S. HRG. 111–203

S.J. RES. 7 AND H.J. RES. 21: A CONSTITUTIONAL AMENDMENT CONCERNING SENATE VACANCIES

JOINT HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

AND

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

MARCH 11, 2009

Senate Serial No. J–111–10

House Serial No. J–111–34

Printed for the use of the Committee on the Judiciary

VerDate Nov 24 2008 11:40 Jan 06, 2010 Jkt 054105 PO 00000 Frm 00001 Fmt 6011 Sfmt 6011 S:\GPO\HEARINGS\54105.TXT SJUD1 PsN: CMORC

S.J. RES. 7 AND H.J. RES. 21: A CONSTITUTIONAL AMENDMENT CONCERNING SENATE VACANCIES

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U.S. GOVERNMENT PRINTING OFFICE

54–105 PDF WASHINGTON : 2010

For sale by the Superintendent of Documents, U.S. Government Printing Office
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S.J. RES. 7 AND H.J. RES. 21: A CONSTITUTIONAL AMENDMENT CONCERNING SENATE VACANCIES

WEDNESDAY, MARCH 11, 2009

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Subcommittees met, pursuant to notice, at 10:05 a.m., in room SH–216, Hart Senate Office Building, Hon. Russ Feingold, Chairman of the Senate Subcommittee, and Hon. John Conyers, Jr., Chairman of the House Committee, presiding.

Present: Senators Feingold, Cardin, Kaufman, and Coburn; Representatives Conyers, Nadler, Scott, Johnson, and Jackson Lee.

OPENING STATEMENT OF HON. RUSS FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Chairman FEINGOLD. The hearing will come to order. I want to welcome everyone to this joint hearing of the House and Senate Constitution Subcommittees on S.J. Res. 7 and H.J. Res. 21, which are both proposed constitutional amendments concerning Senate vacancies. A special welcome to our colleagues from the House side, especially two longtime friends: John Conyers, the Chair of the House Judiciary Committee, who will act as the Chair of the House Subcommittee today, and, of course, James Sensenbrenner from my own State of Wisconsin, a former Chair of the House Judiciary Committee, who now serves as the Ranking Member of the House Subcommittee.

I want to thank my new Ranking Member, Senator Coburn, and his staff for their great cooperation in putting this unusual hearing together. This is the first hearing that Dr. Coburn and I have worked on together—we have worked on many issues together—and I look forward to continuing the productive working relationship that we have had on those issues in the past as he takes on this new role.

Joint hearings of House and Senate Committees are not unprecedented, but they are unusual. I think it is fitting that we are holding this particular joint hearing because the topic is so timely and so fundamental. There are now four Senators who will serve until

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the next general election, still 20 months away, who were not elected by their constituents. They serve because of what I have a called a "constitutional anachronism," which allowed the Governors of their States to appoint them to serve.

Now, I want to be clear. I don't have anything against these newest Senators. In fact, I have developed a good relationship with all of them and think a great deal of them. I hope and expect that they will serve with great distinction, as quite a few appointed Senators have done in the past. But when over 12 percent of our citizens are represented by someone in the Senate who they did not elect, I think that is a problem for our system of democracy. And it is a problem that I think only can be fixed properly by a constitutional amendment.

In 1913, the citizens of this country, acting through their elected State legislatures, ratified the Seventeenth Amendment to the Constitution, providing for the direct election of Senators. That ratification was the culmination of a nearly century-long struggle. The public's disgust with the corruption, bribery, and political chicanery that resulted from the original constitutional provision giving State legislatures the power to choose United States Senators was a big motivation for the amendment. As we have seen in recent months, gubernatorial appointments may pose the same dangers. They demand the same solution and, that is, direct elections.

The constitutional anachronism was created by the inclusion in the Seventeenth Amendment of a proviso, permitting State legislatures to empower their Governors to make temporary appointments in the case of an unexpected vacancy. Since the Seventeenth Amendment, 184 such appointments have been made. So this departure from the principle that was behind the Seventeenth Amendment itself—that the people should elect their Senators—is by no means an uncommon occurrence.

I believe that those who want to be a U.S. Senator should have to make their case to the people whom they want to represent, not just the occupant of the Governor's mansion. And the voters should choose them in the time-honored way that they choose the rest of the Congress of the United States—in an election.

This proposal is not simply a response to the latest cases that have been in the news over the past few months. These cases have simply confirmed my longstanding view that Senate appointments by State Governors are an unfortunate relic of the pre-Seventeenth Amendment era, when State legislatures elected U.S. Senators, and those legislatures might only meet for a few months a year. I view this issue, at base, as a voting rights question. The people of this country should no longer be deprived, for months or even years, of their right to be represented in the Senate by someone whom they have elected.

Direct election of Senators was championed by the great progressive Bob La Follette, who served as Wisconsin's Governor and a U.S. Senator. We need to finish the job started by La Follette and other reformers nearly a century ago. No one can represent the people in the House of Representatives without the approval of the voters, and the same should be true for the Senate. I look forward to the testimony of our witness on this very important topic.

And now, just prior to turning to our Ranking Member, I am going to turn to Senator Ted Kaufman of Delaware, who has to leave but who wants to make a brief statement.

STATEMENT OF HON. TED KAUFMAN, A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator KAUFMAN. Thank you, Mr. Chairman. I appreciate the courtesy, and I think this is a great hearing. I thank two great Chairs, Congressman Conyers and Congressman Feingold, and Ranking Members Coburn and Sensenbrenner, I think this is a good idea.

As the only person in the room, I think, that this applies to, there have only been 185 appointed Senators in the history of the country, but I really associate my remarks to Chairman Feingold's remarks about the fact that this is a democracy, that the elected officials should be picked by a democracy. I think that is really the key part of our system. I have great faith in democracies. So I think the idea of having appointed Senators should yield to the idea of having elected Senators, even for special elections.

The one concern I have, which I have expressed many times, as long as I have been involved in the Senate as a staff person and now as a Senator, is I have a real question about when we should be amending the Constitution. I think our Founding Fathers were—to say "brilliant" really understates it, in how they set this Government up. We have had a few constitutional amendments over the course of our Government. So I am looking forward to what you say, but basically I am concerned about amending the Constitution, but I think anything we can do to encourage Governors and State legislatures to do the right thing and have limited appointed Senators and have Senators elected would be a good thing.

I have a statement to put in the record, and I want to thank you, Mr. Chairman and Chairman Conyers, for giving me this courtesy. I appreciate it.

Chairman FEINGOLD. I thank you, Senator, and I thank you for your service on this Committee.

I am pleased now to turn to our Ranking Member of the Senate Subcommittee, Senator Coburn.

STATEMENT OF HON. TOM COBURN, A U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator COBURN. Thank you, Mr. Chairman. This marks the first hearing of the Senate Judiciary Subcommittee on the Constitution in this Congress, but it is also the first hearing I have attended as Ranking Member of this important Subcommittee. I consider it a high honor to serve in this role, as matters within this Committee's jurisdiction—such as constitutional amendments and rights, separation of powers and federalism, as well as civil rights and civil liberties—are among the Senate's most awesome responsibilities.

I also consider it an honor to serve alongside Chairman Feingold, whose command of the law I have always respected. I look forward to working with him and his especially, and other members of this Subcommittee.

It is fitting that our first order of business is a proposal to amend the Constitution. The matter at hand serves as a reminder of the gravity of our responsibilities as members of this Subcommittee.

Like the Chairman, I do not consider constitutional amendments lightly. Modifying the Nation's founding document should only be done in the most compelling circumstances. Just this week, some seven proposed constitutional amendments were referred to this Subcommittee. While it is highly unlikely that all will be considered, our responsibility as members of this Subcommittee is to thoroughly vet and debate such proposals before they advance in Congress.

After all, constitutional amendments are relatively rare. Since 1789, more than 5,000 proposals to amend the Constitution have been introduced in Congress, yet only 33 have gone to the States for ratification. By design, the Constitution is very difficult to alter. The Founders struck a brilliant balance by creating a document that is amendable, yet authoritative, and their design has served the Republic well.

In reality, proponents of this—and any other—constitutional amendment face overwhelmingly unfavorable odds. Fortunately, proponents of the amendment at issue today do not have to wait for approval of supermajorities in the House and Senate and three-fourths of the States. The Constitution permits what the amendment would require.

Although this hearing is intended to advance S.J. Res. 7 and H.J. Res. 21, it may also lead to further discussion within the States about the most prudent way to fill their own Senate vacancies. These discussions began in light of the inordinate number of vacancies created after this most recent Presidential election. And, most notably, the scandal sparked by Illinois Governor Rod Blagojevich's efforts to fill the seat of our newly elected President exposed the potential for corruption in gubernatorial appointments. Although calls for a special election in Illinois were rejected at the time, the fallout from that appointment continues, and we find ourselves here today debating a proposal that would require for all States what one State would not do for itself.

It is important to note that the vast majority of States have chosen to exercise their constitutional right to allow gubernatorial appointments. Ironically, the Chairman and I represent two of the small handful of States that do not allow such appointments. While the citizens of Wisconsin and Oklahoma have clearly determined that special elections are their own preferred course, whether the same approach is right for all of the other States is still an open question.

Although the witness panel includes diverse perspectives, there are many important voices not present in today's debate. To that end, I would like to submit the statements from Governors who oppose this amendment, including the Governors of Texas and Idaho. I have yet to hear anyone espouse the virtues of appointed representation over elected representation, but I have heard legitimate concerns raised about the practical implications this amendment may have for the States. It is important that we carefully consider all sides of this debate before moving forward on this amendment,

and I invite others to weigh in on this proposal, even after this hearing is over.

I look forward to our witnesses' testimony. I thank, Mr. Chairman, for this, and I do look forward with great anticipation to working with you, and I would submit these two letters from the Governor of Texas and the Governor of Idaho.

Chairman FEINGOLD. They will be entered, without objection, and thank you, Senator Coburn.

I now recognize the Chairman of the House Judiciary Committee, Mr. Conyers.

STATEMENT OF HON. JOHN CONYERS, JR. A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Chairman CONYERS. Thank you very much, and good morning. It is a pleasure and honor, and a little bit intimidating, to be on the Senate side. Everything seems so formal and wonderful looking. Even the people that come in the doors to visit you seem to be more businesslike. We have got to check up for a little bit more equity in terms of the appointments of these buildings.

Senator COBURN. The budgets.

Chairman CONYERS. We will look into the budget a little bit later.

[Laughter.]

Chairman CONYERS. But it is always a pleasure to be here in these kinds of discussions with our colleagues in the other body, and I am happy that we are all here today.

The only point I want to make before I yield to the Chairman of the Constitution Committee on the House Judiciary, Jerry Nadler, is to say that my only problem about this proposal is the possible cost to the States. I need to feel more comfortable about that, but the logic of it to me is perfectly feasible.

The other thing I keep hearing a lot about is how much genius was invested in those that wrote the Constitution, and I have great admiration for the authors. But, you know, without the Bill of Rights, the first ten Amendments, the Constitution would have been roundly criticized. And so to think that we have to approach this with so much caution, about changing the Constitution, I do not think we need to be overly cautious about that. The requirement of approval by three-quarters of the States is a pretty daunting challenge for us to overcome.

So if I can, Chairman Feingold, I would like to yield the rest of my time to Jerry Nadler.

Chairman FEINGOLD. Mr. Nadler.

STATEMENT OF HON. JERROLD NADLER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Representative NADLER. Thank you, Mr. Chairman. I will not use the full 5 minutes. This is a timely hearing, and the issues we are going to examine are of the utmost importance. In recent months, questions have been raised once again—this happens periodically in our history—as to whether vacancies in the Senate should be filled by election rather than by gubernatorial appointment. The Constitution currently provides that States may choose whether to fill a vacancy by direct election or by appointment. Most States, as

noted, have chosen the latter, but some have chosen the former. It is important that we consider whether there should be a uniform national rule to fill such vacancies as there is with vacancies in the House, or whether it would be better to allow the people of each State to decide for them how it should be done. I think we need to answer that question first.

Having said that, my preference would always be for elections, but I have a couple of questions about this situation.

Number one, if we were to go to a system of direct elections within some reasonable period—180 days or whatever—that would put a premium on immense amounts of funding without the time for fundraising and might tend to make the Senate, even more than it is already, a body of millionaires and celebrities and might tend to say that most people could not run, and that is one consideration that we would have to think about.

Second is the question that we are going to have to address with respect to the House, and that is the question of what happens in, God forbid, the event of a terrorist attack where there are mass casualties. How do you reconstitute the House and the Senate quickly in the event of that kind of an emergency? The Senate can be reconstituted quickly now. The House cannot. That is something that we have to address and, with this amendment, it will make that situation impossible in the Senate as it is now in the House. And how could we address that?

Those two questions, I think, have to be considered before we can come to a conclusion on the proposal before us. So I appreciate the Chairman for calling this hearing. I think we ought to consider these questions carefully, and I look forward to the testimony.

I thank you and I yield back.

Chairman FEINGOLD. Thank you, Mr. Nadler.

Let me now turn to the Ranking Member of the Subcommittee, Mr. Sensenbrenner.

STATEMENT OF HON. F. JAMES SENSENBRENNER, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WISCONSIN

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman. I think we ought to start out by saying that this hearing is not called to improve upon James Madison's prose. He was not the author of the Seventeenth Amendment. He was long gone and immortalized by the time there was enough support to pass a constitutional amendment to provide for the direction election of Senators.

Currently, the Constitution's Seventeenth Amendment provides for the popular election of Senators, but it provides an exception in which States can allow Governors to appoint Senators to fill vacancies until a special election is held. As we have seen recently, such an appointment process is not only undemocratic, but it is prone to abuse.

The time has come for Congress to pass an amendment to the Constitution that would require all Senate vacancies to be filled by special election. I am grateful to Congressman Dreier and my Wisconsin colleague on the other side of the Capitol, Senator Feingold, who have introduced such an amendment, which we will consider today. I am an original cosponsor of the amendment.

The amendment would correct a constitutional anomaly that has too often been overlooked. When the Senate was first created, Senators were elected by State legislatures and not by the people. Because State legislatures were often in session only a few months a year, the original Senate provision of the Constitution included a means of replacing Senators when the legislatures were not in session. The mechanism was the temporary appointment by Governors of replacement Senators.

Then came a series of notorious instances of corrupt deals between the State legislators and those whom they selected as Senators. As the Senate Historical Office points out, "Intimidation and bribery marked some of the States' selection of Senators. Nine bribery cases were brought before the Senate between 1866 and 1906."

The result was the passage of the Seventeenth Amendment in 1913, which provided for the popular election of Senators.

However, in an effort to change as little of the original constitutional language as possible, the sponsors of the Seventeenth Amendment simply carried over the State Governor's appointment authority in the case of vacancies that was contained in the original Article I, Section 3. They did so with little debate, even though the removal of State legislatures from the election process rendered the original rationale for allowing temporary appointments obsolete.

Indeed, the only direct mention of the "vacancies" provision of the Seventeenth Amendment during congressional debate on that amendment in both the Senate and the House was made by Congressmen Mann and Rucker. Their remarks are exceedingly short, focusing mainly on grammatical points, and they do not include reference to any policy rationale behind the decision to retain the provision that allows Governors to appoint replacement Senators. That is not surprising, as there remained little policy rationale for those provisions.

Consequently, it is clear from the historical record that the debate over the Seventeenth Amendment focused entirely on the policy of requiring the direct election of Senators, and not at all on the ability of Governors to appoint people to fill Senate vacancies.

Today, however, with the recent example of the former Democratic Governor of Illinois and his appointee, Congress can no longer ignore this constitutional anomaly. It is now clear that the gubernatorial appointment provision can be subject to abuse as well, and it is time for Congress to belatedly address this issue.

My own State of Wisconsin recognized the importance of codifying elections as an essential element of Senate membership the very same year the Seventeenth Amendment was ratified. In 1913, Wisconsin passed a law requiring all Senate seats to be filled by special election, and on an expedited basis. That provision has been successfully administered three times since then: in 1918, following the death in a hunting accident of Senator Paul Husting; in 1925, following the death of Senator Robert La Follette, Sr.; and in 1957, following the death of Joseph McCarthy. The amendment we consider today would allow the rest of the country, however belatedly, to consider amending our shared founding document to fully enshrine elections as a prerequisite for serving the people in our democracy.

I look forward to hearing from all the witnesses today, and I would like to extend a special welcome to Kevin Kennedy of the Government Accountability Board of Wisconsin.

I thank the Chair for yielding.

Chairman FEINGOLD. I thank you, Congressman Sensenbrenner, for your enthusiastic support, and I also want to welcome Mr. Kennedy particularly. We go back a long way, and we will hear from him later.

Now we will go to the first panel of witnesses. Our first witness this morning is the Honorable Mark Begich of Alaska, who was elected to the U.S. Senate in 2008. Senator Begich was a member of the Anchorage Assembly for 10 years and served as the mayor of Anchorage from 2003 until his election to the Senate. He has also served on the University of Alaska Board of Regents, the Alaska Student Loan Corporation, and the Alaska Commission on Postsecondary Education. Senator Begich was the first Member of Congress to contact me after I announced my intention to introduce the Senate vacancies amendment, and I am proud to have him as a cosponsor of the amendment.

Thank you for being here, Senator, and you may proceed.

STATEMENT OF HON. MARK BEGICH, A UNITED STATES SENATOR FROM THE STATE OF ALASKA

Senator BEGICH. Thank you very much, Chairman Feingold and Chairman Conyers and other members here of the Committees, and thank you for the opportunity to testify today. As mentioned, I am from Alaska, the newly elected Senator from Alaska.

I am honored to be an original cosponsor of Senate Joint Resolution 7, along with Senator McCain. When Senator Feingold proposed the constitutional amendment requiring that States hold special elections to fill vacancies, I was happy to agree to cosponsor.

I did so for two reasons. The first is that my constituents feel very strongly about this issue. Just 5 years ago, they voted overwhelmingly to require a special election in the case of a vacancy in Alaska's U.S. Senate seats. That vote, in response to a citizen-run initiative, was nearly 56 percent in favor.

In Alaska, that would be considered a landslide. In my own election as mayor of Anchorage in 2003, I won my election by 18 votes over the threshold necessary to avoid a run-off election. So, again, 56 percent is considered a landslide. And I won this Senate seat by a little over 1 percent out of the more than 327,000 votes.

The second reason I support this amendment is more of a personal one. Some members of these subcommittees may know that my father served in the U.S. Congress in Alaska's at-large seat. In October 1972, Congressman Nick Begich was campaigning for reelection to his second term in the House. His small Cessna 310 left Anchorage on a stormy night bound for our State capital of Juneau. It never arrived.

Also lost was House Majority Leader Hale Boggs of Louisiana, who was campaigning for my father. My father's aide and pilot also perished in this plane. I was 10 years old. My mother was left, along with me, with my five brothers and sisters.

Besides the terrible loss for our family, I recall the tragedy today for what happened next. As the largest aviation search in Alaska's

history up to that time continued, the already scheduled State general election was held 3 weeks later. Despite his disappearance, Congressman Begich was re-elected with better than 56 percent of the vote.

In late December, my father was officially declared deceased, and a special election was set for March 1973. The two political parties nominated their candidates, an abbreviated campaign took place, and Don Young was elected Alaska's sole United States Congressman, a seat he has held since then.

Throughout this ordeal, Alaskans were officially without representation in the House of Representatives. But my recollection—and my review of news reports from that era—show no outcry for the appointment of a new Congressman.

Alaskans then, like Alaskans now, feel strongly that their elected representatives in the Federal Government should be exactly that—elected. The residents of my State believe that they alone have the power to select those representing them in the U.S. House and Senate.

I know a number of arguments will be advanced in opposition to this proposed amendment to our Constitution: that a special election will cost much more or that a State's citizens will be disenfranchised during the vacancy.

When balancing the relatively modest cost of a special election against one of the most fundamental principles of our democracy—the election of representatives of the people—I believe the expense is justified.

And as recent examples have shown us with drawn-out and controversial appointment scenarios, I believe the time required to mount a special election is far more preferable to a gubernatorial selection.

Mr. Chairman, to me and my constituents, this issue is a simple one: United States Senators should be elected by the voters of their States.

I want to thank you for the opportunity to testify and give my personal story. Thank you.

[The prepared statement of Senator Begich appears as a submission for the record.]

Chairman FEINGOLD. Thank you so much, Senator. It is very good to have you before this hearing.

Our next witness this morning is the Honorable David Dreier, who has served California's 26th Congressional District in the U.S. House of Representatives since he was first elected in 1980. A graduate of Claremont McKenna College, Representative Dreier became the youngest Chairman of the House Rules Committee and the first from California 10 years ago. Not long after, Representative Dreier was selected to chair the State's Republican congressional delegation.

I want to note that Mr. Dreier is in many ways responsible both for the momentum on this issue and for this joint hearing because he took the initiative and reached out to me several weeks ago to tell me that he wanted to introduce the House version of the constitutional amendment. So I thank you for that, Congressman, and I welcome you, and you may proceed.

STATEMENT OF HON. DAVID DREIER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Representative DREIER. Thank you very much, Mr. Chairman and my colleagues in both the House and Senate. I know that some will look at this as just one of those typical Feingold-Dreier-Conyers-Sensenbrenner initiatives that are a dime a dozen. But the fact of the matter is this is a very, very important issue, and it is one that I do believe gets to the point that has been raised by almost everyone here, and that is, we need to be very careful when we amend the Constitution.

I have a somewhat unique position within my party. I have joined John Conyers probably more than I have Jim Sensenbrenner on the issue of amending the Constitution. That is, I have opposed balanced budget amendments to the Constitution. I have opposed the three-fifth requirement for increasing taxes as an amendment to the Constitution. I have opposed the flag burning amendment to the Constitution. I have opposed defining marriage in the Constitution. I have opposed the term limits requirement in the Constitution. I have always argued that we should only amend the Constitution if we are expanding the rights of the American people. And, frankly, the only other ones that I have supported are lifting the term limits on the President and allowing Jennifer Granholm and Arnold Schwarzenegger the opportunity to run for President of the United States, because I think there are 12 million Americans right now who we are not giving the opportunity to decide whether they could potentially serve as President of the United States because they were born outside of the United States.

So I think that that really should be the gauge that we would use, and it gets back to, as my friend John Conyers said, the Bill of Rights and the vision of James Madison. And that is why, again, getting to the point raised by Senator Kaufman, I really see what we are doing here as a perfecting amendment.

To the concern that was raised by my friend Jerry Nadler, in my reading of the Constitution, it is my understanding that being a millionaire and a celebrity is a prerequisite for service in the U.S. Senate. So I really do not see that as a major concern. And Russ Feingold and Tom Coburn are great examples of that. I have to say that.

