

REVISION OF THE PRESIDENTIAL PRIMARY SYSTEM

THOMAS J. SCHWARZ
JOSEPH C. SPERO

I

INTRODUCTION

The Ninety-sixth Congress, like every Congress since 1911,¹ entertained proposals to regulate the presidential nominating process. In all, nearly 300 bills have been introduced over the years.² Although no bill has ever passed either house of Congress,³ more criticism of the nominating system is heard each election season.⁴ This criticism has led to recent proposals to reform the presidential primary system, following three different approaches. The first, a regional primary system, would require each state within a given geographic region to hold its primary on the date assigned to its region.⁵ The second approach is a timing-oriented system that would require a state to hold its primary on one of several days within a certain period. The period would be shorter than the current primary season.⁶ The third type of proposal would establish a direct national primary to be held simultaneously in all states.⁷ The proposals vary as to the degree of regulation imposed,⁸ and some of the suggested solutions combine various elements of other proposals.⁹

This article will discuss the central policy implications inherent in the regulation of the nominating process, particularly the roles of political parties and the mass media. Constitutional considerations aside,¹⁰ a direct national primary would be destructive of significant goals underlying the nominating process. The regional and timing-oriented proposals likewise fail to satisfy important policy considerations. It is the authors' opinion that the only acceptable plan for the nomination of presidential candidates is one

1. A. RANNEY, *THE FEDERALIZATION OF PRESIDENTIAL PRIMARIES* 1 (1978).

2. *Id.*

3. Committee on Federal Legislation, *The Revision of the Presidential Primary System*, 33 RECORD OF THE ASSOC. OF THE BAR OF THE CITY OF NEW YORK 306 (1978) [hereinafter cited as *Bar Report*].

4. *Id.*

5. See, e.g., H.R. 125, 96th Cong., 1st Sess. (1979) (introduced by Rep. Bennett).

6. See, e.g., H.R. 1169, 96th Cong., 1st Sess. (1979) (introduced by Rep. Ashbrook).

7. See, e.g., H.R. 1904, 96th Cong., 1st Sess. (1979) (introduced by Rep. Applegate).

8. Compare H.R. 125, 96th Cong., 1st Sess. (1979) with H.R. 4212, 96th Cong., 1st Sess. (1979).

9. See, e.g., H.R. 8116, 96th Cong., 2d Sess. (1980) (introduced by Rep. Studts).

10. For a detailed exposition on the constitutionality of federal regulation of presidential primaries, see *Bar Report*, *supra* note 3, at 314.

which combines characteristics of the regional and timing-oriented proposals. Any such changes should be made by the parties and the state governments acting together.

II

A BRIEF HISTORY OF PRESIDENTIAL PRIMARIES

Since 1800, there have been three major developments in the nominating process: the rise of political parties, the development of the national nominating convention, and the dramatic increase in the use of primaries as a means of selecting delegates to the national conventions.¹¹ Throughout the history of presidential nominations, the prevalence of primaries has been the exception rather than the rule. But in 1980, thirty-four states held presidential primaries.¹²

Perhaps the most significant and essential development in the presidential selection process since the framing of the Constitution has been the rise of political parties. Parties provide an institutional means for otherwise disorganized individuals to influence the government through concerted action. Parties came to dominate the political scene early in our history.¹³ By the election of 1800, for example, party discipline was so rigid that every one of the presidential electors voted his party line.¹⁴

In addition to its influence in the nomination process, political party discipline is also responsible for the current operation of the electoral college. The Framers envisioned the electoral college as an elite group of people who would exercise their independent judgment in selecting the president.¹⁵ The members of the electoral college would not be bound by the preference of the voting populace. Together with the spread of popular democratic ideals, party influence helped guarantee that all of the electoral votes for each state would be given to one presidential candidate—the so-called “unit rule.”¹⁶

11. See *Id.* at 309-13.

12. See *Carter, Reagan Exhibit Similar Assets in Preference Primaries*, 38 CONG. Q. 1867, 1870-71 (1980).

13. For an analysis of the history of party influence see P. DAVID, *PARTY STRENGTH IN THE UNITED STATES 1872-1970* (1972). On the causes and functioning of the two-party system, see generally W. GOODMAN, *THE TWO-PARTY SYSTEM IN THE UNITED STATES* (1956); V. KEY, *POLITICS, PARTIES & PRESSURE GROUPS* (5th ed. 1964); A. SINDLER, *POLITICAL PARTIES IN THE UNITED STATES* (1966); *THE AMERICAN PARTY PROCESS: READINGS AND COMMENTS* (N. Zucker ed. 1968).

