



POLICY BRIEF

Reforming Washington's Primary Elections *Six Proposals in a Nutshell*

By
Richard Derham, Research Fellow

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Introduction

Since 1889, Washington's political parties have used three different systems for nominating their candidates. In the early years, candidates were nominated at party conventions. In 1907, the state legislature required an "open party primary system," under which all voters could participate in the primary of one or the other major political party. In 1934, a voter-approved initiative established Washington's unique "blanket primary," under which voters may participate in nominating the candidates of different political parties at the same time. This is the primary system we have had in place until last summer.

In 1996, California copied our blanket primary law. It was promptly challenged by four political parties and resulted in a ruling in June 2000 in which the court invalidated the blanket primary as an infringement upon the constitutional free speech and freedom of association rights of the members of political parties.¹

In July 2000, Washington's blanket primary was similarly struck down. The court's preliminary injunction requires that all Washington primaries, beginning in 2001, be conducted on a partisan basis. That means Republican candidates must now appear on one ballot and Democrat candidates must appear on another ballot. Voters may choose to vote in one party's primary or the other, but not both.²

This Policy Brief will compare the variety of legislative proposals now under consideration to replace the court's temporary preliminary injunction. Over the next several months, Washington's political parties, the legislature and the courts will be resolving how the constitutional rights of political parties will be exercised and how a party's nominees will be selected in the future.

Definitions

Any discussion of how elections work involves technical and legal terms that can be confusing. For purposes of this paper, the following definitions are used:

Blanket Primary: A primary election in which all candidates for nomination appear on one "blanket" ballot, and voters may choose among the

¹ For a detailed analysis of the history of the blanket primary and the rationale of the Supreme Court, see *Beyond the Blanket Primary: Washington's Parties Nominate Their Candidates*, by Richard Derham, a Policy Brief published by Washington Policy Center in December 2000 and available at www.washingtonpolicy.org.

² At the time of the injunction, only the Republican and Democratic parties were "major parties" under the provisions of Washington law requiring major parties to nominate candidates by primary. In the general election held in November, 2000, the Libertarian Party qualified for major party status. While the Libertarian Party was not a party to the injunction, it will be affected by the ultimate resolution of the primary issue. The Libertarian Party has now sought to intervene in the pending suit and contends, among other things, that it is unconstitutional to prevent it from nominating its candidates solely by convention.

candidates regardless of party participating in the primaries of more than one party at the same time.

Party Primary: A primary election in which separate ballots are prepared for candidates of each party, and each voter may select the party in whose primary he or she will participate.

Closed Primary: A primary election in which only voters registered as members of a particular party may vote to select that party's nominees.

Open Primary: A primary election without party registration in which each voter may participate in the primary of whichever party the voter chooses.

Unrestricted Filing: A system in which a person may file as a candidate of whatever party he or she chooses, regardless of the candidate's affiliation or connection with that party.

Party Certification: A system under which a political party may establish rules and procedures that define the criteria a candidate who seeks to represent that party must meet.

Voter Secrecy: A system under which the voter's choice of party ballot is not disclosed.

Voter Verification: A system under which each party is given the names of the people who chose to participate with that party in its candidate selection process, or who registered as party members.

The Proposals in a Nutshell

1. The Court's Preliminary Injunction

On July 20, 2000 the state Democratic and Republican parties, along with secretary of state Ralph Munro, agreed to a preliminary injunction in the court of U.S. District Judge Jack Tanner which declared the Washington blanket primary to be unconstitutional and which established an open party primary system for Washington.³ The injunction will remain in place until replaced by a permanent injunction or when the legislature adopts legislation meeting the constitutional rights of the political parties.

Summary of Preliminary Injunction:

- It requires a party primary system
- The primary election is open to independent voters, who may choose to vote in either party's primary.
- Voter verification is required – each party will receive the names of people who voted in its primary.

Implications:

- The injunction requires no action by the state legislature. The court's order is effective notwithstanding any existing laws that may conflict with it, although passing clarifying legislation would be appropriate.

³ Order on Motion of Democratic Party for Preliminary Injunction, July 20, 2000, in Washington State Democratic Party v The State of Washington, No. C00-5419FDS, U.S.D.C., W. Wa.

- Voter verification places Washington in line with the majority of states.

Commentary:

The U.S. District Court's injunction represents the minimum level of compliance with the basic civil rights of political parties. It allows parties to select their own candidate (freedom of association) and thus to frame the message they wish to present to voters (freedom of speech).

Voter verification, the most controversial portion of Judge Tanner's injunction, simply recognizes each party's right to know who chose to participate in the selection of its candidates. Thirty-nine states already require it and the rules of the Washington State Democratic Party have established it as a condition for participation in its primary.

2. The Democratic Party Proposal

The Democratic Party's state convention adopted a party charter that requires a party primary system. Consistent with that, the Democratic Party has proposed a permanent plan that closely parallels the court's temporary injunction.

