

S. 1905, THE REGIONAL
PRESIDENTIAL PRIMARY AND
CAUCUS ACT OF 2007

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WEDNESDAY, SEPTEMBER 19, 2007

United States Senate,
Committee on Rules and Administration,
Washington, D.C.

The Committee met, pursuant to notice, at 9:33 a.m., in Room SR-301, Russell Senate Office Building, Hon. Dianne Feinstein, Chairman of the Committee, presiding.

Present: Senators Feinstein, Bennett, Stevens, and Alexander.

Staff Present: Howard Gantman, Staff Director; Jennifer Griffith, Deputy Chief of Staff; Veronica Gillespie, Elections Counsel; Adam Ambrogi, Counsel; Natalie Price, Professional Staff; Matthew McGowan, Professional Staff; Sue Wright, Chief Clerk; Carole Blessington, Assistant to Democratic Staff Director; Mary Jones, Republican Staff Director; Matthew Petersen, Republican Chief Counsel; Shaun Parkin, Republican Deputy Staff Director; Michael Merrell, Republican Counsel; Abbie Platt, Republican Professional Staff; Trish Kent, Republican Professional Staff; and Rachel Creviston, Republican Professional Staff.

OPENING STATEMENT OF CHAIRMAN FEINSTEIN

Chairman Feinstein. Good morning. I would like to convene the meeting. I see that our three senatorial witnesses are present. We have been joined by the Ranking Member, Senator Bennett.

We meet today to receive testimony on a bill that would significantly impact the time, the place, and the manner in which Presidential primaries and caucuses are conducted nationwide. And I would very much like to welcome the three authors--Senator Klobuchar, Senator Alexander, and Senator Lieberman--and I would like to thank them for their leadership in introducing this bipartisan bill, which I have agreed now to cosponsor.

I might note, and ask that it be placed in the record, two communications--one from the Republican National Committee and the other from the Democratic National Committee, indicating their opposition to the bill. And, of course, as we know, the parties could do this on their own. I think they do not like our involvement in the matter. However, many of us feel the time has come to change. At the very least we would urge the national parties to take this action.

[The information follows:]

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Chairman Feinstein. The rapid-fire front-loading of primaries and caucuses that occurred in the 2000 and 2004 election cycles has dramatically escalated in the 2008 cycle. Already, California and 17 other States are set to vote on February 5th--a date that is now being called "Super-Duper" Tuesday. And despite threats from both major political parties, Michigan could vote on January 15th and Florida on January 29th, which will only force New Hampshire and Iowa to move their primary and caucus even earlier. In fact, the Nation's first Presidential primary or caucus could end up occurring this year. Clearly, something needs to be done. The question is what?

The Presidential nominating process is too important to our democracy to allow the pell-mell scramble to continue. Congress needs to consider stepping in to restore order to the process if the parties will not do it themselves.

This is not the first time that Congress has considered revising the Presidential primary system. In fact, there have been more than 300 bills introduced in Congress on this issue in the past 100 years. It is important to note that the idea of Presidential primaries is not something ingrained in the Constitution, and it took many years for the system to develop. For years, even in States that held primaries, it was the State

party leaders or closed caucuses who chose delegates to the national party convention, where the real business of selecting the party's nominee occurred.

Now, all that has changed. In the early 1970s, a wave of reform swept through the parties which transferred the power to choose delegates from party leaders to rank-and-file voters. So, literally, for both of the two major parties, the conventions have become just a showcase. Between 1968 and 1992, the number of States with Democratic Party primaries increased from 15 to 40, and the number of States with Republican Party primaries increased from 15 to 39. This new dynamic also boosted the importance of early races in Iowa and New Hampshire, and other States seeking to boost their own position on the political spectrum moved up their own primaries.

In 2000, for instance, my State of California moved its primary to the first Tuesday of March, along with other States such as New York and Ohio, resulting in 16 primaries and caucuses nationwide on the same day. This meant 70 to 80 percent of the delegates needed to claim the nomination of either party were chosen by March 7, 2000. The media declared the winning nomination on both sides of the aisle, even though voters in fewer than half the States had cast ballots.

As I mentioned earlier, for 2008 it is becoming a scramble to see which State is first. And while the parties have vowed to punish those States that try to buck their party rules, the jury is still out on whether this will actually happen.

In my opinion, S. 1905 provides a simple, common-sense solution to this problem. Beginning with the 2012 election, it would divide the Nation into four regions and have them vote in sequence. The first region would vote in March, with the other three following in April, May, and June. Which region goes first would be selected by lottery. It would also recognize the historic importance of the Iowa caucus and the New Hampshire primary and allow these two to go first.

I also believe that it would actually cut the cost of Presidential campaigns because the earlier they are, the more candidates have to start up, hire staff, take on huge costs, which are really unnecessary if this were done right. So I believe this bill would resolve the most difficult and pressing problems without adversely affecting any of the national parties, State, or territories, or the voters.

So I look forward to the testimony today, and I now yield to my Ranking Member, the distinguished Senator from Idaho, Senator Bennett.

OPENING STATEMENT OF SENATOR BENNETT

Senator Bennett. It is Utah, and in today's--

Chairman Feinstein. Oh, I am sorry.

Senator Bennett. In today's circumstance, we probably ought to be fairly careful about that.

[Laughter.]

Chairman Feinstein. Yes, I think so.

Senator Bennett. Thank you, Madam Chairman. I agree with most of what you say, but I disagree with the comment you make at the beginning when you say the nominating process is broken, because you imply that we have a nominating process. And the great difficulty we have and the reason we are here is that we do not have a cohesive or coherent process. We have a system that has grown up like Topsy and that has no constitutional boundaries.

Our Founding Fathers, who were prescient in a large number of areas, completely missed the rise of political parties. Indeed, they were very anxious to prevent the rise of political parties if you read the Federalist Papers. And of all of the things that caused Abigail Adams to be unhappy with Thomas Jefferson, the one that she was the most unhappy about was the fact that she accused Jefferson of being a party man. And she was absolutely right. Thomas Jefferson created the first political party, and that

absolutely appalled not only Abigail Adams but a number of her contemporaries. And the entire party system of nominating candidates for the Presidency is extra-constitutional, which is why it is so chaotic. There is no structure in our basic law to determine how candidates for President will be chosen in a party system. And that is the one thing that troubles me about this bill, and we are going to have witnesses about this issue on the second panel: How do we justify under the Constitution congressional interference in a system that the Constitution does not contemplate?

That having been said, I want to congratulate Senator Klobuchar and her cosponsors for leading us into this area and forcing a dialogue on it. Even if it may be true that this is not the right bill or the right solution, it is very true that this is the right problem to be addressing.

I spend time in Europe and dealing with people from outside the United States, and they find it absolutely incomprehensible, they find the American nominating system incomprehensible, and they ask me to explain it to them. And when I try to do so in a way that makes it simple and reasonable, I find it is impossible to defend the system as it currently exists as being simple and reasonable.

So I appreciate the bill, I appreciate the hearing. I think we need to get into this issue. But it may very well be that as we explore it, we discover that the solution lies not in a piece of legislation but, in fact, in an amendment to the Constitution that will rectify the item that was overlooked by the Founding Fathers and recognize that political parties do exist and, therefore, should be part of our constitutional structure instead of being maintained in their present circumstance of an extra-constitutional status.

With that, I look forward to the testimony not only of our distinguished colleagues who make up the first panel but those experts and scholars who will be on the second panel.

Chairman Feinstein. Thank you very much, Senator Bennett. I apologize for the State.

I would like to introduce the three Senators in tandem and then ask that they go ahead. The general rules of this Committee are that we try to limit remarks to 5 minutes so that we can have a Q&A, but being Senators, of course, you know no time limit. So whatever is, is.

I would like to begin with Senator Amy Klobuchar. Prior to being elected to the Senate in 2006, the Senator had a distinguished record as a public interest attorney and chief

prosecutor in her native Minnesota. She is the lead sponsor of S. 1905, and we welcome her.

Also, Senator Lamar Alexander is a former two-time Presidential candidate and has been involved in Presidential nomination issues for years. His personal experiences running in Presidential and congressional primaries and caucuses will provide valuable advice to the Committee as we consider this legislation.

And, finally, we welcome Senator Lieberman. He also is no stranger to election reform issues. He has run on a Presidential ticket for President as the Vice Presidential nominee for the Democratic Party. He has worked tirelessly in a bipartisan manner on legislation to reform campaign finance law in the 1990s, on election reform issues in 2000, and now on Senate legislation to grant the District of Columbia voting rights.

It is my pleasure to welcome the three of you, and if you would proceed, I would appreciate it. Senator Klobuchar?

STATEMENT OF HON. AMY KLOBUCHAR, A UNITED STATES SENATOR
FROM THE STATE OF MINNESOTA

Senator Klobuchar. Thank you, Madam Chairman, for holding this timely hearing on the Regional Presidential Primary and Caucus Act of 2007 and for inviting me to testify. I am honored to appear before your Committee in considering this vital issue, and I am

happy to have the opportunity to testify about this bill I introduced, along with my senior colleagues Senator Alexander and Senator Lieberman.

Our Presidential primary system is broken, and it is time to stop the primary arms race. Each individual in this country should have a voice in electing the President of the United States--a voice that begins with selecting the candidate through primaries and caucuses in each State. A vast number of voters in many States across the Nation, however, have lost their voice in the Presidential primary selection process because of the drastically altered calendar.

Currently, we are in a race where each State is trying to leapfrog the next as all the States appear to be vying to hold the earliest primary. The voters of each State no longer have a say unless they are able to compete with the slew of other States who are trying to go first.

The Presidential primaries and caucuses are turning out to be, to quote an editorial in the San Antonio paper, "a big mess," and reforming this mess is long overdue. This legislation would not take effect until 2012, but the primary season now underway shows why this reform is needed. In the 2008 primary season, at least 26 States will hold primaries or caucuses by the first Tuesday in

February--a huge increase from the nine primaries held by the first Tuesday in February, which was called "Super Tuesday" in the 2004 primary cycle. Now 19 States are holding primaries or caucuses on the first Tuesday of February in 2008, as you noted, Madam Chair.

Many States have felt forced to move their primaries up to the date for fear of being left out in the cold if they wait any longer. New Jersey moved its primary to February 5th because, in the words of its State Senate President, "It is time we stop being the Rodney Dangerfield of Presidential primaries." This current system undermines the spirit of the primary process. It turns our primaries and caucuses into a tarmac campaign, and candidates are forced to partake in a blitzkrieg campaign strategy across the entire country. Candidates fly from airport to airport and appear on television, but if this continues, they will have little opportunity for meaningful, targeted discussions with voters. That might be suitable for the last few weeks of a general election Committee, but not for the primaries and caucuses.