14. See Goldman, *Current Proposals to Alter the Electoral College and Their Relation to Equality of Representation*, in *Hearings on Nomination and Election of President and Vice President Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 84th Cong., 1st Sess. 459, 462 (1955).

15. *Bar Report*, *supra* note 3, at 310-11; ABA, *THE CASE FOR DIRECT POPULAR ELECTION OF THE PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES 2* (1964).

16. ABA, *DIRECT POPULAR ELECTION*, *supra* note 15, at 4.

Paralleling the rise of political parties, the national nominating convention became the principal means of selecting party candidates for president.¹⁷ Prior to 1832, the nominee was chosen by a caucus of each party's congressional representatives.¹⁸ This method, however, was not responsive to the nationwide constituency needed to win an election. Regions which failed to elect a representative from one particular party went unrepresented at that party's caucus. Moreover, the election of 1824 suggested that an institutionalized means of forming a coalition behind one candidate was necessary.¹⁹ In that election, splits in the Republican caucus led to the nomination of five candidates. When no candidate received a majority in the electoral college, the House of Representatives eventually selected John Quincy Adams as President.²⁰ Thus, in 1832, the major parties turned to the national nominating convention.²¹

Delegates to the national conventions were selected in each state pursuant to state law. Presidential primaries were first introduced into this process in 1905 by the Wisconsin primary.²² Although that primary did not involve a presidential preference choice, it was the first time a primary election was used to choose delegates to the national conventions.

The growth in the number of presidential primaries over the next ten years was heavily influenced by the increase in direct participation by the rank and file party members in the selection process.²³ Although interest in primaries declined for some time thereafter, the number of primaries remained relatively constant.²⁴ Recently, however, there has been an explosion in the use of presidential primaries, with profound implications for party politics.²⁵ In the past twelve years, the number of states holding primaries has increased from sixteen to thirty-six.²⁶

Presidential primaries and state party conventions or caucuses now share the task of selecting delegates to the national nominating conventions. Those states which do not use the primary system rely on the older system of the caucus and convention to choose delegates.²⁷ The states which have chosen to hold primaries use one of three different approaches: delegate

17. See generally Ostrogorski, *The Rise and Fall of the Nominating Caucus, Legislative and Congressional*, 5 AM. HIST. REV. 253, 266 (1900).

18. See G. POMPER, *NOMINATING THE PRESIDENT: THE POLITICS OF CONVENTION CHOICE* 12-39 (1963).

19. *Id.* at 20.

20. *Id.*

21. *Bar Report*, *supra* note 3, at 311.

22. P. DAVID, R. GOLDMAN & R. BAIN, *THE POLITICS OF NATIONAL PARTY CONVENTIONS* 225 (1960).

23. *Id.*

24. *Id.*

25. *Bar Report*, *supra* note 3, at 312.

26. *Carter, Reagan Exhibit Similar Assets in Preference Primaries*, 38 CONG. Q. 1867, 1870-71 (1980).

27. *Id.*

selection in which the delegate may or may not be bound to vote for a particular candidate; a presidential preference poll that is binding on the delegates who are sent to the national conventions; or a combination of delegate selection with either a mandatory or advisory presidential preference poll.

III

POLICY CONCERNS UNDERLYING THE NOMINATION OF THE PRESIDENT

A. Political Participation, Accountability, and Effective Government

The process of selecting nominees for the office of president is central to the effectiveness of our form of government. An analysis of competing proposals ought to reflect both a concern for fundamental democratic ideals and an appreciation of the need to maintain functional governmental institutions.²⁸ More specifically, the favored method of candidate selection should be responsive to three policy concerns: (i) the encouragement of citizen involvement in political processes, (ii) the provision of a mechanism which insures the accountability of the president to the electorate, and (iii) the maintenance of an institution capable of effective government.²⁹

In evaluating the possible methods by which to encourage wider participation in politics, particularly the nominating process, it is necessary to consider the effects that changes in current nomination systems will have on the volume and the quality of such participation. Primaries increase the volume of participation in the nominating process. They thus open the process to groups which are otherwise excluded from the nominating arena.³⁰ By contrast, state caucus and convention selection of delegates maximize the participation of those most concerned with the process: active party members.³¹ Presumably, these are the people best informed about the issues of the campaign, the candidates' positions on those issues, and on the other qualifications of the proposed nominees.³² Although these active party members may have expended the most energy in an election, nonactive persons also deserve representation. Hence, some sort of compromise between the proliferation of primaries and the state caucus-convention system is desirable.

