**Written Statement on Federal Regional Primary Legislation,
Submitted to the Senate Rules Committee**

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There are three major points I would like to make about federal regional primary legislation:

1. It is most unclear that such legislation is constitutional. In fact, there are two different constitutional challenges that can be raised against federal legislation respecting the presidential nomination process: that the federal government does not have the constitutional authority to compel states to hold primaries on specific dates or to select national convention delegates in particular ways; and that no government, state or federal, has the power to force the political parties to use a particular system for nominating its presidential candidates.

2. Constitutional issues aside, there are a number of reasons why federal legislation is not a good instrument for redesigning the presidential nomination process.

3. If Congress does decide to legislate in this area, regional primaries have a sufficient number of significant drawbacks to suggest that such primaries are not the best way of structuring the delegate selection calendar.

Constitutional Issues I:
The Federalism Question

Critics of the American presidential nomination process have sought relief from a variety of sources, but one persistent hope among many would-be reformers has been that they could reshape the process through the vehicle of federal legislation. According to a then-comprehensive study of federal presidential primary legislation written for the Congressional Research Service (CRS) in 1980, between 1911 and 1979 a total of 272 bills were introduced in Congress that attempted to establish, encourage, or regulate presidential primaries; 117 of these were filed between 1969 and 1979. (None of the bills was ever enacted, and only five made it to the floor of either house.)[1] The interest in federal primary legislation has dropped off somewhat since the 1970s, but a more recent CRS report states that "more than 300" bills to "reform the [presidential] nomination process" have been introduced in either the House or the Senate.[2]

The fact that some observers believe that federal primary legislation would be desirable, however, does not mean that such legislation would be constitutional. To the contrary, there are two separate constitutional challenges that can be raised against any federal legislation that purports to deal with this subject.

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[1] See Joseph B. Gorman, "Federal Presidential Primary Proposals, 1911-1979," Congressional Research Service Report No. 80-53 GOV, February 20, 1980.

[2] See Kevin Coleman, "Presidential Nominating Process: Current Issues and Legislation in the 106th Congress," CRS Report for Congress, March 21, 2000, reprinted in Advisory Commission on the Presidential Nominating Process, Nominating Future Presidents: A Review of the Republican Process (Washington, D.C.: Republican National Committee, May 2000), 101-106.

The first of these challenges is what I would call the federalism question. The delegates to both the Democratic and Republican national conventions are selected by state. All current legislation that establishes presidential primaries and determines their specific method of operation has been enacted by state governments. Does the federal government have the power to tell the states that they must hold a primary, or when they can hold it, or how precisely they are to use this primary to select or bind convention delegates?

There are three provisions in the Constitution that are particularly relevant to this question.

> Article II, Section 1: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress."
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> Article II, Section 1: "The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States."
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> Article I, Section 4: "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

As these clauses indicate, the federal government is given very little power generally to regulate the presidential selection process, particularly in comparison to the rather broad powers it is given over congressional elections. Most important details with respect to presidential elections are specifically left to the discretion of the state legislatures. Congress is given the authority to determine the time of "chusing the electors," but this clause quite clearly relates only to the selection of members of the electoral college. The

entire presidential nomination process -- anything that the parties or anyone else does to influence the effective set of choices available to the electoral college -- would appear to be completely extraconstitutional. Certainly the Constitution gives Congress no explicit authority to regulate that process.

As is often the case in constitutional law, however, the text of the Constitution is one thing, what lawyers and judges do with it something else. In fact, there are a small number of Supreme Court cases that, according to some scholars, may provide a basis for extensive federal intervention into the presidential nomination process.

The seminal case in this area is Burroughs v. United States, which was decided in 1934. At issue in this case was the constitutionality of the Federal Corrupt Practices Act of 1925, which required any committee that raised or spent money to influence a presidential election in two or more states to file periodic disclosure reports. Though the Court made no attempt to argue that the Constitution had expressly granted such powers to Congress, it nevertheless upheld the Act as a valid exercise of Congress's general authority to protect and safeguard the procedures that were essential to the government's continued existence. As the Court put it:

> The President is vested with the executive power of the nation. The importance of his election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated. To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection. Congress, undoubtedly, possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction, whether threatened by force or by corruption.[3]

[3] Burroughs v. United States 290 U.S. 534 (1934), at 545.