Voters will also be forced to vote on dates long before they traditionally paid attention to Presidential politics and before they may be ready to do so. It is time to de-escalate the primary arms race. Senators Alexander, Lieberman, and I seek to give order to this chaotic, messy, and unrepresentative process. The States

cannot solve this problem individually. As the current scramble shows, each State knows that if it holds its primary at a later date, it will be disadvantaged by States that go earlier. And I know, Senator Bennett, you raised some issues about the constitutional authority. I believe that Congress does have the constitutional authority to take this action. The Supreme Court has recognized broad congressional power over Presidential elections and has recognized that this power extends to Presidential primaries. This bill is tied to Congress' clearest power over Presidential elections: its express constitutional power to "determine the time of choosing the electors."

In fact, Justice Scalia in an article written when he was a law professor said that this congressional power means that "Congress must have at least authority to specify the dates of primaries."

So Congress is empowered to create an orderly process that brings a voice back to every States. To do this, we propose that during each Presidential election a different region of the country have the chance to host the first primaries and caucuses. These four geographic regions--West, Midwest, South, and East--will each have 12 or 13 States, as you see on this map, and relatively the same number of electoral votes. One region would be selected

through a lottery system to go first for the 2012 primaries, holding their primary on the first Tuesday of March, or anytime following that date during the week. The States in the next region would hold their primaries on the first Tuesday of April and during that week; the next region on the first Tuesday of May; and the final region, the first Tuesday of June. The order of the regions would rotate with each Presidential election.

This decompresses a system that in its current form is haphazard and disorganized. It brings greater predictability to the voters with a balanced, orderly sequencing of primaries and caucuses, and with that, greater opportunity for meaningful choice in Presidential candidates. This bill does not forget the importance of face-to-face, door-to-door, and neighborhood-to-neighborhood campaigning that the early primaries in New Hampshire and the early caucuses in Iowa provide--something that I know my two colleagues enjoyed so much during their two Presidential campaigns, and I know that they will never forget.

The Iowa caucus and the New Hampshire primary hold an obvious historical significance, but they also represent grass-roots efforts that can only be accomplished on a smaller scale and with a smaller population. As candidates meet with communities on a very intimate level in these States, the voters of the entire country

are able to watch and get to know the candidate on a level that is difficult to replicate in a multi-primary system. Regional primary plans, combined with several small-State primaries, have been gaining widespread support, particularly by the National Association of Secretaries of State, a group equally frustrated with States' clamoring to schedule earlier primaries.

Without reform to the primary selection process, we risk losing the founding principles of the democratic process, giving the voters in every State a voice in the electoral process. Regional Presidential primaries provide a viable solution to what is likely going to be a debilitating primary process to the Presidential candidates of the future. I am proud to be part of this tripartisan effort.

Thank you very much.

[The prepared statement of Senator Klobuchar follows:]

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Chairman Feinstein. Thank you very much, Senator Klobuchar.
Senator Alexander.

STATEMENT OF HON. LAMAR ALEXANDER, A UNITED STATES

SENATOR FROM THE STATE OF TENNESSEE

Senator Alexander. Thank you, Madam Chairman, for holding the hearing. We are all three delighted with your willingness to

cosponsor the legislation, giving it a much better opportunity of passage. So to you and Senator Bennett, let me say I appreciate Senator Klobuchar's leadership in being the principal sponsor of this legislation, and Senator Lieberman has for several years been an advocate for reform of the system, having introduced legislation repeatedly, and I am glad to join them.

Let me take a little different tack with my testimony this morning than perhaps some of the other witnesses will. I propose that we turn the Presidential nominating process over to the National Football League, or that we at least take a lesson from the NFL. Then maybe we could have a second Super Bowl where anything is possible and everyone can participate.

Here is why I say that. Take the example of the New England Patriots in 2003. On September 12th, in the season's first game, the Buffalo Bills trounced the Patriots 31-0. If this had been the first-in-the-Nation Iowa caucus, the Patriots would have been toast. You know the pundits' rule: Only three ticket out of Iowa. The Patriots certainly did not look like one of the three best teams.

Then a few weeks later, the Washington Redskins ambushed the Patriots, which was as unlikely as it would have been for Dennis Kucinich to upend John Kerry in the New Hampshire primary. But in

the NFL, upsets do not end the season. The Patriots played 14 other games. They won them all. And then they beat the Carolina Panthers in the Super Bowl.

The National Football League schedules 16 contests over 5 months to determine its champion. The Presidential nomination process uses the equivalent of two pre-season games in Iowa and New Hampshire to narrow the context to two or three, and sometimes those two pre-season contests pick the winner.

The NFL was not always so wise. In the 1930s, league owners rearranged schedules after the first few games so that the strong teams could play each other. Teams that were doing well played one another. This was good for the Chicago Bears, for example, but not for the league. Fans in other cities quit going to the games, just as voters in most States have quite voting in Presidential primaries. Bears owner George Halas, the late George Halas, and others created today's competitive NFL system in which any one of the 32 teams can hope to make the play-offs. Green Bay can make it because the league makes sure that even small-town teams have enough revenue. Prime-time television opportunities are rotated. Each Monday, senior officials in the league's New York office grade each call, and no one can second-guess even the instant replays. Professional football has become America's game because it

symbolizes the most important aspect of the American character: If you work hard and if you play by the rules, anything is possible. Eight of the two most watched network television shows have been Super Bowls. Ninety-five of the 100 cable television broadcasts that have been most watched have been NFL games.

Every September, the NFL fields 32 teams, almost all with a shot at the play-offs. Yet every 4 years, the Presidential nominating process does well to attract five or six credible candidates for the biggest job in the world, and all but two or three are usually eliminated after the first two contests. The dream that any boy or girl can grow up to be President should be the most important symbol of our country's irrational optimism. The professional football schedule has become what the Presidential nominating process should be. If professional football were Presidential politics, SportsCenter would pick the Super Bowl teams after two pre-season games.

The problem is not Iowa or New Hampshire. The problem is what comes after Iowa and New Hampshire. At least 20 States, as Senator Klobuchar indicated, will choose delegates in a one-day traffic jam on February 5th next year. Our legislation requires States to spread out the primaries and caucuses into a series of regional contests over four months. Beginning in 2012, States could only

schedule contests during the first week of March, April, May, and June of Presidential years. The traditional warm-up contests in Iowa and New Hampshire would still come first, but they would return to their proper role as "off-Broadway opportunities," if you will, for lesser known candidates to become well enough known to compete later on the big stage.

In addition, at the appropriate time, I will offer an amendment to this legislation that would allow Presidential candidates to have start-up funds--to raise up to \$20 million in individual contributions of up to \$10,000 indexed for inflation. The current limit of \$2,300, which was \$1,000 when I ran, makes it too hard for many worthy but unknown candidates to raise enough early money to be taken seriously, leaving the field to the rich, who constitutionally can spend their own funds, and the famous.

Now, finally, together these two reforms--spreading out the primaries and, in my opinion, allowing a start-up fund for candidates--would increase the pool of good candidates willing to run for the White House and give more Americans the opportunity to hear their ideas and to cast a meaningful vote. I am a Republican and a Federalist. While Supreme Court decisions really give Congress the power to schedule Presidential elections, including nominations, it would show more respect for our Federal system if

the political parties themselves did it. Both parties have made some good-faith efforts to do this, but they have failed, largely because some power center within the party believed that clean competition was bad for the power center and used its power to block reform. I believe that people have had it with this broken system, and if the parties do not fix it, the Congress will.

In Buckley v. Valeo in 1976, the Supreme Court made clear that, "Congress has the power to regulate Presidential elections and primaries," and in this legislation we do the minimum. We simply create a framework within which the States can make judgments.

Fewer than 50,000 Iowans voted for John Kerry, our colleague, in the 2004 Iowa caucus; 84,000 New Hampshireites voted for him in the New Hampshire primary. Senator Kerry may have been the strongest Democratic candidate, but we will never know since in Presidential nomination politics, we never play the whole season. Over 90 million people watched the last Super Bowl. Perhaps we can learn something from America's game about how to nominate a President of the United States.

Thank you.

[The prepared statement of Senator Alexander follows:]

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Chairman Feinstein. Thank you, Senator Alexander.

Senator Lieberman.

STATEMENT OF HON. JOSEPH I. LIEBERMAN, A UNITED STATES
SENATOR FROM THE STATE OF CONNECTICUT

Senator Lieberman. Thanks, Madam Chairman and Senator Bennett, Senator Stevens. I appreciate very much the speed with which you, Madam Chairman, went to this very important issue. I am honored to be here with my cosponsor, Senator Klobuchar, and should I say "Commissioner Alexander"? Yes, a very compelling argument I thought the Commissioner made.

Chairman Feinstein. Roger Goodell will like that.

Senator Lieberman. Right. The only problem that will follow Lamar now for the next week or so will be to explain to the legion of Redskins fans here why he compared them to Dennis Kucinich.

[Laughter.]

Senator Lieberman. I will leave that to him.

My two colleagues have made such good statements. I would ask that my opening statement be submitted to the record, and I would like to just make a few general comments.

Chairman Feinstein. So ordered.

Senator Lieberman. Thanks.

The first is to respond to the, I suppose, understandable but

I think unjustified statements filed with the Committee by the two national parties--the Democratic National Committee and the Republican National Committee--basically saying that they can handle it. The fact is they have shown that they cannot handle the problem. It is why it is out of control.

I remember an old line that I heard early in my legal career where somebody said that laws should only be adopted insofar as they are necessary, insofar as people's natural inclination to do what is right does not manifest itself. So as the old story goes, in heaven there is no law because everybody naturally does what is right; in hell there is all law because everybody naturally does what is wrong; here on Earth, we are somewhere in between.

This is a case that cries out for law because those in charge--and it is really mostly the national parties--have simply not been able to create a process that is orderly and rational and democratic--with a small "d"--which is why, as has been documented, I think it is now more than 34--or 34 States at least will choose their delegates before next March 1st, and it will probably all be over in both parties by February 5th. So I think there is an urgent need to legislate.

The bottom line is this is no way for the greatest country in the world to select its leader. I don't say "greatest country"

cingoistically. I mean, there has never been a country that has had as much economic, military, cultural power in the world, in the history of the world. And yet we select our leader, whose leadership affects the rest of the world powerfully, in an extremely irrational and ultimately unfair way.

I want to comment on, if I may, as a second point, your opening reference, Madam Chairman, to the fact that we have selected nominees for President by primaries only relatively recently in our history. For a long time, most of our history, they were selected by conventions, and I offer this politically incorrect--but that is what Independents do, of course.