28. See generally A. RANNEY, *supra* note 1; A. BICKEL, *THE NEW AGE OF POLITICAL REFORM* (1968); J. FOLEY, D. BRITTON & E. EVERETT, *NOMINATING A PRESIDENT* (1980).

29. See generally A. RANNEY, *supra* note 1; INSTITUTE OF POLITICS, JOHN F. KENNEDY SCHOOL OF GOV'T, HARVARD UNIV., *THE PRESIDENTIAL NOMINATING SYSTEM: A PRIMER* (1979).

30. See A. RANNEY, *supra* note 1, at 13.

31. *Id.* at 14-15; see J. FOLEY, D. BRITTON & E. EVERETT, *supra* note 28, at 34.

32. See N. POLSBY & A. WILDAVSKY, *PRESIDENTIAL ELECTIONS* 27 (5th ed. 1980). But see A. RANNEY, *supra* note 1, at 14-16.

With respect to the second policy concern, the accountability of a president should be provided by the nomination system as part of the election process. To the extent that the president must maintain party support, political parties guarantee some continuing responsiveness on the part of the president to the party.³³ Political parties, however, may also deter accountability. By limiting ballot access to mainstream party members, party politics limit the degree of accountability of the chief executive to larger sectors of society. In a system where nearly fifty percent of the eligible voters fail to exercise their franchise, the choice presented to the voters by the major parties may not be responsive to the needs of many Americans.³⁴ To rectify this deficit in adequate candidate choice and to promote accountability by facilitating the selection of candidates who are responsive to the needs of their constituencies, the nominating system should provide opportunities to candidates who are not recognized mainstream party members. The length of the primary period, for all of its other drawbacks, at least partially serves this need. Relative unknowns, such as Jimmy Carter, can be catapulted into contention by doing well in early, albeit small, states. On the other hand, the long primary season can be detrimental. Candidates who fail to garner support early on may find that their funds, and hence their opportunities, have dissipated. Although this may not be fatal to a nationally recognized and supported candidate, minor contenders must win early or face almost certain defeat.³⁵

Good government, the third and perhaps most important policy consideration, is more problematic than either political participation or accountability. The presidential nominating process implicates three aspects of effective governance: the personal qualities most desirable in a chief executive, the smooth functioning and interacting of diverse government institutions, and the orderly and stable transfer of power.³⁶ These policy concerns are by no means entirely separate. They encompass, however, most of the concerns relevant to effective governance. The nominating system should favor the election of persons who are capable of leading the country, and who will lend legitimacy to the office and to their acts.

B. Political Parties and the National Nominating Conventions

These three policy concerns are directly affected by the nominating conventions and other actions of the major political parties.³⁷ With respect

33. See *infra* page 00.

34. See ABA, *DIRECT POPULAR ELECTION*, *supra* note 15.

35. Cf. 11 C.F.R. § 9033.5(b) (1981), which conditions a candidate's eligibility for matching federal funds on his or her receipt of 10% of the votes cast by the candidate's party in the primary.

36. See generally A. BICKEL, *supra* note 28.

37. See generally J. PARRIS, *THE CONVENTION PROBLEM* (1972); David, Goldman & Bain, *The Nominating Process and the Future of the Party System*, in *THE AMERICAN PARTY PROCESS*, *supra* note 13, at 115.

to political participation, the parties exert efforts to turn out a favorable vote, which tends to increase the number of voters and the breadth of the electorate. This effect on the volume of participation is limited somewhat by the fact that parties tend to focus their attentions on groups whose members already intend to vote but vacillate between one party and the other. Time spent persuading these groups does not increase the total number of voters. All parties affect the quality of political participation by encouraging articulation of the major campaign issues and by educating the electorate through national convention platforms.

Powerful political parties also ensure the continuing accountability of the president. Except in the case of a one-term president or a second-term president without any political future, the president's reelection or further public service depends on the continuing support of the party. Parties tend to demand only that the president preserve the party and its policies. Any need for restraint within the limits of these policies is left to other mechanisms. This parochial attitude, however, does not seem to create much of a problem. The major parties enjoy a broad base of support. Moreover, situations in which major party policies differ radically from the desires of the electorate are rare.

The most important contribution of the political parties to the election process is their support of effective government. By selecting candidates who are party members, parties guarantee that a president will have already developed political skills. By choosing candidates from among their most established members, parties focus on persons who know how to use power effectively.³⁸ Moreover, party labels provide at least some indication of candidates' political tendencies,³⁹ and most people vote consistently for a particular party's nominee.⁴⁰ Effective government is further buttressed by the national party conventions. In their attempt to reach a consensus on a candidate and unify the party, they institutionalize an essential aspect of effective government: coalition formation.⁴¹ With strong political parties and constructive national conventions, a president is elected with major coalitions already in place. These coalitions assist in the smooth functioning of governmental institutions. Any scheme which threatens this institutionalized formation of alliances also threatens the efficient operation of the government. Moreover, institutionalized coalition formation directly encourages the orderly transfer of power.

