

**Challenges and Legal Implications**  
**Presentation and Question and Answer by Lyn Utrecht**  
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**Commission on Presidential Nomination Timing and Scheduling**  
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MS. UTRECHT: It's a pleasure to be here. And, as you can see, I've represented presidential campaigns since 1984, including four of the last six cycles, and the general-election nominee.

I want to note that I have Sarah Chambers here, from my office, and she is here with me because there was some question about whether I could actually speak and punch buttons at the same time.

I think the kinds of issues that we need to look at from the legal standpoint really are -- fit into two different categories. One is those that relate to state-law issues and what you would have to do in order to set the calendar. Initially, you have to look at the fact that there are 50 state legislatures, and they're the ones who establish the primary dates. If changes are made to the calendar, obviously there have to be changes made to state laws.

There also are issues related to state funding of primaries. Paying the cost of running the state -- the primaries also needs to be addressed.

Some states recently have chosen not to fund primaries. And the question of how to fund them has become, in a number of states, an increasingly contentious state budget issue.

Then there are the issues that relate more directly to the presidential candidate, as previous speakers have mentioned. How the calendar is set will affect the decision of candidates, whether or not they can accept the public funding. The decisions by presidential candidates about how, where, and when to spend their money are also directly affected by how the calendar is set.

I want to talk, in particular, first, about getting on the ballot. Some state laws are very simple and allow the Secretary of State to simply announce who the nationally-recognized candidates are who are in the race as of a particular date. Those dates are generally set by state law, and they start as early as the year before the election. At the other end of the spectrum are states that require candidates to comply with extremely burdensome, time-consuming, and expensive petition requirements. Many also require filing fees. Setting the calendar is going to require changes to state laws, not just related to the timing of the

primary, but also related to the filing requirements, qualifications, and the deadlines.

In 2004, in Governor Dean's campaign, we also encountered some new difficulties that arose for the first time since public financing that related to who the nationally-recognized candidates are. We discovered that, in some states that the Secretary of State was specifically required to recognize nationally-recognized candidates as those who had qualified for public funds. Since Governor Dean had not accepted public funds, there were some efforts that we had to make in some states to make sure that he was able to get on the ballot.

In addition to this issue of whether you are a nationally-recognized candidate related to your public-funding acceptance or rejection, the state laws generally are not uniform in what qualifications the Secretary of State has to look at in order to determine who the nationally-recognized candidates are. If there are going to be changes attempted to amend various state laws, we probably also should be looking beyond just the timing issue, but also looking to see if there are uniform standards that ought to be applied or other issues that arise in the course of reviewing these state laws.

Related to funding the primaries, this is something that has become, over the last few years, a more important issue, I think, than it had been in the past. States are very reluctant now to fund primaries where the Democrats and the Republicans have them on different days. The first, from 2008, as previous speakers mentioned, the Republican calendar is substantially set at this point. And their window for 2008 begins on the first Tuesday in February.

Even where the states -- the parties have held primaries on the same dates, though, states are increasingly reluctant to pay for the primary election.

In 2004, there were a number of states where Republicans and Democrats chose to have primaries on different days. But the result was that those parties had to pay for those primaries. And, you know, that's an issue that we really need to pay some attention to.

In 2004, for example, Utah cut -- decided to cut funding for all presidential primaries. As a result, the party in Utah was required to finance the primary on its own. Also in '04, Republican legislatures attempted to eliminate primaries in Arizona and Missouri, but the Democratic governors in those states were able to find the funding for those. There were a -- also a number of other states where there was obviously no Republican primary, and the Republican legislatures did abolish funding for the primaries in several other states in 2004.

We have already seen that controversy moving into this year, in 2005. In Arkansas, there was already a bill to move up the date of the primary to February. But it did not pass, because there was no agreement whether the state or the parties would be funding that primary.