Summary of Democratic Proposal:

- It requires a party primary system.
- Unaffiliated voters may vote in party primary
- Voter verification is required.
- Party Certification – each party may set its own rules for choosing candidates if a regular primary election is not held.

Implications:

In general, the implications for the Democratic Party plan are the same as those discussed under the preliminary injunction on the previous page.

The party certification provision expands the preliminary injunction and makes clear that if the state legislature adopts a primary system not in compliance with the Democratic party charter (such as SB 5859 or the Grange Initiative) the Democratic Party will exercise its right to designate a single candidate to represent it on the ballot.

Commentary:

If a different primary system, like the one contemplated by SB 5859 (discussed later), is imposed on the parties, the Democrats have said that in that case only candidates chosen in accordance with their own party rules will be listed on the ballot as Democrats. Most likely these candidates would be chosen at a party convention. The Democratic Party believes that it has a right to control its own "brand name," and that this is necessary in order to avoid confusing voters. This position, if challenged, is likely to prevail in court.

3. Republican Party Proposal

The Republican Party plan was adopted by a unanimous vote of the Republican State Committee in January 2001. It moves beyond the issues covered in the preliminary injunction and addresses matters outside the scope of the present lawsuit.

Summary of Republican Proposal:

- It requires a party primary system.
- It allows voluntary party registration (with unaffiliated identification permitted).
- Unaffiliated voters may participate in the party primary.
- Party verification is required.
- Party rules control the selection of Republican candidates. (Candidates must either file nominating petitions signed by 5% of the registered Republicans in their district or, for statewide offices, obtain 20% of the delegate votes at a state convention.

Implications:

- Party registration requires action by the legislature. In the absence of party registration, the nominating petition method would not be available and the party would certify all its candidates through the convention method.
- In absence of legislation, the plan would probably require a court order to require implementation of the party's qualification rules.
- See also Preliminary Injunction.

Commentary:

In a “closed primary” only members of the Republican party would be allowed to help select Republican nominees and spokesmen. By agreeing to an open primary in which non-Republicans may participate, the party gives up to some extent the ability to be sure the candidates selected will faithfully represent the Republican party's philosophy. The Republican plan seeks to strike a balance in order to encourage broad participation in the Republican primary. It would require that candidates seeking to represent it first establish some defined level of support within the Republican Party. This can be done either by filing a nominating petition signed by 5% of the registered Republicans in the district or by securing 20% of the vote at a party convention. These requirements are comparable to those used in many states.⁴ They do not screen out legitimate candidates, but they do assure the party some control over its own message.

4. House Select Committee Proposal (HB 1551)

House Bill 1551 has been introduced by the two co-chairmen of the House Select Committee on Elections, Representatives Dave Schmidt and Val Ogden, and four other members of the eight-member committee have signed on as cosponsors. The bill shares some elements of the two party proposals, but diverges materially in others.

Summary of HB 1551:

- Requires a blanket primary. Significantly, HB 1551 would preserve Washington's traditional blanket primary system. While the legislature cannot override the constitutional rights of the political parties, the presumption is that the other provisions in the bill would create a system acceptable to the parties.

⁴ See “Beyond the Blanket Primary” cited in footnote 1.

- Voluntary party registration. The bill would allow voters may register as members of the party of their choice, or they may remain unaffiliated.
- Party verification. Party registration rolls would be available as public records, but no record would be kept of unaffiliated voters' choice of party.
- Party Certification. Political parties may certify candidates for the ballot, provided that candidates are allowed to seek certification either by a convention or nominating petition.

Implications:

- The bill's blanket primary provision would still be unconstitutional unless the three major political parties (Democrat, Republican and Libertarian) agree to accept it as a compromise. It is unclear, however, whether the existing party leaders can make the plan binding on their successors, because it would mean giving up the basic constitutional rights of party members.
- The details of the bill's candidate certification rules may conflict with party rules. Court precedents suggest that if there is any conflict, party rules would prevail over the bill's requirements.

Commentary:

Some supporters see this bill as a “reasonable compromise” between the interests of the public to preserve the blanket primary and the constitutional rights of the political parties to limit who may seek to represent them in elections.

5. The Senate Proposal – SB 5859

The leading proposal pending in the Senate Committee on State and Local Government, SB 5859, would establish a nonpartisan primary in which the top two vote-getting candidates for office advance to the general election regardless of their party affiliation.

Summary of SB 5859:

- Requires a blanket primary.
- A “jungle,” or “nonpartisan,” primary is established, similar to Louisiana's.

Implications:

- Using the jungle primary system may result in two candidates of the same party appearing on the ballot for the same office.
- Smaller parties (Libertarian, Green and Reform) would be eliminated from the November ballot.