Though Burroughs is invariably cited by supporters of federal primary legislation, it is important to note the narrowness of the Court's actual ruling in this case. The Court did not claim that Congress had the general authority to rewrite the rules of the presidential selection process anytime it believed that it could make the system work better. The Court merely said that Congress had the power to protect the fundamental integrity of the presidential election process whenever it was threatened by what the Court called "the two great natural and historical enemies of all republics, open violence and insidious corruption."[4] It was this same power that the Court relied upon in Buckley v. Valeo, when it upheld Congress's general capacity to regulate campaign finance during the nomination phase of a presidential election.[5]

Some authorities, however, have used the Burroughs decision to argue that Congress possesses quite sweeping powers to regulate and control presidential elections. The best-known and most frequently-cited example of such an argument occurs in the case of Oregon v. Mitchell. In early 1970, Congress passed a voting rights act that, among other things, lowered the voting age to 18 in all federal elections, presidential as well as congressional. A number of states, including Oregon, claimed that the act took away from

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[4] Burroughs v. United States, 290 U.S. 546. In this passage, the Court was actually quoting its decision in Ex parte Yarbrough 110 U.S. 651 (1884).

[5] See Buckley v. Valeo 424 U.S. 1 (1976), at 13-14. The question of congressional authority over the presidential selection process was not a major issue in the Buckley decision and was dealt with very briefly. As the Court noted, "The constitutional power of Congress to regulate federal elections is well established and is not questioned by any of the parties in this case" (13, emphasis added).

them "powers reserved to the States by the Constitution to control their own elections." In announcing the judgment of the Court, Justice Black not only upheld that portion of the act, but argued that Congress had an almost unlimited authority to govern presidential elections.

> I would hold, as have a long line of decisions in this Court, that Congress has ultimate supervisory power over congressional elections. Similarly, it is the prerogative of Congress to oversee the conduct of presidential and vice-presidential elections and to set the qualifications for voters for electors for those offices. It cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections.[6]

Since the Court had earlier ruled that Congress's authority over congressional elections extended to primaries as well as general elections, Black's opinion would seem to provide a basis for virtually any kind of regulatory scheme Congress chooses to adopt with respect to the presidential nomination process.

Not to put too fine a point on it, but Black's opinion (which, it is important to say, was not the opinion of the Court)[7] is a travesty of legal reasoning. Indeed, there isn't much real reasoning in it -- just a rather bluff assertion that Black can't imagine the Framers

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[6] Oregon v. Mitchell, 400 U.S. 112 (1970), at 124.

[7] There was no opinion of the Court in Oregon v. Mitchell. A majority did uphold the provision that lowered the voting age in federal elections to 18, but four justices (Douglas, Brennan, White, and Marshall) did so on the basis of the Equal Protection Clause, a line of reasoning that does not give any obvious support to national primary legislation. (The Equal Protection Clause mandates that no state deny "to any person within its jurisdiction" the equal protection of the laws, while the usual justification for national primary legislation is the desire to eliminate various kinds of interstate inequalities.) In short, Black was the only justice convinced by the argument quoted above. Unfortunately, many references to Black's opinion pass over or blur this point. See, in particular, Leonard P. Stark, "The Presidential Primary and Caucus Schedule: A Role for Federal Regulation?" Yale Law and Policy Review 15 (1996): 331-97, at 376, who attributes Black's statement to "the Court." See also Justice Marshall's dissenting opinion in O'Brien v. Brown, 409 U.S. 1 (1972), at 15.

writing the Constitution according to a different set of principles than he would have employed if he had been given the job. The actual text of the Constitution, however, leaves little room to doubt that the Framers did, in fact, give Congress much greater control over congressional elections than over presidential elections. As the clauses quoted above clearly indicate, Congress was given power to control the "times, places, and manner" of congressional elections, but only the "time" of choosing presidential electors. This difference cannot legitimately be called meaningless or unimportant. As the debates in the constitutional convention show, and as Madison was to argue in Federalist No. 39, the Constitution was deliberately designed so that some offices in the new government had a national character while others embodied the "federal" principle.[8] The latter accordingly gave a greater role to the states -- and correspondingly more limited powers to the national government.