Let me just say, Mr. Chairman, if there was ever a time when the American people needed a clear, undiluted voice in Washington, it is right now. Working families are facing tremendous economic difficulties, and we remain engaged in conflicts across the globe. And yet, the residents, as you said, Chairman Feingold, of those four States haven't elected their newest Senators. Those same Senators are now voting on the critical economic issues of our time. Some of my colleagues and I, as has been stated, believe that this is, in fact, undemocratic. The people of those States, and every State, do deserve a voice in their representation. That is why we have proposed this constitutional amendment to require all U.S. Senators be duly elected by the people they represent.

We have not proposed this amendment as a reaction to the people chosen to fill those seats. As you said, Mr. Chairman, we have proposed this amendment because of the people they represent. They are understandably outraged at some of the gamesmanship

that surrounded the most recent Senate appointments. We don't need to recount them here, but suffice it to say, they have brought back to the forefront of American discussion the need for popular elections when deciding our representatives in both bodies of Congress.

Personally, I believe the amendment we are proposing, as I said, is a "perfecting" amendment to the 17th, and Jim Sensenbrenner hit the nail on the head. We are not tampering with James Madison's vision. We are tampering with those guys who in the early part of the 20th century were battling over this thing. After years of back-room deals, this amendment reformed the Senate selection process by instituting direct elections. However, it left to the States the authority to decide what to do when an out-of-cycle vacancy came up. Most States chose to allow their Governors to make appointments. A few, including yours, Mr. Chairman and Mr. Sensenbrenner, chose to leave it to the people, and now Senator Begich's, calling for special elections. While our amendment does call for all Senators to be elected, it does not dictate the terms of those elections, leaving that to the States. I view this proposal as the fulfillment of the reform effort that began with the 17th Amendment nearly a century ago.

Now, some argue that special elections are too expensive, as has been raised here, and that is what Chairman Conyers raised as his concern. This is an argument that I have, in fact, heard before and one does have some resonance at a time when State budgets are stretched very thin. However, I do not believe budget constraints nullify the imperative for electing our leaders.

Now, there are others—and I read that piece from our friend George Will in the Post the other day. Some have argued that this amendment only weakens the pillars of federalism that the Founders carefully constructed. I spoke to Mr. Will about this the other day, and in this piece in the Post, he referred to the fact that our Constitution created distinct electors for the three elected bodies of the Federal Government—as we all know, the Electoral College, the State legislatures, and then we the body of the people, those of us in the House of Representatives. And the President was to be elected, as I said, by the Electoral College, the Senate by the legislatures, and the House directly by the people.

With this perspective in mind, the 17th Amendment would appear to have undermined the Founders' intentions, and today's proposed amendment would undermine them further. I respect Mr. Will's point of view. I, too, look to the Founders' original intentions and do not support amending the Constitution lightly, as I said. But I believe in addressing this matter we must look at the history of our electoral processes—not just how they were envisaged at our Nation's founding, but how they have been conducted in practice.

From a purely academic perspective, it is interesting to consider whether the authors of the 17th Amendment could have plotted a reform course that was truer to the Founders' intentions. But the reality today is that we now have a nearly 100-year tradition of directly electing our Senators, nearly half the life of our country. This practice has become an integral part of American democracy. Trying to undo a century of our history simply is not a viable option. The American people elect their Senators and would not accept any

other method. Yet the current system does have this loophole. The large number of sudden vacancies in the Senate this year has made the consequences of this loophole very, very clear, as you said, Mr. Chairman, with 12 percent of the people having their newest Senators not having been elected. Today's proposed amendment I believe will address this challenge.

A few years ago, the issue of preserving the direct election of our representatives was raised within the context of a continuity plan for Congress in the event of a catastrophe and the deaths of more than 100 House Members. My colleague Mr. Sensenbrenner and I argued vigorously for the direct election of all House members, as the Constitution mandates, under any circumstance. We were joined by an overwhelmingly bipartisan majority in our effort to ensure that we did not tamper with the Constitution on that, undermining the opportunity for elections to be held. At the time, we argued that holding and participating in elections, even in the event of a catastrophe, was an absolutely essential part of our democracy to ensure that it remains vital and functioning.

Senate vacancies are no less significant than vacancies in the House. Yes, they should be filled as quickly and as fairly as possible. But most important, Mr. Chairman, they should be filled by the people.

Thank you very much.

[The prepared statement of Representative Dreier appears as a submission for the record.]

Chairman FEINGOLD. Thank you, Representative Dreier, for your excellent testimony.

Also joining us this morning is Representative Aaron Schock. Congressman Schock represents Illinois' 18th District. A graduate of Bradley University, he is a former Illinois State Representative. He joined the House in January of this year, becoming the youngest Member of the House of Representatives and the first born in the 1980's.

Congratulations, Mr. Schock, and welcome. You may proceed.

STATEMENT OF HON. AARON SCHOCK, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Representative SCHOCK. Thank you, Mr. Chairman, thank you, Chairman Conyers, and thank you to the members of the distinguished panel for inviting me to be here today.

I have a simple alternative to the amendment that is being offered today. I introduced it several weeks ago. It is the Ethical and Legal Elections for Congressional Transitions Act, or, simply put, the ELECT Act, which would get us to where we all want to go much quicker, cleaner, and more efficiently. Simply put, it would require that all State voters be given the opportunity for a special election within 90 days of a vacancy being created for their U.S. Senate seat.

To determine this time period, we looked around the country at vacancies, when congressional vacancies occur, and 90 days was the greatest latitude given for States to be able to call for a special election. And so we afforded that same opportunity for the vacancies in a U.S. Senate seat, allowing for the potential marrying of

a special elect with statewide referendum or local municipal elections to reduce the cost.

The second issue that has been raised is the cost to these States. First, I would like to point out the fact that in my home State of Illinois, it was precisely this issue that got us into the problem we had when, in fact, an elected official tried to place a value on a U.S. Senate seat—in his words, "monetize the position." I would submit to you that there is no value that can be placed on good government or having the will of the people in terms of who they wish to represent them here in the United States Senate.

To that point, our bill allows for cost-sharing, half to be borne by the Federal Government, the other half by the State government, recognizing that both benefit from a clear and open election.

Second, it would still allow us to work within the confine of the 17th Amendment, which means that if some national crisis occurs or it is the belief of the Governor at that time that the State would be best served to have a representative, he or she may make that appointment during that 90-day window of time, but that individual would have to stand for election before the voters.

Regardless of whether an appointment is made or not, it is very clear and history has shown that those appointments made by the Senators, regardless of party or regardless of State, are not in tune with the wishes of the voters. In fact, less than a third of those U.S. Senators who are appointed by gubernatorial appointments win re-election during their first time standing before the voters. So, clearly, the will of the voters is not being done by the gubernatorial appointments, and, thus, action is necessary in either this form or the amendment being offered.

Simply put, we have a shared goal. We believe, all of us, I think, that there is a problem and that at the end of the day the power should not be vested with the legislatures or with the Governors, but ultimately with the voters. There is no one better qualified to choose his or her representative than the electorate of each State, and the ELECT Act is easier to pass, quicker to enact, does not amend our national charter, and still allows for immediate vacancies when a national crisis occurs.

So I wish to again thank you for the opportunity to address you this morning, and I would be happy to answer any questions my colleagues would have. Thank you.

[The prepared statement of Mr. Schock appears as a submission for the record.]

Chairman FEINGOLD. Thank you, Representative.

As is our practice, we will not have questions for this panel, but I want to thank all of you for your great testimony. Thanks for being here. You are excused, and we will bring up the next panel.

Chairman FEINGOLD. All right. Please stand to be sworn. Do you swear or affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. NEALE. I do.

Mr. EDGAR. I do.

Mr. KENNEDY. I do.

Mr. SPALDING. I do.

Mr. SEGAL. I do.

Mr. AMAR. I do.

Ms. KARLAN. I do.

Chairman FEINGOLD. Thank you. We will begin with our second panel now, and our first witness will be Thomas H. Neale, Specialist in American National Government at the Congressional Research Service. Mr. Neale's work focuses, among other things, on U.S. elections and U.S. constitutional history and theory. Mr. Neale has been a featured lecturer on U.S. elections at the U.S. Embassy in Austria, the State Department's Foreign Press Center in Washington, and for the House of Representatives' Democracy Assistance Commission. He is a graduate of Georgetown University School of Foreign Service.

Before you begin, Mr. Neale, I want to take this opportunity to thank you and all of your colleagues at CRS, especially Jennifer Manning and Carla Warner for the work you have done over the past several weeks to prepare excellent research materials on the history of temporary appointments, along with your updated report in filling U.S. Senate vacancies. Without objection, all these materials will be placed in the record of this hearing.

Mr. Neale, thank you for being here, and I will ask you and all of our witnesses to limit your presentations to 5 minutes. Of course, your full statement will be placed in the record. You may proceed.

STATEMENT OF THOMAS H. NEALE, SPECIALIST IN AMERICAN NATIONAL GOVERNMENT, CONGRESSIONAL RESEARCH SERVICE, WASHINGTON, D.C.

Mr. NEALE. Thank you, sir. Chairman Conyers, Chairman Feingold, my name is Thomas Neale, and I am with the Congressional Research Service, the Government and Finance Division. I have prepared testimony in the form of my report, "Filling Senate Vacancies: Perspectives and Contemporary Developments," which is available for inclusion in the record.

The Presidential election of 2008 resulted, directly and indirectly, in the highest number of Senate vacancies within a short period in more than 60 years. The election of incumbent Senators as President and Vice President, combined with subsequent Cabinet appointments, resulted in four Senate vacancies, in Colorado, Delaware, Illinois, and New York—all States in which the Governor is empowered to appoint a temporary replacement.

Chairman FEINGOLD. Just pull that microphone closer to yourself, if you would.

Mr. NEALE. Protracted controversies surrounding the replacement process in two of these States have drawn scrutiny and criticism of not only these particular instances but of the appointment process itself.

While the process of appointing temporary vacancies is under examination currently, the practice itself is as old as the Constitution, having been incorporated in the original document by the Founders at the Constitutional Convention.

The practice, as was noted earlier, was revised by the 17th Amendment, which became effective in 1913. The amendment's primary purpose was to substitute direct popular election of Senators for the original provision of election by State legislatures, but it

also changed the requirements for filling Senate vacancies, by specifically directing the State Governors to "issue writs of election to fill such vacancies." At the same time, it preserved the appointment power by authorizing State legislatures to empower the Governor, the executive thereof, "to make temporary appointments until the people fill the vacancies by election as the legislature may direct." The record of congressional deliberations at that time shows that the appointments provision was not controversial but, rather, the primary conflict centered on a proposal that would have eliminated the Article I Section 4 power of Congress to override State provisions regarding the "Times, Places, and Manner of holding Elections for Senators."

Since the amendment was ratified, the appointment by Governors of interim Senators has remained the predominant practice in the States, with the appointees serving until a special election is held. State provisions differ as to when the special election should be scheduled, but appointed Senators generally serve well under 2 years, and their terms usually expire immediately upon certification of the special election results.

Most State Governors have broad authority to fill Senate vacancies, provided the appointee meets constitutional requirements for the office, but here again, variations exist in State practice. Four States seek to guarantee that a departed incumbent will be replaced by one of the same party, thus respecting the public's choice in the previous election. Also, Arizona requires appointed Senators to be of the same political party as the prior incumbent, while Hawaii, Utah, and Wyoming require the Governor to choose a temporary Senator from a list of three names submitted by the previous incumbent's party apparatus. It should be noted that some legal commentators have questioned these provisions, suggesting that they place additional qualifications beyond the constitutional ones of age, citizenship, and State residence at the time of election.

Over the 96 years since the 17th Amendment was ratified, 184 Senate vacancies have been filled by the appointment of 181 individuals—and, yes, three individuals have been appointed twice to fill Senate vacancies. This process has generated relatively few controversies prior to the present. Most of these centered on occasions when the incumbent State Governor resigned after a Senate vacancy occurred and was appointed to fill the vacancy by his successor. In almost all such instances, the Governor-turned-appointed-Senator was defeated in the subsequent special election.

At present, three States—Massachusetts, Oregon, and Wisconsin—do not permit any gubernatorial appointments, requiring special elections to fill Senate vacancies. A fourth, Oklahoma, allows the Governor to appoint only the winner of a special election, and then only to fill out the expiring term, after the election. A fifth State, Alaska, has passed both legislation and a referendum providing for special elections, but the statute retained the Governor's power to appoint in the interim, while the referendum eliminated it entirely. Given the conflict, the official reviser's notes cast doubt on the Governor's appointment authority in future instances.

As the controversy surrounding gubernatorial appointments has grown since the 2008 election, legislation that would curtail or

eliminate the Governor's appointment power has been introduced in the current sessions of no fewer than eight State legislatures, including Colorado, Connecticut, Illinois, Iowa, Maryland, Minnesota, New York, and Vermont.

A number of factors may suggest themselves to Congress as the Committees consider Senate Joint Resolution 7 and House Joint Resolution 21. These may include, but will almost certainly not be limited to, arguments in favor of a more democratic means of filling vacancies compared with those of preserving a traditional State option; questions of the costs associated with special Senate elections, which would be borne by State and local governments; and, in the post-9/11 era, the comparative advisability of appointments as opposed to special elections in the event of an attack resulting in the death or incapacity of a large number of Senators.

I thank the chairmen and members of these committees for their attention, and I would be happy to respond to your questions.

[The prepared statement of Mr. Neale appears as a submission for the record.]

Chairman FEINGOLD. Thank you so much, Mr. Neale.

Our next witness is Bob Edgar, the President and CEO of the nonpartisan, nonprofit citizens lobby, Common Cause. Mr. Edgar served six terms in the House representing the 7th Congressional District of Pennsylvania until 1986. More recently, he served as General Secretary of the National Council of the Churches of Christ in the USA before joining Common Cause in 2007. He holds a Master of Divinity degree from the Theological School of Drew University and is the recipient of five honorary doctoral degrees.

Mr. Edgar, we very much appreciate your presence here today, and you may proceed.

STATEMENT OF BOB EDGAR, PRESIDENT AND CHIEF EXECUTIVE OFFICER, COMMON CAUSE, WASHINGTON, D.C.

Mr. EDGAR. Thank you, Mr. Chairman. I have five honorary doctorate degrees but only four arrests for civil disobedience, so I am looking for one other opportunity.

Mr. Chairman, it is a pleasure to be here today, and I was particularly moved by two of the congressional speakers who spoke on the first panel.

First, Congressman Dreier and I have a lot of things in common. I was President of the Claremont School of Theology across the street from the school he graduated in, and for 10 years, he was my Congressman. And we differed on almost every issue you could imagine, and we agree on this issue, so I would like to associate myself with his remarks.

Also, you had the youngest Congressman here, and when I got elected by accident in 1974, there were six Congressmen younger than I was, and I was 31 at the time. So we have a tradition of people in certain times in history stepping forward and running for public office and being able at a variety of ages to make a real contribution. And I appreciated his comments.

Dr. Martin Luther King said, "We will have to repent in this generation not merely for the hateful words and actions of bad people, but for the appalling silence of good people." I am reminded often that we have to stand up and speak out when things seem to be

broken, and I think the systems of selection of Senators in a few States have been proven to be broken over the past couple months. And I sit here before you strongly supporting S.J. Resolution 7 and House Joint Resolution 21 proposing the constitutional amendment. We urge Congress to pass this proposed constitutional amendment and send it to the States for ratification.

I am currently President of Common Cause, founded by John Gardner some 39 years ago as the people's lobby. We have about 400,000 members and growing, and we are growing with Republicans, Independents, and Democrats who want Government to work. And they anticipate that their elected officials in both the House and the Senate would be elected by the people and serve in that office as public servants.

I think too often over the period of the last few years we have seen elected officials who often are controlled more by special interests than by the public's interests. And I believe that we need to reform a number of measures across the board to get our election process straight, to get money moderated in its influence in Congress, and to elect public officials who serve that broader public interest.

We believe the Constitution should be amended rarely and with great care, but election of representatives in Congress is one of those issues that crosses that threshold.

We all know this issue has arisen because of the unfortunate experiences in recent months as four Senate seats became vacant subsequent to President Obama's election. As an article in the December 10, 2008, New York Times noted, "Given the prestige of the and of the Senate seat and the magnetic allure of politicians, it is perhaps not surprising that when these vacancies come up, the process of awarding the office has become fraught with malfeasance and political peril."

In many State governments and too often in Congress itself, there is a prevalent attitude that you must pay to play. Common Cause strongly supports this action and strongly works to try to get money's influence out of the political process.

Democracy is at its best when it is open and transparent. We believe that setting a special election within 3 or 4 months is reasonable, and we do not believe that State or Federal Government will suffer unduly from the lack of a Senator for a period of time.

Let me just close by answering one of Mr. Nadler's questions about the cost. Previous speakers have talked about the fact that there could be shared costs, but I would urge both House and Senate Members to take a look at an effort to revisit the issue of public financing of campaigns. Shortly, we will see on the Senate and House a reintroduction of a public financing measure, and it has been renovated over the past year given the experiences in Connecticut, Arizona, and Maine, and given the Obama Presidential campaign with its ability to raise some small contributions. I hope both the House and Senate will take a look at that. I think there are provisions of public financing that could, in fact, be in place and provide an answer to the question of how do we pay for these elections.

I close by simply urging both the House and Senate to pass this constitutional amendment. Let us get on with the process of having government for the people and by the people.

Thank you.

[The prepared statement of Mr. Edgar appears as a submission for the record.]

Chairman FEINGOLD. Thank you, Mr. Edgar. I appreciate your comments on public financing as well.

Our next witness is Kevin J. Kennedy, Director and General Counsel for the Wisconsin Government Accountability Board and former Executive Director and Legal Counsel for the Wisconsin State Elections Board. He is a former President of the National Association of State Election Directors. A graduate of the University of Wisconsin Law School, Mr. Kennedy worked in private practice and served as assistant district attorney in Wisconsin before joining the Elections Board in 1979. He has also served as co-chair of the National Task Force on Election Reform. Mr. Kennedy and I have known each other for longer than either of us may care to remember, and he did preside over an election in 1982 where a 29-year-old kid was trying to run for the State Senate and ended up winning by 31 votes out of 47,000. That would be me. He was in charge of our elections in Wisconsin at that time as well.

So it is good to see you again, Kevin. Thank you for being here today. Please proceed.

STATEMENT OF KEVIN J. KENNEDY, DIRECTOR AND GENERAL COUNSEL, WISCONSIN GOVERNMENT ACCOUNTABILITY BOARD, MADISON, WISCONSIN

Mr. KENNEDY. Thank you, Chairman Feingold, Chairman Conyers—I believe I was a kid back then, too; I appreciate that—Representative Sensenbrenner. I also want to just acknowledge the fact that it is great to be here in front of two of Wisconsin's dedicated public servants. You make Wisconsin look well in your service in Congress, and the citizens back home and your public officials appreciate that. Chairman Conyers, I had the honor of testifying once before in the House, and I can appreciate the more comfortable atmosphere that is there at times.

I want to thank you for the opportunity to provide information to the Subcommittees on Wisconsin's procedures for conducting special elections to fill vacancies in the office of United States Senator. It is a special honor to be here. Wisconsin has a long history of relying on special elections to fill vacancies in the office of United States Senator dating back to the ratification of the 17th Amendment to the Constitution.

While it has been 40 years since our last special election to fill a vacancy in the office of the U.S. Senate, in that 40 years since that time, we have actually filled four House vacancies. And in those cases, we always managed, with the flexibility in Wisconsin's statute, to coordinate those elections with regularly scheduled elections, thereby saving significant costs in the administration of the election process.

Let me just briefly describe how the special election works in Wisconsin. There is a vacancy, either by death, resignation, or some other cause. The Governor issues an order calling the elec-

tion. There is no real deadline for the Governor to issue that call. There will be practical considerations. There will also be some political considerations in that order. Generally, our staff will work with the Governor's staff to work through timing considerations and to deal with the flexibility that our law provides in terms of cost savings.

Once the Governor issues that order, that date is set between 9 and 11 weeks from the time of the order that we are going to have that special election. That date determines our primary election, which is 4 weeks before the special, if it is required. The deadline for getting nomination papers submitted to our office is 4 weeks before the date of the primary. That leaves a very short period for circulating nomination papers, but it has worked well for a large number of special elections. We use the same procedure for vacancies in our State legislature as well.

Thirteen days after the special election, the counties have to have their official canvass results to us. They often have it there sooner. Within 5 days, we have to certify those results and prepare the Certification of Election for the Governor's signature. So things move very quickly in Wisconsin.

There are some special timing considerations that come up in even-numbered years with our regularly scheduled election in the fall. In those periods of time, again, the Governor has some more constraints, but we, again, look to try and schedule an election at the same time as the regular election if a vacancy occurs.

Costs have been an issue that has been identified, and I think it is important for the Committee to understand what the elements are when we talk about costs. I provided you with a line-item listing that suggests a stand-alone special election in Wisconsin would cost close to $3 million, and this is an investment that we make in democracy in Wisconsin. But, again, we have a certain level of flexibility.

One of the things that is not included in that is the regular staffing that goes into running our office, running our county offices, and in Wisconsin, we run our elections at the municipal level. So our municipal clerks are the ones who are out there handling the absentee ballots, the voter registration, equipping the polling places, recruiting and training the poll workers.

If we hold a special election at the same time as the regularly scheduled election, most of those costs are shifted from direct costs to just incremental changes. Only the Notice of Election is really the stand-alone cost. The other costs that I have identified, that is the cost of running an election just about any State you look at—cost for publishing notices. Wisconsin is a paper ballot-based State, so if we ran an election, we would expect to print 2.5 million ballots for a special election for the U.S. Senate. That cost would be there in conjunction with other costs.

We now have—one of the things we did not have in 1957—the costs of programming electronic voting equipment so that people with disabilities can participate in the electoral process. Again, Wisconsin uses optical scan voting, so we program that equipment.

Absentee postage, a cost borne by municipalities, is a big factor. The biggest single cost factor is what we pay our poll workers. Popular belief is that they work for free. Given the commitment that

they bring, maybe they do. But we do recognize them with a small amount of money for that.

Incidental costs are the supplies for poll lists, various forms that have to be filled out.

Those are costs that I think Wisconsin has committed itself to. We have had a long history of special elections not only with our U.S. Senate vacancies that Congressman Sensenbrenner identified, but also our four House vacancies. We have had a number of vacancies in the legislature sometimes as legislators have moved on to higher office.