Commentary:

Adopting a “jungle primary” system would motivate each party to move to a nominating convention to avoid what would have happened to the Republican Party in 1980 and 1996 had the jungle primary then been the law. In each of those years, just two Democrat candidates sought the office of governor, but several Republican candidates divided the Republican vote into smaller segments. Thus in 1980 Democrats Jim McDermott and Dixy Lee Ray were the top two vote-getters. Under the jungle primary, only they would have advanced and the

voters would have been denied the opportunity to vote for the ultimate winner, Republican John Spellman. Likewise, in 1996, when there were eight Republicans seeking the nomination for governor, the leading Republican candidate came in third behind Gary Locke and Seattle Mayor Norm Rice. In both years, then, no Republican would have appeared on the general election ballot and supporters of the Republican philosophy of government would have been denied a candidate of their choice.

The parties can avoid such an unsatisfactory result by nominating a single candidate to represent their philosophy through a convention. The “jungle primary” would not select the nominee of any party, but would determine which two candidates would advance to the general election.

6. The Grange Initiative (Initiative 751)

The Grange initiative would establish a multi-candidate general election by advancing, in many circumstances, two Republican and two Democrats to the general election ballot. In the event the core provisions do not meet constitutional muster, the Grange initiative would establish a three-candidate general election run off. For details on the proposal see: “Elections by Plurality; A Multi-Party System and the Grange Initiative.”

Summary of Grange Initiative:

- Separate primaries would be conducted for “official” candidates of the major parties and for “affiliate” candidates of those parties.
- The general election would generally have two “Republican” and two “Democrat” nominees.
- Candidates would be elected by a plurality.
- In the event the core provisions are held unconstitutional, partisan elections would be conducted so the top three candidates advance to the general elections.

Implications:

Since more than two candidates would appear on the general election ballot, most winners would be elected with only a plurality of votes.

Commentary:

The political parties almost certainly will object to unauthorized candidates filing as “party affiliates” and representing a connection with the party that they do not have.

The courts are likely to reject, as an interference with freedom of association rights, any law that allows candidates to represent themselves as “affiliates” of the Republican, Democrats or Libertarian party without the consent of that party.

The resulting unconstitutionality of the core provisions of Initiative 751 would result in all elections for partisan offices becoming contested as runoff elections between the top three candidates in the primary, a result certain to favor the minority philosophy in each district. For example, in a district where the Republican philosophy is strongest, a more vigorous Republican primary is likely, with the result that one Democrat and two Republicans would advance to the general election. In that case, the united Democratic vote, although a minority

of all votes cast, would likely elect the winners, even though a majority of voters preferred the Republican philosophy. To avoid that outcome, all major parties would be motivated to nominate a single candidate by convention, thus preserving their control over their message.

Prohibition of Publicly Funded Primary Elections SB 5864

In a related matter, Senator Tim Sheldon has proposed the elimination of party primaries. SB 5864 would require each party to pay for the "political party's proportionate share" of the cost of holding a nominating primary. Each party must post a bond equal to \$750,000 in gubernatorial years, \$500,000 in other even-numbered years, and \$25,000 in odd-numbered years.

Senator Sheldon's bill does not define "proportional share," or discuss how costs would be allocated between the nonpartisan matters on the ballot (judicial races, school board and local government, ballot measures and the like). Nor, for example, is it clear whether a party is conducting a primary (and must pay for it) when only one nominee for that party appears on the primary ballot.

It appears, though it is not clear, that the intent is not to limit the party's costs to the variable cost resulting from its partisan primary, but that SB 5864 would require the party to pay a significant share of the fixed cost the state and counties must pay for conducting the nonpartisan portion of the primary. A party that does not pay its full proportional share would be barred from future primaries.

Implications:

Political parties are likely to choose to nominate candidates exclusively by convention.

Commentary:

SB 5864 presents a fundamental issue of public policy: Is a party primary merely a service the government provides to the political parties for their private benefit? If so, then it may be reasonable for the parties, not the taxpayers, to bear the cost. But if it is merely a private benefit, then there is no justification for the state to mandate, as present law does, that the parties select their candidates by the primary method.

Or is there a significant public benefit to broader public participation in the selection of candidates that primary elections assure? If so, then the public benefit justifies a determination that the state should encourage parties to hold candidate selection primaries by paying the cost for the process.

In 1907, when the state legislature mandated that the parties shift from nominating conventions to an open party primary system, the legislature believed that here was a public benefit. Senator Sheldon's bill places that in question. Another way of stating the question is this: If the government requires a primary, shouldn't the government pay for it? If there is no public benefit to nominating candidates by primaries, then what is the justification for mandating it?

About the Author

Richard Derham is a graduate of Harvard College and Columbia Law School. He practiced law for thirty years in the Seattle office of Davis Wright Tremaine where his practice included election law matters. He also served for three years in the Reagan Administration as Assistant Administrator of the Agency for International Development. Most recently he served three years as President of the Washington Institute Foundation. Mr. Derham is the author of the study “Beyond the Blanket Primary, Washington’s Parties Nominate Their Candidates.”

