that the votes of military and overseas voters are counted in primary elections for President and do not end up being thrown out because a candidate on the original ballot has dropped out before the state's Presidential primary is held.

There is a technical sense that local voters and overseas voters are not being treated equally since the overseas voter is given a special "ranked vote" ballot whereas the local voter is not. But this difference in treatment is not likely to support a successful equal protection challenge since the difference in treatment in fact is designed to put the overseas voter and the local voter on an equal footing in the event a candidate for President listed on the original primary ballot drops out before the state's primary is held. It is true that the two voters are not being treated "identically," but that does not mean they are not being treated "equally" with respect to having their vote count when the votes are tabulated.

It is my judgment, accordingly, that it is highly unlikely that a constitutional challenge on either due process or equal protection grounds would prevail.

IV. Conclusion

Since S.213 governs the printing and distribution of ballots in Presidential primary elections, and not the conduct of elections for state office, any constitutional challenge would have to be based on federal constitutional law. For reasons set out above, the proposed legislation violates neither the provisions of Article II governing appointment of electors to the Electoral College (the institution which elects the President in our federal constitutional system) nor basic equal protection and due process principles embodied in the 14th Amendment.