Chairman Feinstein. Of course.

Senator Lieberman. --nostalgic insight, if you will, or opinion, that those conventions were not as democratic as primaries in the sense that they were not open to everybody, different States selected delegates in different ways, they--and I borrow here from David Broder, who has written about this. They were composed of representatives of the various States and regions and interests and ethnic groups and racial groups in the country who got together every 4 years and, generally speaking, they had a goal, which was to nominate a candidate who could be elected President of the United States. That tended to produce candidates who, for want of

a better term, were more mainstream, were more centrist; whereas, the current process, not through the fault of the process but just by virtue of who turns out, tends to bring out people who are more ideological, who feel more intensely about what is happening, and, therefore, have a disproportionate effect so that, as we all know, the candidates run to the margins in the primaries, and then when they get nominated, try to scuttle, hurry back to the center, and it does not have a positive effect on the system overall.

Bottom line, let me say what my colleagues have said in my third point here. The current system somehow has ended up being both too long and too short. It starts too early and it ends too soon. And the result--by starts too early, I obviously mean basically it begins 2 years before the election. Candidates are tested in a way that is almost unimaginable. Lamar and I have been through this. I suppose we might call ourselves "recovering Presidential candidates." It is not just a marathon. It is about ten marathons. Now, I suppose you could say that is the way to really test who is ready to be the leader of the greatest country in the world. But it does not really produce, in my opinion--it is not the right test, if I can put it that way. And it ends too soon in all the ways that my colleagues have indicated, which is why in the 1990s I give special credit to our former colleague. Slade

Gorton of Washington State and I introduced two bills in 1995 and 1999 to create regional primaries to try to spread the process out and give more people in more States the opportunity to be involved. That is why we have introduced this bill as the actual process has become much more front-loaded and, therefore, I think less fair and less rational.

I will say that when we introduced the bill, I entered a kind of dissent in part and said that in the best of all worlds, I do believe that if we go to a regional primary system, we ought not to have Iowa and New Hampshire be first and separate. I have been to both States, spent a lot of time in them campaigning. These are great States. They are wonderful people. Amy is right. There is something great about being in small States at the outset. But the fact is it has given the voters who come out in those States in either party disproportionate influence in the selection of the nominees.

Since 1976, there have been eight Presidential elections; therefore, Republicans and Democrats have chosen 16 candidates to run for President. All nine of the candidates in either party who have won Iowa and New Hampshire have been nominated. All nine. Only one candidate who did not win either was nominated, and that, not surprisingly, was the comeback kid himself--Bill Clinton.

So I do think that in the best of all worlds we would blend Iowa and New Hampshire into the regional primaries. I will say on behalf of the proposal we have made, which recognizes the unique history of the two, that if you spread out the regional primaries, it will tend to diminish the extraordinary influence that the two early States have now because people know the rest are coming.

I want to ask a question before I make my final point. This is extraneous and spontaneous. I said at the beginning that the system we have now starts too early and ends too soon. I do not have an easy answer to how we stop the process from starting too early. Senator Bennett referred to the puzzlement that people around the world, including in Europe, have about these 2-year campaigns we have, where they limit the campaigns. I raise the question. I do not have an informed answer. Is there anything we can do to shorten our Presidential campaigns? Can we, for instance, say that Presidential candidates cannot raise money until January 1st of the election year? That would be a way to shorten the campaign. I leave you with that question without an answer.

I would say finally this: The situation now with regard to Presidential nominations is out of control. So I will say to you, Madam Chairman, that I am very grateful that you have not only held this hearing but that you have signed on as a cosponsor. It gives

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this effort that three of us have begun real seriousness, and I think it has to be taken seriously and not just as a kind of curiosity, because it truly affects our governance, the fairness of our political process, the quality of our national leadership.

So I thank you for your leadership, for your attention, and I hope that together we can really bring about a fundamental change this year so that the next time we select our President, it will be fairer and more people in both parties will have the opportunity to participate in that selection.

Thank you very much.

[The prepared statement of Senator Lieberman follows:]

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Chairman Feinstein. Thank you, Senator Lieberman. I appreciate the comments of all the Senators.

I have no questions, so let me turn it over to you, Mr. Ranking Member.

Senator Bennett. Well, I have a whole series of questions and comments, which I shall forbear. Again, Madam Chairman, and to our three colleagues, this is a vital issue, and you are doing a wonderful service by raising it. I think we need to go deeper than just trying to fix the present system and address the fundamental question of what kind of system do we want. And we may very

seriously decide we do not want a series of regional primaries. We do not want the present structure.

If I may, the Founding Fathers gave us a structure for nomination. They said the State legislatures shall choose the wisest people they can find in their States to nominate somebody for President, and then the House of Representatives will pick the President from the top three of that list.

Now, if somebody happens to get a majority of the nominating votes from the electors chosen by the State legislatures, then we will not go through the process of having the House pick. But, clearly, once George Washington has passed from the historical scene, there will not be anybody who can command enough national prestige to get a majority of the electoral votes. So the nominating process will be State legislators will pick electors who will nominate, and the House of Representatives will pick the President. And Thomas Jefferson figured out a way to beat the system, which was a power base between Virginia and New York, and Jefferson went to New York and got Aaron Burr, the primary political power in the North, and Jefferson of Virginia, which was the primary political power in the South, to make a deal and they would get a majority of the electoral votes.

Now, the unspoken understanding was that Burr would be the

Vice President and would throw one of his votes, and Burr did not do it, and so we had the difficulty in the House trying to pick between Jefferson and Burr. But the only time the system the Founding Fathers had in mind worked was the choice of John Quincy Adams over Andrew Jackson, where the House of Representatives made the decision, because the creation of political parties extra-constitutionally destroyed the system the Founding Fathers put in place. And I hope from this debate we can examine that fundamental system and ask ourselves: In the 21st century how do we want to intelligently devise a system for choosing a President? And we may decide that we do not want regional primaries as the logical way to do that.

What you have proposed here is a logical way to fix the present mess, and it may be where we should end up. But let us step back from the present mess and ask the fundamental question: What do we really want to do here? And maybe the National Football League is the model we follow, but my concern here is let us honor the Constitution and recognize that the system the Founding Fathers had in mind simply does not work. And maybe it is time for us to have some constitutional amendments on this issue that brings the whole process into the 21st century without the kind of constitutional questions that have been raised about this one.

Chairman Feinstein. If you would allow me just a brief rejoinder before turning to Senator Stevens. I think a system that was devised when we were 13 colonies and 4 million people, with very different values then to a great extent. Women for example, could not vote. Women could not own property because property owners tried to devise a system that benefited them. We are a very different country now. The closest we can come to a perfect system is a direct election system, with a is the connection of the individual to the vote.

The Electoral College is a vestigial remnant of a day long gone by. People want to vote directly. And I think connecting the individual directly to the vote is the thing that is going to bring those people out. So I think we are going to have some interesting discussions.

I will now turn to Senator Stevens.

OPENING STATEMENT OF SENATOR STEVENS

Senator Stevens. Well, I have to go to another meeting, so I shall just be brief. I cannot support the concept of regional primaries as suggested by the panel because I think it eventually will just bring one area of the country against another. If we are going to use congressional power to bring about a scheme to schedule primaries in the States, then I somehow agree with Senator

Bennett. But I do believe we ought to think about how we can do it in away that would not necessarily bring about a conflict between the most populous States in each one of these primaries. That is what will happen with the regional concept. It will be the major population States against one another. That is the way I see it, anyway.

I would suggest that we divide the 50 States into ten categories based on population, and that we, 2 years before the election, require a drawing literally by somebody, of one from each one of those categories and have each one of those take place so we would not know what region you would be in every election. But somehow or other, I look at that map, and I am a Westerner. I see 19 States that are all together, and California will determine what the outcome will be.

Chairman Feinstein. Wouldn't that be nice?

[Laughter.]

Senator Stevens. Well, that is what happens in terms of the Ninth Circuit, anyway. We are dominated by California in everything we do in the West. As a concept, why should we be dominated in the selection of the President?

I do think we ought to think about population and have some way to schedule--give the States a schedule if they want to have

primaries, that they should schedule them on a specific date so we avoid this concept of everyone rushing West or everyone rushing South, everyone going up to New England. It ought to be that we look to the concept of primaries being a way to indicate support for each party of particular candidates.

But I come back to Senator Bennett. I do not think the system is broke, so why try to fix it? I think the parties have the capability of establishing a system of selection. Under the current system, some States have Presidential primaries; some States have primaries to elect their delegates to the convention of each party. That is a party system. I really think that Congress ought to stay out of it. But if you are going to get into it, do it on the basis of population and do not bring about a system where it is one region versus another. That is what would be the result of this concept of regional Presidential primaries. I would oppose regional Presidential primaries.

Chairman Feinstein. Thank you very much, Senator Stevens.

As you can see, we have got a hot topic for debate, and I think it is a worthwhile debate. I think it is one that is long overdue. So let me thank these three Senators for their leadership on this issue. It has been great to have you here. I think you have not heard the last of it. So thank you very much.

We will move on to the next panel. We have a vote, as I understand it, scheduled for 10:30. It has been pushed back to 10:45. We will try and keep the hearing going. I will go quickly to vote. I ask Senator Bennett to continue the hearing, and then come back.

So if I could ask the next panel please to come forward, there are four people to take their places, and I will quickly begin the introductions. We have two witnesses that are Secretaries of State and serve as co-chairman of the Elections Subcommittee on Presidential Primaries of the National Association of Secretaries of States. They will testify on behalf of their Association regarding the Presidential nomination system in S. 1905. The first is Iowa Secretary of State Michael Mauro. He has decades of experience in State and local election administration, including Iowa's role in the Presidential nomination system. And the second is Kentucky Secretary of State Trey Grayson. He has extensive experience with State and local election officials. He serves on a number of national organizations, and he is currently chairman of the Republican Association of Secretaries of States.

The other two witnesses are Professor William G. Mayer and Professor Richard L. Hasen. Both will address the constitutional concerns regarding whether Congress has the authority to legislate

in this area. Professor Mayor is an Associate Professor in the Department of Political Science at Northeastern University in Boston. He has considerable experience in campaign finance and election law issues. And Professor Hasen is the William H. Hannon Distinguished Professor of Law at Loyola Law School in Los Angeles. He is a nationally recognized expert in campaign finance regulation and election law.

If we may begin with Secretary of State Michael Mauro, and please note the 5-minute clock. Please proceed.

