United States Senate Committee on Rules and Administration
Hearing on S.1905, "Regional Presidential and Primary Caucus Act of 2007," September 19, 2007

STATEMENT OF RICHARD L. HASEN

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Chairman Feinstein, Ranking Member Bennett, and Senators on the Rules and Administration Committee:

Thank you very much for the opportunity to appear before you today to testify about Senate Bill 1905, which would establish rotating regional primaries for choosing delegates for presidential nominating conventions. 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. In preparing for this testimony I came across a law review article expanding on the 1986 testimony of Professor Eugene Gressman about the constitutionality of a number of similar proposals considered by the 99th Congress.[1] But the unprecedented front-loading and "race to the front of the line" that we are seeing in the 2008 presidential election season adds new urgency to the oft-proposed regional primary solution.

Upon my review of the constitutional text, the relevant Supreme Court caselaw, 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. The remainder of my testimony will explain the basis for my 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 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 political parties.[2] Some also claim that imposing such a regional primary system would violate the First Amendment associational rights of political parties.[3]

In my view, the textual argument is not wholly persuasive. No doubt, Congress's power to regulate presidential elections is not coextensive with its power to regulate Congressional elections. For example, Congress could not pass a law barring states from using a "winner-take-all" system for choosing presidential electors.[4] 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 reached just this conclusion when he was a law professor reviewing the issue in 1981. He said: "Since…Congress has explicit authority under Article II…to [determine

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[1] Eugene Gressman, *Observation: Uniform Timing of Presidential Primaries*, 65 NORTH CAROLINA LAW REVIEW 351 (1987).
[2] The most sustained argument along these lines is William G. Mayer and Andrew W. Busch, *Can the Federal Government Reform the Presidential Nomination Process?*, 3 ELECTION LAW JOURNAL 613 (2004).
[3] *See id.* at 620-23.
[4] *See* Dan T. Coenen and Edward J. Larson, *Congressional Power over Presidential Elections: Lessons From the Past and Reforms for the Future*, 43 WILLIAM AND MARY LAW REVIEW 851, 903-04 (2002)

the time for choosing electors], Congress must have at least the authority to specify the *dates* of primaries and even of state and national nominating conventions."[5] Justice Scalia relied upon the Supreme Court precedent of *United States v. Classic*,[6] 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 caselaw bolsters the conclusion that Congress has the power to set the time for presidential primaries. In *Burroughs v. United States*,[7] the Court "squarely rejected"[8] the narrow textualist reading of Article II. The Court held that Congress had the power under Article II to regulate corrupt practices that could affect presidential elections. In *Buckley v. Valeo*,[9] the Court upheld Congress's power to regulate campaign financing in both congressional and presidential elections. And in *Oregon v. Mitchell*,[10] the Court upheld Congress's power to change the voting age for president to 18. Justice Black cast the decisive vote on the issue, concluding that "[i]t cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections."[11]

Professors Mayer and Busch have criticized Justice Black's opinion as a "travesty of legal reasoning,"[12] given the Constitution's textual differentiation between Congressional power over congressional and presidential elections. But, regardless of the merits of the legal analysis, the Justice's opinion (like the majority opinions in *Burroughs*, *Classic*, and *Buckley*) remains good law unless overruled by the Court. Indeed, a ruling striking down a congressional-imposed regional primary as exceeding Congress's Article II power would call into question a great many congressional laws that regulate presidential elections, from campaign finance, to election administration (including aspects of the National Voter Registration Act and 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"[13] problem that can be solved only by national legislation. This is the same impetus

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[5] Antonin Scalia, *The Legal Framework for Reform*, 4 COMMONSENSE 40, 47 (1981) (original emphasis). He added the caveat that he was not addressing factors "such as states' powers and the parties' First Amendment rights" that may limit the exercise of this authority.
[6] 313 U.S. 299, 317 (1941).
[7] 290 U.S. 534 (1934).
[8] James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 893, 984 (1997).
[9] 424 U.S. 1 (1976).
[10] 400 U.S. 112 (1970).
[11] *Id*. at 124 (opn. of Black, J.). *See also* Leonard P. Stark, *The Presidential Primary and Caucus Schedule: A Role for Federal Regulation?*, 15 YALE LAW AND POLICY REVIEW 331, 373-77 (relying upon *Burroughs*, *Classic*, and *Mitchell* in support of argument for Congressional power to impose timing of presidential primary system upon the states).
[12] Mayer and Busch, *supra* note 2, at 617.
[13] *See* Garrett Hardin, *The Tragedy of the Commons*, SCIENCE, Dec. 13, 1968, http://www.sciencemag.org/cgi/content/full/162/3859/1243 ("Each man is locked into a system that compels him to increase his herd without limit--in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.").

behind Article II's requirement that Congress choose a uniform day for choosing presidential electors.[14]

The other constitutional objection that could be raised to S. 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—each party can decide who gets to vote on its choice of standard-bearer.[15] But the Court has assumed that the government may require parties to use a primary (rather than another method, such as a caucus) to choose its nominees for political office,[16] and it is hard to see how a law dictating the *timing* of such a party primary would unconstitutionally limits a party's right of association.[17] Moreover, S. 1905 would be directed to the *states*, not to the parties, and would not affect the parties' internal deliberations. (Of course, a solution Congress legislated with the consent of the parties would obviate this class of objections.)

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

I would be happy to answer any questions that you may have.

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[14] Congress alternatively might make participation in the system voluntary, but condition state receipt of election-related funds upon participation in the program.
[15] *See e.g.*, Cal. Democratic Party v. Jones, 530 U.S. 567 (2000).
[16] American Party of Texas v. White, 415 U.S. 767, 781 (1974); *Jones*, 530 U.S. at 572 ("We have considered it 'too plain for argument,' for example, that a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion.").
[17] *See* Scalia, *supra* note 5, at 49 ("I doubt that any but the most unusual and obstructive [congressional regulation of presidential primaries] would be invalidated on 'freedom of association' grounds.").