Elections are the cornerstone of our democracy. Wisconsin has committed to filling vacancies since 1913. This enables Wisconsin voters to actively participate in determining their Federal representative in the United States Senate rather than delegating the selection to the Governor, even for a short period of time. It comes at a price, but the conduct of fair, transparent elections provides the foundation for public confidence in their elected representatives.

Thank you for allowing me to share my thoughts with you. I would be happy to answer questions later.

[The prepared statement of Mr. Kennedy appears as a submission for the record.]

Chairman FEINGOLD. Thank you, Kevin.

Our next witness will be Dr. Matthew Spalding, the Director of the B. Kenneth Simon Center for American Studies at the Heritage Foundation. Dr. Spalding has a Ph.D. in Government from Claremont Graduate School where his work concentrated in government, political philosophy, and early American political thought. He has written and edited books on political history and the Constitution.

We welcome you, Dr. Spalding. The floor is yours.

STATEMENT OF MATTHEW SPALDING, PH.D., DIRECTOR, B. KENNETH SIMON CENTER FOR AMERICAN STUDIES, THE HERITAGE FOUNDATION, WASHINGTON, D.C.

Mr. SPALDING. Thank you, Chairman Feingold and Chairman Conyers, and everyone on the Subcommittees, thank you for taking constitutional questions seriously.

I would actually like to make three arguments against the proposed amendment this morning, and I will right to those.

The first is based on the nature of the United States Senate and its unique role representing States in our constitutional structure. Based on equal representation in all the States, as guaranteed in Article V, the Senate—with its longer terms of office and larger and distinct State constituency—was to be more stable, deliberative, and oriented toward long-term State and national concerns. The 17th Amendment did not change that. It is because of the nature of the Senate that the chamber is given its unique responsibilities having to do with, among other things, executive appointments and treaties with other countries. Therefore, it is in the interest of individual States—and, given the responsibilities of the Senate, in the interest of the Nation—that ongoing representation in the Senate be maintained.

Without the possibility of temporary appointments, the Senate could be prevented by vacancies from being able to conduct its busi-

ness in a timely fashion, subject to fluctuating numbers and representation. The proposed amendment leaves States unrepresented—or at least underrepresented—potentially at times of great significance to that State, as well as—considering the Senate's role in confirmations, treaty-making, and the like—the Nation. Several vacancies of several months, at a time of crisis, could well have a detrimental effect on the well-being of those States—consider the economic legislation of late—but also to our national security.

Second, the proposed amendment is unnecessary. Over the course of the 40 years between 1866 and 1906, there were nine cases of bribery concerning the appointment of United States Senators. Over the course of the 95 years between the passage of the 17th Amendment and today—during which there have been 184 appointments to fill Senate vacancies—there has been only one case of a Governor trying to sell a Senate seat. As appalling as this case clearly appears to be, this is neither a pattern of corruption nor a crisis of constitutional proportions. Appointment per se is not corruption.

Third, the proposed amendment undermines rather than supports core political principles. Temporary gubernatorial appointment in this case is a perfectly reasonable and necessary option for the Senate to work in the context of our democratic system. The current arrangement does not take away or jeopardizes fundamental voting rights anymore than the proposed amendment takes away voting rights of the people and the Senate.

While the proposed amendment seems to advance the principle of democracy, it would do so at the expense of other principles, like federalism, self-government, and democratic constitutionalism. The amount of time considered necessary for statewide special elections, as we have heard, differs from State to State, depending on the size, demographics, and other aspects of individual States. As a result, there is great variance in current State laws. I see no reason for a uniform rule.

The question here is not one of democracy versus other principles. It is a question of weighing the risk associated with the possibility of a bad appointment, on the one hand, and accepting that the people of a State are not being fully represented in the Senate for a period of time, on the other. Different States have different opinions. This is as it should be.

In my written testimony, I consider the importance of constitutional amendments and the historical pattern of previous amendments. The proposed amendment, in my opinion, does not rise to that level of serious consideration. This is not a "great and extraordinary occasion," as it says in the Federalist Papers. Nor is there an underlying consensus either about a problem or about a solution to justify pursuing a constitutional amendment at this time.

Let me add here that while we are moving temporary gubernatorial appointments and cases of vacancy by legislation, it is likewise my opinion of that idea it is also clearly unconstitutional. The appropriate place for such legislation is in State legislatures, not Congress.

The best mechanism for balancing democratic principles and representation, and for weighing the risk of a bad appointment against the temporary loss of representation in the case of vacancies in the

U.S. Senate, is already in place. It is in the second clause of the 17th Amendment. That clause actually goes back to a discussion in the Constitutional Convention, and it was decided at the time it was a necessity, given the nature of the institution. As such, Congress, in my opinion, should not proceed to amend the Constitution in this manner.

I thank you for your time this morning and look forward to taking your questions.

[The prepared statement of Mr. Spalding appears as a submission for the record.]

Chairman FEINGOLD. Thank you, Dr. Spalding.

The next witness is David Segal, an analyst for the advocacy group FairVote, who is serving his second term as a member of the Rhode Island House of Representatives. A graduate of Columbia University, he served as Minority Leader of the Providence City Council from 2003 to 2007 and remains the first and only Green Party member to be elected in Rhode Island.

Mr. Segal, welcome and thank you for joining us.

STATEMENT OF DAVID SEGAL, ANALYST, FAIRVOTE, RHODE ISLAND STATE REPRESENTATIVE, PROVIDENCE, RHODE ISLAND

Mr. SEGAL. Thank you, Mr. Chairman. FairVote and I are, of course, honored to be here before you today to testify in strong support of the proposal that is before you.

I would like to quickly stress that I speak today on FairVote's behalf rather than for my constituents or for the Rhode Island Legislature at large.

FairVote is active at the local level in several States and has a broad network of State-level partner organizations and allies. We have followed State legislative attempts to end senatorial vacancy appointments—some efforts new, others longer-standing—and will focus our testimony on rebutting the notion that the vacancy appointment issue, and any problems arising therefrom, are better resolved via State legislation than via constitutional amendment. State legislation is important and, for the moment, necessary, but it is far from sufficient. Such legislation seems unlikely to yield broad-based Senate vacancy reform, which is why we so strongly support the constitutional amendment track.

It has been suggested that passage of the proposal before you would be an affront to pluralism or federalism, and FairVote contends that it is not pluralism or federalism as such that would make it difficult for States to reform Senate vacancy laws; rather, the major obstacle is the natural tendency of powerful, self-interested actors to strive to maintain their authority. We believe that the proposal before your Committee respects federalism, insofar as it provides States with wide latitude in determining how best to implement vacancy elections. And we also note that States, per those mechanisms set forth by our Nation's Founders, will play a critical role in the ratification of any constitutional amendment relative to this matter. Amendment of the Constitution is not an affront to federalism. It is an exercise therein.

FairVote has identified nine States in which legislation requiring U.S. Senate vacancies be filled by special election has been intro-

duced this year, and we believe this to be a nearly exhaustive account of such States at this time, though additional legislation may be introduced in coming weeks and months.

It is worth noting our initial surprise at the relative lack of formal consideration of this issue by State legislatures, despite the prominence in the national discourse of Senate vacancies, and what appears to be broad popular support, editorial support from prominent newspapers, and support by many Government reform groups like FairVote and Common Cause. Even at this relatively early moment in most legislative sessions, it is evident that few of the aforementioned bills stand a chance of passage this year, and we attribute this state of affairs largely to the euphemistically awkward, frequently tense, intra- and inter-party political dynamics endemic to most State governments. The predicament in Illinois is the most loaded and remains fluid and unpredictable, but let us consider the various other scenarios.

First, States in which the legislature is dominated by the same party as the Governor—especially those with political dynamics that are relatively stable—are unlikely to perceive an urgency to act on the Senate vacancy issue without all States moving forward in concert. The party that rules the legislature is hesitant to strip authority from a Governor of the same party, and individual members might fear being ostracized or other political retribution for participating in such efforts.

Consider Colorado, where Democrats control the legislature and the Governor's seat, special election legislation was introduced by Republican State Senator Michael Kopp, and the legislation died in committee on a 3–2 party-line vote, with Democrats openly acknowledging that passage of the legislation was politically unpalatable because it would appear to be a demonstration of disapproval of Governor Ritter's recent appointment of Senator Bennet.

In Maryland, a Democratic Delegate introduced legislation to require special elections, but only beginning after 2015, when Democratic Governor Martin O'Malley will certainly have vacated his office. And this has reduced any sense of urgency to pass the legislation, and it appears unlikely to move forward this session.

In New York, Republicans have lined up behind legislation to require special elections. Democrats control both houses of the Assembly, and passage of the legislation would no doubt be seen as a referendum on Governor David Paterson's appointment of now-Senator Kirsten Gillibrand.

Second, in the remaining States in which power is shared by Democrats and Republicans, the parties typically have competing interests that tend to complicate the case for holding vacancy elections. Legislative chambers might be controlled by different parties, or a single party might control both chambers, but not have enough votes to override a likely gubernatorial veto.

This is true in Vermont, where the Vermont House and Senate are controlled by Democrats, but Governor Jim Douglas has said that he thinks the status quo of allowing appointments under certain circumstances "is a pretty good system" and sees no reason to change it.

Connecticut Democrats control both chambers, but the Republican Governor's office called the move to end appointments a "political maneuver" and a "political ploy."

In Mississippi, legislation to end appointments has died already in the Democratic-controlled State legislature, despite controversy there over Governor Barbour's appointment to replace Trent Lott a couple of years ago.

And in Minnesota, legislation has been introduced to require specials to fill future vacancies, but in the midst of a contentious multi-party scrum and expensive recount, it appears that this legislation will not advance.

Such dynamics appear to confirm the hypothesis that a constitutional amendment is more likely to achieve widespread adoption of this reform than would individualized, State-by-State bills. And one State, my State, serves as the proverbial "exception that proves the rule." For reasons that are intuitive, it appears that the greatest likelihood of passage is in States where the Governor is of one party but the legislature is overwhelmingly of the other party, and Rhode Island's House voted yesterday to strip the Governor of his appointment power on a 65–6 vote.

So we would urge that Congress formally propose this amendment to the States and hopefully catalyze a national effort on its behalf.

Thank you.

[The prepared statement of Mr. Segal appears as a submission for the record.]

Chairman FEINGOLD. Thank you very much, Mr. Segal.

Our next witness is Professor Vikram Amar from the University of California School of Law, where he serves as Associate Dean. A graduate of Yale Law School, Dean Amar clerked for Judge William Norris on the Ninth Circuit Court of Appeals and for Justice Harry Blackmun on the United States Supreme Court. Today, Dean Amar writes, teaches, and consults in the field of constitutional law. He also authors a biweekly column on constitutional matters for Findlaw.com, a website devoted to legal issues.

Dean, welcome and thank you for making the trip to be with us, and you may proceed.

STATEMENT OF VIKRAM D. AMAR, ASSOCIATE DEAN FOR ACADEMIC AFFAIRS AND PROFESSOR OF LAW, UNIVERSITY OF CALIFORNIA, DAVIS SCHOOL OF LAW, DAVIS, CALIFORNIA

Mr. AMAR. Thank you all so much for having me.

I would like to offer a few thoughts and suggestions, but before I do, let me make it clear that I completely agree with the premise behind the proposed amendment, namely, that popular election is the best way to pick U.S. Senators. Of the three devices that we have experience with—legislative selection, popular election, and gubernatorial appointment—there is no doubt that popular election is the best mode.

But the problem, of course, is that elections take time. And as Mr. Nadler pointed out, you need a fair amount of time for the election to be fair and open to candidates. Related to that is a very important factor we have not talked about, and that is voter turnout.

If an election is not organized well enough to facilitate turnout, it loses a lot of its normative force.

You know, I have read the literature, and it seems like 3 months is about the minimum amount of time under ordinary circumstances you could expect an election to take place, which brings us to the crux, and that is, whether 3 months is too long to tolerate vacancies and a State's underrepresentation that the Constitution so painstakingly tries to avoid. And whether 3 months is a long time or not depends on how you look at things.

Reflect back on how much important work you all have done in the last 6 weeks, which is half of 3 months, and you realize how close some of those votes were, how the margins are tight in these times. And super-majority rules like filibusters may exaggerate the tightness of those margins. Then 3 months may be a fair amount of time.

I know my good friend Pam Karlan in her written remarks points out that even though States that lack one Senator have a second Senator to represent them, but, you know, if California had had only one voice, one vote in some of the big votes in the last 6 weeks, I as a Californian would have felt very disenfranchised by that if there had not been a full Senate contingent.

That is why all but a handful of States—and I recognize that they are represented here today—a handful of States have decided to allow their Governors to make temporary appointments. Note that the current Constitution does not require States to do that. It simply authorizes them, and almost all of them have done so, and I think that there is some wisdom to be gleaned from State common practice.

Of course, as we have heard, delay in filling vacancies is exponentially more problematic if we are talking about mass vacancies in, say, the setting of a terrorist attack or some other crisis. In a post-9/11 world, we simply cannot ignore the possibility of large numbers of vacancies, so that brings me to the first big prescriptive point I want to make, and that is, if you proceed with a constitutional amendment, at a minimum include a fallback provision that would allow temporary gubernatorial appointment when some trigger, say 20 vacancies in the Senate, is hit. And if you are worried about those people gaining incumbency advantage at the next election, you can make them constitutionally ineligible to run. You could build that into the constitutional amendment yourself if you wanted to. And I would actually recommend that you carry that idea over to the House. Since you are cleaning up that altogether, you might want to provide a similar emergency trigger for the House of Representatives in addition the act that has already been passed that requires elections to take place within a prompt time.

My second big point builds on Representative Schock's interesting statute, which I think is a very promising avenue, and that is, you can accomplish much of what you want to do here today by congressional statute. You could pass a statute that requires an election to be held to fill a vacancy within 90 days. That would not foreclose gubernatorial appointments in that interim, but it would make them less likely to be used, because they will only last 90 days, and it would prevent anyone from serving more than that 90-day window.

Because you would not be absolutely foreclosing gubernatorial appointments but, rather, regulating the time of a legislative election, that falls squarely within your Article I, Section 4 powers to prescribe times and manners of Senate elections. And as Mr. Neale pointed out, in the legislative history surrounding the 17th Amendment, there was a big effort to free States from congressional control under Article I, Section 4, and that was defeated, affirming that Congress retains that power. And, indeed, Congress does set the time for regular Senate elections. There is no difference in the text of the 17th Amendment between regular Senate popular elections and special vacancy-filling popular elections. Both are subject to congressional oversight.

The one thing you could not accomplish by statute—and I will close with this point—is that you could not make the gubernatorial appointee ineligible to run 90 days hence because that would move beyond setting the time of an election to prescribing the qualifications to be in the Senate, and I think that falls outside your Article I power—so if you are really worried about that incumbency advantage, then the constitutional amendment is the only way to go. But if that is not really driving too much of it, then I think a statute which is flexible has the advantage.

And let me say one other point. I do not disfavor constitutional amendment versus statute because I revere the Founders, although I do in some ways. I agree with Mr. Conyers that a lot of the best parts of the Constitution came via amendment. But I think statutes are flexible and could be amended and tweaked in light of experience going forward, and for that reason, I would urge incrementalism if it satisfies most of your concerns.

Thank you very much

[The prepared statement of Mr. Amar appears as a submission for the record.]

Chairman FEINGOLD. Thank you so much, Dean.

Our final witness is Pamela Karlan, the Kenneth and Harle Montgomery Professor of Public Interest Law at Stanford Law School, and co-Director of the school's Supreme Court Litigation Clinic. A graduate of Yale Law School, Professor Karlan clerked for Judge Abraham Sofaer of the United States District Court for the Southern District of New York and for Justice Harry Blackmun of the United States Supreme Court. After her clerkship, she worked as assistant counsel at the NAACP Legal Defense and Educational Fund and later as a commissioner of the California Fair Political Practices Commission before beginning her work at Stanford in 1998.

Professor Karlan, thank you for being here today, and you may proceed.

STATEMENT OF PAMELA S. KARLAN, KENNETH AND HARLE MONTGOMERY PROFESSOR OF PUBLIC INTEREST LAW, STANFORD LAW SCHOOL, STANFORD, CALIFORNIA, AND CO-DIRECTOR, STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC

Ms. KARLAN. Thank you, Mr. Chairman. It is an honor to be here.

In 1913, the 17th Amendment made a decisive change to the original constitutional structure, and I recognize that some people differ on the wisdom of that change, but now the Senators are selected by the people. They do not represent the States as States. They represent the people of the States.

The 17th Amendment did not fully realize that principle because of the method of allowing Governors to continue filling vacancies. And I think at the level of principle we all agree that vacancies should be filled by the same method that is used to select Senators in the first place, because the people's right to representation is not limited to participating in a biennial election, but it is a continuing right that should not be defeated by the death or the resignation of their Senator. And experience over the years shows us that gubernatorial appointment has in some sense reprised some of the same flaws that led to the 17th Amendment in the first place.

First, one of the central criticisms of gubernatorial appointment and of legislative appointment was the corruption process, and we have seen that both in overt corruption, but also in other forms of corruption—appointing your relatives to a seat, or appointing a friend, or my favorite case, the 24-hour appointment of an 87-year old woman in Georgia so that she could be the first female Senator. I think those things are problematic.

The second thing, though, is I think that the gubernatorial appointments can distort the representational process in important ways, because the Governor may be appointing someone who absolutely could not have been elected by the constituents that that Senator is ostensibly serving. And we know this in part from the fact that so many of the people who are appointed and then run for election from the positions do not get elected.

Now, that undermines, I think, the legitimacy of what they do while they are in office, because they are not representing the people of the States. They are representing themselves. And a Senator who has never faced and perhaps has no intention ever of facing the voters is, I think, an illegitimate Senator.

Third, gubernatorial appointments can create long-term distortions by changing the dynamic of the next election. They can make it impossible for a candidate of the party that has nominated the temporary Senator to run because that then divides the party in a primary election. They can change the fundraising dynamic and the like. And that I think is also problematic. So that all of the arguments against filling senatorial vacancies solely by election stem, I think, just from practicality and not from principle.

From an argument that there is a period of time in which it is a problem for a State to be represented by only one Senator, let me make a couple of observations here.

The first is that that happens all the time now. Senators are vacant during critical votes due to illness or due to family emergencies or due to some other personal or professional business. And no one says that the Senate has become illegitimate because 100 members are not on the floor voting.

Second, it is often the case that much of a Senator's work is done through casework for constituents and the like, and here there is a distinction between the Senate and the House, which is, if a House member resigns or a House vacancy occurs, the people in

that district are not represented at all in the House until the next election. And we have not seen that to be a constitutional problem. Whereas, in the Senate the likelihood of there being two vacancies from a single State simultaneously is so low as to be almost nonexistent. And so people are still represented in the Senate.

So it seems worthwhile to me to distinguish between what we might think of as conventional Senate vacancies, where that short period of time is not a problem, and what we might call the catastrophic, where you have widespread vacancies in the Senate because of a terrorist attack or the like.

And, of course, I urge you all to be thinking seriously about continuity in Government, but I do not think that issue should be the enemy of the good. And the enemy of the good is we have had 180 people appointed to serve in the Senate since 1913, which is basically almost two full turnovers of Senators. And I think we should think seriously about how to deal with the legitimacy of the process by which we fill those seats.

I will say one last thing about the ELECT bill, which is it has one, I think, very salutary suggestion in it, and I make some remarks in this direction in my prepared testimony as well, which is that using your power under Article I, Section 4, Congress might think about ways to help the States defray the cost of special elections so that they can do that swiftly. But I do not think that temporary appointments, whether for 3 months, 6 months, or in some cases, for up to 2½ years, is the right way to fill seats in a body that since the 17th Amendment has been elected by the people.

Thank you very much.

[The prepared statement of Ms. Karlan appears as a submission for the record.]

Chairman FEINGOLD. Thank you so much, Professor Karlan. Thanks to all of you for your presentations.

We will start with questions, and I understand that our friends from the House have a series of votes coming up, so what I would like to so—and Senator Coburn has said this is all right with him—is to recognize as many House members for 5-minute rounds of questions as I can before they have to leave.

So let me turn things over now to Mr. Nadler.

Representative NADLER. I thank the Chairman.

Let me start by saying that, in principle, the idea of elections is certainly a good one. The recent round of selections, appointments, has not been the most edifying exercise in Government, shall we say. But I do have one serious, practical problem, and it was not really addressed. Bob Edgar did a little. And, that is, especially in a State like New York or California, where you are talking $20, $30, $40 million to run for a Senate seat, it is one thing to raise that over a period of a couple years; it is another thing to raise it in 90 days or 180 days. And unless we are to amend this amendment to provide for mandatory public financing and no private financing at all, which I would support, how do you get around the problem that if you call a special election—and it is not analogous to the House because House seats are much smaller, but in a large—and maybe not in Alaska, but in large States, how do you get around the problem if you call a special election with 90 days' notice, 180 days' notice, in effect you are telling everybody who

does not have $30 million in the bank or is not a celebrity or a basketball player or whatever, or even a statewide official, you cannot run?

Mr. EDGAR. Mr. Nadler, I would like to respond to that. The public airways that we spend so much money on with television commercials to get Senators elected are public airways. And I think you could address that in a number of ways by making those public airways free for those candidates that qualify after going through the process system. But you could also try to recognize the fact that by raising all of that money, special interests often control the outcome of those elections.

So I think it is not so bad that a Senate race in New York, for example, would cost less in that 90-day period because the candidates could not raise the amount of money necessary, but——

Representative NADLER. But that would simply mean that it would be limited to candidates who already had the money.

Mr. EDGAR. Not necessarily, if the public demanded that the airways be open, that advertisements be less costly, those candidates—when I first ran for my seat in the most Republican district in the Nation to have a Democratic Congressman, I only raised $35,000 and my opponent raised more than a quarter of a million dollars, and there was an awful lot of grassroots effort. And I think in a starting effort of a Senate race, the public should be interested, their interest should be heightened. They should get to know the candidates. And if the public airways were open and not as expensive as they are in a traditional Senate race, I think that would be helpful.

I would also argue that in traditional Senate races we have got to lower the cost and——

Representative NADLER. I certainly agree on that. My only concern—I mean, I support public financing, clean elections and so forth. I think it is essential. I have said that the campaign financing system is a metastasized cancer in American democracy.

Mr. EDGAR. We agree.

Representative NADLER. I know we do. My concern is that the quick special elections and statewide elections without mandating some form of public financing or free airways or whatever would simply make the problem worse. Anybody want to comment on that?

Ms. KARLAN. You raise, of course, a huge problem with the American electoral system altogether, and this may be one reason why we want to leave to individual States the decision about whether to hold an election within 90 days or to recognize that democracy takes time. And so maybe there are States in which the State will choose rather to have a vacancy for 5 months or 6 months, or even a year. I think the real question is whether slotting somebody into a seat while you go through that process—and in New York, as you know, there is going to be a special election, that is, Senator Gillibrand is not serving the entire unexpired term of Senator Clinton.