Black's opinion also ignores a second major difference between the clauses regarding congressional and presidential elections -- an oversight worth emphasizing because it also characterizes the most common argument made in favor of federal primary

[8] The argument that some parts of the Constitution should rest on a popular foundation while others should incorporate a direct role for the states was made most explicitly during the Convention's discussion of how to elect the members of the Senate. See Max Farrand, ed., The Records of the Federal Convention of 1787 (New Haven, Conn.: Yale University Press, 1937), 1:150-56, particularly the comments of John Dickinson (at 152-53) and George Mason (at 155-56). For Madison's views, see Federalist No. 39, in Alexander Hamilton, James Madison, and John Jay, The Federalist Papers, ed. Clinton Rossiter (New York: New American Library, 1961 [1788]), 240-46.

legislation in the small number of law review articles on the subject.[9] This latter argument involves three propositions:

1. Article II, Section 1 of the Constitution clearly gives Congress the power to "determine the Time of chusing the Electors."
2. In United States v. Classic, the Court ruled that whatever powers Congress has with respect to general elections it also has with respect to primaries.
3. Therefore, Congress at least has the power to regulate the timing of presidential primaries.

If accepted, this argument would not allow Congress to impose some measure of uniformity on the state laws that regulate delegate allocation or access to presidential primary ballots, but it would give ample authority for a regional primary scheme or a bill that would restrict the dates on which presidential primaries could be held.

The problem with this argument concerns proposition #2, which is, in my view, a highly problematic summary of the Classic decision. At issue in Classic was the constitutionality of an indictment lodged against two Louisiana election officials, who had allegedly stolen votes during a congressional primary election held in 1940. In upholding the indictment, the Court ruled that the authority of Congress given in Article I, Section 4

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[9] See, in particular, Eugene Gressman, "Observation: Uniform Timing of Presidential Primaries," North Carolina Law Review 65 (January 1987): 351-58. The same argument is made, more briefly, in Michael S. Steinberg, "A Critique of the Current Method of Scheduling Presidential Primary Elections and a Discussion of Potential Judicial Challenges," George Washington Law Review 69 (March 2001): 453-76; Committee on Federal Legislation, "The Revision of the Presidential Primary System," The Record of the Association of the Bar of the City of New York 33 (May/June 1978): 306-34, at 319; and Antonin Scalia, "The Legal Framework for Reform," Commonsense 4 (1981): 40-49, at 46-47.

"includes the authority to regulate primary elections when, as in this case, they are a step in the exercise by the people of their choice of representatives in Congress."[10] But this ruling was plainly made only with respect to Congress's powers concerning congressional elections. The same principle does not easily or obviously extend to presidential elections.

Again, there is a key difference in wording. Article I, Section 4 gives Congress the authority to regulate the "Times, Places, and Manner" of holding congressional "elections." The grant of power in Article II, Section I, by contrast, is considerably more limited, merely allowing Congress to set "the Time of chusing the electors" (i.e., the members of the electoral college). It is quite reasonable to argue, as the Court did in Classic, that the word "elections" takes in the entire process through which qualified electors express their choice of candidates, even if a state "changes the mode of choice from a single step, a general election, to two," a primary and a general election.[11] It seems, by contrast, almost willfully perverse to say that, because the Constitution permits Congress to determine the time of one particular step in the presidential selection process, it therefore gives Congress the power to determine the time of every step in the process -- as if, once the words "Congress may determine the time" were included in the Constitution, any words, phrases, or qualifications that followed were essentially irrelevant. Certainly the Supreme Court has never made such a startling claim. What the Court has said, albeit in a somewhat different context, is that:

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[10] United States v. Classic 313 U.S. 299 (1940), at 317.

[11] United States v. Classic 331 U.S. 316.

> Any connection between the process of selecting electors and the means by which political party members in a State associate to elect delegates to party nominating conventions is so remote and tenuous as to be wholly without constitutional significance.[12]

There is, then, ample reason to think that Congress does not have the constitutional authority to impose a national or regional primary system upon the states. Of course, as the preceding analysis has made clear, my reading is not the only way of interpreting the Constitution. Indeed, with respect to questions of federal versus state authority, there are two well-known attempts to argue that the Supreme Court should basically stay out of federalism questions altogether and simply defer to Congress's own interpretation of its powers.[13] What is important to note, however, is that the contemporary Court has generally declined to follow this advice. To the contrary, a number of recent Court decisions have showed a renewed commitment to limiting federal power and protecting state autonomy, a trend that one well-known legal textbook has gone so far as to call "the antifederalist revival."[14]

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[12] Democratic Party of United States v. Wisconsin, 450 U.S. 107 (1981), at 125, note 31.