STATEMENT OF MICHAEL MAURO, IOWA SECRETARY OF STATE, DES MOINES, IOWA, AND CO-CHAIRMAN, SUBCOMMITTEE ON PRESIDENTIAL PRIMARIES, NATIONAL ASSOCIATION OF SECRETARIES OF STATE

Mr. Mauro. Thank you, Chairman Feinstein and Senator Bennett. It is a pleasure to be here today. I would also like to thank other members of the Rules Committee for allowing me this opportunity to be here. I am excited and I am humbled and honored to be in front of such a distinguished group. The three Senators who spoke previously all had great comments about this process, and I think it is a very timely process that we are dealing with today because of what is taking place in the country.

I think there is lots of uncertainty, and that is why we are

here, because of the uncertainty that is taking place, and trying to put everything together. It has been an interesting time trying to follow it from the concept of Iowa and New Hampshire and trying to determine when and where they are going to be holding their caucus and primary.

The uncertainty of the election calendar is causing problems for everyone. It is not just elected officials on this level. It is candidates. It is the election officials. I am a former election official, and trying to determine caucus sites, trying to determine polling place sites, trying to hire election officials, trying to put all these things together with no certain set dates just creates more problems to the issue.

But there is one certainty that I think we all can agree on, and I know it is there because I see it every day. The process is going strong in Iowa, and it going strong in New Hampshire. If you were in Iowa last Sunday and seeing what took place in a farm field in Indianola, or if you were in Iowa in August and seeing what took place in Ames, the candidates and how they were there face to face, one on one, lesser known candidates on the same field as highly recognizable candidates, discussing the issues. And I think Iowa and New Hampshire go beyond just Iowa and New Hampshire. Many news agencies were there reporting the events. You could not turn on C-

SPAN or CNN without seeing and feeling and seeing these candidates up close and personal. Sound bites were not the key for the day. Negative advertising that we are so used to in political campaigns does not happen in Iowa and New Hampshire. They have to talk about issues. They have to look you in the eye. You know them and you get a sense for who the candidates are. Really, it is incredible, because in Iowa and New Hampshire, by the end of the process, these candidates really are not even celebrities anymore. You know them so much and seen them so much that you kind of take them for granted, where in other States they are highly touted and highly celebrated. But you get to know them, and the process does work there. And it works very well.

You know, the National Association of Secretaries of State has put together a proposal very similar to Senate bill 1905, which talks about the rotating regional primaries, and it talks about breaking them into regions. But it does allow Iowa and New Hampshire to maintain their first-in-the-Nation status. The Senate 1905 bill that you are talking about is very similar and mirrors this concept.

But I can tell you this: Both processes include Iowa and New Hampshire on the front end, and I am here to support that. Not only am I here as a resident of Iowa who has selfish interests, but

from New York to California. I just picked up an editorial in the New York Times, the chief political correspondent Adam Nagourney, who writes a great editorial talking about you have to go to Iowa and you have to go to New Hampshire, you have to see the process. You have to see how they interact with the candidates. You have to see the issues that are discussed every day.

And then you go to California, and I picked up an editorial from the San Jose Mercury News that compliments Chairman Feinstein and talks about the need to change the process. But one thing is for certain. It is working in Iowa and New Hampshire, and the candidates get to vent and they get to express their issues, and those issues get expressed further on.

In response--and I will just close up here. I have about a minute left. In response to Senator Alexander's comments and Senator Lieberman's comments, I respect both those individuals greatly. They spent some time in Iowa. I got to know Senator Lieberman, got to visit with him in neighborhood halls and in all different types of venues. And I think that basically what they discussed is that small-town candidates do have an opportunity, lesser known candidates do have an opportunity to go on to be big-time candidates. And I kind of disagree with the process because it does not end in Iowa and it does not end in New Hampshire. The

amazing thing to me is: Who drives this process? It is the candidates.

Believe me, when we have the November election next November 2008, in January of 2009 there will be somebody, either a Republican or Democrat, whoever is in office, will be traipsing through Iowa, will be traipsing through New Hampshire trying to put their organization together. It is not the parties that are responsible for that. It is the candidates who kind of drive the process. It is going strong in Iowa and it is going strong in New Hampshire because of the candidates. They make it strong there.

Finally, I need to close with the idea about where this belongs. Does it belong with Congress? Does it belong with the parties? I think there is a real constitutional question here. And I am not a constitutional lawyer, but I think to a certain extent this process should remain with the parties, should remain with the States. The parties set up the caucus operation, and it is done on a party level. In Iowa, Secretary of State that I am, I have very little control over the process. It is a party process. And in the primary States, it is done by the States. How do we bring order to that is what I think the Congress needs to address. How do we address and get order to this process to get the States, to get the parties to work in a manner to let them know we are

tired of this, the country is tired of this? We need to bring some order to this process. Is it through constitutional law? Is it through changing laws? Can we legislate everything? I do not know. We need to have some order to an uncertain process.

So I am going to tell you that I think the concept is a good concept. There might be a better concept, but I think the process has to be looked at, and I commend this Committee for addressing this issue.

Thank you very much for having me.

[The prepared statement of Mr. Mauro follows:]

Chairman Feinstein. Thank you very much, Mr. Mauro.

Mr. Grayson, please proceed.

STATEMENT OF TREY GRAYSON, KENTUCKY SECRETARY OF STATE,
FRANKFORT, KENTUCKY, AND CO-CHAIRMAN, SUBCOMMITTEE ON
PRESIDENTIAL PRIMARIES, NATIONAL ASSOCIATION OF
SECRETARIES OF STATE

Mr. Grayson. Thank you, Chairman Feinstein, for having me and, Ranking Member Bennett, for having me as well.

Secretary Mauro and I kind of divided our remarks. I am going to focus more on the broader concept of the rotating regional plan. He was going to focus more on the value of New Hampshire and Iowa going first.

I think as we have listened to some of the testimony today, there are kind of three issues here, and the first and threshold issue is: Is the system broken? There has been a lot of testimony today, and I am not going to repeat some of the statistics we have already heard about all the front-loading. I can just tell you that I have spent the last year as chairman of our Rotating Regional Primary Subcommittee at NASS. We get a lot of media calls at NASS about the calendar.

Chairman Feinstein. Say for people who are listening what NASS is.

Mr. Grayson. NASS is the National Association of Secretaries of State. Thank you for asking for the clarification. And we get a lot of calls from folks in the media because we are kind of the unofficial keeper of the calendar. We keep track of all the States that have been moving their dates up, and I am getting asked to appear on radio shows and getting called by newspaper reporters all around the country with increasing frequency. So I think that first issue--Is there a problem?--I think we are beginning to get, at least in the opinion maker part of this country, starting to get to some consensus on that. But we have to get to the agreement there is a problem.

Then the second part of it is once there is a problem and we

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can agree to that, what is the best solution? On behalf of NASS, I think that the rotating regional primary system, whether it is through Federal legislation or State or party action, but the concept of rotating regional systems is the best possible solution.

One of the most important attributes of the rotating regional plan is that it has been vetted. It has been vetted by our organization, which is a bipartisan organization of folks who actually run elections. And when we sat down in 1996 to try to address this problem, we worked through and discussed a lot of the different plans and weighed the different issues: the history and the value of the early States, how to involve more States, how to enfranchise more voters. And we came up with this plan. It is probably not a perfect plan, but given where we are and given where we want to go, we think it is the best plan. It will involve more States. It will involve broader issues. It will allow long-shot candidates a shot at building--starting small and building up to a larger, more successful campaign. So we think there is a lot of value here.

And I speak from a personal standpoint. My State, Kentucky, has a primary that is scheduled in May. And if you look at the calendar, we are very much at the end. Candidates never come to Kentucky, and it is always funny to go in in May to go vote in our

Presidential primaries. All the names are there, and our votes are generally meaningless.

And so I am really excited about the concept of a rotating regional plan because it means that our State would become meaningful. Candidates might actually come to Kentucky and talk about some of the issues that matter to us, like: How do we transition from a tobacco-based economy in much of our rural area to a more modern agricultural economy? What do we do about the perils and promise of coal, trying to implement clean coal technology, improve our environment, and provide jobs and relatively cheap and stable electricity?

There are a lot of issues that we would love to have candidates come to our State and discuss, and under our rotating regional plan, our State and so many other States would be involved in the process.

We also think it would increase participation for that very reason. More would be involved. The States that would come earlier in the process, then in the middle, and even at the end, you are more likely to have higher turnout when there is something to go to the polls for. We are not driven to the polls by the Presidential nominating process. It is the other issues on the ballot.

And then finally I think the question is, once you come to a consensus on what is the best way or the best solution, then it becomes how to implement it. Now, as a body, NASS has no position on Federal legislation. I am not sure that we could reach consensus on Federal legislation. We think that the States should adopt model legislation and the parties should change their rules to allow for a rotating regional system to be set up. We did at our last meeting vote to ask the Republican Party to make a small modification in its rules to allow modification of its primary calendar after the convention, because right now under Republican Party rules, for the next 4 years they are set at the convention, which gives you a very small window to discuss reform.

Now, my understanding is that the Republican Party and the Democratic Party are looking very closely at trying to solve this on their own within their rules. It would be great if they could do it. But as NASS, we are not sure that they can--or as NASS, we hope that they can do it.

Now, speaking individually and not on behalf of NASS, I am very excited about this legislation because I think when I look at the situation, getting all the States to look out for the Nation's interest and not their own interest and to get the parties to come to a consensus in time to fix this thing by 2012, I do not think we

can do it. So if the constitutional issues can be addressed by the gentlemen to my left and to all of your crack researchers, I think the notion of Federal legislation might be the best way to go, and I am excited to have a tripartisan solution.

[The prepared statement of Mr. Grayson follows:]

Chairman Feinstein. Thank you very much, Mr. Grayson.

Dr. Mayer.

STATEMENT OF WILLIAM G. MAYER, PROFESSOR, DEPARTMENT OF
POLITICAL SCIENCE, NORTHEASTERN UNIVERSITY, BOSTON,
MASSACHUSETTS

Mr. Mayer. First of all, I have been told to ask your permission, Madam Chairman, to submit a revised version of my statement.

Chairman Feinstein. So ordered. That is fine.

Mr. Mayer. Thank you. Well, I, too, am grateful for the opportunity to appear in front of this Committee, and I commend the Committee and the sponsors of this bill for trying to grapple with this problem. But having said that, I must confess that I am not a supporter of either this particular bill or of the general idea of trying to reform the Presidential nomination process through the vehicle of Federal legislation. I have three points to make, all of which are set forth in a lot more detail in my statement.

First of all, I think there are serious questions about whether this legislation is constitutional. In fact, there are two different constitutional challenges that can be raised against a regional primary bill.