I think we have to be realistic about this and realize this is a trend, that if there is a desire to set regional primaries, you're going to have to decide and address the issue of whether those regional primaries are going to be funded by the states or whether somehow the parties are going to find the money. And, in fact, one of the things we were talking about, you were mentioning earlier, in terms of incentives, I think there is a possibility here of building some incentives to parties over these funding issues, if the DNC is able to figure out, you know, how they can fund a primary, if the party in a particular state is willing to have it at a time that is more desirable from the DNC's standpoint. Caucus states are obviously easier, because the party already controls those, the timing and the funding of them.

The possibility of changing these state laws is also a real issue that needs to be looked at. We have only 22 states and three territories that have Democratic governors. In 21 states and territories, the Democrats have legislative majorities in the House and the Senate. There are only states and territories that have both a Democratic governor and a majority in both houses of the legislature. We're really going to have to look at that to see whether it's realistic in a lot of states to set new deadlines, and whether there can be -- it sounds -- you know, because of the way the Republican rules work, it's very unlikely that, at this point, there can be any cooperation between the Republicans and the Democrats in dealing with the state-law issues.

One final issue related to changing these state laws is the fact that there are a number of states -- and, in some states, particular counties -- that are subject to the pre-clearance provisions of

the Voting Rights Act. If there are changes made to the election code in those states, those also have to go to the Justice Department for approval.

Now, to the decision to accept primary public financing. As you know, candidates who do accept primary funding have to adhere to a spending limit. That spending limit covers all spending from the day the candidate gets into the race until the date of his or her nomination at the convention. In 1974, when the law was passed, the amount for the spending limit was set at \$10 million. That's indexed for inflation. So by the time we got to 2004 that number is 50.2 million, and that included the index for inflation and the allowance for fundraising costs and legal and accounting costs. Obviously, the earlier the campaigns begin, the harder it is to stay within the spending limits.

Let's look again for a minute at the history of public financing and the spending limits. In 1976, which was the first publicly-financed campaign, and in 1980, the overall limit was not an issue; the candidates were able to stay comfortably within it. In the '84 cycle, the Mondale Campaign began in 1983, fairly early in the year, and spent a significant amount of money in the year before the election. By the time the campaign got to the spring of '84, it was essentially out of money. That was partially attributable to the fact that there were some unexpected challenges, particularly from Gary Hart, in terms of the strength, and also it was attributable to the early nature of the spending and how much money was left by the time we actually got into 1984. It's -- in 1988, the Dukakis Campaign did not have a spending-limit problem, and, in fact, had a surplus, which it repaid to the Federal Election Commission at the end of the campaign.

In '92, the Clinton Campaign didn't start until fairly late in the year. It was in the early fall of '91. And the campaign did not have an overall spending-limit problem, because by that time a lot of the money that the campaign actually raised came in after the time of the nomination, so there was not a limit problem.

We move to '96, the Clinton/Gore Campaign started in April of '95, but also did not have a spending-limit problem. There really were two reasons for that. One is that at that point we had DNC issue advertising. Back in '84, we hadn't discovered DNC issue advertising yet and had to rely on delegate committees to take up the slack between the time that the money started to run out and the convention. But the other advantage that Clinton/Gore had in '96, which is not to be underestimated, is the advantage of incumbency.

There was a lot of travel and a lot of activity that occurred during '95, where the President was still able to travel as President, achieving many of the same goals as the campaign would have achieved. If you're dealing with a candidate who is not the incumbent, you, of course, do not have that advantage.

In '96, the Dole Campaign is the one that had the spending-limit problem. Dole was basically out of money by March or April of '96, and the RNC did pick up some of that in issue advertising, but, between the amount of the DNC issue advertising and the advantages of incumbency, the Dole Campaign was at a significant disadvantage to the Clinton/Gore Campaign.

In 2000, Bush opted out of the public financing system, and he had basically unlimited money to spend up until the time of the convention, while Gore had to abide by the spending limit. The Gore Campaign began early in the year before the election.

It was early. It was in January of '99, but, as in '96, had the advantage of DNC issue advertising that was paid for, in part, by soft money. And Gore also had the same advantage of incumbency. He was able to travel around the year before the election, actually spending very little time campaigning -- or taking trips that had to be paid for by campaign funds, except to the extent he was out doing his fundraising. In that cycle, though, during the primary period, alone, the Bush Campaign outspent the Gore Campaign by \$65 million.