So that is going to be there in any event, and I think, you know, this is one of these questions where, to use your metaphor, if you have a cancer in the election system, that does not mean you do not keep the electoral patient's teeth clean in the meantime. And

I think that is part of why you do not want to have people slotted into that seat who will then have a huge advantage in the next round of trying to raise the money that we all, I think, agree they should not be raising solely from large contributors.

Representative NADLER. Thank you. I yield back.

Chairman FEINGOLD. Thank you, Mr. Nadler.

We will alternate parties here. Mr. Gohmert.

Representative GOHMERT. Thank you, Chairman Feingold. I appreciate the opportunity to be here. And as Mr. Sensenbrenner said, there is—and Chairman Conyers—more feeling of comfort down here. It almost makes you want to pass a big omnibus bill or something.

But on this issue, I have been really torn. I met with the Governor of Texas who is here today, and we had, I think, 21 or so Representatives, as many Democrats as Republicans, I think, in the meeting, and I asked them, "What do you think?" And as one Democrat said—and this seemed to be the consensus—"Should we let one bad Governor in Illinois make us change everything?"

I do not know, maybe it is the spirit of the room or whatever, but I found significant points of interest in my friend Mr. Nadler and Mr. Conyers as well. Before 9/11, we did not worry so much about possible disasters leaving us without a Government to represent us. But I would just be interested in—and, Professor Karlan, I appreciate your use of the word "illegitimate" a number of times, "illegitimate Senator," "illegitimate body." We have not heard that a lot back home in some years, that word.

But I am curious. I did not hear anybody address that, I did not think, adequately. Suppose we had what was painted in Tom Clancy's novel back in the 1990s and then we saw in the 9/11 experience, suppose that plane had come in during a joint session and taken out our body. Do you think there is any merit to having some ability to have appointments, if necessary, immediately so that we do not just have two Representatives and two Senators, all that is left of a representative government from the States? I am open to anybody's comment. But that seems to be one factor that did not used to be as significant as it seems to be after 9/11. Any thoughts?

Mr. AMAR. Well, let me just jump in. I do think that is something to focus on. As I indicated, at a minimum, if you are going to amend the Constitution, it might be wise to build in such a fallback provision with a vacancy trigger. Even if you have a distaste for gubernatorial appointments, it is certainly better than having mass vacancies. And, again, you might want to do the same thing for the House of Representatives. You get to amend the Constitution so infrequently that I think cleaning up related messes makes sense.

The only thing I would say—and Pam, I think, mentioned it—you do not want the perfect to be the enemy of the good. But since you are focusing on this now, and if you write the amendment so as to foreclose gubernatorial appointments altogether, such that you are not going to have statutory room later then to authorize a gubernatorial appointment in the event of an emergency, you have got to deal with it now. And I certainly do not think it is going to be easy to pass subsequent constitutional amendments.

So including such a provision in the work that you do now, if you go the constitutional route, would seem to make sense to me.

Representative GOHMERT. Well, let me just say with regard to the House, we call it the "people's House" because right now it is the only Federal body where the only way in there is to be elected. But those of us representing districts, it seems like you could get an election a whole lot quicker, for example, in Texas for a Representative than you could for a Senator. So I am not sure if I would be in favor of undoing the process of elections in the House.

Mr. AMAR. I do think there is a difference between the House and the Senate, and the problem is more acute in the Senate. I agree with that. One could draw a line if one wanted to.

Representative GOHMERT. Any other comments? Yes.

Mr. SPALDING. I agree with the remarks about continuity of Government being an extremely important question that ought to be considered as we go down this path. In the current circumstances, that is something that has to be thought through.

But having said that, I would point, as you have alluded to in all of your questions and all the questions raised here, all these questions that are brought today, I agree these are all legitimate concerns—cost, representation. The best place to make those decisions is for individual States to think it through themselves. The cost is very different in New York, say, as opposed to Delaware. That is the nature of the system the way it is set up.

So all of these questions, it seems to me, suggest that there is not one uniform national rule that will fit in all cases. We actually want to have this variance of opinion and all them to make those decisions in the appropriate manner, and they can choose whether they are willing to allow for a lack of representation for a period of, say, 3 months or they would like to have a temporary appointment made by their Governor. That is a reasonable thing, and they ought to have the ability to do so.

Mr. EDGAR. I would like to respond to your first point about the fear of a catastrophic event. I think that whether it is the election or the appointment of Senators in a catastrophic event is going to be the least important issue when that event occurs. I think it is something to think about, but I would basically say my fear is that we do not have good health care, we do not have good public education, we do not have a good response to that catastrophe rather than what happens. If that kind of catastrophe happens, in my opinion, we would sort that out given the conditions of the catastrophe, and I just do not feel that you should hold up a thoughtful conversation on the selection of Senators based on the question of catastrophe. All of those issues will be considered given the nature of the catastrophe, but I do not think we ought to prejudge what that catastrophe——

Representative GOHMERT. But you surely would have to acknowledge that catastrophe is one of the factors that you use in considering—and I appreciate the Chairman's indulgence. I came in here unsure how I felt about a constitutional amendment, so I welcome all the positions. And if you knew which particular Senators each year were kept out of the joint session in the State of the Union, it might make some years more important to have quicker appointment than others. But thank you very much, Mr. Chairman.

Chairman FEINGOLD. Thank you. I appreciate your comments and I am about to turn to Representative Scott, but let me just say

quickly, as people look at their views on this, we do not talk about federalism when we talk about the right to vote. The right to vote includes the right to vote for a Senator. We do not say, you know, in some States you can vote for a Senator and in some you cannot. You have a right to vote. And it seems very odd that since we fought so hard to make sure that everybody got the right to vote that in some States people are denied the right to vote when it comes to a vacancy. They simply do not get to vote. That rises to a very high level where it seems to me federalism is trumped. The very nature of the right to vote was all about trumping some extreme and wrong notions of federalism.

And it is also odd that so many of these arguments that are made really would argue in favor of having similar flexibility with regard to House Members. You can argue that, obviously, a State is bigger than a congressional district, but not always. When you think about the arguments you are making, well, we really probably should have the option for appointing House Members then, too, to address all these concerns about cost and the like. And, obviously, I do not support that.

Finally, more of a light-hearted note, I have just turned 56 years old, and we have only had to have one special election for the U.S. Senate in my lifetime. That is the famous death of Joe McCarthy where Bill Proxmire was elected. So, fortunately, these things do not happen to Senators too often.

Mr. Scott.

Representative SCOTT. Thank you, Mr. Chairman.

I think just in perspective, the question is not whether or not we ought to be debating, but whether the debate should take place in the State legislatures or the U.S. Congress. And it is not whether we would rather have appointed or elected Senators. The question is whether you would rather have an appointed Senator or a vacancy and whether or not the people are better off with an appointment by their elected Governor or no representation at all.

In that light, let me ask the panel: What would be a reasonable time for an election in New York or California, some of the larger States, as opposed to some of the smaller States where you could probably have one in a couple of months? Because they are about the size of a congressional district, you could have one pretty quickly. What would be a reasonable time to have an election in a large State? Mr. Spalding.

Mr. SPALDING. I think that precisely is the question, and the answer there depends upon—it is going to be different from one State to the other State. And that suggests exactly why there should not be one rule.

Representative SCOTT. The constitutional amendment before us lets the executive issue the writ of election. I guess he could decide how long it is. What would be a reasonable time? How long would, say, California or New York be without a representative? And I assume if you had a situation where you had a vacancy in Alaska and one in California, Alaska could have a quick election in a couple of months; in California, it might reasonably take to the primary-3 months to the primary, 3 more months to the general election, maybe 6 months. What would be a reasonable—how long a vacancy are we talking about?

Mr. EDGAR. On a humorous note, I would say that the District of Columbia has been for many, many years with a vacancy.

Representative SCOTT. We are trying to do something about that. [Laughter.]

Mr. EDGAR. I think that the amendment as proposed gives the State the opportunity to make the selection, and to your earlier point, I do not think it is catastrophic to be 120 days in the larger States and 90 days in the smaller States, or whatever makes the best sense for those States, particularly given what Mr. Kennedy talked about in terms of finding a time where—

Representative SCOTT. You think you can do it—what are we talking, almost 120 days for the vacancies in the House. In Illinois—when is that election? New York? When are those elections. I mean, you are talking 3 months for a House of Representatives election.

Mr. EDGAR. Just to remind you that there are some other democracies that elect their Prime Ministers and Presidents in a shorter time than the United States does.

Representative SCOTT. OK. Well, if the quickest we can reasonably fill a House vacancy is 3 months, you would expect a large State to be 4, 5, 6 months or more. Most people, when they announce for the U.S. Senate, announce about 2 years in advance in getting ready for an election. Professor Karlan.

Ms. KARLAN. Well, two points, Representative Scott. The first is having been on the Fair Political Practices Commission in California when we had the gubernatorial recall election, we actually can run a statewide election and produce a statewide winner in a couple of months. I think it was about 3 months from the time that the ballot initiative qualified until the special election was called, maybe slightly longer than that. So that can be done.

The second point which I will just make is about the flexibility of the States, and as you know in your own State, the Commonwealth of Virginia, the parties have some control over how they do nominations for seats so that sometimes they use primaries—the Democrats often do. The Republicans, as you know, often use conventions. And so it is available to a State, for example, to have a process in place by which, if there is a vacancy, you do not have primary elections for that vacancy. You go straight to conventions, and then you go straight into a general election.

So leaving aside Representative Nadler's point about the money, which I agree with 100 percent, in terms of the logistics I do not think the logistics will take all that much longer for a senatorial election than to fill other kinds of vacancies.

Representative SCOTT. My time is running out, but in the last 12 years, the margin in the Senate has been often one vote. I think about half the time in the last 12 years it has been one vote. If you go 6 months with a vacancy, does that mean that the control of the Senate flips until the election is held and flips back? How would that work?

Mr. EDGAR. You have that situation now with Minnesota.

Representative SCOTT. Well, this would happen more often. If you go 6 months with a vacancy, that would be a routine—

Mr. EDGAR. And the United States has not come to a screeching halt in terms of legislative priorities as the State itself sorts out

who they want to represent them and who the people, in fact, have elected.

Ms. KARLAN. Well, and there may be a question about legitimacy here. I hate to use the word again, but imagine, for example, that the Senate is very closely divided and a Senator dies, and then a Governor from the other party appoints somebody who the people of that State would never have elected, and that switches control of the Senate. It is not clear to me that that does not cause you exactly the same problem.

Chairman FEINGOLD. Thank you, Professor Karlan. Thank you, Mr. Scott.

Mr. Johnson, please.

Mr. JOHNSON. Thank you, Mr. Chairman.

In January of 2009, we have an unfolding drama in Illinois, allegations that the Governor attempted to sell a Senate appointment. And that was just a couple of months ago, and now in response to—I would argue in response to that we have this move to amend our Constitution. And I want everybody to know that, you know, I do not think that it is a given that the Governor is guilty of whatever, I assume, he will be charged with. And it is important to note that he has not even been indicted yet, much less convicted, and he certainly has a presumption of innocence.

And so for us to assume that that is what he did and then as a premise look at amending our Constitution to make sure that that does not happen, I am kind of leery about that. And I am also troubled by the fact that States can set elections for a special election in—you know, you have to do it in 45 days, some might say between 90 and 120 days. Special elections probably should be uniform so that everyone, all Americans would have the same opportunity to experience a vigorous campaign, debates, forums, that kind of thing, before they are called upon to cast their vote.

And so having said that, I kind of like the idea that Representative Schock put forth to make changes in the way that Senators are appointed to fill vacancies. I think that that is probably a more prudent approach. And I am looking here at Section 4 of Article I of our Constitution: "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 place of choosing Senators."

So the first question I want to ask, or the main question I want to ask is: If anyone has had a chance to review Representative Schock's proposed legislation, I would like to know whether or not you feel that that legislation could accomplish what this constitutional amendment would accomplish?

Mr. AMAR. Well, as I said in my earlier remarks, I think it would accomplish a great deal of what is behind the constitutional amendment. It does not fully address the question that Pam Karlan and others have raised about whether any appointed Senator has legitimacy to act on behalf of the State. But I think it does help address Mr. Scott's concern of States being underrepresented during that time, during the time of a vacancy, by having somebody in there, but then somebody who cannot be there for more than 90 days without having won a vote of the people.

The one other thing, as I mentioned earlier, you could not do under Article I, Section 4 is prevent that appointed person from running in the election thereafter. And if you are worried about the kind of incumbency status that arises from having the office for up to 90 days, then you cannot statutorily do anything about that because you can set the time of the election, but you cannot set the qualifications for that election.

Mr. JOHNSON. Thank you, sir. My time has about ended. I will just close with the observation that it is better to have some representation—it is better to have appointed representation than no representation, especially at crucial times like we face today.

Thank you.

Chairman FEINGOLD. Representative Jackson Lee.

Representative JACKSON LEE. Thank you very much, Mr. Chairman. As I have sat here this morning and now almost afternoon, it becomes very clear that this hearing becomes more important by the moment, and I thank you for joining with the House on this constitutional question and I think something that the public should take notice of because it speaks to representation.

Our time is short, so let me pose my questions, and I appreciate your answers in that context. I want to go to my good friend Bob Edgar, and let me just suggest that your election was not a mistake. We are grateful for your service and your service now. But your testimony indicates that this proposed amendment is in keeping with the strides toward democracy and, of course, your eloquent quoting of Dr. King.

The majority of States allow gubernatorial appointment of Senate seats. Are gubernatorial appointments in your view of Senate seats inherently undemocratic?

Mr. EDGAR. I think they are, and this is a personal view, but shared by many members of Common Cause. I think we believe that the best way to serve democracy is for the election of House and Senate Members, and we see that over and over again. And I would like to speak just quickly to Mr. Johnson's point. It looks like this hearing is only about the issue in Illinois. I would say strongly that our constituents of Common Cause are concerned about the issue in Delaware, the issue in New York, the issue in Colorado, and other places.

I think it is important for us to recognize that it is not just the Illinois Governor's appointment. There have been stumbles and fumbles on several other aspects of the election, and the people really need to be served, as opposed to the interest of one person—namely, the Governor.

Representative JACKSON LEE. Thank you very much. Let me go to the constitutional question and also the extensive amount of time that it takes to amend the Constitution and the sacredness in which I think most of us, on behalf of the American people, hold this process of constitutional amendments. And I would like to—I associate myself with the idea of public finance, for example, in this narrow window. That might equalize the kinds of persons that can come into the U.S. Senate, such as celebrities like Senator Feingold and stars getting their way into the body. But I do know, knowing Senator Feingold and the Chairman, that he welcomes the

everyman and everywoman. And I happen to think that the 90-day window may be favorable.

I would ask Professor Amar and my good friend—I know we have been together before—Professor Karlan two issues very quickly. Distinctly separate the constitutional approach versus the statutory approach, and what is your angst or your disagreement, Professor Amar, in particular, with the constitutional approach? And, Professor Karlan, just your analysis on why the view of the statute, which for me says, very quickly, that if there was a terrorist act and the only person standing was the Governor, we are stuck with the constitutional amendment. But I am open to how we can make this most effective. I certainly think there is a constitutional or democratic question or people's question of getting people to elect their Representative. Professor Amar.

Mr. AMAR. Sure. Statutorily, you can make the term of any appointment very small by setting a requirement that there be an election within a short period of time when the vacancy occurs. But you cannot foreclose a State from trying to appoint someone for whatever that window is, because the 17th Amendment right now gives States the power to fill vacancies until the next election. You can set the time for the next election a week after the vacancy, but, of course, then you have got the problem of no voter turnout and not a full and fair election because no one could really run.

So if you have an election set for 90 days or so after a vacancy——

Representative JACKSON LEE. By statute.

Mr. AMAR. By statute, you can limit the term of a gubernatorial appointee, but you cannot eliminate that altogether. So——

Representative JACKSON LEE. The statute does not eliminate it, so the Governor can appoint——

Mr. AMAR. That is right.

Representative JACKSON LEE. But that person has to stand for election in 90 days.

Mr. AMAR. That is right.

Representative JACKSON LEE. Is there a problem with that?

Mr. AMAR. I do not see a problem with that, which is why I support the statute. But if you believe that there should be no appointees at all because they are inherently illegitimate democratically, then the statute does not get rid of that problem.

Representative JACKSON LEE. OK. And your problem with the constitutional amendment?

Mr. AMAR. Well, again, I think it is—I think it is important for States to be represented even in that window, and I think it is also important to proceed incrementally.

Representative JACKSON LEE. I thank you.

Professor Karlan.

Ms. KARLAN. Two points. It is always good to see a satisfied client.

The first is to draw an analog here to the 23rd Amendment, which I know is near and dear to many of you, which is the 23rd Amendment went part of the way toward enfranchising the people of D.C., and we are now in the process of seeing whether a statute can do the rest of that. And, you know, there is constitutional doubt about statutes like that, and there is going to be lots of liti-

gation and the like, because there are some things that cannot easily be done through statutes.

The same thing here. You can get most of the way there, but you cannot get the whole way there to ensuring that the Senate represents the people.

Now, I agree with you, I agree with all of the other members who have said you need to do some serious thinking about continuity in Government. And I support thinking seriously about the continuity in Government point, but that is different than the normal kind of predictable, actuarial vacancies in the Senate. And as to those, I think a constitutional amendment is the way to go. And just the sheer length of time it is going to take for an amendment to get proposed, sent out to the States for ratification and the like allows, I think, for a goodly amount of time for discussion and debate. And ultimately the people of the several States will decide whether they want a gubernatorial election to occur or not by deciding whether they are going to ratify the amendment. But I think that process of having that conversation at a constitutional level is important and valuable.

Representative JACKSON LEE. Well, as usual, you all have shed light on areas that have been quite gray, and it will give us a lot to think about. It is a very important question that we are raising, and I think the issue of democracy and the people's choice may be swaying us to move forward as quickly as possible.

I thank you, Mr. Chairman, and I yield back.

Chairman FEINGOLD. Thank you, Representative. I am pleased we were able to have all the House Members here have a round before their votes start.

Let me take my time and first say thank you to Mr. Edgar for pointing out this is not just about Illinois. Each of the situations that has occurred raises, in my view, serious concerns that have really nothing or very little to do with the people who are appointed. But without getting into the specifics, each of them raises real concerns when you do not have all the people being eligible to choose somebody, when it is just one person who can make the choice.

And, frankly, I say to my friends from the House, the more you tell me that it is better to have somebody appointed than to have a vacancy, well, maybe you ought to reconsider what happens when House Members have to change. If that is true, we should change the Constitution to have appointment of House Members. We cannot have it both ways, and I strongly oppose that. I think the notion that people have a right to vote for their House Members or their Senators applies with equal force.

So the more I hear this notion that somehow you have got to have somebody appointed right away, you cannot have a gap, that really raises questions about the whole way in which the House of Representatives is constituted. And I have no problem with the way it is constituted.

Mr. Kennedy, just very quickly, I wanted to know your reaction to what seems to be another argument that is constantly raised, the assumption of some of my colleagues somehow that special elections would take longer to organize in larger or more populous States. Could you comment on that?

Mr. KENNEDY. Well, I think it has already been pointed out, Senator, that California can run an election—it was a bit chaotic, their election, but—maybe I am understating it for those that live in California. But it can be done, and it is done in several countries. Wisconsin, which is 24th in population, 26th in geographic size, holds its special elections, the shortest 62 days from the time the Governor calls the order. You look at other countries and how they organize it, it can be done, where if you leave it to the States, it is how they organize that election process.

I would also say that the public really does not want to see an election that goes on for 5 months. You know, while the candidates may want to articulate their positions and articulate their positions, given the media that we have in this country and the ability to communicate, I think the public could be well informed. I think the infrastructure exists that we can actually conduct an election, as, again, in Wisconsin we are doing it in as short as a 9-week period. So I think it is practically there.

And when you think about the information that the people are going to have to make their choice, it can be done in that period of time. And——

Chairman FEINGOLD. And in that spirit, I want to turn to Mr. Edgar on this question of cost, and Mr. Nadler is concerned about the high cost of a statewide election to States like New York. Isn't one of the main contributors to the cost of an election the length of the campaign? It costs a lot more to run ads for 9 months than it does to run them for 3 months, doesn't it?

Mr. EDGAR. That is absolutely correct. I think we drag out these elections. We ought to take a look at the Presidential election. It probably has already started for 2012.

I think we in the United States need to figure out systems where elections can be fair, where the machinery works, where there can be a paper trail and audited, and I think Minnesota has shown that, in fact, they had the right machines, they had the process, they had a close election. It could be verified. It is taking a long time. But I think normally we can shorten the time. It would shorten the cost, and I think we would have a better Congress if we knew that all were representing all the people.

Chairman FEINGOLD. Thank you.

Mr. Neale, thanks for all the work you have done again, and your colleagues. Both Dr. Spalding and Dean Amar are very concerned about the possibility that States will lack full representation in the Senate for several months. Of course, this can even happen when a seat is not vacant, because of an illness, for example. I can think of several Members of the Senate since I have been here who have been unavoidably absent for weeks or months at some point in their service.

You have been at CRS for quite a while. Can you think of some examples that former Senators were unable to vote on the floor for extended periods of time?

Mr. NEALE. Certainly, Mr. Chairman. I think probably the champion in this case was Senator Carter Glass from Virginia, who was President Pro Tem and I believe Chair of the Committee on Appropriations. From about 1942 through 1946, he was basically bedridden with serious heart problems, and he finally did die before

the end of his term. But for a 4-year period, he did not appear in the Senate chamber.

More recently, in 1964, Senator Clair Engle of California was ill with—being treated for a brain tumor, from which he ultimately died, and, in fact, came to the Senate in a very dramatic moment to cast his vote. He could not speak. He raised his hand to cast a vote to break the filibuster on the Civil Rights Act of 1964.

And, more recently, Senator Karl Mundt suffered a disabling stroke so far as speech was concerned. He became aphasic in 1969, continued to serve out his term while from his hospital bed or from home from 1969 until 1972. And at that time, it was pointed out, with Senator McGovern campaigning for President and Senator Muntz essentially disabled, that the State was without a Senator for a full year.

Chairman FEINGOLD. Thank you. One more question.

Mr. Segal, Dean Amar suggests that special elections are an unappealing method of filling Senate vacancies due to low voter turnout. Do you agree with his statement that the premise that popular elections are the best way to pick a Senator is justified only when "those popular elections are ones in which a broad cross section of statewide voters are encouraged and likely to participate?"