[13] See Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," Columbia Law Review 54 (April 1954): 543-60; and Jesse H. Choper, Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court (Chicago: University of Chicago Press, 1980).

[14] See, in particular, United States v. Lopez 514 U.S. 549 (1995), in which the Court ruled that a federal law forbidding the possession of firearms in a school zone exceeded Congress's power to legislate under the Commerce Clause; and New York v. United States 505 U.S. 144 (1992), in which the Court held an act forcing states to "take title" to low-level radioactive waste infringed upon the "core of state sovereignty reserved by the Tenth

At a minimum, I think it highly presumptuous to claim that the constitutionality of federal primary legislation is "clear" and "inescapable."[15] None of the major precedents come close to providing a definitive resolution of the issue.

Constitutional Issues II:
The Private Action Question

As noted earlier, there are two major reasons to question whether the federal government has the constitutional authority to regulate or reform the presidential nomination process. In the second case, what is at issue is not federalism -- i.e., whether the federal government can impose its will on the state governments -- but whether any government can control the activities of a political party, an entity that many view as a private association, whose internal operations are protected from outside interference by the First Amendment.

Political parties are, of course, mentioned nowhere in the original text of the Constitution. As parties emerged and developed during the last decade of the eighteenth century and the first half of the nineteenth century, they were accordingly treated as entirely private organizations, whose decisions and procedures were beyond the scope of

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Amendment". See also Printz v. United States 521 U.S. 898 (1997) (holding part of the Brady Handgun Act unconstitutional because it compelled state and local executive officials to execute federal law); and United States v. Morrison 529 U.S. 598 (2000) (ruling that the Commerce Clause did not authorize Congress to provide a federal civil remedy for victims of gender-motivated violence). The phrase "antifederalist revival" is quoted from Kathleen Sullivan and Gerald Gunther, Constitutional Law, 14th ed. (New York: Foundation Press, 2001), 115.

[15] Both claims are made in Gressman, "Observation," 351, 357. To be fair to Gressman, his article was published before any of the cases cited in note 19.

governmental regulation. As the eminent political scientist V.O. Key has noted of this early period, "It was no more illegal to commit fraud in the party caucus . . . than it would be to do so in the election of officers of a drinking club."[16] As parties became more powerful, however, they were gradually subjected to extensive legal regulation.[17] "By 1920," Austin Ranney notes, "most states had adopted a succession of mandatory statutes regulating every major aspect of the parties' structures and operations."[18]

Though these laws and regulations were enacted by state legislatures, the courts did nothing to obstruct the trend. In certain respects, in fact, they reinforced it. Of particular significance was a series of Supreme Court decisions known collectively as the white primary cases. Through the first several decades of the twentieth century, most southern states openly and explicitly banned blacks from participating in Democratic party primaries. Had this occurred in a general election, it would plainly have been a violation of the Fifteenth Amendment and hence unconstitutional.[19] But what about a primary election? Was a primary an instance of "state action," and thus subject to the strictures of the

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[16] V.O. Key, Jr., Politics, Parties, and Pressure Groups, 4th ed. (New York: Thomas Y. Crowell, 1958), 411.

[17] The best history of the early growth of state regulations respecting political parties is still C. Edward Merriam, Primary Elections: A Study of the History and Tendencies of Primary Election Legislation (Chicago: University of Chicago Press, 1908).

[18] Austin Ranney, Curing the Mischiefs of Faction: Party Reform in America (Berkeley: University of California Press, 1975), 81.

[19] Blacks were, of course, almost completely excluded from voting in southern general elections during this period, but precisely because of the Fifteenth Amendment, their exclusion was accomplished through means other than outright prohibition, such as literacy tests, poll taxes, threats of violence, etc.

Constitution? Or was the Democratic party simply a "voluntary association," as the southern state parties themselves maintained, that had a First Amendment right to select its own members and limit participation in organizational decisions in any way it found suitable? After dancing around this question for a number of years, in Smith v. Allwright (1944) the Court finally and definitively came down in opposition to the white primary. "Primary elections," the Court argued,

> are conducted by the party under state statutory authority. . . . this statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the state in so far as it determines the participants in a primary election. The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party.[20]

Through the first seven decades of the twentieth century, courts gave every indication that they regarded political parties as public entities, subject to whatever regulations a state chose to impose upon them. Beginning in the early 1970s, however, the pendulum began to swing back in the opposite direction.