In 2004, of course, Bush opted out again. Both Governor Dean and Senator Kerry opted out, as well. If we had nominated any other candidate who had accepted public financing, that candidate would have been out of money by the time the spring came around in 2004. And since the change in the law in campaign finance reform, in the bipartisan Campaign Reform Act, for the 2004 cycle, any money that was spent by the DNC had to be all hard dollars. Fortunately, we were lucky enough to have an incredible cycle of fundraising. So in 2004 the DNC was able to spend \$120 million in independent expenditures, either in support of the Kerry Campaign or in opposition to the Bush Campaign.

During that same period of time, that same election, the RNC spent only 18.2 million in independent expenditures. In addition, the DNC spent 24 million in what we would consider generic issue ads, and the RNC spent 45.8 million. But, again, that had to all be hard money in 2004;

whereas, in '96 and 2000 that was a mix of hard and soft money.

On the issue advertising, in -- the comparative figures were, from '96, the DNC had spent \$46 million in issue advertising; and in 2000, it spent \$70 million. So the expenditures for party advertising in 2004 were significantly greater than they had been in the prior cycles.

Publicly-financed candidates are also subject to the state spending limits, which are based on state voting-age population and are also indexed for inflation. Under the current calendar, Iowa and New Hampshire have relatively low limits. And in 1980 through '88, candidates had trouble staying within those limits.

What happened after that is that the FEC, which was -- actually got tired of auditing the state spending limits, since basically everyone went over them, they changed their rules so that there are enormous amounts of expenditures that are made in states that no longer have to count against the state limits. That worked in '92 through 2000, in that during those years basically there were no state-limit problems. That's another -- the FEC has consistently asked Congress, since back in the late '70s, to eliminate the state spending limits. And Congress has not done that yet.

In 2004, the decision to opt out of public financing meant, of course, that Dean and Kerry were not subject to these state spending limits, and they were able to spend, and spent, very large amounts, related to Iowa and New Hampshire. The six Democratic candidates who did accept public financing were subject to these limits. They, of course, had no overall spending limit. None of them came close to the overall spending limit. But I think we will see that after their audits by the Federal Election Commission, my guess is that there will be some of them who had Iowa and New Hampshire spending limits, because they were forced to spend more money in those states, because of the amounts of money that were being spent by the Dean and Kerry Campaigns.

In addition to the issues of public funding, the filing deadlines and the compaction of the schedule into a shorter period of time does affect the timing and the way that candidates choose to spend their money. In the '04 cycle, the first drop-dead filing deadline was November 18th, 2003, for the February 3<sup>rd</sup>, 2004, Missouri primary. There were other deadlines prior to that date, but that was the first one that, if you missed it, you were not going to be on the ballot in that state.

Also in '04, there were numerous states that held primaries in March that had December filing deadlines. Some of those states were ones that had significant petition requirements. And when you're looking at the calendar and what states are being moved where, you have to take into account what kind of resources it's going to take for the presidential campaigns to comply with those state filing requirements, especially in the states that have petition requirements.

I think that also has a harder impact on state candidates that are accepting the public funds, because they don't actually receive that money until January 1 of the election year. So, although they can borrow against money they have been certified by the Federal Election Commission, they don't actually receive the public funds until January 1st of the election year. And to the extent that there are a lot of deadlines that occur in the year before the election, it's important to think of that impact on the campaigns and whether they have the resources or not to comply with those requirements.

If campaigns continue to start early in the year before the election or even in the year before that -- Governor Dean started in 2002 -- it's basically impossible to see how the current primary public financing system can continue. It is not possible to start a campaign in these years coming up if you have to make that spending limit last for two years. There just is no way to do it. I guess it probably could still be possible if we were dealing with an incumbent President or Vice President who would have those advantages in the year of the election, but it is not likely.