C. The Influence of the Mass Media

No institution, with the obvious exception of the election itself, has as much impact on the choice of a president as does the media. With the

38. See generally A. BICKEL, *supra* note 28; B. OGDEN, ELECTING THE PRESIDENT 17-39 (1968).

39. A. BICKEL, *supra* note 28, at 15.

40. N. POLSBY & A. WILDAVSKY, *supra* note 32, at 9.

41. A. BICKEL, *supra* note 28, at 22. But see S. BRAMS, THE PRESIDENTIAL ELECTION GAME 134-71 (1978).

advent of television in particular, mass media has become a crucial element in all candidates' election strategies.⁴² Mass media has both good and bad implications for political participation. Given the huge numbers of people reached by the media, coverage of the campaign insures that information about the election will be conveyed to many more people than would be addressed otherwise. What is gained in volume, however, is sacrificed in the quality of participation. To a large extent, the media sets the issue agenda for the campaign. Moreover, the media, especially television, tend to emphasize charisma rather than substance. Voters are thus encouraged to choose a candidate on a basis which may be unrelated to the policy issues and the candidate's qualifications.

The increased importance of the media in elections has weakened the national political parties.⁴³ Image-projection, rather than organizational politics, is emphasized. Furthermore, media coverage depends on funding to a much greater extent than on grassroots and organizational interest. Although political parties play an important role in raising funds, television and other media provide at least a partial avenue of independence for candidates with outside funding. As compared with caucus and convention delegate selection, primaries encourage a more substantial media role. To the extent that such a role weakens political parties, the proliferation of primaries threatens the viability of national parties and conventions.

In emphasizing media image over issue differentiation and party support structures, the media do not encourage the selection of persons with executive or political skills. Certainly the sort of charismatic personality that does well on television has some political and leadership value. However, by providing partial independence from party organizations during the campaign, the media eliminate scrutiny by the candidate's party whose function it is to promote the effectiveness of the president. Moreover, by weakening the political parties and the national nominating convention, mass media threaten institutional coalition-formation processes. This, in turn, is detrimental to effective government. In short, the best television candidate does not make the best president.

IV

PROPOSALS FOR REFORMING THE PRESIDENTIAL PRIMARY SYSTEM

A. Direct National Primaries

These policy goals and the interaction between the political party and the media must be kept in mind when specific reform proposals are consid-

42. See generally N. POLSBY & A. WILDAVSKY, *supra* note 32; J. FOLEY, D. BRITTON & E. EVERETT, *supra* note 28.

43. H. MEDELSON & G. O'KEEFE, *THE PEOPLE CHOOSE A PRESIDENT* 131 (1976).

ered and evaluated. A large majority of the proposals for federal regulation of presidential primaries envision a national primary of some sort. In the Ninety-sixth Congress three measures were introduced to this end. H.R. 1904, the proposed National Presidential Direct Primary Election Act of 1979, sponsored by Congressman Applegate, is typical.⁴⁴ This bill would require each state to hold a closed primary election on the first Tuesday after the first Monday in May of each presidential election year. The ticket receiving the most votes within each party would be nominated. National nominating conventions would be abolished.

The popularity of a direct national primary is in part due to its attempt to impose the democratic ideal of popular election on the nominating process. This approach would encourage large-scale political participation and lessen the role of political bosses in the selection process.⁴⁵ The advantages of this type of proposal, however, are largely illusory. With respect to political participation, the benefits of a national primary are minimal. In 1980, only eighty-six million of one-hundred-sixty-million eligible voters participated in primary elections.⁴⁶ There is no reason to suppose that a direct national primary would radically alter this low turnout. Moreover, a direct national primary would increase the already large role played by the media, thereby augmenting their detrimental effect on political parties, voter awareness, and effective government.⁴⁷ Beyond this, the coalition-forming process of the national party conventions would be deinstitutionalized. This would result not only in a less efficient government, but might well be destabilizing.

B. Regional and Timing Approaches

The proposed timing-oriented and regional reforms of the presidential nominating process do not respond completely to the policy concerns outlined above.⁴⁸ Each has its advantages and drawbacks. Ultimately, a limited form of regulation incorporating aspects of both types of proposals is needed.