The seminal case in this new line of thinking was Cousins v. Wigoda, decided in 1975. The Cousins case emerged out of a battle between two groups of delegates, both of whom claimed to represent the Chicago area at the 1972 Democratic National Convention. One group, the Wigoda delegates, had been elected in the 1972 Illinois Democratic primary, many by overwhelming margins. But a second group, the Cousins delegates, claimed that

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[20] Smith v. Allwright, 321 U.S. 649 (1944), at 663 (emphasis added).

they deserved to be seated at the convention, since the first group had failed to adhere to the new "slate-making" and affirmative action guidelines that had been established by the national Democratic party. Eventually, the Democratic National Convention chose to seat the second group; contempt proceedings were then initiated against the Cousins delegates on the grounds that they had violated Illinois law, which required delegates to be selected via the Democratic primary.

The Supreme Court, however, sided with the Cousins delegates, ruling that "the National Democratic Party and its adherents enjoy a constitutionally protected right of association" that overrode any interest the state had in protecting the integrity of its electoral processes.

> If the qualifications and eligibility of delegates to National Political Party Conventions were left to state law each of the fifty states could establish the qualifications of its delegates to the various party conventions without regard to party policy, an obviously intolerable result. . . . The Convention serves the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual state.[21]

Since then, the Supreme Court has quite consistently upheld the claims of political parties almost every time they have come in conflict with state law. In 1981, it overruled the Wisconsin Supreme Court's attempt to assert the supremacy of that state's "open primary" law against national Democratic rules. In 1986, the Court allowed the Connecticut Republican party to open up its primaries to independent voters, even though state law limited primaries to registered party members. In 1989, the Court invalidated California laws that dictated the organization and composition of party governing bodies and

prohibited those bodies from making endorsements before a primary. In 2000, it declared that the state of California could not compel the Democratic and Republican parties to nominate their candidates through a so-called blanket primary.[22]

Yet, if the general principle has been clearly established, the precise boundaries of party autonomy remain rather murky. The general mode of analysis the Court has used in these cases first requires it to determine if the burden on the parties' First Amendment rights is mild or severe. If severe, the law may still be upheld if it is "narrowly tailored to serve a compelling state interest." And while the Court has repeatedly made clear that it accords considerable importance to the parties' freedom of political association, particularly as it relates to the parties' "basic function" of nominating candidates for public office, it is not so easy to say, in any given instance, what constitutes a "compelling state interest."[23]

Suppose, then, that Congress were to adopt a law establishing a national or regional primary system. Could one or both parties opt out of the system on the grounds that they thought the law unwise or harmful to the party's interests, and that they had a First

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[21] Cousins v. Wigoda, 419 U.S. 477 (1975), at 490 (internal quotation omitted).

[22] The cases referred to are, respectively, Democratic Party of United States v. Wisconsin, 450 U.S. 107 (1981); Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986); Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989); California Democratic Party v. Jones, 530 U.S. 567 (2000).

[23] In various decisions, the Court has undeniably recognized a compelling state interest in such things as "maintaining stable government" (see Eu v. San Francisco County Democratic Central Committee, 489 U.S. 226), "protecting the integrity of its electoral processes" (Cousins v. Wigoda, 419 U.S. 489), "fostering an informed electorate" (Eu v. San Francisco County Democratic Central Committee, 489 U.S. 228), and limiting the damage caused by "splintered parties and unrestrained factionalism" (Storer v. Brown, 415 U.S. 724

Amendment right to determine their own nomination procedures? There is, at present, no clear answer to this question.[24] The Court has made clear, in two different cases, that national party rules take precedence over state law, but as the passage from Cousins v. Wigoda quoted earlier suggests, part of the Court's concern was with the possibility that the sheer diversity of state laws and practices could undermine the integrity of a national party convention. Perhaps the Court would look more favorably on a uniform national procedure.

Other Problems with Federal Legislation

For those who remain attracted by all the apparent advantages of federal presidential primary legislation and who might see this as sufficient reason to uphold its

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[1974], at 736). But the Court has then typically denied that these interests were actually and legitimately protected by the various laws and regulations governing political parties.

[24] Indeed, even at the state level, there is no case that directly confronts the question of whether a state may require the political parties to select their nominees by primary rather than by some alternative procedure, such as a caucus-convention system. A number of cases explicitly assume that the states do have this power (see, for example, American Party of Texas v. White, 415 U.S. 767 [1974], at 781), but all such comments are obiter dicta. As Justice Stevens notes in his dissent in California Democratic Party v. Jones, 530 U.S. 594, "the point [that a state may require parties to use the primary format for selecting their nominees] has never been decided by this Court."