In fact, this year it happened that some candidates got out of the race before they had accepted any public funds, and there were several of the Democratic candidates who got out right at -- immediately after. In fact, the public funds really did nothing for them except help them to pay off whatever debt they ended their campaigns on.

The chair and vice chair of the Federal Election Commission have proposed that there be a drastic rewrite of the public financing system. Their proposal suggests raising the spending limit up to as much as 150 million, as compared to the 50 million it was in 2004. They recommend higher matchable contributions. And they also recommend more stringent requirements, in terms of qualifying for the public financing. To date, though, there's no legislation that would relate to this at all.

There also is an important issue related to the general-election public financing, which was

encountered in its, probably, most extreme form in the 2004 race. Both candidates get the same amount of money, but the beginning of the general election period is determined by the date on which the candidates are nominated. In this cycle, Kerry was nominated at the end of July, and Bush was not nominated until the beginning of September. That meant that there were an enormous number of weeks there where the Kerry Campaign had to live within that spending limit, and the Bush Campaign was still spending the excess primary money that they had managed to accumulate.

This problem could be solved by having a uniform date for the beginning of the general election period. Again, that would be require a federal statutory change to do that. The way the system works now is, it is the date of nomination, or September 1st, whichever occurs later. So maybe if we could work on a proposal to get that to be September 1st, that might solve that problem.

There are, however, external constraints, that have nothing to do with law, on when the conventions are held. By tradition, the party out of power has its convention first. The Olympics are always an issue. That is what caused the problem with the Kerry convention being in July and the Bush convention being in the end of August and the very beginning of September. Obviously, the earlier convention means the longer that the general election period is.

There also were some -- have been both -- not for us in 2004, but for us in '96 and for the Republicans in 2004 -- there are some other state-law issues that are affected by when the convention occurs. In fact, in '96 there were some states where the secretary of the convention was required to certify the nominee to the state as the nominee of the party before the date that the convention began. So we had to work out, in some of those states, some accommodations on provisional certifications and things like that. And the Republicans had similar issues in '04. If there are going to be changes in state laws in a particular state, it's probably worth also taking a look at those deadlines to see if there's anything that should be done there.

In the past, if candidates had accepted public financing, from the candidates' standpoint it was more advantageous to have an earlier convention, because then the public money would not have to last as long in the primary, and generally the grant for the general election has been perceived as being close to, if not enough money, to cover the general election period. But if

the candidate does not accept matching funds, it is more advantageous to have a later convention.

There was discussion earlier about whether there are incentives and any leverage that the party can exercise over states, in terms of setting the convention. While they're not, maybe, the strongest incentives possible, certainly the party could decide to give bonus delegates to states that held their nominating convention or their primary at a later date, if that is what you were trying to accomplish. You could maybe change the proportional representation rules and maybe relax those for states that agree to hold their primaries during a particular window. Or, as I mentioned earlier, since we're going to have this issue of whether the states are going to fund primary elections, as in the first instance, if you needed to, you could possibly entice states to have elections on days that you wanted by offering to fund -- basically, for the DNC to help the states fund those primaries.

In summary, I think the issues that I think you need to address or talk about that are related to my topic here today are the mechanics and feasibility of achieving these necessary changes in the state laws. You need to make some determination as to whether that's possible. You need to calculate the cost to party committees of funding primaries and caucuses, and you need to consider whether there is an incentive that the DNC can offer to get those scheduled during the window that you want them scheduled in.

It is also important to look at the effect of the calendar on candidates' financing, whether or not they accept public funding, and whether they will have resources to comply with the early deadlines in the year before the election.

The party fundraising needs -- I think there's already been reference to that -- I share Don Fowler's sense that the funding -- the level of hard money that we saw in 2004 is maybe not something that we can count on again in 2008, either for whoever is the eventual nominee or for the party. And it will be important to figure out where you're going to try to focus on getting that money, and whether the DNC is going to plan to do an extensive independent expenditure campaign in '08 again, and whether there are ways to make sure that the nominee, if he or she doesn't accept public funding, will have sufficient resources to be able to raise a significant amount of hard money, as was done in 2004.