Five bills submitted to the Ninety-sixth Congress proposed that the country be divided into regions.⁴⁹ States choosing to hold primaries would be required to do so on the date assigned to that region. Although the dates would be set out in the law, the Federal Election Commission would assign

44. H.R. 1904, 96th Cong., 1st Sess. (1979). See H.R. J. Res. 81, 96th Cong., 1st Sess. (1979); S. 16, 96th Cong., 1st Sess. (1979).

45. See A. RANNEY, *supra* note 1, at 33.

46. See FEC REC., Feb. 1981, at 2.

47. See *supra* Section III(C).

48. See *supra* Section III.

49. H.R. 125, 96th Cong., 1st Sess. (1979); H.R. 4212, 96th Cong., 1st Sess. (1979); H.R. 7753, 96th Cong., 2d Sess. (1980); H.R. 8116, 96th Cong., 2d Sess. (1980); S. 964, 96th Cong., 1st Sess. (1979).

the dates to regions just prior to the primary season. Some of the proposals go further, requiring states to hold primaries and regulating the conduct of the primaries themselves.⁵⁰

The regional proposals have several virtues. Running area primaries on one date minimizes the cross-country campaigning required under the present system. Regional primaries would result in substantial savings in money and candidate energy. In addition, regional primaries would encourage candidates to refine and clarify their positions on many issues. They would be forced to concentrate their efforts for some period of time on a given region. States within a region would have many common concerns. As a result, candidates would be able to focus on issues of regional concern, rather than give their standard speech of nationwide applicability.

Regional primary proposals, however, would encourage the current practice of giving the primaries disproportionate weight. The current lengthy primary season emphasizes the results of the early primaries. This practice has a two-fold result. The sentiments expressed in the early states, such as New Hampshire, are given substantially more weight than those in more populous states like California. Moreover, a candidate who is unpopular in an early primary may find that no further funding is available.

A timing-oriented proposal would partially ameliorate the disproportionate weight given to early state primaries. Only one "timing" proposal, H.R. 1169, was submitted to the Ninety-sixth Congress.⁵¹ Sponsored by Rep. Ashbrook, this bill provides that each state holding a presidential primary would be required to do so on one of four dates. The principal thrust of this measure, as with all timing-oriented bills, is to confine the primary election to a discrete period of time, for example, four Tuesdays in the March, April, May, and June preceding the general election. In a primary season which spans only five or six specified dates, the impact of the first primary is reduced.

A hybrid of the regional and timing-oriented approaches may be the most effective means of reform. If, for example, the country were divided into six regions, and no more than two states from any one region were permitted to hold their primaries on the same day, the impact of regionalism would be minimized while, at the same time, both an intra- and inter-regional popularity test would be provided for each candidate. Moreover, this proposal would thwart the proliferation of the primary and thereby bolster the party role in the process. This, in turn, would promote the benefits of party politics, as well as quality participation and institutionalized coalition-formation. These changes would contribute to effective government.

In any event, primaries should not be mandatory but should be left to the individual states. Timing regulations may discourage some states from

50. See, e.g., H.R. 4212, 96th Cong., 1st Sess. (1979).

51. H.R. 1169, 96th Cong., 1st Sess. (1979).

holding primaries. Methods of selection which are responsive to party organization should be encouraged. This is not to say that primaries are not useful. Their drawbacks suggest, however, that an optimal system of delegate selection would use both primaries and state caucuses or conventions.

V

CONCLUSION

Reform of the presidential nominating process must proceed with a sensitivity to the broad policy concerns at stake. Changes in this process will affect political participation, the accountability of the president, and the effectiveness of our governmental institutions in performing their appointed tasks. To disregard these effects is to invite hardship and ineffective leadership.

National political parties and their presidential nominating conventions play a central and desirable role in the current system. Strong parties perform substantial educative functions and ensure the continuing accountability of the president. Moreover, by encouraging the election of accomplished politicians and the formation of coalitions, parties significantly promote effective government.

The current proliferation of primaries, on the other hand, and the aggrandizement of mass media, threaten not only political parties but the effectiveness of governmental institutions. Television and other media tend to dominate the opinion-shaping process of popular elections. As a result, media image and charisma are emphasized, rather than issues and specific individual qualifications. A direct national primary would be the most vulnerable to this media domination. The best solution is one which uses primaries as a test of popular sentiment together with state party caucuses and conventions. Within such a system, a combination of regional and timing-oriented primaries may be best. Legislation along these lines would minimize the disproportionate weight given to early primaries and ameliorate the effects of regionalism. Nevertheless, I believe that this legislation should result from party cooperation with the various state governments. As in many areas, the federal government should enact legislation only as a last resort, and only after the parties and the states have had a fair opportunity to act.