If the courts have never explicitly confronted this question, there are a number of law review articles arguing that the line of reasoning set forth in cases like Cousins v. Wigoda and Tashjian v. Republican Party of Connecticut will ultimately compel the Court to grant parties the right to refuse to nominate their candidates by primary. See, for example, Karl D. Cooper, "Are State-Imposed Political Party Primaries Constitutional? The Constitutional Ramifications of the 1986 Illinois LaRouche Primary Victories," Journal of Law and Politics 4 (Fall 1987): 343-78; Arthur M. Weisburd, "Candidate-Making and the Constitution: Constitutional Restraints on and Protections of Party Nominating Methods," Southern California Law Review 57 (January 1984): 213-81; and James S. Fay, "The Legal Regulation of Political Parties," Journal of Legislation 9 (Summer 1982): 263-81, at 279.

constitutionality, it is important to look at the other side of the coin. There are also some signal drawbacks to federal regulation of the presidential nomination process. Perhaps the most important of these is the potential rigidity that federal legislation is likely to introduce into the system. National and regional primary proposals both plainly represent substantial departures from the current system, whose full consequences are difficult to predict. Given that fact, and the fact that changes in technology, candidate behavior, and media organization and practices may soon introduce further important changes in the process, it is likely that any legislation that Congress passes will soon need to be modified. In 2000, the Republican party created an advisory commission to study its own nomination procedures. As the chairman of that commission noted at one point, "Whatever our proposed 'solution,' it would at best be out of date in a decade. The world is simply changing too rapidly."[25] Yet, the clear record of federal legislation in this area indicates that such laws are difficult to pass, even when there is widespread dissatisfaction with the current system.

Or, to take another plausible scenario, suppose that the new federal law is found, once in operation, to confer some kind of advantage on one party over the other in terms of its prospects of winning the general election.[26] Unlike party rules, changing federal law generally requires some cooperation from both parties, particularly when Congress is as closely divided between the parties as it has been in recent years. Neither party, we think it

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[25] See Bill Brock, "Introduction," in Advisory Commission on the Presidential Nomination Process, Nominating Future Presidents: A Review of the Republican Process (Washington, D.C.: Republican National Committee, May 2000), 7.

[26] Nelson W. Polsby has made precisely this argument about the consequences of the reforms enacted by the Democratic party in the early 1970s. For details, see Polsby, Consequences of Party Reform (New York: Oxford University Press, 1983), 85-88.

fair to say, would readily agree to surrender such an advantage. The result might be that one party that stuck with a nomination process that it felt was doing it serious harm, yet had no capacity to change or abandon. In either case, it seems particularly unwise to enact a major reform of the nomination process in a way that would be so difficult to change if the new system is found to be seriously deficient.

The Problems of Regional Primaries

Finally, I would like to call the Committee's attention to a number of problems with regional primaries, however they are adopted and enforced. First, though regional primaries have recently been proposed primarily as an antidote to front-loading, it is by no means clear that a regional primary system would actually reduce front-loading. It depends on how the system is designed. The proposal formulated by the National Association of Secretaries of State (NASS) provides a good example of the problem. The NASS calendar allots separate weeks to Iowa and New Hampshire -- and then, one week later, the first region would vote. In other words, one week after New Hampshire, delegates would be selected in twelve different states on the same day. By comparison, most recent presidential nomination calendars have started up more slowly. Immediately after New Hampshire, there have typically been several weeks in which only one or two states held their primaries or caucuses. The NASS calendar, to be sure, would be less front-loaded after that: There would be a month off before the next region voted. But this is small consolation to all the candidates who cannot afford to campaign in twelve states, even twelve contiguous states,

just one week after the race begins and who will therefore not be around when the second region goes to the polls.