Finally, I think we do need to look at the public financing system. The way it is currently structured, it is not viable. I think it is both a

financial issue and a political issue. There had been discussion in previous cycles, I know, in '96 and in 2000, about whether the President and Vice President should opt out of the system. There were political decisions made not to do that, as well as concern about whether it would have been possible, during those years, to raise sufficient hard money. And that is something that the party, having been proponents of campaign finance reform, whether we ought to be looking now to try to reform the system so that it is viable and that our candidates can participate, but recognizing that it's unlikely that well-financed Republican campaigns will do that, and the possibility even that they won't participate in the system in the general election at some point in the future, as well.

If there are any questions, I would be happy to answer them.

CO-CHAIR PRICE: Thank you very much, Lyn.

CO-CHAIR PRICE: Don Fowler?

MR. FOWLER: Is the January 1 date fixed in law, or is that an FEC regulation?

MS. UTRECHT: It's the law. You can get matchable contributions, you can raise them during the year before, but you don't get the matching funds until January 1st.

CO-CHAIR PRICE: Spencer Overton?

MR. OVERTON: Thank you for that presentation. For those states that are party primaries, where the party pays for and the party runs the primary, do we have to go to a state legislature to determine that date? So, for example, would we have to go to a Republican-controlled state legislature, or would it just be the Democratic Party in that particular state that said, "Okay, yeah, sure, you can move it."

MS. UTRECHT: Yeah, you would be able to -- the party could decide to hold a primary, if it's financing it.

CO-CHAIR PRICE: Lyn, could you just clarify, what kind of moves have states taken already to alter their primary dates for the next cycle -- California, for example, and others that you --

MS. UTRECHT: I'm not sure. I think -- Joe (Sandler) or Phil (McNamara) -- I'm not aware of any that have gone through yet.

MR. TORRES: California has changed its primary to June again, effective '08.

CO-CHAIR PRICE: Is that a decision that's going to stick?

MR. TORRES: Yes, it was passed by the legislature and signed by the governor.

SENATOR LINCOLN: You noted Arkansas there, but, yes, it is my understanding, since the Democrats or Republicans don't have any money in Arkansas, a Republican governor has already signed into law what the legislature passed to move us to -- I think it is the second Tuesday of February in Arkansas.

CO-CHAIR PRICE: So Arkansas has moved earlier. California, back to June.

MR. TORRES: We may become a caucus state.

[Laughter]

CO-CHAIR PRICE: Any other quick questions?

AMBASSADOR SHUMAKER: Lyn, in the states that have state-run primaries, on the filing requirements and the deadline that you talked about, we have a one-page form that has to be signed by New Hampshire, signed by the candidate, a modest filing fee, not all these complicated requirements, a short time frame.

What role, if any, legally -- a sort of a question on two levels -- what role, legally, does the party have with regard to state-run primaries on dictating or encouraging onerous or easy filing requirements? And do you have any recommendations in that regard for this Commission?

MS. UTRECHT: Well, most of those -- the filing requirements are a matter of state law, and they're set out in the state laws. And I think -- I think it's a majority of the states that simply allow the Secretary of State to declare who the nationally-recognized candidates are. I think that system works pretty well. There usually are still some kind of filing deadlines that go along with that.

The states that are the really onerous ones are ones -- I think New York is the one that comes to mind -- because the requirements there are so onerous that basically you have to hire a whole group of people to help you comply with the state filing requirements there. I mean, I think if there are states that you're going to be looking at trying to get state legislative changes, you might want to move -- try to move them towards the nationally-recognized-candidate idea and away from the petition requirements.

AMBASSADOR SHUMAKER: Being an early state, we don't even have that authority. And the Secretary of State, he has to accept all applications that are properly and timely filed. He makes no determination about national viability.

MS. UTRECHT: Well, then that's when you get the ballot for the primary candidates that includes 50 people or 100 people.

CO-CHAIR PRICE: Lyn, thank you. Thanks very much.