First, does the Federal Government have the constitutional authority to compel States to hold primaries or caucuses on specific dates or to select national convention delegates in particular ways? As I acknowledge in my statement, this is a complicated issue, and there are no court cases that really settled the issue definitively. But at the very least, there is no explicit grant of power in this area, and most important, powers with respect to the Presidential nomination process are, in fact, specifically entrusted to State legislatures.

The second constitutional question: Does any government, federal or state, have the power to compel the national political parties to use a particular process for nominating their Presidential candidates? In a string of cases beginning in the mid-1970s, the Supreme Court has repeatedly made clear that parties are, at least in part, private associations whose ability to organize their own affairs and make their own decisions is guaranteed, to some extent, as part of the freedom of association protected by the First Amendment. As you acknowledged in the

beginning, the Democratic and Republican National Committees are both opposed to this kind of legislation, and there is a strong case to be made that they would have the ability to opt out if they wanted to.

The second major point: Constitutional issues aside, there are a number of reasons why federal legislation is not a very good instrument for redesigning the Presidential nomination process. In particular, once enacted, Federal legislation would be much more rigid, much more difficult to change and adapt than rules that are designed and enforced by the political parties. As you know far better than I, it is difficult to get any major bill through Congress. There is, I think, a pretty general consensus that the technology and strategies of Presidential campaigns have changed very rapidly in recent years and are likely to continue changing in the years ahead. And, unfortunately, there is no guarantee that if the bill needs to be revised or updated a decade from now that Congress will undertake that task in anything like a timely manner. Witness, for example, how long it generally takes Congress to pass campaign finance legislation.

By contrast, the national parties have a much clearer, more self-interested reason to stay abreast of these changes and modify the system in any way they believe will help them nominate better

candidates or stay competitive in national elections.

Third major point: If you are determined to go through with Federal legislation, I would at least recommend that you think about a different system than regional primaries. Regional primaries have a number of potential problems, but far and away the greatest, in my view, is simply that they give a huge and quite arbitrary advantage to whichever candidate happens to run best in whatever region goes first. At the end of my written statement is a table that shows, based on an analysis of past nomination races, that region is a very important variable in Presidential primaries.

In the 1992 Democratic nomination race, for example, then-Governor Bill Clinton won 65 percent of the votes cast in Southern primaries, but only 27 percent of the votes cast in Northeastern primaries. So if the Northeast had gone first, Paul Tsongas probably would have been the nominee. If the South had gone first, it would have been Bill Clinton. And if the Midwest has gone first, it might well have been Bob Kerrey.

In the contemporary Presidential nomination process, the order in which primaries are held matters. That is what momentum is all about. That is why front-loading has become so severe. So if this Committee is determined to pass Federal legislation respecting the Presidential nomination process, I would at least recommend that

you design a system in which the primary and caucus calendar is not stratified by region, in which Presidential candidates have some opportunity to demonstrate their strength or weakness in every major region of the country before the nomination is effectively decided.

Thank you.

[The prepared statement of Mr. Mayer follows:]

Chairman Feinstein. Thank you very much, Dr. Mayer.

Dr. Hasen.

STATEMENT OF RICHARD L. HASEN, WILLIAM H. HANNON

DISTINGUISHED PROFESSOR OF LAW, LOYOLA LAW SCHOOL, LOS ANGELES, CALIFORNIA

Mr. Hasen. Chairman Feinstein, Ranking Member Bennett, and Senators on the Committee, thank you very much for the opportunity to appear before you today to testify about Senate bill 1905. I was specifically asked to comment on the constitutionality of the measure should it pass and be challenged in court.

Congressional bills which would establish regional primaries are not new, but the unprecedented front-loading and race to the front of the line that we are witnessing in the 2008 Presidential season adds new urgency to this old proposal. Upon my review of the constitutional text, relevant Supreme Court case law, and

scholarly commentary, I believe there is a good but by no means certain chance that the Supreme Court would uphold Senate bill 1905 as a constitutional exercise of congressional power, and the rest of my testimony will explain the basis for that opinion.

The key constitutional issue is this: Though Article I, Section 4 of the Constitution gives Congress the power to regulate the time, place, and manner of congressional elections, Article II gives Congress only the power to set the time for choosing Presidential electors, leaving the manner for choosing electors in the hands of the State legislatures. Based primarily upon this textual difference, some have argued that Congress lacks the power to impose regional primaries for choosing Presidential electors, leaving the issue to the States or parties. Some also claim that imposing a regional primary system would violate the associational rights of political parties.

In my view, the textual argument is not wholly persuasive. No doubt Congress' power to regulate Presidential elections is not co-extensive with its power to regulate congressional elections. For example, Congress could not pass a law barring States from using winner-take-all systems for choosing Presidential electors. But Article II of the Constitution does grant Congress the power to set a uniform national date for the general election for President, and

that power to set the time for the general election should extend under the Necessary and Proper Clause to the power to set the time for the nomination of Presidential candidates as well.

Justice Scalia, who is the Supreme Court's leading textualist, wrote in 1981 that since Congress has the explicit authority under Article II to determine the time for choosing electors, Congress must at least have the authority to specify the dates of primaries and even of State and national nominating conventions. Justice Scalia relied upon the Supreme Court precedents of United States v. Classic, which used similar reasoning under Article I to hold that Congress could regulate congressional primaries as well as general elections for Congress.

Other Supreme Court case law bolsters this conclusion. In Burroughs v. United States, the Court squarely rejected the narrow textualist reading of Article II. The Court held that Congress had the power under Article II to regulate corrupt practices affecting Federal elections. In Buckley v. Valeo, the Court upheld Congress' power to regulate campaign financing in both congressional and Presidential elections. And in Oregon v. Mitchell, the Court upheld Congress' power to change the voting age for Federal elections, including for President, to age 18. Justice Black cast the decisive and controlling vote on the issue, concluding that it

cannot be seriously contended that Congress has less power over the conduct of Presidential elections than over congressional elections.

Professors Mayer and Busch have criticized Justice Black's opinion as "a travesty of legal reasoning" given the Constitution's textual difference between congressional power over congressional and Presidential elections. But regardless of the merits of the legal reasoning, the Justice's opinion, like the majority opinions in Burroughs, Classic, and Buckley, remain good law unless overruled by the Court. Indeed, a ruling striking down a congressionally imposed regional primary as exceeding Congress' Article II power would call into question a great number of congressional laws that regulate Presidential elections, from campaign finance to election administration, including the National Voter Registration Act and the Help America Vote Act, to the 18-year-old Presidential voting age. That is not a step the Court would take lightly.

In addition, the facts of the 2008 primary season, with its race to the front of the line, would weigh heavily on the Court. The country faces a classic coordination "tragedy of the commons" problem that can only be solved by national legislation. This is the same impetus behind Article II's very requirement that Congress

choose a uniform day for choosing Presidential electors.

The other constitutional objection that could be raised to Senate bill 1905 is that it infringes on the First Amendment associational rights of political parties. In recent years, the Supreme Court has held that political parties may object to the open or closed nature of party primaries imposed without their consent. But the Court has assumed that the Government may require the parties to use a primary rather than another method to choose its nominees, and it is hard to see how a law dictating timing of such a primary would unconstitutionally limit a party's right of association. Moreover, the bill would be directed to the States, not the parties, and would not affect the parties' internal deliberations. Of course, the solution Congress legislated with the consent of the parties would obviate this class of objections.

In sum, the strongest argument against the constitutionality of Senate bill 1905 rests on a narrow textual reading of Article II of the Constitution. Though it is possible the majority of the Supreme Court could accept this argument and strike down the legislation for reasons I have set forth, I think it is very unlikely the Court would do so.

Thank you very much.

[The prepared statement of Mr. Hasen follows:]

Chairman Feinstein. Dr. Hasen, you said very unlikely the Court would find S. 1905 unconstitutional.

Mr. Hasen. Very unlikely that the Court would strike it down.

Chairman Feinstein. Would you expand on that for a moment, please?

Mr. Hasen. Well, if this bill passed and someone challenged it in court as exceeding Congress' power, I think with the precedents that the Court has already established in the campaign finance area, in the area of regulating corrupt practices, in Congress regulating congressional primaries as well, with the possibility that those older precedents would be overruled by some kind of holding that this would exceed congressional power, I think it is unlikely. And I think one of the strongest indications is that the--the main argument against it is a narrow textualist argument. And there is no stronger textualist on the Supreme Court than Justice Scalia, and Justice Scalia himself has said that he believes that Article II gives Congress at least the power to control the timing of the Presidential primaries.

Chairman Feinstein. In light of what Senator Stevens said, if we did have regional primaries, it would unduly weight one area of the country against the other. I see it to the contrary. I really see it as encouraging people to vote. If nothing else, there is a

competitive instinct to produce votes. I see us getting a much greater voter turnout in a Presidential primary.

One of the things that happens in the West now is the belief, that with these elections it does not really matter. It is foreordained I will just skip voting. And I have always been surprised at how low voting is in the United States. And I actually see a law that connects the individual with the right to vote more directly as being a very difficult law for the Court to strike down.

Would any of you like to comment on that? You do not have to agree with it.

Mr. Mayer. I am sorry. Could you repeat the last question?

Chairman Feinstein. The last question was really based on what your colleagues said. There now has been a litany of cases that support congressional legislation in this area. If you connect the legislation with the right to vote, and if you use the Articles of the Constitution not narrowly but broadly, I have a hard time seeing how a court would strike the legislation down.

Mr. Mayer. Well, I think that the--where the Supreme Court has clearly upheld congressional power to intervene in Federal elections is almost entirely with respect to corrupt practices in campaign finance. The decision in Oregon v. Mitchell, as Professor

Hasen says, is solely the reading of Justice Black. The other four Justices who upheld the drop in the voting age did so on an equal protection analysis.

The other thing I would just say in regards to a regional primary, it seems to me that in a regional primary system, the turnout would go up in whatever region went first. But it is quite likely that the race would be effectively settled, if not completely settled, by the time the second region went to the polls. And you would see significant drop-offs in whatever regions went third and fourth.

So the year that the West went first, you would be perfectly delighted with the result. But if the next cycle the West was last, you would see an even more severe drop-off in turnout.

Chairman Feinstein. I really disagree with that. People can disagree. I see it exactly the opposite.

If we ever get there, we could see the incentive. If the West were last, it would be a real call to turn out the vote and change it around if one could. The same would exist for whatever area of the country of the three were coming last.

But, Mr. Grayson, I was intrigued and gratified by your support and the National Association of Secretaries of State's support. What would the association be prepared to do to support

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this if we were able to place some momentum behind it?