Mr. SEGAL. I think higher participation is obviously preferable to lower participation, but I think that to have a Senator selected by perhaps not the entire breadth of the electorate but a large portion of it is certainly preferable an appointee by a single individual. And there are in our estimation ways of increasing turnout in special elections. We in particular support instant runoff voting, which has been incorporated into the legislation that is pending before the Vermont Legislature right now, which would compress the general election and the primary election, increasing the number of candidates on the ballot, increasing the focus on that particular date, and likely increasing turnout.

Chairman FEINGOLD. Thank you very much.

Mr. Gohmert, did you have anything further?

Representative GOHMERT. No. Thank you very much. I do appreciate the manner in which you have conducted the hearing, and it is heartwarming to note from your comments that you really see no difference between Senators and Representatives.

Chairman FEINGOLD. Absolutely none. Celebrities and millionaires all.

Mr. Scott.

Representative SCOTT. No. Thank you very much, Mr. Chairman.

Chairman FEINGOLD. OK. Thank you all. Of course, I thank all the witnesses.

If there are no further questions, we will bring this hearing to a close. Once again, I want to thank all the witnesses for their very thoughtful written testimony and oral presentations. It has been a fascinating hearing. I think all the major issues raised with regard to the proposed constitutional amendment have been aired with great care.

The record of this hearing will be a significant aid to Members of Congress, and hopefully State legislatures who will have to decide, of course, how to vote on the amendment if we are able to get it to them.

I want to thank my colleagues who have participated for their insights as well, and I look forward to working with all of you as we move this amendment through the legislative process.

The record of this hearing will remain open for one week for the witnesses or anyone who has not testified today to submit any materials they wish to provide for the record. Members will have the same amount of time to submit written questions, and we will ask the witnesses to respond to those questions promptly so that we can close the record in a reasonable amount of time.

Again, I thank everyone who has participated in the hearing, and the hearing is adjourned.

[Whereupon, at 12:05 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Responses by Professor Vikram Amar to Written Questions of Senator Tom Coburn, M.D.

Hearing: *"S.J. Res. 7 and H.J. Res. 21: A Constitutional Amendment Concerning Senate Vacancies"*
Subcommittee on the Constitution
United States Senate Committee on the Judiciary
March 11, 2009
(Responses in **bold**)

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1. In the aftermath of September 11th, debate in Congress was about how to preserve continuity of government in case of catastrophic vacancies. The special elections requirement in the House was generally viewed as an impediment to that challenge, while the virtues of temporary appointment in the Senate were extolled. Does this proposed constitutional amendment complicate the problems that may be faced in the event of a catastrophic vacancy? Please explain.

   In its current form, undoubtedly the proposed amendment does. As I explained in my earlier written testimony, and as University of Texas Law Professor Sanford Levinson and others have elaborated, the possibility of an attack on Washington that could kill tens or dozens of Senators is all too real. And special elections to fill all those vacancies would take at least a few months to organize and hold. (Indeed, conducting special elections under "normal" circumstances is tough enough; administering them in times of national crisis might prove more difficult still.) So if this amendment were adopted, the nation would run the non-trivial risk that key decisions about how the federal government should respond to unprecedented crisis might be made by a miniature Senate in which some states or even regions of the country would lack full and equal, or perhaps any, representation and voice.

   It is no solution to say, as some at the March 11 hearing suggested, that problems concerning continuity in government can be dealt with outside the contours of this amendment; if the amendment passes, it would block reasonable legislative efforts by states or Congress to provide a means to fill Senate seats quickly in the event of mass vacancy. It would take yet another constitutional amendment to address this important question. And it is extremely unlikely that two successful constitutional amendment drives could be mounted in the foreseeable future.

   Campaigns for general elections often begin very early. Special elections, however, are often called unexpectedly, removing the possibility of any early campaigning. Does this put candidates and voters at a disadvantage? How else might candidates and voters be disadvantaged by a special, rather than general, election?

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Special elections always place burdens on the states holding them, and on the voters who are asked to participate in them. As I noted in my earlier written testimony, promoting good voter turnout may be a particular problem in special elections, and might be a problem that is greater in some states than others. Moreover, as Representative Nadler pointed out at the hearing, short election campaign cycles may tend to favor rich and famous candidates in a big state, such as California or New York, where it usually takes time to raise the large amounts of money needed to run a state-wide campaign across many cities and hundreds of miles. It was mentioned in the hearing that in 2003 California was able to hold a statewide special election for Governor in a matter of about three months. But it is also perhaps worth noting that the winner of that election was a rich celebrity -- Arnold Schwarzenegger.

None of this is to say that special elections are poor means to fill Senate vacancies. To the contrary, elections are the *best* means to fill vacancies. But the practical problems of special elections (relating to time, expense and turnout) may mean that Senate vacancies would persist for intolerably long periods of time if gubernatorial appointments were foreclosed altogether. It also might mean that an unalterable one-size-fits-all timeframe for special elections might not adequately respect the demographic differences among the states.

Is a constitutional amendment necessary to ensure special elections to fill Senate vacancies, or are states already free to enact such requirements?

States are free to use special elections (and they do), but some states may not hold special elections promptly enough to satisfy many observers. And some proponents of the proposed constitutional amendment apparently think that having vacancies is preferable to having appointed Senators fill the seats until an election is held. I continue to believe that appointed Senators are better than absent Senators during the time it takes to hold reasonable, inclusive, fair elections.

Do you agree that this proposed constitutional amendment essentially guarantees that states facing Senate vacancies will have fewer than two senators for a period of time?

Yes, because even under the best of circumstances, elections take a matter of months.

Under this proposed amendment, is it also possible for states to have no Senate representation at all for periods of time? If so, how is this consistent with the Constitution's establishment of equal representation of the states in the Senate?

Yes, it is possible under the amendment for a state to have no Senate representation for a period of time, although this is statistically unlikely (except in the case of terrorism or other mass disaster). But even 50% representation of a state in the Senate for a matter of months is problematic. The Senate is somewhat anachronistic in its representational structure. From the point of view of a small state, being

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denied two Senate votes for any significant period of time undermines the special concessions that small states won in 1787 in forming the Senate the way it is. And for a large state, underrepresentation is even more problematic; a populous state having half the voice of a small state in the Senate for any appreciable period of time seems to raise significant problems of democratic legitimacy. This is particularly true given that a great deal of important Senate business is often transacted in a matter of weeks, and that thin voting margins (both as to cloture and as to final votes on the merits of proposed actions) seem to have characterized many crucial recent public policy questions.

2. In your opinion, should S.J. Res. 7 and H.J. Res. 21 be passed by Congress and sent to the states for ratification?

No, not in its current form, for a handful of reasons: (1) the absence of a "mass vacancy exception" is deeply problematic; (2) the underrepresentation of states (especially large states) during the months required to hold special elections is worrisome; and (3) I think a statutory fix that that requires states to hold vacancy-filling elections promptly -- but that preserves short-term appointments -- is constitutionally permissible and susceptible of alteration in light of additional data and experience, and is thus superior to the constitutional amendment route.

I hope this is helpful. Thank you for seeking my input.

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Responses by Professor Vikram Amar to Written

Questions of Representative John Conyers, Jr.

U.S. Senate Committee on the Judiciary
Subcommittee on the Constitution
&
U.S. House Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Joint Hearing on S.J. Res. 7 and H.J. Res. 21:
A Constitutional Amendment Concerning Senate Vacancies

(Responses in **bold**).

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1. In your written testimony, you express the concern that without immediate appointments, States may not be represented at times of great significance. Former Representative Rahm Emmanuel's seat was only filled at the beginning of March, having been vacated in November. Do you think House vacancies should be filled by Governors for the same reason?

   One could argue that House vacancies *should* be fillable by appointment as well, especially in moments of mass vacancy, but the House and Senate are not remotely situated similarly in this regard, for a number of reasons.

   For starters, a single vacancy in the House does not usually deprive persons of an entire state their representational due. It is a much bigger problem when tens of millions of residents (in a large state) are underrepresented in the Senate than when several hundred thousands of persons (in a Congressional district) temporarily lack a voice in the House.

   Moreover, while the needs of citizens of Rep. Emmanuel's (or any) district may differ from the needs of citizens in neighboring districts in Illinois, all these citizens share much in common such that their House members can often be counted on to virtually represent the interests of the region. Consider, for example, the recently-enacted stimulus package and the aid to states it contained. All Illinois residents benefit from the stimulus money dedicated to Illinois; if Illinois were missing one House member, that would be far less troubling than if Illinois lacked one of two Senators.

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Even as to so-called "earmarks" destined for particular Congressional districts, there is far more spillover effect into other districts within a state than there is spillover across state lines. Because states remain important political and regulatory units in the United States, lines between states are much more important than lines between Congressional districts.

Also, the law of large numbers makes the House much less likely than the Senate to suffer a disturbingly high percentage (say, 10%) of vacancy at any time.

Finally, special supermajority rules of operation in the Senate, like the filibuster, may tend to make the margins of victory on key votes smaller there, which in turn makes the presence of any vacancies more significant and troubling.

For these and other reasons, the House and Senate cannot be equated for these purposes.

2a. If the delays created by special elections hurt a State's interests in Congress, shouldn't we have this same concern in the House where there are no gubernatorial appointments?

See above.

2b. Have you seen evidence of this?

See above.

2c. Shouldn't we be more concerned with House vacancies considering every person is represented by two Senators but only one Representative?

No, see above. See also my response to Senator Coburn's questions, in which I reiterate the special problems of temporarily unequal representation in the Senate, both from the perspective of small states and (especially, to me) of large states.

3. Sixty-seven appointed Senators, or more than a third of all appointed Senators, did not seek reelection. Without a special election, how can the people make sure that these Senators who do not want reelection are representing their interests?

Of course, many elected officials (Senators, Presidents, etc.) either choose not to run, or are ineligible to run, for reelection, and thus are less accountable in some sense than persons who stand for another term. And yet these non-returning incumbents are not deemed "illegitimate" in their lame-duck terms. Moreover, Governors who appoint Senators are in almost all circumstances themselves elected, and elected by the same statewide electorates that elect Senators. Governors are accountable, and indeed are removable (by recall) in many states. As I have already noted, I don't quarrel with the notion that elections are superior to appointments as a general matter. What I argue, however, is that appointments are superior to vacancies during the significant periods of time that special elections invariably require. And

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if we, regrettably, need appointments to fill vacancies, then Governors are the best (albeit imperfect) ones to make such temporary appointment, for reasons I laid out in my earlier written testimony -- reasons that motivated the drafters of the Seventeenth Amendment.

3. In your written testimony, you called the ELECT Act the "wisest course to pursue." Mr. Matthew Spalding is concerned about the Act's constitutionality. Other experts say the legislation would likely be ruled unconstitutional, because it would infringe on the 17th Amendment's grant of authority to the States to direct how Senate vacancies are filled. How do you address these Constitutional concerns?

Dr. Spalding did not express concern about the constitutionality of the ELECT Act (nor would I expect him to weigh in on technical legal doctrine, given that he is not a constitutional lawyer.) What his written testimony said was that it would be unconstitutional to foreclose by statute temporary gubernatorial appointments altogether, since the Seventeenth Amendment provides for them. See Spalding Testimony, at p. 12 ("Let me say something about *removing* the temporary appointment option by legislation. . . .") (emphasis added). I might agree with Dr. Spalding that *eliminating* temporary appointments by statute would be unconstitutional. But the ELECT Act would do no such thing; it would simply prevent any gubernatorial appointments from lasting more than 90 days by requiring elections to be held within that time. For the reasons I explained in my earlier testimony, Congress enjoys the power to set the *time* of vacancy-filling elections under Article I, Section 4; Dr. Spalding said nothing to undermine the arguments I advanced.

I have heard no constitutional expert say s/he thinks the ELECT Act would be struck down. The most I have heard is that a challenge might be raised about its validity, and that litigation outcomes cannot be guaranteed. (Laurence Tribe of Harvard was reported in a *Washington Post* editorial as "disagree[ing]" with my position that the ELECT Act is constitutionally permissible, but my discussions with Professor Tribe lead me to believe that he has questions more than answers, and that he has not yet had a chance to look at all the arguments that I -- and others, including Congressional legal expert Michael Stern -- have advanced in support of the bill's validity.)

In short, I am at present unaware of any sustained and sophisticated analysis of the text, structure, history and practicalities of the Constitution suggesting that Congress lacks power to pass a measure like the ELECT Act. The essential question concerns the Constitution's Article I, Section 4, which expressly gives state legislatures the power, in the first instance, to set the time and manner of federal legislative elections but then also gives to Congress the power to override those state legislative decisions. The precise issue is whether this provision applies to vacancy-filling elections under the Seventeenth Amendment. Congress had (and exercised) power to regulate vacancy-filling devices in the Senate before the Seventeenth Amendment was enacted. And there is nothing in the Seventeenth Amendment that

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should be read to eliminate this power. Certainly Article I, Section 4 applies to regular (six-year) elections under the Seventeenth Amendment: state legislatures are allowed to regulate, in the first instance, the time and manner of regular six-year elections, and Congress possesses the power (which it has invoked) to step in to prescribe the time of those elections. There is no plausible reason why Article I, Section 4 should not *also* apply to vacancy-filling elections.

As noted in my earlier remarks, Southern Senators attempted, during the latter-stage debates over what became the Seventeenth Amendment, to insert language that would have freed popular elections of Senators in the several states from Article I, Section 4 Congressional control. The Southerners' proposal for the wording of the Seventeenth Amendment would have explicitly given state legislatures power over the time, place, and manner of Senate elections, replicating the first part of Article I, Section 4, but pointedly would *not* have repeated the second part of Article I, Section 4, which speaks to Congressional override power. Proponents of this language were overt about their intentions; they trumpeted their goal of trying to eliminate Article I, Section 4 power in Senate elections, even going so far as to highlight that objective in the preamble to their proposal. These attempts were discussed extensively during the deliberations in Congress, and, of course, the Southerners' efforts ultimately failed; proponents of the (what became the) Seventeenth Amendment successfully argued for the continued need for federal oversight over the time and manner of picking Senators. It would be hard to imagine that the Southerners lost their battle to remove federal oversight power with respect to regular Senate elections, but won this battle with respect to vacancy-filling elections, *without anyone in the debate (so far as I can tell at this point) having even intimated that the two kinds of elections (regular and vacancy-filling) should be treated differently in this regard.*

Indeed, a number of noteworthy features of the battle over the unsuccessful Southern effort to eliminate Congressional oversight power over Senate elections corroborate Congress' power to pass a law such as the ELECT Act. First, there seemed to be general agreement -- on both sides of the debate -- that if the Southerners' wording proposal were rejected (as it ultimately was), and none of Article I, Section 4's words were repeated in the Seventeenth Amendment, the broad powers and language of Article I, Section 4 would apply to popular Senate elections of their own force; the debate focused on the Southerners' efforts to "remove" or "eliminate" federal oversight power, whereas opponents of the Southerners' proposal were characterized by both sides during the debate as attempting to "preserve" or "retain" or "keep intact" federal power.

Second, proponents of federal oversight power argued that Congress needed to retain the power to do what it did in the 1866 Act, an Act which (as noted in my earlier testimony) regulated the manner and timing of *all* state legislative elections (not just elections every six years) of U.S. Senators. The Act said that whenever there was a Senate vacancy of any kind, both houses of a state legislature, on the second Tuesday they were in session, must vote to fill the vacancy, and if no person

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was elected, both houses must continue to vote at least once each and every day thereafter of the legislative session.

Third, the arguments in favor of retaining Article I, Section 4 power often rested on the wisdom of having Congressional power over Senate elections coextensive with its power over House elections, and there does not seem to be a question about Congress' power to impose time limits for vacancy-filling House elections (as Congress did a few years back to provide for the case of mass vacancy.)

Fourth, and importantly, the arguments in favor of retaining federal oversight power -- the desire to promote widespread suffrage to blacks and other disenfranchised groups, to reduce election fraud and abuse, to prevent the timing of elections from being used to manipulate outcomes -- all apply to vacancy-filling elections just as to regular elections. (That is likely why no one suggested Congressional power ought to be treated any differently in the context of vacancy-filling elections.) Indeed, at least some of the arguments supporting federal power -- the need to prevent states from setting the time of special elections to manipulate turnout and skew outcomes -- apply with *added force* to vacancy-filling elections.

If, for example, Congress passed a law to prevent vacancy-filling Senate elections from taking place *too soon* -- in order to allow a few weeks of campaigning so that voter awareness and voter turnout could be increased, such a law would have fit *perfectly* into the Article I, Section 4 power rationale that successful opponents of the Southern proposal articulated. And if Article I, Section 4 applies to vacancy-filling elections, the ELECT Act is within Congress' authority.

That leaves us with the question, then, of why the vacancy-filling provision of the Seventeenth Amendment closes with the phrase "as the legislature may direct." Here are two of many plausible reasons: First, the language simply reflects that state legislatures do, by virtue of Article I, Section 4's general applicability, have the power to regulate the procedure of all congressional elections, *in the first instance*. Second, the wording makes clear that state legislatures, rather than state Governors, are the ones who set the procedures for elections. Much of the Seventeenth Amendment focused on limiting the power of (untrusted) state legislatures, but the amendment's drafters wanted to make clear that although they had more faith in Governors than in state legislatures to pick Senators, they recognized and affirmed that enacting general and prospective rules -- to govern elections and other things -- is quintessentially a legislative rather than executive task.

No mention of Congress' override power right after the mention of state legislative power was necessary, because such federal power was, as noted above, well understood to exist by participants in the drafting debate. After all, the text of Article I, Section 4 by its own terms already applied. And newly-created state powers may generally be subject to preexisting federal preemption power (as in the Twenty-First Amendment) unless the constitutional text otherwise makes clear.

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Thus, while I remain open to seeing new arguments and new historical evidence, I believe the ELECT or something like it falls within Congress' Article I, Section 4 power.

Finally, with respect to the ELECT Act, I should note, as I did in my earlier written testimony, that spending power could likely be used as a backup to Article I, Section 4, to get all states to agree to prompt vacancy-filling elections.

4. In your written testimony, you support gubernatorial appointments because Governors are directly accountable to the same electorate as Senators. But as Professor Pamela Karlan notes in her written testimony, Governors can appoint individuals who may not be the people's choice – e.g., if the Governor is of a different political party. How do you respond to Professor Karlan's point?

Sometimes an appointee of a party other than that of the departed Senator would be the people's choice; the departed Senator might have been elected because of his/her personality, not his/her party. Or perhaps the departed Senator's party might have been repudiated in the meantime because of incompetence or scandal. So it is hard to know whether a Governor is, or is not, appointing a person the people would have elected. But the Governor *is* accountable to (and in some states removable by) the people, so the Governor's appointment is not inherently illegitimate, as some at the hearing suggested.

Everyone agrees that fair elections are the best ways to fill vacancies. But because good elections take time, and because allowing vacancies to persist in the meantime is, to my mind, not a good idea, I strongly believe that gubernatorial appointments are the best alternative we have in a world that is imperfect because we can't have instantaneous credible elections.

I hope this is helpful. Thank you for seeking my input.

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Questions of Senator Tom Coburn, M.D.

Hearing: *"S.J. Res. 7 and H.J. Res. 21: A Constitutional Amendment Concerning Senate Vacancies"*
Subcommittee on the Constitution
United States Senate Committee on the Judiciary
March 11, 2009

1. *In the aftermath of September 11th, debate in Congress was about how to preserve continuity of government in case of catastrophic vacancies. The special elections requirement in the House was generally viewed as an impediment to that challenge, while the virtues of temporary appointment in the Senate were extolled. Does this proposed constitutional amendment complicate the problems that may be faced in the event of a catastrophic vacancy? Please explain.*

The passage of a constitutional amendment is a grave and serious undertaking which we firmly believe is necessary to preserve our democracy – namely that those who govern serve at the consent of the citizens who elect them. If a catastrophe such as 9/11 occurs and we lose a number of our elected Senators in the tragedy – it is all the more critical that we still honor the principles which make our nation great – and not jettison these principles for simplicity, peace of mind, or convenience. If this constitutional amendment passes, and we firmly believe that it should, we should no more abandon it than we should abandon the other processes we have in place to elect members of the House of Representatives, members of the state legislature, or our governors. In times of crisis, it will be adherence to the rule of law and to the principles of our democracy which will restore our nation. We as a nation are built on the idea that the complications of democracy and the ensuing rights and freedoms, far outweigh the difficulties inherent in the "complications."

An event such as 9/11 may make adherence to the rule of law in all respects more difficult; nonetheless, it is at this time that it is even more vital that the difficulties be endured.

Campaigns for general elections often begin very early. Special elections, however, are often called unexpectedly, removing the possibility of any early campaigning. Does this put candidates and voters at a disadvantage? How else might candidates and voters be disadvantaged by a special, rather than general, election?

Voters are well served when they have the opportunity to vote for those who represent them whether the campaign process is of normal duration or is truncated due to the need to elect a Senator within three or four months due to a vacancy. Although voters may benefit from a longer period of campaigning to get to know the candidates, they are far better served by having the opportunity to vote for their choice than not having that opportunity at all.

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In addition, appointing replacements to fill Senate vacancies puts other candidates at a huge disadvantage when the next election rolls around – as the appointee by then enjoys the power of incumbency – and effectively limits voter choice.

Is a constitutional amendment necessary to ensure special elections to fill Senate vacancies, or are states already free to enact such requirements?

Although states are free to choose whether Senators are elected or appointed, a constitutional amendment is necessary to ensure that all Senators serve at the will of the citizens in their states, not at the will of one person.

Do you agree that this proposed constitutional amendment essentially guarantees that states facing Senate vacancies will have fewer than two senators for a period of time? Under this proposed amendment, is it also possible for states to have no Senate representation at all for periods of time? If so, how is this consistent with the Constitution's establishment of equal representation of the states in the Senate?

If a Senate seat becomes vacant in the middle of a six-year term for any reason, there will be a period of time, while special elections are being conducted, that there will not be a Senator from that state serving in the Senate. Indeed, at very infrequent times there may come a time when both Senators from a particular state are no longer serving in the Senate. However imperfect this may be, we believe that ensuring democratic representation is more important than ensuring 100% continuity of representation. It is worth the wait to have voters represented by someone they elect rather than someone appointed by a single person. Senators who are elected know that they are in the Senate to represent the people of a particular state and serve at their will, not at the will of the one person who appointed them.

The current protracted battle for the U.S. Senate seat in Minnesota illustrates this point. It is worth the wait, no matter how inconvenient, to have Minnesota represented by the majority's choice, and voters would not tolerate having the governor simply proclaim his choice in order to ensure continuous representation.