Another major problem associated with regional primaries is that they would confer a significant advantage on any candidate who happened to be particularly strong in whatever region went first.[27] As Table 1 indicates (it is located at the end of this statement), region is a very important variable in explaining primary outcomes. Almost every recent presidential candidate has done significantly better in one region than in the others. In 1976, for example, Gerald Ford won 60 percent of the vote in the average northeastern primary, as against 35 percent in the average western primary. In the same year, Jimmy Carter won, on average, 62 percent of the vote in the South, 35 percent in the Northeast, and 21 percent in the West. In 1980, Edward Kennedy won 53 percent of the vote in the average northeastern primary, but only 18 percent in the southern primaries.[28]

In the contemporary presidential nomination process, the order in which primaries are held matters. Indeed, that is why front-loading developed in the first place. And thus,

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[27] This advantage is sometimes thought to be equivalent to a favorite-son effect: i.e., that candidates will only run conspicuously well in their own home region. But as Table 1 indicates, many candidates actually run best in a region other than their own. In 2000, for example, John McCain's best region was not the West, in which he lived, but New England. But whether the advantage falls on a favorite son or an outsider is irrelevant: the essential point is that the vote does vary by region, and that the order in which regions vote may therefore be very important in determining who gets nominated.

[28] The kind of analysis conducted in Table 1 is only meaningful in a race where approximately the same set of candidates contest a large number of primaries. Where one of the candidates listed withdrew from the race before the end of the primary season, we include only those primaries that took place before the withdrawal date. In 1996 and 2000, the races came to an end so quickly as to make a regional analysis of questionable value.

which region goes first could have very important implications for which candidate gets nominated. In 1992, for example, Bill Clinton's candidacy would likely have been doomed if the southern states had voted last: for the first five weeks of that year's delegate selection season, Clinton didn't win a single primary or caucus outside the South. Supporters of regional primaries implicitly acknowledge this problem, for regional primary proposals invariably include a provision that rotates the order in which regions vote or determines that order by lot. But rotation and lotteries do not eliminate this problem -- they merely ensure that the direction and recipient of the distortion will vary, in a random manner, from one election cycle to the next.

Conclusion

I commend this Committee and the sponsors of the regional primary legislation for trying to come to terms with an issue that is very difficult, very important, and yet, not particularly salient to most voters. Yet, as this statement should indicate, I am not convinced that federal legislation is the proper vehicle for solving the problems of the presidential nomination process -- or that regional primaries are the best way to structure the delegate selection calendar.

It is hard to square a fair reading of Articles I and II with the notion that the national government has the same control over the presidential selection process that it has over congressional elections. And while the precise boundaries of party autonomy are murky, a plausible case can certainly be made that if freedom of association is to have any meaning at all with respect to political parties, then it must give the parties some ability to

control the process they use for making what is probably their single most important decision: which candidate to nominate for the presidency. All of which convinces me that those who seek to reform the presidential nomination process should not place too much reliance on the prospect of federal legislation, but should look instead for ways to strengthen the national parties' ability to enforce their rules and mandates upon the states.

TABLE 1
Primary Vote by Region
in Recent Nomination Races

	Northeast	South	Midwest	West
1976 REPUBLICAN				
Ford	60	44	53	35
Reagan	38	55	46	63
(N of states)	(4)	(6)	(7)	(4)
1976 DEMOCRATIC				
Carter[a]	35	62	47	21
(N of states)	(6)	(6)	(7)	(5)
1980 REPUBLICAN[b]				
Reagan	38	65	56	54
Bush	45	24	24	35
(N of states)	(5)	(8)	(6)	(1)
1980 DEMOCRATIC				
Carter	41	70	56	45
Kennedy	53	18	36	38
(N of states)	(9)	(8)	(7)	(5)
1984 DEMOCRATIC				
Mondale	38	33	37	33
Hart	33	29	46	48
Jackson	21	24	13	13
(N of states)	(9)	(6)	(5)	(3)
1988 DEMOCRATIC[c]				
Dukakis	57	18	27	--
Jackson	26	29	22	--
Gore	7	35	8	--
(N of states)	(5)	(12)	(4)	(0)
1992 DEMOCRATIC[d]				
Clinton	27	65	40	27
Tsongas	47	19	18	26
Brown	17	9	20	29
(N of states)	(4)	(8)	(4)	(1)

[a]Carter was the only Democratic candidate in 1976 who contested enough primaries to make this sort of analysis feasible.
[b]Averages are based on those primaries conducted through May 20. On May 26, Bush withdrew from the race.
[c]Averages are based on those primaries conducted through April 19. On April 21, Gore withdrew from the race.
[d]Averages are based on those primaries conducted through March 17. On March 19, Tsongas withdrew from the race.

Note: Regions are those contained in the plan of the National Association of Secretaries of State.