Mr. Grayson. Well, I think as an association, as a body, we definitely support the concept. And as I mentioned, I think we have to sell the concept. And so we have disagreement probably within our body on the manner in which it should be implemented. That is your buzzer to go vote, I guess.

Chairman Feinstein. That is.

Mr. Grayson. That is the bell tolling for thee. But we definitely will do our part to sell the concept, and as individuals, those of us who believe that Federal legislation is appropriate, I think those of us as individuals could step forward and do that. And I agree with you on the voting percentages. I think whatever region goes first, the native son or daughter, that success is going to be discounted. Similarly, when Senator Harkin ran for President, the fact he was going to win Iowa made Iowa less important that year. And so other primaries and caucuses were played up--were more important. And I think this will last throughout the regions. We may not have it settled by the--it may be settled before the last region, but that is better than now. And I don't think we should let perfect become the enemy of good, because right now our system is broken and the rotating regional system is better.

Chairman Feinstein. Right. My time is up, and I will go to vote. I turn the hearing over to you and will come right back.

Senator Bennett. [Presiding.] Okay. Thank you very much, Madam Chairman.

I have the sense that everything that you are talking about, Dr. Hasen--not everything, but most of what you are talking about, Dr. Hasen, relates to the general election. And, again, back to what I said in my opening comments, the Founding Fathers did not anticipate primaries. They did not anticipate a nominating process. Their nominating process was as I described it, with the State legislators picking electors. That is how you nominated somebody for President. And the assumption that you could take powers dealing with the general election and apply them to a party discipline and a nominating process is for me a leap too far. And I go to this example, which we recently have--it did not work in terms of winning the Presidency. But the Reform Party was created by Ross Perot putting his own money in it so that he gets around Buckley v. Valeo and he gets around BCRA, exercising his First Amendment rights, and the nominating process is on the Internet.

Suppose a more viable party were to come into existence than the Reform Party and decide they wanted to mount a challenge to the Republicans or the Democrats, and they decided that their

nominating process would be a variation of the Reform Party--that is, there would be a method on the Internet, more tightly controlled than the Reform Party--whereby everybody could participate in choosing the nominee, an electronic convention, if you will, in a way not contemplated by the Founding Fathers, and certainly not contemplated by the smoke-filled rooms that gave us Warren G. Harding.

As I understand this legislation and, Dr. Hasen, your view of what would happen, the Congress could say to that party, "You cannot do that." The Congress would be saying to that particular party, "You have to have regional primaries. They have to be on these dates. They have to be in this kind of pattern." And I would assume that whoever was general counsel for this mythical party that I have described would be able to go the Supreme Court and say, "We have got the right to pick our nominee in any way we choose." And I think the Supreme Court would say, "Yes, you do."

Now, respond to that argument, the two of you.

Mr. Hasen. Yes, I see you are making two separate points--one related to whether Congress has power over primary elections given-

Senator Bennett. The nominating process. Don't say "primary elections." The whole nominating process, because in Utah we do

not have primaries. In Utah, we still choose our delegates to the national convention by convention. And would this bill make that illegal?

Mr. Hasen. Well, that is yet a third question. Let me back up just for a moment to the question of Congress' power to regulate primaries.

On the congressional side, one of the cases I mentioned, United States v. Classic, this is a Supreme Court case which held that even though Article I, Section 4 of the Constitution speaks only of Congress' power to regulate the time, place, and manner of congressional elections, this extended to congressional primaries, especially because in many States, the primary becomes decisive in terms of who the winner is.

The other cases that are referred to specifically speak to Congress' power to regulate different aspects of the Presidential election process, including through the--if you take Buckley v. Valeo, the Supreme Court has upheld the right of Congress to set rules for campaign financing in Presidential primaries.

So I certainly think that there is existing Supreme Court precedent that recognizes the right of Congress to do more than just set the time for choosing electors, which is what the literal words of Article II require.

Senator Bennett. I think we are talking a little bit past each other here, because everything you are talking about has to do with the existing system. I am talking about the power of a party to create a new system and does Congress have the right to prevent that.

Dr. Mayer?

Mr. Mayer. Well, I agree with just about everything you said. I think the precedent he cites, United States v. Classic, does give Congress the power to regulate congressional primaries, but that is because the text in Article I gives Congress the authority to regulate the time, place, and manner of elections. And the Court says, well, since it grants us power over elections, that includes primaries as well because they are elections and it is sort of two stages in a single electoral process.

The grant of power in Article II is much more narrow. It is only about the time of choosing electors. And I think, as I indicate in my statement, that it is a misreading of the Constitution to say, well, because they grant Congress the power to regulate one time with respect to congressional elections, then anything having to do with time may be regulated.

The other thing I would say about the article you cite of Justice Scalia's is it was written 26 years ago, and I am willing

to bet he might take a different view of the matter today.

Senator Bennett. Well, now, go to the hypothetical I have given. Would either of you accept the case if I formed a party and said we are going to have an Internet nominating process and we are not going to have primaries at all, regional, State, or otherwise, we are going to have a website and we have got controls to prevent multiple voting, which I do not think the Reform Party really did have. They claimed they had, but that is neither here nor there. That somehow with software geniuses I have created a process where anybody in the United States can get online, prove that he or she is a registered voter, and cast an Internet vote for the nominee for my party, and the existing law says you have to have a regional primary to produce your nominee, and I challenge that law as violating my constitutional right. Would either of you accept the case to defend before the Supreme Court my right to have that kind of a nominating process?

Mr. Mayer. Well, I am a political scientist rather than a lawyer.

Senator Bennett. Okay.

Mr. Mayer. But I would--

Senator Bennett.

Mr. Mayer. --write an amicus curiae brief.

[Laughter.]

Mr. Mayer. I mean, I think your point is exactly right, that the recent cases have run very strongly in the direction of granting the political parties control over their own internal processes, and there is no decision the parties make more important than the decision about which Presidential candidate to nominate. And, therefore, if the parties wanted to opt out of this bill, I think they would have every constitutional right to do so.

Mr. Hasen. If I can respond as well, I think that if you are talking about a minor party--and we actually may see something like this. There is a Unity '08 group that is trying to form a third-party movement and is trying to use the Internet to do so. I think it is such a challenge it would raise. It would raise a different question, which is whether the minor party's First Amendment rights would be violated, and the Supreme Court has recognized that it is permissible to treat the major parties--the Democratic Party and the Republican Party--differently from minor parties.

And so what may be constitutional in terms of regulating the major parties may be unconstitutional as to the minor parties. That raises a different question than the question of whether this system could be imposed.

And I should point out that the system is imposed not on the

parties but on the States; that is, the States must hold the primaries, and whether or not the parties would be required to seat delegates chosen from these primaries or caucuses or conventions would be a question that the parties would address. So this is not directed at what the parties must do. It is directed at what the States must do.

Senator Bennett. Well, let us say--I have got my eye on the clock. I am going to have to go save the Republic in about 5 minutes. Let us say that the Democratic Party says, "We want to abolish the convention. We want to just have primaries, and we will total up the support from the various primaries, and we will save the money because the media does not cover the convention anymore. It is of no value to us." And the Republican Party says, "No. The primary process still is for the purpose of choosing delegates, and we are going to have a convention."

Can the Congress intervene and say to the Democrats, "You have got to hold your convention"? Or say to the Republicans, "You have got to follow the Democratic pattern and abolish the convention"?

Mr. Hasen. I do not think that the Supreme Court has definitively answered that. What the Court has said most recently in the 2000 case called California Democratic Party v. Jones, the Court said it is "too plain for argument that the States may

require parties to choose their nominees through primaries." That statement, which has been made more than once, has never been tested and has not been applied to the issue of conventions. So I think that is an open question. But I do not believe that this bill would require the parties to hold conventions.

Senator Bennett. Again, in Utah, when I ran in 1992, the first time, I won a primary and, therefore, the nomination. I have never had a primary since. I have been nominated by convention under Utah law, and I will not take the time to explain it to you because it is quite complicated. But I have been nominated by convention in my subsequent elections and have never had a subsequent primary. And if I hear what you are saying, the Congress could tell Utah, "You cannot do that anymore."

Mr. Hasen. Well, no. I was talking about what a State could tell a party, not what Congress could tell a State. I do not know-

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Senator Bennett. The whole regional primary thing is what Congress can tell the States. It is telling the States, "You have to hold your primary on this date."

Mr. Hasen. I would have to go back and look at the text, but I believe it can be a primary or a caucus. It may even allow for a convention.

Mr. Mauro. I would like to add a comment on this.

Senator Bennett. Yes.

Mr. Mauro. Caucuses throughout the country are functions of parties. Where primaries are operated and financed by the States, caucuses are entirely functions of the party, where the State has no real direct input on any of it. It is all a party function. So I think there is a little difference there.

Senator Bennett. I can see a lawsuit right now where somebody says that violates the Equal Protection Clause because I have a different authority under a caucus than I do a direct vote. I think that might very well be a problem.

I would like to pursue this further, Dr. Mayer. I do not have a Ph.D., but I do consider myself a practicing political scientist. Dr. Hasen, I am unburdened with a legal education, so I have to defer in legal matters. But I do have a clear sense that these are very muddy constitutional waters, and we need to be very careful about crafting this.

I agree with your statement that the present system is broken. As I said in my opening comment, I have a terrible time trying to explain it to anybody who asks what is really going on. And I think we need to come up with a 21st century solution. I am not sure the regional primary is that solution, but I salute those who

have put it forward as a good and logical way to start the dialogue. I am not sure that is where we are going to end up.

With that, Senator Alexander, if you want to take over the Committee and dominate, feel free, because I am now going to vote and I understand the Chairman is not coming back.

Senator Alexander. That is what I understand, and I would be honored.

Senator Bennett. You can undo--

Senator Alexander. For a week or two may I take the Committee over?

Senator Bennett. You can undo all the bad things I have done in your absence.

Senator Alexander. [Presiding.] I have a few questions, and thank you very much, Senator Bennett, and thank you to the witnesses very much for coming and giving your thoughts. And I will not abuse my privilege here with the Committee. I had an observation or two, and then I had a couple of questions for you to see if you could help me.

First, I think this discussion strikes a chord with the American people and with each of you and with many of us, because we see the problem and we have suggested a solution, and there might be a better solution. But what we are dealing with, the job,

as I tried to say in my statement, that really represents the most important aspect of this country. The whole idea of America is that anything can happen. If there were any visible symbol of that aspect of the American character, it would be the Presidential contest --the idea of Abe Lincoln from the log cabin to the highest office in the land, or the idea of Lyndon Johnson teaching first grade in Catulla, Texas, and becoming President of the United States. You can go on and on. That idea and all that goes with it is essential to the character of this country, and we have messed that up in a very serious way, and we ought to be better custodians of that.