We also note that it is not infrequent that the entire body of 100 senators are not in place at one time; senators may be absent from the work of the senate due to illness, campaigning, fundraising, or personal crisis; yet this body has been able to continue with its important work.

2. *Who should bear the cost of the special elections that would be required by this proposed constitutional amendment?*

Currently states pay the bulk of the cost of special elections and this would continue to be the case.

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In your opinion, which option is more "democratic": for states to be un- or under-represented for a period of time in the U.S. Senate, or for states to have appointed representation during that period?

It is our contention that it is more democratic for citizens to be served by those they elect than those that are appointed for them. When vying for a Senate seat, which is appointed, a prospective senator need only win the approval of one person in that state – the governor. When vying for a Senate seat and having to face election, a prospective senator must gain approval of the voters. And, while having appointed representation may seem preferable to having none at all in the short term, having an appointed replacement means voters will be deprived of democratically chosen representation for a much longer period of time in most cases.

The process of a special election is also more transparent. As we stated in our testimony, "Democracy is at its best when it's open and transparent. But as we have seen recently, this is not the case when one person makes his or her own decision, behind closed doors, to appoint someone to become a U.S. Senator."

How would a campaign to ratify this proposed constitutional amendment requiring special elections to fill Senate vacancies differ from a campaign to encourage states to change their current laws, consistent with existing authority?

A campaign to ratify the proposed constitutional amendment would have the imprimatur of Congress and would be uniform across the states.

3. *In your written testimony, you said:* "A constitutional amendment, by providing a uniform way of filling Senate vacancies, would eliminate any resistance to change based on a potential disadvantage to states who choose to hold a special election rather than the generally more timely appointment process." *States, however, are supposed to be laboratories of political experiment. How is your view consistent with basic principles of federalism, which respect state autonomy and decision-making?*

While it is true that the states are laboratories of democracy, many issues which impact the federal government are determined at the federal level. The number of United States senators, the number of members of the House of Representatives are all determined at the federal level. It is not inconsistent to have some rules and procedures governing federal office to be decided at the federal level.

Nonetheless, the impetus for this constitutional change is based on what the experiences in the states are telling us – that, increasingly, the system of having governors fill Senate vacancies is not meeting basic standards and democratic principles. The outcome of the proposed amendment will lie in the hands of the states, and the amendment process give them an opportunity to come to a consensus on what the rule for replacements should be, without any one state putting itself at a strategic disadvantage.

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In your written testimony, you also said, "We cannot simply wait for the next Senate vacancy and hope that the governor making the appointment will act with honor and transparency in naming someone to represent that state in the U.S. Senate." *Yet, the recent scandal in Illinois resulted in the impeachment of Governor Blagojevich. Doesn't this demonstrate that states, which govern closest to the people, are well-suited to guard against similar abuse? Indeed, as Mr. Neale testified, the appointments process has generated relatively few controversies, prior to the present.*

The process of having governors appoint senators to serve out a one- or two-year term is inherently opaque and devoid of democratic process. Fortunately for the people of Illinois Governor Blagojevich was under an FBI probe – the probe of a federal agency. Without a wiretap in place, the people would never have known what machinations were at play to anoint their next senator. Additionally, despite the fate of the Blagojevich, the people of Illinois are still being represented by a sitting senator they did not elect, around whom there is a cloud of controversy, including a possible Senate ethics investigation and increasing calls for his resignation.

The fact that voters have not, until recently, had a window into the appointment process does not mean that process generally works well, or that it should not be revisited and restored to a process more compatible with the vision of the 17th amendment. As we stated in our testimony, the purpose of the 17th Amendment was to require Senators be elected, not appointed.

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Questions of Representative John Conyers, Jr.

U.S. Senate Committee on the Judiciary
Subcommittee on the Constitution
&
U.S. House Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Joint Hearing on S.J. Res. 7 and H.J. Res. 21:
A Constitutional Amendment Concerning Senate Vacancies

1. *There are two competing concerns here: (1) the interest of States having immediate representation in the Senate with (2) the ability of the people to elect Senators who represent their interests. How should we weigh these factors?*

   We support this constitutional amendment because we firmly believe that a special election to fill a Senate vacancy is the best way for the people of that state to receive fair representation in the Senate. Although it might appear that an immediate appointment to fill a Senate vacancy would offer citizens of a particular state immediate representation, that may not be the case depending on the choice of the governor. The fact that a governor appoints a senator to serve in the event of a vacancy does not necessarily mean that the people in the state will be fairly represented. Governors and senators from the same state may be from different parties. And although some state statutes specify that the appointed senator must be from the same party, not all states have this restriction, and in some cases the governor may choose a member of their own party to fill a senate vacancy. In other words, a Democratic governor may choose to appoint a senator who is a Democrat, even if the senate seat in question was vacated by a Republican. If that is the case, can the representation really be considered true and fair? We don't believe this to be the case. And that is why we believe a special election is the best alternative.

2. *John Fortier from the American Enterprise Institute wrote in Politico that if this amendment is ratified, "the death or resignation of a Senator would lead to a State effectively losing representation for a prolonged period, likely five or six months, before the special election is held."[1] In his written testimony, Professor Vikram Amar argued that under-representation results from the delays of special elections. Please respond to this argument.*

   We support this constitutional amendment because we firmly believe that representation of the people of a particular state is best achieved when the citizens in that state can choose their representative. Currently 37 states allow the governor to appoint a senator to a vacant senate seat and also allow that person to serve the duration of the term – however long that term may be. The situation is therefore not expedient or temporary. A

[1] John Fortier, *No Good Alternative to Appointments*, POLITICO, March 2, 2009.

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situation in which an appointed, not elected Senator may serve for a period of two years or more flies in the face of the 17th amendment.

Vacancies for the U.S. House and state legislatures across the country are filled by special elections, without any dire consequences and with more democratic (and less manipulable) outcomes. There is no compelling reason why the U.S. Senate – a co-equal chamber of the legislative branch – should be treated any differently.

3a. *Special elections have been criticized for low voter turnout, a concern raised by Professor Vikram Amar. What Steps can states take to improve turnout?*

Low voter turnout is a critical concern in a democracy, but is the result of a combination of variables and factors each of which can be addressed by a variety of solutions. To the extent that there are barriers to voter participation resulting from cumbersome election administration practices, Congress can do a great deal to remove these barriers. For example, low voter turnout can be the result of overly stringent and cumbersome registration requirements – which can be overcome by allowing voters to register and vote on the same day.

Low voter turnout can in part be the result of the election occurring only on one day. There are many citizens who cannot leave their workplace on one Election Day because public safety would be in jeopardy (for example hospital emergency room staff, police workers, fire and rescue squad workers). Early voting and no-excuse absentee voting would allow these voters to cast ballots. Congress can certainly pass legislation which would mandate that during federal elections, citizens be allowed to vote one or two weeks prior to Election Day and that citizens be allowed to cast ballots by mail.

Low voter turnout also may be the result of deliberate misinformation campaigns. During this past election cycle, voters received deceptive automatic phone calls stating that polling places had changed, when in fact they had not. Voters also received flyers saying that, "Due to the anticipated heavy turnout, Democrats would be voting on Wednesday and Republicans would be voting on Tuesday." Congress should pass legislation to penalize these types of practices.

3b. *When there is low voter turnout, is the turnout reflective of the State's demographics or do certain groups disproportionately vote compared to regular elections?*

The academic literature on low voter turnout has tended to show that the poor, minorities, and young voters lag behind the rest of the population in voter participation. However, according to recent research conducted and published by the Pew Research Center in their recent report ("Dissecting the 2008 Electorate: Most Diverse in U.S. History"), many shifts were recorded in this past election cycle. According to the study:

> The electorate in last year's presidential election was the most racially and ethnically diverse in U.S. history, with nearly one-in-four votes cast by non-whites. The nation's three biggest minority groups -- blacks, Hispanics and Asians -- each accounted for unprecedented shares of the presidential vote in

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2008. Overall, whites made up 76.3% of the record 131 million people who voted in November's presidential election, while blacks made up 12.1%, Hispanics 7.4% and Asians 2.5%. The white share is the lowest ever, yet is still higher than the 65.8% white share of the total U.S. population.

The unprecedented diversity of the electorate last year was driven by increases both in the number and in the turnout rates of minority eligible voters.

The levels of participation by black, Hispanic and Asian eligible voters all increased from 2004 to 2008, reducing the voter participation gap between themselves and white eligible voters. This was particularly true for black eligible voters. Their voter turnout rate increased 4.9 percentage points, from 60.3% in 2004 to 65.3% in 2008, nearly matching the voter turnout rate of white eligible voters (66.1%). For Hispanics, participation levels also increased, with the voter turnout rate rising 2.7 percentage points, from 47.2% in 2004 to 49.9% in 2008. Among Asians, voter participation rates increased from 44.6% in 2004 to 47.0% in 2008. Meanwhile, among white eligible voters, the voter turnout rate fell slightly, from 67.2% in 2004 to 66.1% in 2008.

It is therefore somewhat difficult to predict how voter participation will shift and which demographics will be reflected in a special election to fill a vacant senate seat. Certainly, the demographics of the state in question and laws governing election administration, as well as the candidates and campaigns, will impact which voters participate.

However, it is clear that voter participation is not possible when there is no election and senators are simply appointed.

4. *Another concern has been that in a national emergency, the nation may have to replace a number of Senators at the same time. How do you respond to the argument that the gubernatorial appointment power be retained in times of national emergency?*

At the time of a national emergency, we believe the rule of law should prevail. The number of senators that must face special election should not deter the operation of democracy. During each election cycle, one third of the Senate faces election at the same time, and this has not threatened our democracy.

The passage of a constitutional amendment is a grave and serious undertaking that we firmly believe is necessary to preserve our democracy – namely that those who govern serve with the consent of the citizens who elect them. If a catastrophe such as 9/11 occurs and we lose a number of our elected Senators in the tragedy, it is all the more critical that we still honor the principles which make our nation great. If this constitutional amendment passes, and we firmly believe that it should, we should no more abandon it than we should abandon the other processes we have in place to elect members of the House of Representatives, members of the state legislatures, or our governors. In times of crisis, it will be adherence to the rule of law and to the principles of our democracy which will restore our nation. We as a nation are built on the idea that the complications of democracy and the ensuing rights and freedoms, far outweigh the difficulties presented by special elections.

An event such as 9/11 may make adherence to the rule of law in all respects more difficult; nonetheless, it is at this time that it is even more vital that the difficulties be endured.

5a. *Should there be a national emergency clause to address the possibility of a large number of vacancies at one time?*

The principles of democracy should not be compromised even in a national state of emergency. It is our contention that those that govern should be elected by the people they govern and that this democratic principle should be followed even during very difficult times.

5b. *If so, when would the clause be triggered; what should the numerical or other threshold be?*

See above.

6. *According to your written testimony, Common Cause works with State legislatures across the country. In your view, how will the States receive this constitutional amendment?*

Each state will have to ratify this amendment if it passes the Congress by a two-thirds majority. It is unclear how the state legislatures of each state will react and how the citizens of each state will react. However, Common Cause is committed to seeing this legislation pass and will be working with our membership in all of the states towards ratification.

7. *In your written testimony, you say, "[w]e do not believe the State or Federal government will suffer unduly from the lack of a Senator for that period of time," the period of time being three or four months. How do you respond to Professor Vikram Amar's concerns about this period of under-representation?*

Certainly it is not desirable for the citizens of a particular state to be served by less than two senators. However, this must be weighed against what we mean by "represented." As we have stated in our comments above, we believe that citizens are more fully represented by those that they have the opportunity to elect than those that are chosen for them.

8. *In your written testimony, you note that this Constitutional amendment builds upon the efforts throughout history to expand the voting franchise. Do you believe the 17th Amendment as written disenfrachises voters; can you please explain why or why not?*

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The 17th amendment has had the tremendous impact of giving citizens a greater voice in the process of selecting Senators; it does not disenfranchise voters. The provision to allow for temporary appointments however has been interpreted in an overly broad fashion. This constitutional amendment would restore the original intent of the amendment which was to give citizens the right to choose those who represent them in the Senate.

9a. *In your written testimony, you say that the "obvious political obstacle" preventing States from adopting reforms is Governors. Can you expound on this?*

Currently governors in most states enjoy the rare privilege of acting as a "king maker" when there is a senate vacancy. Behind closed doors, without debate or public discussion, a governor can decide who can be senator. The senator then enjoys the benefits of incumbency if he or she wishes to remain in office, and has not had to conduct the difficult but vital work of campaigning to be in this office. Some governors may not wish to give up this power.

9b. *Why is it impractical to continue the effort to have each State change their election law?*

Each state will have to consider this constitutional amendment and ratify it; it is not impractical for each state to have this discussion – in fact states are critical and vital part of this process. However, we believe it is appropriate for the Congress, which does have the authority to decide the procedures for election to federal office, to begin the process of amending the constitution to restore the intent behind the 17th amendment.

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Answers to Supplemental Questions
From Professor Pamela S. Karlan

Questions from Senator Tom Coburn, M.D.
(Note: The questions appear in *italic* type with my answers following in roman type.)

1. *In the aftermath of September 11th, debate in Congress was about how to preserve continuity of government in case of catastrophic vacancies. The special elections requirement in the House was generally viewed as an impediment to that challenge, while the virtues of temporary appointment in the Senate were extolled. Does this proposed constitutional amendment complicate the problems that may be faced in the event of a catastrophic vacancy? Please explain.*

As I explained in my prepared testimony before the Committee, the proposed amendment does not deal with the problems that would arise from what I term "catastrophic" vacancies – that is, multiple vacancies caused by a single event. I urge Congress to consider a coherent, coordinated response to this problem.

Campaigns for general elections often begin very early. Special elections, however, are often called unexpectedly, removing the possibility of any early campaigning. Does this put candidates and voters at a disadvantage? How else might candidates and voters be disadvantaged by a special, rather than general, election?

I am neither a political scientist nor someone with campaign experience, so my answers here are necessarily speculative. As I understand the evidence, most voters do not concentrate on elections until shortly before Election Day, so the length of the campaign season is not particularly relevant to them. (I leave aside citizens who are actively involved in the campaign process.) For candidates themselves, there are a variety of considerations that go into whether a short or a long election campaign is desirable. One way of thinking about this issue is to recognize that in many other Western democracies, the campaign season is far shorter than it is in the United States: for example, as I understand the Canada Elections Act, a campaign season (from when the election is called until when it is conducted) can last as little as six weeks.

In terms of special vs. general elections, it is also important, I think, to distinguish between regularly scheduled and specially scheduled elections. One significant problem with the latter arises if there is only one race or issue on the ballot. That can depress turnout since there are fewer candidates or groups interested in getting out the vote. If, however, a Senate vacancy election were on the ballot along with other important elective offices or ballot propositions, that difficulty would be significantly diminished.

Is a constitutional amendment necessary to ensure special elections to fill Senate vacancies, or are states already free to enact such requirements?

Assuming no state constitutional provision to the contrary, states are free to enact legislation providing for special elections.

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Do you agree that this proposed constitutional amendment essentially guarantees that states facing Senate vacancies will have fewer than two senators for a period of time? Under this proposed amendment, is it also possible for states to have no Senate representation at all for periods of time? If so, how is this consistent with the Constitution's establishment of equal representation of the states in the Senate?

I agree that the proposed amendment means that states facing vacancies will have fewer than two Senators for a period of time and that it is possible for a state to have no Senate representation at all for a period of time if both seats are vacant. (I do not believe the latter situation has ever occurred.) I note that it is also possible – indeed, it has happened – that states lack full representation in the Senate during periods of time while governors consider whom to appoint. With respect to its consistency with the constitutional principle of equal representation of the states in the Senate, I note as a practical matter that illness, absence from the country (or from the Senate chamber), and other factors quite often mean that, as a practical matter, a particular state does not have two Senators available to participate fully.

2. *Who should bear the cost of the special elections that would be required by this proposed constitutional amendment?*

I do not have an informed opinion on this question.

In your opinion, which option is more "democratic": for states to be un- or under-represented for a period of time in the U.S. Senate, or for states to have appointed representation during that period?

I think, for the reasons given in my prepared testimony, that each of these possibilities has undemocratic aspects: being "represented" by someone for whom one never had an opportunity to vote is "democratic" only in an attenuated sense.

How would a campaign to ratify this proposed constitutional amendment requiring special elections to fill Senate vacancies differ from a campaign to encourage states to change their current laws, consistent with existing authority?

One argument in favor of a nationwide requirement for filling Senate vacancies that would be unavailable in a campaign to encourage states to change their current laws themselves is that no state would face a competitive disadvantage, relative to other states, if all states were required to use election rather than appointment.

3. *On average, how long do you believe it would take for states to organize a state-wide special election? What legal obligations must states fulfill to accommodate absentee voters, particularly those in the military? Should states with covered jurisdictions trigger the Voting Rights Act, how long does pre-clearance take? Are you aware of any state laws that restrict the timing of special elections?*

I am not an expert in election administrative, so I do not have an informed answer to the first question, but I would imagine that this varies by state. The federal legal obligations to

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accommodate absentee voters, particularly those in the military, are set out in the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff et seq. and implementing regulations. In jurisdictions covered by section 5 of the Voting Rights Act preclearance for the setting of a special election date can be obtained expeditiously. See 28 C.F.R. § 51.34 (providing for expedited consideration of preclearance requests.)

In your opinion, what effect does low voter turnout have on an election? Is there evidence that turnout is lower in a special election than in a general election?

There is evidence that, all other things being equal, turnout is lower in special elections than in general elections. (Turnout is, however, often higher in elections for open seats than in elections involving incumbents.) Low turnout can skew election results in close cases, since decreases in turnout tend to be higher among groups that are generally less likely to participate in elections.

If voter turnout is lower for special elections, isn't it true that such an election could yield a senator elected by only a small handful of citizens? Yet, this amendment provides that special elections be held to fill the remainder of a senator's term. In theory, this could be as long as six years. Under many current state laws, however, appointed senators serve only until the next general election. Is it more "democratic" for a senator elected by a small minority of the people to represent the entire state, for as long as an entire six-year term, or for a senator to be elected in the normal course of a general election, held as soon as possible after a vacancy?

While turnout is likelier to be low in special elections than in general elections, it seems implausible to assume that a "small handful of citizens" will elect a Senator. Both political parties, for example, will likely have powerful incentives in any remotely competitive state to encourage their supporters to turn out.

Special elections are held for many local, state, and federal offices. States and localities are sometimes forced to hold many throughout the course of a relatively short period of time. What effect does this repetition have on voters? What about poll workers? Do special elections cause you concern about voter and poll worker fatigue?

All things being equal, having fewer elections throughout a given year is likely to increase turnout in any particular election. I worry less about poll worker fatigue than about voters not turning out in any particularly election. That being said, a U.S. Senate election is far likelier to excite voters to participate than a low-salience local nonpartisan election.

In your testimony, you urged Congress to consider what to do in the event of "catastrophic" vacancies, adding that they were only a "remote possibility." In the aftermath of September 11th, however, Congress recognized the very real possibilities of such an event. The bipartisan Continuity of Government Commission made recommendations to address such a threat and testified before Congress numerous times to demonstrate the importance of addressing this possibility. Throughout that debate, the virtues of temporary appointments in the Senate were extolled. How does eliminating the

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possibility of a temporary appointment get us closer to a solution on the continuity of government problem?

I don't think the proposed amendment does anything to solve the continuity of government problem, which is a separate issue. I urge Congress to consider that issue more fully.

Questions from Representative John Conyers, Jr.
(Note: The questions appear in *italic* type with my answers following in roman type.)

1. There are two competing concerns here: (1) the interest of States having immediate representation in the Senate with (2) the ability of the people to elect Senators who represent their interests. How should we weigh these factors?

My view is that the risks attendant on having unelected Senators serve for significant periods of time – as some states now do – are every bit as troubling as the short-term lack of full representation for a state during the period between when a vacancy occurs and when the vacancy is filled by special election. I identified those risks in my prepared testimony.

2. John Fortier from the American Enterprise Institute wrote in Politico that if this amendment is ratified, "the death or resignation of a Senator would lead to a State effectively losing representation for a prolonged period, likely five or six months, before the special election is held." In his written testimony, Professor Vikram Amar argued that under-representation results from the delays of special elections. Please respond to this argument.

As I mentioned in my answer to Sen. Coburn's question, other nations regularly manage to hold what we would think of as "special elections" -- in the sense that they do not occur on a previously long-established date – within six to eight weeks of a decision to hold an election (e.g., Canada, the United Kingdom). Thus, I am not sure that there needs to be a "prolonged period" of vacancy. And in the future, as electoral technology changes, that period could be made even shorter.

3a. Special elections have been criticized for low voter turnout, a concern raised by Professor Vikram Amar. What Steps can states take to improve turnout?

Turnout could be increased, in special elections as in general ones, by permitting day of election registration, early voting, and lenient absentee voting.

3b. When there is low voter turnout, is the turnout reflective of the State's demographics or do certain groups disproportionately vote compared to regular elections?

In my experience, which occurred during the 1980's and may not be as true today, special elections tend to disproportionately affect less well-educated and less affluent voters who find it more difficult to turn out without the normal kinds of get-out-the-vote efforts that accompany

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general elections. I would expect, though, that an election for the U.S. Senate would attract the kind of GOTV funding and attention that normally does not occur in special elections.

4. *Another concern has been that in a national emergency, the nation may have to replace a number of Senators at the same time. How do you respond to the argument that the gubernatorial appointment power be retained in times of national emergency?*

Given that such a national emergency is likely to affect the House of Representatives as well as the Senate, I'm skeptical that gubernatorial appointment of Senators provides much of the flexibility the Nation might need.

5a. *Should there be a national emergency clause to address the possibility of a large number of vacancies at one time?*

As I mentioned in my answer to Sen. Coburn's questions, I think Congress should address this issue comprehensively, rather than piecemeal.

5b. *If so, when would the clause be triggered; what should the numerical or other threshold be?*

I don't have an opinion on this question.

6. *Professor Vikram Amar says Governors are well suited to fill vacancies because they are "directly accountable to the exact same statewide electorate that elects Senators." Even though Governors are voted in by the same electorate, why do gubernatorial appointments "distort the representational process," as your written testimony says?*

There are a number of states in which voters have elected Governors and Senators affiliated with different political parties, either because of the qualities of the individual candidates or because their preferences with regard to party control of Congress differ from their views about which state-level party best represents their interests. (For example, in my state – California – the current governor is a Republican while both Senators are Democrats, and the Governor's policies can fairly be described, on many issues, as closer to the positions of the national Democratic Party than the national Republican Party.) Permitting a Governor to appoint a Senator may risk swinging party control over the Senate in a direction that the Governor's constituents would not prefer.

7. *In your written testimony, you found that incumbent Senators enjoy "significant electoral advantages" over challengers, giving appointed Senators an "unwarranted boost." However, even with this advantage, only about a half of appointed Senators who seek reelection win. How do you reconcile this "unwarranted boost" theory with the fact that only half of our appointed Senators get reelected?*

It may be a sign that the people who are being appointed are particularly unattractive to the constituents they are ostensibly representing, especially given the general boost political scientists have found incumbency to provide.

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8. *Professor Vikram Amar and Mr. Matthew Spalding are concerned about States not having full representation when there is a Senate vacancy. When a State has a Senate vacancy and is awaiting the outcome of a special election, please explain how one Senator representing the State can protect the State's interests and constituents.*

To be sure, one Senator has less voting power than two. And a State with only one Senator for some period of time will have a diminished presence on committees and the like. That's one reason why most states are likely to conduct special elections rather than leave seats vacant for substantial periods of time. But to the extent that your question is asking about constituent service, Senators from different states already handle constituent service for vastly different sized constituencies. For example, even during a period when Delaware would have only Senator, that Senator would represent fewer constituents than each of the Senators from most of the other states, even if they split the workload.

Response of Kevin J. Kennedy

To

Questions of Senator Tom Coburn, M.D.

Hearing: *"S.J. Res. 7 and H.J. Res. 21: A Constitutional Amendment Concerning Senate Vacancies"*
Subcommittee on the Constitution
United States Senate Committee on the Judiciary
March 11, 2009

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1. *In the aftermath of September 11th, debate in Congress was about how to preserve continuity of government in case of catastrophic vacancies. The special elections requirement in the House was generally viewed as an impediment to that challenge, while the virtues of temporary appointment in the Senate were extolled. Does this proposed constitutional amendment complicate the problems that may be faced in the event of a catastrophic vacancy? Please explain.*

   The proposed amendment would require a procedure similar to the procedure for filling vacancies in the House of Representatives. A special election may take longer, but it reduces the role of cronyism and patronage in the selection process. There are significant benefits, particularly in a time of crisis, to letting the voters make a deliberative decision on the selection of their leaders. The primary benefit being increased public confidence in its elected representatives.

   Campaigns for general elections often begin very early. Special elections, however, are often called unexpectedly, removing the possibility of any early campaigning. Does this put candidates and voters at a disadvantage? How else might candidates and voters be disadvantaged by a special, rather than general, election?

   I do not believe a special election puts candidates or voters at a disadvantage. In the case of a special election, all candidates start out from roughly the same point because they would be unable to plan in advance for an upcoming scheduled election. Candidates with access to personal wealth or a large campaign balance may have an advantage, but that may occur in any election scenario. A special election may reduce some of the natural advantages elected officials seeking higher office may have in a scheduled election. The shorter time frame presents a challenge for the candidates to adapt their campaigning. This enables them to demonstrate a different set of leadership skills.

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I think voters will have abundant opportunity to obtain the requisite information to make an informed choice and may welcome a respite from a protracted contest that adds little new information over the course of the campaign. There are multiple channels of communication in this digital age for candidates to carry a campaign to voters in a cost effective manner.

Is a constitutional amendment necessary to ensure special elections to fill Senate vacancies, or are states already free to enact such requirements?

A constitutional amendment is required to ensure a uniform approach to filling vacancies in the U.S. Senate by special election. States, such as Wisconsin has done, can choose to rely on special elections to fill vacancies without a constitutional amendment. However, without a constitutional amendment, states will continue with a hodge podge approach that is susceptible to improper influence, a lack of transparency and accountability as well as cronyism and patronage.

Do you agree that this proposed constitutional amendment essentially guarantees that states facing Senate vacancies will have fewer than two senators for a period of time? Under this proposed amendment, is it also possible for states to have no Senate representation at all for periods of time? If so, how is this consistent with the Constitution's establishment of equal representation of the states in the Senate?

Any vacancy or unresolved election, such as currently in neighboring Minnesota, leaves a state with one or possibly no Senators for a period of time. The focus of the proposed amendment is to provide the public with a clear means of filling the vacancy that is transparent and accountable. Equal representation of states in the Senate is based on the authorization that each state is to be represented by two Senators, not on a guarantee of the offices being filled. At a given point in time one of the offices may not be filled due to a vacancy created by death, resignation, disability or an unresolved election.

Who should bear the cost of the special elections that would be required by this proposed constitutional amendment?

Current law leaves the cost of conducting federal elections with the states and local jurisdictions. States would certainly prefer to have the federal government fund or supplement the costs of a federal mandate.

In your opinion, which option is more "democratic": for states to be un- or under-represented for a period of time in the U.S. Senate, or for states to have appointed representation during that period?

I view democracy as the opportunity for citizens to participate in the selection of their leaders. The appointment process removes this opportunity from citizens.

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Any vacancy will leave citizens without one or more elected representatives until the vacancy is filled, either by election or appointment.

How would a campaign to ratify this proposed constitutional amendment requiring special elections to fill Senate vacancies differ from a campaign to encourage states to change their current laws, consistent with existing authority?

A campaign to ratify a proposed constitutional amendment would focus on the uniform requirement for a special election to fill a vacancy in the U.S. Senate while leaving the election process to the states. A campaign to cajole states into changing existing laws would lack the requirement that legislation be enacted. I think a campaign to change existing laws would have less chance for success because states would have no incentive other than the persuasiveness of the campaigners to change existing laws. The proposed constitutional amendment still leaves states with the choice of methods of implementation of the special election procedure.

Respectfully submitted,

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Response of Kevin J. Kennedy

To

Questions of Representative John Conyers, Jr.

U.S. Senate Committee on the Judiciary
Subcommittee on the Constitution
&
U.S. House Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Joint Hearing on S.J. Res. 7 and H.J. Res. 21:
A Constitutional Amendment Concerning Senate Vacancies

1. *There are two competing concerns here: (1) the interest of States having immediate representation in the Senate with (2) the ability of the people to elect Senators who represent their interests. How should we weigh these factors?*

   I believe more weight should be given to the opportunity for citizens to participate in the selection of their leaders. The appointment process removes this opportunity from citizens. Any vacancy will leave citizens without one or more elected representatives until the vacancy is filled, either by election or appointment. The appointment process does not necessarily fill the vacancy immediately, as states try to add transparency to the appointment process.

2. *John Fortier from the American Enterprise Institute wrote in Politico that if this amendment is ratified, "the death or resignation of a Senator would lead to a State effectively losing representation for a prolonged period, likely five or six months, before the special election is held."[1] In his written testimony, Professor Vikram Amar argued that under-representation results from the delays of special elections. Please respond to this argument.*

   Wisconsin has demonstrated it is able to conduct a special election in 9 to 11 weeks from the call of the election. A State may be without full representation in Congress for a number of reasons including death, resignation, disability or an unresolved election. The length of the period depends on the State's ability to fill the vacancy. However, voters also have a stake in representation. By being shut of the process for filling a vacancy, voters may perceive they are unrepresented when the choice was made for the voters, rather than by the voters.

[1]John Fortier, *No Good Alternative to Appointments*, POLITICO, March 2, 2009.

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3a. *Special elections have been criticized for low voter turnout, a concern raised by Professor Vikram Amar. What Steps can states take to improve turnout?*

Turnout is primarily a factor of the electorate's perception the election is important. This is why presidential elections generate a larger turnout than statehouse races, where turnout is larger than local election contests. However, certain referendum or ballot initiatives may generate turnout close to a statehouse race because of the high level of personal impact perceived by voters. States have no control over the quality of the candidates or the nature of the issues in an election campaign.

There are other factors that impact turnout such as administrative barriers to voter registration and absentee voting. Wisconsin has Election Day registration, no excuse absentee voting and an election schedule that permits calling a special election to coincide with a regularly scheduled election for local and judicial offices. States could emulate these practices to improve voter turnout.

3b. *When there is low voter turnout, is the turnout reflective of the State's demographics or do certain groups disproportionately vote compared to regular elections?*

Demographics is one factor. Motivated voters participate. This means older voters and voters closely aligned with a particular interest, partisan or issue oriented, are more likely to participate whether it is a special election or a lower profile election.

4. *Another concern has been that in a national emergency, the nation may have to replace a number of Senators at the same time. How do you respond to the argument that the gubernatorial appointment power be retained in times of national emergency?*

Congress has already enacted continuity of representation provisions when it passed the 2006 Legislative Branch Appropriations Act. Those provisions can be adapted for election of U.S. Senators as well as Members of the House of Representatives. 2 USC 8. A special election may take longer, but it reduces the role of cronyism and patronage in the selection process. There are significant benefits, particularly in a time of crisis, to letting the voters make a deliberative decision on the selection of their leaders. The primary benefit being increased public confidence in its elected representatives.

5a. *Should there be a national emergency clause to address the possibility of a large number of vacancies at one time?*

I believe this can be addressed by modifying existing law related to the continuity of representation adopted in 2005. 2 USC 8.

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5b. *If so, when would the clause be triggered; what should the numerical or other threshold be?*

I suggest including a provision the presiding officer of the Senate may declare extraordinary circumstances triggering the special elections when the number of vacancies in the Senate exceeds 25.

6a. *Wisconsin is one of four States that requires special elections in the event of Senate vacancies. In your written testimony, you said that the expected cost of a special election is approximately $3 million. What steps has the State taken to reduce the costs of holding a special election?*

The primary means of reducing costs is to hold the election in concert with a regularly scheduled election. The chief cost components are the time of administrative officials and costs for poll workers. The state could consider consolidating polling places or conducting an election by mail to reduce operating costs.

6b. *Do you think Congress should offset some of these costs, as proposed by the ELECT Act?*

Yes. I think the ELECT Act provides a framework for the federal government sharing part of the costs of a special election for U.S. Senator.

7. *What advice can Wisconsin offer to other States about holding special elections?*

Wisconsin's special election timetable is compact and provides an excellent prototype for other states. Wisconsin has Election Day registration, no excuse absentee voting and an election schedule that permits calling a special election to coincide with a regularly scheduled election for local and judicial offices.

8a. *Professor Vikram Amar found that voters don't turn out for special elections. What steps has Wisconsin taken to increase turnout?*

Wisconsin has adopted a number of administrative procedures to facilitate voter participation which has resulted in a turnout ranked second in the country, behind Minnesota, the last two presidential elections. These include Election Day registration, no excuse absentee voting, uniform poll hours and an election schedule that permits calling a special election to coincide with a regularly scheduled election for local and judicial offices.

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8b. How *would you describe the turnout when Wisconsin held its seven special elections?*

The turnout was consistent with turnout for regularly scheduled elections for local and judicial offices. The special election for U.S. Senator in 1957 produced a 35% turnout which is higher than a regularly scheduled Spring election for local or judicial office or the partisan nominating primary for the November general election.

8c. *Were there complaints that the candidates elected were not reflective of the State's interests or eligible voters?*

No. The last two special elections to fill vacancies in the U. S. Senate selected two very popular Senators: Robert M. La Follette, Jr. and William Proxmire. Three of the four special elections for Representative in Congress led to the election of individuals who were re-elected several times: Gerald Kleczka, David Obey and Thomas Petri. The other Congressman elected in a special election came from the same political party as his predecessor, but redistricting has changed the demographics of the district.

9. *Why did the Wisconsin legislature remove the Governor's temporary appointment power in 1986?*

The change was a floor amendment to a comprehensive piece of legislation introduced at the request of my office to make a series of administrative and technical changes to the election code to improve the efficiency of conducting elections. 1985 Wisconsin Act 304.

According to former State Representative Steven Brist, who authored the amendment, he wanted to return to the practice of filling vacancies in the office of U.S. Senator by special election. This was the procedure in place at the time of the last U.S. Senate vacancy. All other state and federal legislative offices are filled by special election without temporary appointment and former Representative Brist believed this was an important change. Our legislation provided a convenient vehicle for making the change since it is difficult for a second term legislator to secure passage of his own bills even if he is in the majority, as was the case in 1986.

Another factor according to former Representative Brist was the case in Minnesota following the election of Walter Mondale as Vice-President in 1976. Governor Wendell Anderson resigned from office and the acting Governor appointed Mr. Anderson to the Senate vacancy. He was defeated at the next general election.

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10a. *Both Professor Vikram Amar and Mr. Matthew Spalding are concerned about the length of time a special election takes to organize. How soon after a Senate vacancy can a special election be held?*

Wisconsin has demonstrated it is able to conduct a special election in 9 to 11 weeks from the call of the election.

10b. *In comparison to a House special election, is there a different timetable for a Senate special election because it is state-wide?*

No. Wisconsin's timetable is the same for a statewide special election.

10c. *If there is certainty that a Senator is leaving office, can States prepare in advance so that the special election can be held shortly after the Senator leaves?*

I believe so. Wisconsin provides for this with respect to legislative vacancies. Whenever a member of the state legislature is elected to another office and the term of the new office begins before the end of the term for the legislative office, the Governor may call a special election before the vacancy occurs. §8.50 (4)(e), Wis. Stats.

Respectfully submitted,

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Questions of Representative John Conyers, Jr.

U.S. Senate Committee on the Judiciary
Subcommittee on the Constitution
&
U.S. House Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Joint Hearing on S.J. Res. 7 and H.J. Res. 21:
A Constitutional Amendment Concerning Senate Vacancies

1. You have written about Electoral College reform. The issue before us today is somewhat similar in that arguments have been made that the Electoral College and Senate appointments are not truly democratic processes. What is the danger to representative democracy if Governors fill temporary appointments?

The answer to this question depends on a person's point of view. The arguments for and against the proposed amendment are drawn from the same competing interpretations of democratic principle that animate the two-century old discourse concerning the electoral college method of electing the President and Vice President.

Both interpretations are democratic, but one argues that direct popular election is best under nearly all circumstances. Call it the "Jeffersonian" persuasion, if you will, at least for the purposes of answering your immediate question. Jeffersonians passionately hold the belief that more democracy, and more direct democracy, are always to be preferred, unless the converse can be definitively proved. Under this interpretation, while there may not be an immediate danger to representative democracy if Governors have the power to fill Senate vacancies, election by the people is to be preferred on principle in all but the most extraordinary circumstances. Proceeding from the same philosophical foundation, "Jeffersonians" will generally support direct popular election of the President and Vice President over the electoral college system for the same reasons: their conviction that direct election is more inherently democratic, and therefore, preferable.

The alternative theory is also democratic, but it argues for what has been described as "balanced," or "filtered" democracy, or "ordered liberty." Again, for the purposes of responding to your query, this may be styled the "Hamiltonian" school of thought. Hamiltonians arguably place a high value on precedent, separation of powers, checks and balances, and the role of states as partners in the federal system. Given these fundamentals, they might suggest that gubernatorial appointments to fill Senate vacancies do no harm in the short run, and in fact, by tempering the passions of the moment, they may be more fully consonant with the vision of the founders. Proceeding from the same point of view, Hamiltonians would also seem to be more likely than their Jeffersonian counterparts to support the values represented of the electoral college system, rather than direct popular election.

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2. The 17th Amendment's ratification was driven by a movement to restore the people's voice. Yet, it allows Governors to temporarily appoint Senators. Why was this exception created?

The historical record seems clear on this point: Senator Joseph Bristow of Kansas, author of the resolution that became the legislative vehicle for the 17th Amendment, noted that, while his proposal employed "exactly the same language used in providing for the filling of vacancies which occur in the House of Representatives," the clause empowering the states to provide for gubernatorial appointment to fill temporarily Senate vacancies "is practically the same provision which now exists in the case of such a vacancy." It seems clear that he was seeking to assure his colleagues that while the proposed amendment embraced the increasing demand for popular election of the Senate, some of the more familiar elements in the election process, such as gubernatorial appointments, would be preserved, at least at the discretion of the states.

3a. Did the authors of the 17th Amendment imagine temporary appointments lasting two or more years?

It's unlikely that the authors of the 17th Amendment contemplated temporary appointments of such length. The language of the amendment specifies that governors could be empowered to make temporary appointments "until the people fill the vacancies by election as the legislature may direct[,]" and only when so authorized by the legislatures. Although the amendment nowhere suggests how long this period might last, it may be inferred that its authors envisioned prompt special elections, in part because public concern over lengthy vacancies prior to the amendment's ratification had been an important factor in its successful consideration by Congress.

Another element here was the fact that in 1913, congressional sessions were still fairly short: the first session of a new Congress did not assemble until 13 months after it was elected, and generally adjourned by the end of the following June. The second, or lame duck, session, generally convened the following December, after the general election, and adjourned sine die in March of the following year. Prior to ratification of the 20th Amendment, an average Congress would generally spend 10 months of its two-year term in actual session time, a comparatively short period by comparison with contemporary standards. Of course, there were some notable exceptions, such as during World War I and the New Deal.

3b. Do you believe they envisioned something like *Valenti v. Rockefeller* where the court upheld a temporary appointment that lasted twenty-nine months, which is more than a two-year House term?

It is difficult to discern and speculate on any unified intent or understanding of the drafters of the 17th Amendment in Congress respecting the length of a "temporary" appointment of United States Senators prior to an election by the people. Both the historical record and contemporary accounts identify several different political and sectional factions and ideologies in competition in Congress in the drafting of the language that became the 17th Amendment. One of these was a determination to preserve to the states as much authority as possible over the selection, election,

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and choosing of United States Senators. The enactment history of the amendment in the United States Congress shows a serious debate and division concerning "states' rights," with one of the major contentions in the debate centering on a provision, adopted in the House version, that sought to remove entirely Congress' residual authority over the "Times, Places and Manners" of federal elections in the states under Article I, Section 4, clause 1 of the Constitution.

In light of the strong states' rights sentiment, the author of the substitute amendment eventually adopted by Congress, Senator Joseph Bristow of Kansas, noted explicitly that the direct election provisions were not intended to "add new powers of control to the Federal Government" at the expense of the authority of the state legislatures over such elections. The constitutional provision adopted thus expressly provided, as to vacancies, that after a temporary appointment, the people of the state will fill the vacancy by election "as the legislature may direct." This is a direct grant in the United States Constitution of authority and discretion to the state legislatures, limited only by the requirement that the Governor's appointment be "temporary," and there is no indication of a uniform or agreed-upon understanding of a federally-mandated time limit on such appointments, as authorized by the various state legislatures, other than that such appointments be "temporary."

An early concern of the Congress with regard to mandating "special" elections, as opposed to appointments, it may be noted, had been the expense of such elections to the states. Thus, in the earliest formulations of the vacancy language used in what became the 17th Amendment, the drafter recognized the issue of the expense of statewide elections, and expressly intended to allow the state to be spared the expense of having to hold an extraordinary statewide "special election" soon after or before a regular statewide election.

4. In your opinion, why have the majority of States allowed gubernatorial appointments?

It seems likely that the state legislatures had at least three motives in providing their governors with power to make temporary appointments to fill Senate vacancies. The first was to guarantee that their states would have full representation in the Senate at all times. The spectacle of lengthy, sometimes multiple, Senate vacancies was one of the prime factors contributing to the passage in Congress of the 17th Amendment and its speedy ratification in the states. Second, temporary gubernatorial appointment was familiar to state legislators. Governors had exercised this constitutional mandate for more than a century at the time the 17th Amendment was ratified, and they may have regarded the arrangement as ensuring a degree of continuity. Finally, the states generally accord a high priority to the costs of election administration costs in our own era, so it seems logical to suggest that it may have been of similar concern to state legislators in the early 20th century. With temporary appointments, special elections could be scheduled concurrently with regular statewide elections at substantial savings that may well have attracted cost-conscious state legislatures.

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Questions of Senator Tom Coburn, M.D.

Hearing: *"S.J. Res. 7 and H.J. Res. 21: A Constitutional Amendment Concerning Senate Vacancies"*
Subcommittee on the Constitution
United States Senate Committee on the Judiciary
March 11, 2009

1. In the aftermath of September 11th, debate in Congress was about how to preserve continuity of government in case of catastrophic vacancies. The special elections requirement in the House was generally viewed as an impediment to that challenge, while the virtues of temporary appointment in the Senate were extolled. Does this proposed constitutional amendment complicate the problems that may be faced in the event of a catastrophic vacancy? Please explain.

The proposed amendment, as introduced, would prohibit gubernatorial appointments to fill Senate vacancies. As such, it may be argued that an absolute ban on alternative arrangements would complicate the task of reconstituting the upper house following an attack on the Senate that caused wide-scale death or disability of its Members. An alternative might be changes to the amendment, such as a disaster exemption, that would provide for cases in which a certain number of seats became vacant simultaneously. A disability exemption would be more complex, since it would need to define what a disability is, when it may be declared, when it has been resolved, not to mention procedures for disputed cases. Another option might be to consider the concept of alternate or contingent Members who would assume office in the event the position became vacant. While this practice is little known in the American political context, several European parliaments routinely provide for standby members who are chosen at every regular election.

Campaigns for general elections often begin very early. Special elections, however, are often called unexpectedly, removing the possibility of any early campaigning. Does this put candidates and voters at a disadvantage? How else might candidates and voters be disadvantaged by a special, rather than general, election?

There can be no question that special elections impose a burden on all participants because of the abbreviated timeline under which they are held. These burdens fall not only on individual candidates who seek the office to be filled, but also on the party organizations in the affected state or district, as well as elections administration officials on both the state and local levels. It is unclear, however, that these obstacles are insurmountable. Vacancies in the House of Representatives generally occur several times during the course of every Congress, yet the states have established efficient procedures to fill them by special election.

Senate elections would be different because of their statewide scope. Arranging to fill a Senate seat by special election would require an exponentially greater effort in the more populous states, but recent experience suggests it can be done. California, the Nation's most populous state, conducted a *de facto* special election in 2003 when its voters recalled Gray Davis and replaced him in the governor's office with Arnold Schwarzenegger. Although the recall campaign began

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in February, 2003, only on July 24 did the Secretary of State order the two-step recall election to be held on October 7, a date 75 days into the 80-day window prescribed in the state constitution. Nine million voters, comprising 61.2% of those registered, participated in the recall election. This figure falls below the 79.4% who cast votes in the 2008 presidential election, but it demonstrates that a successful special election can be scheduled and conducted on an expedited basis in even the Nation's most populous state.

With respect to the second part of your question, there are certain other considerations that might affect a special election. With very few exceptions, special elections scheduled for any time other than a regular general election will draw a lower voter turnout. The potential disadvantage here is that well-organized advocacy groups might be able to exercise disproportionate influence in a special election. This leverage could take the form of contributions, provision of campaign volunteers in both primary and general elections, and mobilization of large numbers of committed supporters on election day. It would be inappropriate to characterize this influence as overwhelmingly positive or negative, but it is a real possibility, and arguably should be a factor in considering proposals to fill Senate vacancies exclusively through special election.