I will emphasize, as I did in my statement, I am a Republican and I am a Federalist. I believe the parties ought to do it, but they have not done it. And Professor Mayer said, well, it was harder to pass a law through Congress than it is to get the parties to change it. Well, maybe we will see. Maybe we will see. The parties have not done a thing yet. And the last time they tried to change it was 2000, if I am not mistaken. As soon as President Bush was nominated, Karl Rove decided that it would be to the incumbent President's advantage to have everything continually in a mess, and so they killed it in the Republican Committee. The Republicans were about to adopt a Delaware plan, which is a

different way of putting some semblance to this system, and maybe that is a good system. So there is this natural instinct of those who are in charge to say, "Well, a mess actually is to our advantage because it discourages any challengers." So it may very well be that the Congress has to act.

I hope not. You know, I would much prefer that the parties would, in whatever way they think is best, solve the problem. But I think there is sufficient interest in the United States Senate, in any event, that if the parties do not, we will. And I want to be very respectful of the constitutional issues. There are some. I tend to agree with Mr. Hasen of the view of it. And we have tried to do the minimum amount of interference with the Federal system by simply setting a time framework and then the regional aspect within that as well.

So I have communicated to the Republican Party what I just said, that it would be my great preference that the National Committee fix the problem. But if they do not, I think Congress will.

Now, as to the other observation and then my question, which I would like to ask each of you to answer. I am not so sure that the regional primary greatly disadvantages, Dr. Hasen, on your point-- or maybe Professor Mayer said this, I believe, that it gives a

great advantage to the first one. Having gone through this process, the first--whoever does well in Iowa and New Hampshire has an enormous advantage. But I think the reason is because everyone knows that the season is over in 2 or 3 weeks. If we understood that the season--in this case, four regional primaries with a month between each set of primaries for candidates to go home and brush their teeth and see their supporters and raise sufficient funds and then begin to travel to those States -- I think the anticipation of those upcoming primaries could be just as important as winning the first regional primary.

For example, if Rudy Giuliani had to start in the South, which might not be his strongest area, if the Northeastern region were last, that would look to me like maybe a trump card for him. Or, on the other hand, if he had to start in the Northeast and the South were last, that might look pretty good for Fred Thompson.

I can remember as recently as 1976 when, even with the system we had, we played all the way through to the end. And the California primary, in the case of President Reagan and President Ford, turned out to be decisive because everyone anticipated it. It was in 1968 thought to be a very important primary, even though it was toward the end.

So candidates arrange their strategies, and my feeling has

always been that the enormous influence that Iowa and New Hampshire have comes primarily not because of them but because we know that the game is over within the next few days. If we had 4 months--the game is just beginning, the season is just beginning, to use the NFL metaphor.

Now, let me switch to my question, and I will ask it and maybe each of you might have a comment. Senator Lieberman raised the question: How do we shorten the process? It is too long, longer than it ought to be. And I have a suggestion, which is not in our bill but which I intend to make as an amendment, because my cosponsors did not agree with it well enough to put it in the bill. I think there are two problems with the nominating process. One is the primaries are concentrated and need to be spread out. The other problem are the limits on campaign contributions. And I testified before this Committee several years ago when I was not a Member of the Senate, and Eugene McCarthy was here at the time, and he was with me. And he argued against limits on campaign contributions because he said that, in 1968, when he ran for the Presidency, he was an unknown Senator running against an incumbent President, Lyndon Johnson, and if Stewart Mott had not given him \$1 million, he never could have run a race against the Vietnam War.

The practical effect, I have discovered, of the limits on

campaign contributions is that that becomes one, the major reason campaigns are long because candidates have to spend so much time organizing to raise money; and, two, it discourages candidates like, let us say, former Governor Thompson of Wisconsin, who are not as well known and simply cannot raise enough money to get onto the front pages.

I can only use my personal experience in this, but in 1995, when the limits were \$1,000 per person, I raised \$10 million in 1995, even though I was not very well known outside Tennessee. In order to do that, I went to 250 fundraising events in that year, in addition to walking across Iowa and New Hampshire in my red and black shirt. And that means that in 1993 and 1994 I had to go out all across the country and meet all the people into whose places I would go to raise \$1,000. That meant I spent a disproportionate amount of time with people who could give \$1,000 instead of, you know, in the lunch lines or the labor union lines or the fish fries or the other meetings. And unlike raising money for universities or churches or anything else we do where we start out by saying we will get a few larger gifts to start and then we will go on and then go to the broad-based gifts, we expect people to start out with a capacity to raise tens and tens and tens of millions of dollars at \$2,300 a person.

Now, nobody knows that many people, so we really default the whole race to those who have their own money, as Senator Kerry was able to do in Iowa, when he was basically out, and he borrowed \$7 million and put himself back in and won; or the famous, people who already start out famous, and we limit ourselves, the voters, from a broad consideration of people.

So my thought, as someone said, I think Senator Lieberman said, well, you could ban fundraising early. Well, you cannot do that. You could say you could start the fundraising on January 1st of the year before. But what would we do, the candidates who wanted to run? We would just go around and meet everybody and say, "If I were to run, would you raise \$25,000 for me if I call you up on January the 1st." And that would be the way you would do that.

So I am going to offer an amendment to create a start-up fund for Presidential candidates, in the same way venture capitalists do when they start a company, or in the same way universities do or churches do when they have a fundraising drive. And it will have reasonable limits on it, but it would say you could raise the first \$20 million in contributions of up to \$10,000 each rather than \$2,300, which is the first thing. Then when the race starts, the New York Times would not write and say, "Well, we will now write a story about all the people who can run for President, since it is a

money primary,"as they always say. Only those people who can raise \$50 million are credible candidates, and everybody else--all these Governors, all these lesser known Senators, maybe big-city mayors--they are out because they cannot do it.

Almost anybody who is credible, if they had an opportunity, could raise a sufficient amount of money to get started if they could take contributions of \$10,000 up to \$20 million, I believe; and once they are credible, they would have a broad enough base to run a campaign and perhaps do well in an early caucus or primary and to raise money on the Internet.

So my question is, and I would appreciate any comments you might have: What do you think of the idea of a start-up fund for Presidential candidates, \$10,000 limits on contributions up to \$20 million raised? Or can you think of some other way to shorten the primary to make it more compact? Or is that even worth worrying about? So what are your comments?

Mr. Mauro. I could start off by saying that how do you shorten it, and living in Iowa and seeing what happens in Iowa, the candidates drive the process. I would tell you, next November, after we elect a new President, in January somebody is going to be out there from the other side starting to campaign. So candidates seem to drive this thing, and they seem to make it go.

I enjoyed your analogy on the NFL. I thought that was brilliant. I think you are bringing some good points together. But regardless of whether Iowa is on the exhibition season or the regular season, they do play a dominant role. And I still believe that what happens in Iowa and New Hampshire does not dictate the winner--I heard everybody on the panel today say what happens in Iowa and New Hampshire decides the election. I necessarily disagree--I disagree with that, because I think it is the same format, and now you have went to Iowa, you went to New Hampshire, the world has seen these people through the eyes of television cameras face to face, person to person, and now you can take it to the regions or whatever other system you come up with, and take it to the next level. And regardless of whether you are the first region or the last region, all those votes are going to be important.

And as far as campaign finance is concerned, gosh, something needs to be done. That is another benefit of the Iowa and New Hampshire early caucus and primary because it does allow lesser known people to come in and try to hang on. But it is very, very difficult and definitely something needs to be done along those lines. And the ideas that you present are worthy ideas that need to be discussed.

But, fundamentally, I would like to close by saying that I think the discussion is good. I think Congress has put the parties and the States on notice. I still believe fundamentally it should be the parties and states who get this thing solved or Congress is coming after it. Hopefully that will get their attention. Now, maybe it will not, but if it does not, then you have to do what you have to do. But at this particular point, I would like to see that.

Thank you.

Senator Alexander. Thank you, sir.

Mr. Grayson?

Mr. Grayson. Let me begin with a disclaimer saying I am speaking on my own, not on behalf of NASS, on your specific question. I also want to make sure that I understand your concept. Is your concept that for individual limits it would be raised to \$10,000 so you could get more from individuals, not a taxpayer-funded start-up fund?

Senator Alexander. That is correct. You could raise contributions at \$10,000 from an individual until you raised your first \$20 million.

Mr. Grayson. And then it would revert back to \$2,300?

Senator Alexander. Then you would go back to the \$2,300, or

whatever the indexed level is.

Mr. Grayson. I personally find that pretty intriguing. I come from--and it is not just because my Senator is Mitch McConnell and he is, you know, big into the campaign finance. My school of thought is let us have more disclosure and let us have higher limits. And I think one thing you might want to consider with your proposal is to have maybe increased, maybe even immediate disclosure of those contributions so that if folks are writing those large checks, the bloggers and the media and the opponents can have access to that information quickly, and we can see who exactly are writing these \$10,000 checks. And then the public can decide is that a good thing or a bad thing.

So I am kind of intrigued by that idea. I do not support taxpayer-funded campaigns, but I like that notion of loosening it up to get you that start. However, I would say that the notion of a better primary system, whether it is the Delaware plan or the American plan or the rotating regional plan, I think that will de-emphasize the role of money, at least at the beginning, because of the reasons why they are having to raise so much right now is you have got to spend it immediately, because you are fighting a multi-front war in about a 3- or 4-week period. And so you have to be able to have this money to spend.

I think if we had a longer process where you would have to be in it for the duration, there certainly would be a lot of money raised. That money might be raised over a longer period of time, and that might free you up because at the end of the day you do have to go into those States and ask those voters for their votes.

Senator Alexander. That is a very insightful comment. That was my experience. I did well in Iowa and New Hampshire, and suddenly the money started flowing in from every direction, but it was too late to spend it in South Carolina and the other States. And Senator McCain found the same thing in 2000. He did very well in New Hampshire and was able to raise a lot of money over the Internet, but President Bush was already spending money against him in South Carolina, Michigan, and other places, and that was a disadvantage.

Yes, sir?

Mr. Mayer. I think the idea of allowing for start-up funds is a great idea. I would favor the same thing in congressional elections that, for example, you ought to be able to raise \$200,000, say, you know, with higher limits, and then--because a lot of congressional candidates are in the position where they cannot raise money because they are not doing well in the polls, but they are not doing well in the polls because they do not have

even the initial seed money. So I think that is a great idea.

I am very skeptical, however, that there is just about anything that you can do that will shorten the Presidential nomination process. The fact is that there is a hard core of activists in the parties nationally, but particularly in Iowa and New Hampshire, who kind of expect the candidates to court them personally. I have just heard anecdotal evidence about candidates who have gotten in relatively late in the game and found that all of the people who--this, for example, I have often heard asserted about Howard Baker's campaign in 1980, which you may remember he got in quite a bit later than, say, George Bush, and he went to a lot of the activists in Iowa and New Hampshire and said, "Would you support me?" And they said, "Well, you know, I would have 6 months ago, but a year ago George Bush came and asked for my support, and he asked for it three more times, and finally 6 months ago I signed on with him."

And regardless of how you configure that opening process, I think it is going to happen that way. I mean, the reason campaigns are so much shorter in, say, Great Britain is because they have a parliamentary system, and you do not really know when the next election is until the Prime Minister announces it. You want to amend the Constitution that severely, I suspect we could, you know,

reduce campaigns, the length of Presidential campaigns. But I am not sure of any other way to do it.

Senator Alexander. Thank you, sir.

Mr. Hasen. And I think certainly there would be no constitutional problem with raising the limits in the early period. As a matter of policy, I tend to prefer the public financing method for Presidential campaigns. As we all know, the Presidential campaign public finance system is broken, and none of the leading candidates are using it anymore.

I also think that since you ran, there has been a change in fundraising in two directions: one is the amounts the candidates need to spend has increased greatly, which supports your proposal; on the other hand, the number of small donors has greatly increased thanks to the Internet, starting with Howard Dean and John McCain and others, who have been able to raise many smaller donations. You might think about other ways, for example, matching funds for campaign contributions that are under \$200. That would be another way to raise a lot of money, and you would not have to go out to a lot of fundraisers, because much of this would be on the Internet. It would give an incentive for every \$100 that a small donor gives, the Government matches that, and that might be a way to spur interest and accomplish the same things. But it would require some

kind of public funding along with that.

Senator Alexander. Well, thank you. May I thank all four of our witnesses. You have given us a very broad set of recommendations and reactions to this proposal, and we heard from Senator Stevens and Senator Bennett and Senator Feinstein and Senator Klobuchar, also very different reactions.

I think what I will do now, I will say another word, and then I will go to Senator Klobuchar, if she would like to make some comments and ask some questions.

Senator Klobuchar. Sure.

Senator Alexander. And I would ask her to close out the hearing because I have another place to go. But let me simply say before that, I believe we are just beginning the discussion about this, and I hope that Senator Feinstein, Senator Klobuchar, and others decide that we can pursue this in a number of ways, perhaps in hearings or discussions outside of Washington, D.C., and give other Secretaries of State and other distinguished academics and Governors a chance to have their say about how the process by which we nominate the person who has the most important job in the world. It is not only an important job; it is an important symbol of the American character, how you can start from scratch, play by the rules, compete all the way through to the end, and achieve a

result. And we ought to make that system as good as we can possibly make it, and by your being here today, you have helped us do that.

Senator Klobuchar?

Senator Klobuchar. Thank you, Senator Alexander, and thank you to our witnesses.

I just wanted to follow up with you, Mr. Grayson. I know you have mentioned trying to get the major political parties to proactively adopt a plan like this, similar to our plan or the Secretary of State plan, at the 2008 convention. Is that correct?

Mr. Grayson. Yes.

Senator Klobuchar. And could you tell me what steps, what is going on to try to encourage that to happen?

Mr. Grayson. My understanding--and I actually had a conversation while on the tarmac at the airport last night with Chairman Duncan, who is from Kentucky, is actually a very good mentor of mine. My understanding is from the Republican standpoint that the Rules Committee is going to look at this issue very carefully between now and the convention next summer. They want to wait and see how it plays out a little bit before they make any definitive decisions as to how the process might work. I said, "It is going to not work." You know, the system is going to be chaos,

and we will have a nominee probably. But they want to play it out a little bit. And their goal is to have a Rules Committee proposal that they could agree upon that would then be adopted by the convention at the convention itself.

In 2000, what happened was the Rules Committee recommended the Delaware plan to the 2000 Republican Convention, and then the convention itself did not adopt that Delaware plan. So they are trying to do the same thing that they tried in 2000, and I know we have at least--I do not know if she is still here, but there is an attorney from the Republican National Committee in the audience today.

Also, just to note on Senator Alexander's comment about having broader discussions, in March we are having some discussions--we, meaning NASS, are having some discussions with Harvard University about doing kind of a day-long hearing on this issue, spotlighting all the plans, the issues, and the constitutional questions. And we want to do that probably in the first or second week of March right after probably this will all be settled, right after the early March primary. So I think that that could be a real good opportunity to bring in a lot of people and bring in the two of you.

Sorry, I did not realize you were still there. I turned my

back to you.

Senator Alexander. Well, Senator Klobuchar, let me ask this: Would you like to ask questions for a while longer?

Senator Klobuchar. I just have three or four questions.

Senator Alexander. If it is all right with you, what I would like to do is--I know one of the witnesses has a 12:40 flight.

Senator Klobuchar. Oh, okay.

Senator Alexander. And if you need to do that, please go. And Senator Klobuchar is our prime sponsor but not a member of the Rules Committee. So what I can do is officially, just for our technical rules here, end the hearing. But if the other three of you can stay for a few minutes and take Senator Klobuchar's questions, we would appreciate it, because she is our lead sponsor and we would like for her to have a chance to ask the questions and make the comments that she would like to make. Is that all right?

Senator Klobuchar. Well, thank you, Senator Alexander. That would be wonderful.

Senator Alexander. Okay. Thank you.

Senator Klobuchar. I had some follow-up a little bit about that. You can understand the frustrations for Congress when the parties have continued to claim that they are going to finish this and it really has not--there has been no progress made, and every

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election it has gotten worse and worse and worse.

Mr. Grayson. Yes. I agree. That is why as an individual, not on behalf of NASS, I am very open to this bill. Having watched the parties try to solve it and having seen the States act in what they believe is their own best interest--there was a reference to the commons problem by Dr. Hasen, and he is absolutely right. The States think it is in their best interest to move forward, and as a Nation we suffer. So I really am very intrigued by the notion of Federal action, just speaking as Trey Grayson, citizen of the United States. And I hope that if we can come to a consensus on the solution and we can address some of the constitutional issues-- I think this may be the only way we are going to be able to do it. So I thank you for taking the steps to bring this forward, and having this bill before this Committee and before this body I think really is a great jump-start to trying to get us to a solution, and it may very well be that it will take this bill or a bill in a future Congress to get something done.

Senator Klobuchar. Okay. Thank you. And I have a little different view of the constitutional issues than Dr. Mayer, and I was just curious. I looked at some of the research here, and the Burroughs case that you look at very narrowly and cite it for simply focusing on anti-corruption measures. But then you have--I

think it was the Seventh Circuit's case where Judge Posner, who I took Corporations from, read that same case as holding that Congress' power over Presidential elections is co-extensive with its power over congressional elections. And then you also have the issues--I am just trying to imagine that if the Supreme Court would strike down a bill like our primary caucus bill, the implications that could have for decisions they have made with campaign finance or motor-voter or some of these other issues. And I would like you to comment on that.

Mr. Mayer. Well, I concede that my reading of the--I certainly think I said this in the statement, that these issues are murky, and my reading of the Constitution is far from being the only one.

Senator Klobuchar. That is good.

Mr. Mayer. Pardon?

Senator Klobuchar. That is good.

Mr. Mayer. That is good.

[Laughter.]

Mr. Mayer. I think that--and I do have, just as a general philosophy, a somewhat closer reading of the Constitution than Professor Hasen, for example.

I think the capacity of Congress to establish laws in regards

to campaign finance is clearly established in Burroughs and Buckley v. Valeo. So I am not at all convinced that the--that if the Court were to rule this unconstitutional it would then have to go back and revise a lot of these other laws. The difference is that the campaign finance laws are, I think, more clearly not completely under the jurisdiction of the political parties. They are much more connected, much more directly connected to the powers that the Federal Government clearly does have to kind of organize a Presidential election process that is, as the Court says in Burroughs, free from the twin enemies of republican government corruption and violence. So I am not convinced that just because it overturned this law, it would then have to go and revise a whole other series of precedents, as Dr. Hasen claimed.

Senator Klobuchar. Do you think then Justice Scalia was wrong when he said in his Law Review--

Mr. Mayer. Yes, I do.

Senator Klobuchar. You do.

Mr. Mayer. I think in my statement I explain why he is wrong. I think it was a--you know, I think it was a putting together of two--one provision of U.S. v. Classic decision which applied to congressional elections with a provision in Article II that applied specifically just to the timing of choosing Presidential electors.

As I say, that was 26 years ago, so he may have re-thought the issue since then.

Senator Klobuchar. And I would take it you agree with the Republican and Democratic Parties when they said that they believe that they have the power to set their own primary dates, because I think you have talked--in your article, you talked about the First Amendment rights of the parties. And what I am trying to work out in my mind is that the timing of the primary is already regulated by State law, and the parties have lived with this for many years. And so to me, that would show that the timing of primaries is a proper subject of regulation, whether it is State regulation or Federal regulation.

Mr. Mayer. Yes, I mean, what there is ample precedent for, though, is the notion that a State can hold its primary anytime it wants, but the parties have the ability to opt out of actually using it to do anything with a formal connection to the Presidential nomination process.

For example, for many years, the Democratic Party tried to get Wisconsin to modify its State law so that not everybody--so that they did not have kind of unlimited, unrestricted crossover voting, and the State Legislature in Wisconsin refused to go along with it. So, finally, what the Democratic Party said is, well, you know, the

State of Wisconsin can hold any kind of election it wants to, but that election cannot be used to hold delegates.

So in 1984, there was a Presidential primary in Wisconsin. The Republicans actually used it to select convention delegates. On the Democratic side, it was completely a beauty contest, and one week later they actually held a series of caucuses. So I think if the Court did uphold the--or if the Court did uphold the parties' powers in this regard, what would happen is that, you know, you could go ahead and hold a series of regional primaries if you want; you just probably could not compel the parties to actually use them to select delegates. So the parties could, if they wanted to, use a different kind of process.

Now, whether they would or not I think depends on how badly they--how aggrieved they are about a series of regional primaries.

Senator Klobuchar. Very good. Well, I appreciate your comment. I look at this maybe from a practical standpoint as well, but I doubt very much if we enacted some Federal plan that the parties would decide to completely opt out of it. And I also think that there is some acknowledgment by the parties in how they have had to interact with the States that this has been a very difficult thing for them as well. And I think it would be great if they set an orderly process similar to this, but in the absence of that,

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that is why we are moving ahead with this legislation.

So thank you very much, both of you. I appreciate it.

[Whereupon, at 11:33 a.m., the Committee was adjourned.]