> Is a constitutional amendment necessary to ensure special elections to fill Senate vacancies, or are states already free to enact such requirements?

If the goal is to ensure that Senate vacancies may be filled *only* by special election, then a constitutional amendment would be necessary, because the states are guaranteed the appointment option in the 17th Amendment. It is worth noting, however, that the amendment cites special elections first in clause 2. This arrangement of the constitutional language arguably suggests special elections are the primary procedure to meet such contingencies, and that the gubernatorial appointment option, ("the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election....") was established as a secondary expedient to avoid lengthy Senate vacancies at such times when Congress is in session.

> Do you agree that this proposed constitutional amendment essentially guarantees that states facing Senate vacancies will have fewer than two senators for a period of time? Under this proposed amendment, is it also possible for states to have no Senate representation at all for periods of time? If so, how is this consistent with the Constitution's establishment of equal representation of the states in the Senate?

Equality of the states in the Senate, known as the "Great" or "Connecticut" Compromise was one of the cornerstone decisions that made possible the Constitution, and thus, the government of the United States as we know it today, possible. It remains one of the foundations of federalism in the American republic, and is a principle that should not be taken lightly. Opponents of the amendment before the subcommittees will argue that, if it is ratified, it will do violence to this principle, not just by tolerating, but by establishing procedures that will ultimately tolerate longer interruptions in equal state representation in the Senate than at present. Further, it is conceivable that, in extraordinary circumstances, a state could be totally deprived of Senate representation for a certain period. To opponents of the proposal, these contingencies are sufficient to eliminate it

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from consideration. Supporters of the amendment might argue that the amendment would tolerate interruptions in state representation in the Senate, but that in this instance, the "best" may be enemy of the good. Vacancies will occur if the amendment is approved and ratified in the states, but is it not better, they might suggest, that these gaps in state representation be filled by persons who have been elected by, and therefore enjoy the unquestioned support of, the state's voters?

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Questions of Representative John Conyers, Jr.

U.S. Senate Committee on the Judiciary
Subcommittee on the Constitution
&
U.S. House Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Joint Hearing on S.J. Res. 7 and H.J. Res. 21:
A Constitutional Amendment Concerning Senate Vacancies

1. You have written about Electoral College reform. The issue before us today is somewhat similar in that arguments have been made that the Electoral College and Senate appointments are not truly democratic processes. What is the danger to representative democracy if Governors fill temporary appointments?

The answer to this question depends on a person's point of view. The arguments for and against the proposed amendment are drawn from the same competing interpretations of democratic principle that animate the two-century old discourse concerning the electoral college method of electing the President and Vice President.

Both interpretations are democratic, but one argues that direct popular election is best under nearly all circumstances. Call it the "Jeffersonian" persuasion, if you will, at least for the purposes of answering your immediate question. Jeffersonians passionately hold the belief that more democracy, and more direct democracy, are always to be preferred, unless the converse can be definitively proved. Under this interpretation, while there may not be an immediate danger to representative democracy if Governors have the power to fill Senate vacancies, election by the people is to be preferred on principle in all but the most extraordinary circumstances. Proceeding from the same philosophical foundation, "Jeffersonians" will generally support direct popular election of the President and Vice President over the electoral college system for the same reasons: their conviction that direct election is more inherently democratic, and therefore, preferable.

The alternative theory is also democratic, but it argues for what has been described as "balanced," or "filtered" democracy, or "ordered liberty." Again, for the purposes of responding to your query, this may be styled the "Hamiltonian" school of thought. Hamiltonians arguably place a high value on precedent, separation of powers, checks and balances, and the role of states as partners in the federal system. Given these fundamentals, they might suggest that gubernatorial appointments to fill Senate vacancies do no harm in the short run, and in fact, by tempering the passions of the moment, they may be more fully consonant with the vision of the founders. Proceeding from the same point of view, Hamiltonians would also seem to be more likely than their Jeffersonian counterparts to support the values represented of the electoral college system, rather than direct popular election.

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2. The 17th Amendment's ratification was driven by a movement to restore the people's voice. Yet, it allows Governors to temporarily appoint Senators. Why was this exception created?

The historical record seems clear on this point: Senator Joseph Bristow of Kansas, author of the resolution that became the legislative vehicle for the 17th Amendment, noted that, while his proposal employed "exactly the same language used in providing for the filling of vacancies which occur in the House of Representatives," the clause empowering the states to provide for gubernatorial appointment to fill temporarily Senate vacancies "is practically the same provision which now exists in the case of such a vacancy." It seems clear that he was seeking to assure his colleagues that while the proposed amendment embraced the increasing demand for popular election of the Senate, some of the more familiar elements in the election process, such as gubernatorial appointments, would be preserved, at least at the discretion of the states.

3a. Did the authors of the 17th Amendment imagine temporary appointments lasting two or more years?

It's unlikely that the authors of the 17th Amendment contemplated temporary appointments of such length. The language of the amendment specifies that governors could be empowered to make temporary appointments "until the people fill the vacancies by election as the legislature may direct[,]" and only when so authorized by the legislatures. Although the amendment nowhere suggests how long this period might last, it may be inferred that its authors envisioned prompt special elections, in part because public concern over lengthy vacancies prior to the amendment's ratification had been an important factor in its successful consideration by Congress.

Another element here was the fact that in 1913, congressional sessions were still fairly short: the first session of a new Congress did not assemble until 13 months after it was elected, and generally adjourned by the end of the following June. The second, or lame duck, session, generally convened the following December, after the general election, and adjourned sine die in March of the following year. Prior to ratification of the 20th Amendment, an average Congress would generally spend 10 months of its two-year term in actual session time, a comparatively short period by comparison with contemporary standards. Of course, there were some notable exceptions, such as during World War I and the New Deal.

3b. Do you believe they envisioned something like *Valenti v. Rockefeller* where the court upheld a temporary appointment that lasted twenty-nine months, which is more than a two-year House term?

It is difficult to discern and speculate on any unified intent or understanding of the drafters of the 17th Amendment in Congress respecting the length of a "temporary" appointment of United States Senators prior to an election by the people. Both the historical record and contemporary accounts identify several different political and sectional factions and ideologies in competition in Congress in the drafting of the language that became the 17th Amendment. One of these was a determination to preserve to the states as much authority as possible over the selection, election,

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and choosing of United States Senators. The enactment history of the amendment in the United States Congress shows a serious debate and division concerning "states' rights," with one of the major contentions in the debate centering on a provision, adopted in the House version, that sought to remove entirely Congress' residual authority over the "Times, Places and Manners" of federal elections in the states under Article I, Section 4, clause 1 of the Constitution.

In light of the strong states' rights sentiment, the author of the substitute amendment eventually adopted by Congress, Senator Joseph Bristow of Kansas, noted explicitly that the direct election provisions were not intended to "add new powers of control to the Federal Government" at the expense of the authority of the state legislatures over such elections. The constitutional provision adopted thus expressly provided, as to vacancies, that after a temporary appointment, the people of the state will fill the vacancy by election "as the legislature may direct." This is a direct grant in the United States Constitution of authority and discretion to the state legislatures, limited only by the requirement that the Governor's appointment be "temporary," and there is no indication of a uniform or agreed-upon understanding of a federally-mandated time limit on such appointments, as authorized by the various state legislatures, other than that such appointments be "temporary."

An early concern of the Congress with regard to mandating "special" elections, as opposed to appointments, it may be noted, had been the expense of such elections to the states. Thus, in the earliest formulations of the vacancy language used in what became the 17th Amendment, the drafter recognized the issue of the expense of statewide elections, and expressly intended to allow the state to be spared the expense of having to hold an extraordinary statewide "special election" soon after or before a regular statewide election.

4. In your opinion, why have the majority of States allowed gubernatorial appointments?

It seems likely that the state legislatures had at least three motives in providing their governors with power to make temporary appointments to fill Senate vacancies. The first was to guarantee that their states would have full representation in the Senate at all times. The spectacle of lengthy, sometimes multiple, Senate vacancies was one of the prime factors contributing to the passage in Congress of the 17th Amendment and its speedy ratification in the states. Second, temporary gubernatorial appointment was familiar to state legislators. Governors had exercised this constitutional mandate for more than a century at the time the 17th Amendment was ratified, and they may have regarded the arrangement as ensuring a degree of continuity. Finally, the states generally accord a high priority to the costs of election administration costs in our own era, so it seems logical to suggest that it may have been of similar concern to state legislators in the early 20th century. With temporary appointments, special elections could be scheduled concurrently with regular statewide elections at substantial savings that may well have attracted cost-conscious state legislatures.

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Questions of Senator Tom Coburn, M.D.
Hearing: "S.J. Res. 7 and H.J. Res. 21: A Constitutional Amendment Concerning Senate Vacancies"
Subcommittee on the Constitution
United States Senate Committee on the Judiciary
March 11, 2009

1.In the aftermath of September 11th, debate in Congress was about how to preserve continuity of government in case of catastrophic vacancies. The special elections requirement in the House was generally viewed as an impediment to that challenge, while the virtues of temporary appointment in the Senate were extolled. Does this proposed constitutional amendment complicate the problems that may be faced in the event of a catastrophic vacancy? Please explain.

A) The president is afforded broad, temporary, increased powers during national emergencies, so as to be able to maintain the functions of government. The catastrophic scenario most often discussed is an attack on a joint session of Congress; we note that under such a scenario, assuming comparable losses of membership in the House and Senate, given the status quo, the legislative branch would be rendered unable to function for a period of several weeks pending re-constitution of the House.

B) If need be, we could treat catastrophes differently than run-of-the-mill vacancies. We believe that if emergency appointment clauses are to be enacted, they should be taken up separately from the issue which the amendment in question seeks to address.

C) It is precisely during a time of crisis when we should be most wary of having unelected, unaccountable leadership -- it is during such times that we are most vulnerable to abusive governance, and the rise of despotism.

Campaigns for general elections often begin very early. Special elections, however, are often called unexpectedly, removing the possibility of any early campaigning. Does this put candidates and voters at a disadvantage? How else might candidates and voters be disadvantaged by a special, rather than general, election?

A) Elections in the US, for all federal offices, are much longer than elections for national office in other countries. The length of our elections is by no means an unambiguously positive phenomenon: It means increased costs -- and therefor increases influence by moneyed interests; it can increase the likelihood of negative campaigning and voter cynicism. And it is a truism that a large portion of the electorate does not start paying attention until the final months of an election.

B) Potential disadvantages include lower turn-out, vote-splitting, favor to those with higher name recognition/wealth. Though "low" turn-out is obviously higher than turnout of just one -- a governor -- as results from allowing appointments; and vote-splitting and advantage for the

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wealthy and well-known manifest are relatively likely to manifest in races for open seats, whether special elections or otherwise.

Is a constitutional amendment necessary to ensure special elections to fill Senate vacancies, or are states already free to enact such requirements?

A) De jure, states can enact such requirements via local legislation. In practice, it's unlikely that the bulk of states will do so, per political dynamics that have been evinced by current deliberations on the matter, and which we discuss at length in our testimony. In that sense, a constitutional amendment is probably necessary to achieve broad adoption of special elections.

Do you agree that this proposed constitutional amendment essentially guarantees that states facing Senate vacancies will have fewer than two senators for a period of time? Under this proposed amendment, is it also possible for states to have no Senate representation at all for periods of time? If so, how is this consistent with the Constitution's establishment of equal representation of the states in the Senate?

A) Yes -- in the case of a senator's acute death or incapacitation, or sudden resignation, the state he or she represented would be without a full complement of senators for a period of time. It is possible, but unlikely, that both of a state's Senate seats might be vacant for a while. Though both such scenarios may manifest under current laws as well -- vacancies are not filled instantly upon their creation, even in those states which appoint senators in case of vacancy; and some states hold special elections. Society regularly accepts lengthy absences from the Senate, in case of illness. We believe that special elections could be held quickly, within a period of 60 days, facilitated by the use of instant runoff voting.

B) Some states allow for legislators to announce resignations ahead of time, triggering elections but keeping the given seat full until the new replacement legislator is elected. It seems reasonable to explore allowing for this for federal senators -- for instance, having allowed Barack Obama and Joe Biden to announce their resignations in November, effective in early January, with an election held during the intervening period.

C) Upon our nation's founding, U.S. House size was initially only 64 members, and one state (Delaware) had only one seat, but still the founders required all vacancies to be elected -- so from their logic, once you go to a representative democracy, you hold elections, even if on the House side that could leave a state without any representation and at the beginning each Member held a higher proportion of the House (1/64th) than any Senator holds of the Senate today (1/100th). (The House membership was obviously still greater than the Senate membership, but the ratio of House seats to Senate seats was much higher than today -- each House member of that era represented about twice as much of the nation's total legislative power than does a modern House member.)

2.Who should bear the cost of the special elections that would be required by this proposed constitutional amendment?

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A) We think that it would be reasonable for the Federal government, recognizing its obvious interest in the election of senators, and its greater access to monetary resources, to fund such elections. Vacancies in any given state occur on an essentially random basis, but as with most risks, the aggregation of such phenomena across all affected parties would smooth out variability. The Federal government could reasonably expect about two vacancies to occur per year, and budget accordingly. Failing full federal funding, a state-federal partnership seems reasonable, but none of these need be addressed via constitutional amendment.

In your opinion, which option is more "democratic": for states to be un- or under-represented for a period of time in the U.S. Senate, or for states to have appointed representation during that period?

A) A randomly-selected warm body in a seat in the Senate chamber does not constitute meaningful representation: We would assert that an appointed senator, by definition, is un- or under-representative of the state whom he or she supposedly represents -- or worse, as an appointee can more readily act contrary to the will of his or her constituents. Having such an appointment in place for a period of months or years extends this period of un-, under-, or anti-representation far beyond the two-month time-frame that a special election would require.

How would a campaign to ratify this proposed constitutional amendment requiring special elections to fill Senate vacancies differ from a campaign to encourage states to change their current laws, consistent with existing authority?

A) Foremost, it would remove governors from the process. Powerful actors rarely act to decrease their own authority, making governors a steep obstacle to the enactment of new laws relative to Senate vacancies -- but governors have no formal role in the ratification of a constitutional amendment. A constitutional amendment is essentially an interstate compact -- parties to it would need not fear that action would allow for any one state to gain an advantage relative to others. The formal proposal by Congress of a constitutional amendment would likely catalyze a national movement, depoliticize the matter, brand it as a 'good government' issue, and encourage local chapters of FairVote, Common Cause, and other groups to act vigorously towards its enactment.

3.I am familiar with Fair Vote's good work on voter turnout. According to your organization, "Voter Turnout is a fundamental quality of fair elections and is generally considered to be a necessary factor for a healthy democracy." Are you concerned about the possibility of low voter turnout for a special election?

A) Turn-out in a special election is likely to be lower than turn-out in a regular election -- but it would certainly be higher than the turn-out of precisely one voter (the governor) for the appointment of a senator. A broad electorate is preferable to a narrow one, but a narrow one better than none at all. We also believe that instant runoff voting, by compressing a primary and general election into a single election day, would keep turnout higher than it would be during a 'normal' special election.

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Your organization has studied voter turnout in federal primary elections, including how it often drops in subsequent runoffs. Are you concerned that voter turnout would be even lower in primaries and runoffs for special elections to fill Senate vacancies?

A) This is a possibility, but an imperfect election is preferable to no election, and IRV could assuage such concerns, at least to a degree. Vote-by-mail, Saturday-Sunday elections, and other pro-turnout reforms could also be employed here.

Questions of Representative John Conyers, Jr.

1U.S. Senate Committee on the Judiciary
Subcommittee on the Constitution
&
U.S. House Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Joint Hearing on S.J. Res. 7 and H.J. Res. 21:
A Constitutional Amendment Concerning Senate Vacancies

1.1There are two competing concerns here: (1) the interest of States having immediate representation in the Senate with (2) the ability of the people to elect Senators who represent their interests. How should we weigh these factors?

A) As far as we are concerned, a non-elected senator should not be considered a representative of the people of the state from which he or she hails. Such a senator has little accountability to his or her constituents, and could act contrary to their will more easily than could an accountable senator. We side squarely with elections of senators by the people.

2.John Fortier from the American Enterprise Institute wrote in Politico that if this amendment is ratified, "the death or resignation of a Senator would lead to a State effectively losing representation for a prolonged period, likely five or six months, before the special election is held."1 In his written testimony, Professor Vikram Amar argued that under-representation results from the delays of special elections. Please respond to this argument.

A) We believe that special elections could be held in a much quicker time-frame than that outlined above -- as little as 2 months. We believe that having a non-elected senator should not be considered tantamount to 'representation,' and can readily conceive of circumstances when it could be _worse_ than having no senator at all. Special elections are the norm for House vacancies -- leaving districts, and sometimes whole states, with no representation in that body. We frequently accept the prolonged absence of senators, in the case of severe illness.

3a. Special elections have been criticized for low voter turnout, a concern raised by Professor Vikram Amar. What Steps can states take to improve turnout?

A) We believe that instant runoff voting could raise turnout, by compressing two election days (primary and general) into just one. We also advocate election day holidays and no-fault

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absentee voting, in the case of special elections and otherwise. We also note that turnout is necessarily higher in an election than in the case of appointment. (In the latter, turnout is just one voter -- the governor.)

B) Vote-by-mail, Saturday-Sunday elections, and other pro-turnout reforms could also be employed here.

3b. When there is low voter turnout, is the turnout reflective of the State's demographics or do certain groups disproportionately vote compared to regular elections?

A) There is not a hard and fast rule, but in general, the electorate skews older, whiter, and wealthier -- but this dynamic is the same with our current primary system: Regularly scheduled primaries often have low, skewed turnout. To the extent to which we realize that the status quo can be imperfect, the answer is not to block elections -- the answer is to fix the problems.

4. Another concern has been that in a national emergency, the nation may have to replace a number of Senators at the same time. How do you respond to the argument that the gubernatorial appointment power be retained in times of national emergency?

A) The president is afforded increased power during national emergencies, helping to maintain the functions of government. The catastrophic scenario most often discussed is an attack on a joint session of Congress -- we note that under such a scenario, assuming comparable losses of membership in the House and Senate, given the status quo, the legislative branch would be rendered unable to function for a period of several weeks pending re-constitution of the House.

B) It is precisely during a time of crisis when we should be _most_ wary of having unelected, unaccountable leadership -- it is during such times that we are most vulnerable to abusive governance, and the rise of despotism.

C) If need be, we could treat catastrophes differently than run-of-the-mill vacancies.

5a. Should there be a national emergency clause to address the possibility of a large number of vacancies at one time?

A) FairVote does not fundamentally oppose this, but it need not interfere with improving the way in which the regular rhythm of run-of-the-mill vacancies are addressed.

5b. If so, when would the clause be triggered; what should the numerical or other threshold be?

A) We believe that if emergency appointment clauses are to be enacted, they should be taken up separately from the issue which the amendment in question seeks to address. Any such emergency appointments should obviously be considered very seriously, with a high threshold for implementation: to be triggered upon death or incapacitation of a number of members such that it is essentially impossible for government to function otherwise -- and ideally with affirmation of such by the legislatures and executives of the states whose representatives are said

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to be unable to function. Any such emergency appointments should be short, and writs of election should be filed simultaneous to such appointments.

6a. Professor Vikram Amar is concerned that special elections cause delays. In the New York Times, you suggested compressing runoffs into general elections as one solution.1 Can you expound on this?

A) Instant runoff voting (IRV) allows for primary and general elections (or general and runoff elections) to be compressed into a single election. Voters rank their choices in order of preference, and a runoff is simulated, nearly instantly. IRV is used in a variety of communities -- including for certain voters in state-wide elections in Arkansas and South Carolina, and in municipalities throughout the nation. We believe that IRV has many benefits -- in the case of special elections, doing away with the lag between a primary and general, allowing for cost savings, and increasing turnout. Legislation pending in Vermont includes IRV, after private party nominations; New York does not hold primaries in the case of US House vacancies.

6b. What other steps should states take so special elections run quickly?

Please see above answer.

7. You were the only hearing witness who is serving as a State representative. You also sponsored legislation in Rhode Island to require special elections. In your view, how will the States receive this constitutional amendment?

A) The reception will likely be mixed, though substantial action on this issue is far more likely in the form of constitutional amendment than as state-level legislation. An amendment would remove self-interest governors -- who are unlikely to assent to the stripping of their authority -- from the process: Governors have been the most significant obstacle to state reform efforts to date. A constitutional amendment is essentially an interstate compact -- parties to it would need not fear that action would allow for a one state to gain an advantage relative to others. A proposal by Congress of a constitutional amendment would likely catalyze a national movement, depoliticize the matter, brand it as a 'good government' issue, and encourage local chapters of FairVote, Common Cause, and other groups to act vigorously towards its enactment.

8. Why did Rhode Island allow its Governor the exclusive power to fill Senate seat vacancies and what has changed since that time?

A) It's important to note that governors filled Senate vacancies prior to the passage of the 17th Amendment. Allowing them to continue to do so, even after 1913, was essentially maintenance of the status quo. Over the course of the last century, the notion that senators should be elected by the populous has, thankfully, become a basic tenet of our democracy -- what seemed normal a century ago now seems like a gross, unjustifiable misappropriation of power. I introduced legislation to change this process last year, primarily as an abstract assertion of values I believe are important, but it did not pass out of committee. It is the broad public disgust at the shenanigans in Illinois and elsewhere that has led to the higher likelihood of passage this session.

9. Mr. Matthew Spalding said in his written testimony that "the proposed amendment, by preventing States from supplying immediate appointed representation to the national legislature if they so choose, would be detrimental to the States." Please respond to this argument.

A) This requires a brief meditation on the relevant meaning of the term "State." States deserve representation insomuch as we understand "State" to be synonymous with the totality of the people who reside within the borders of the given geographical unit: States have no interest apart from the aggregated will of the people who reside within them. Such aggregated will can only be determined by election. A senator who has been appointed by a governor does not represent a state in a meaningful sense -- foremost, he or she represents the interests of said governor, which may or may not coincide with the will of the people of the relevant state.

10. In your written testimony, you found that nine States introduced legislation requiring special elections. Why do you think more States have not acted?

A) As outlined in our testimony, the political realities of most states make such action highly unlikely -- inter- and intra- party tension and conflict within and between branches of government make such action unlikely. In particular, governors are unlikely to accede to the diminishment of their own authority. Legislatures controlled by the same party as the governor are unlikely to act to strip the governor of such powers. Legislatures controlled by a different party than the governor are more likely to act, but their efforts will be negated by gubernatorial vetoes -- except in states like Rhode Island, wherein the legislature is controlled by a super-majority of a different party than the governor, and will therefor be able to override such vetoes. A constitutional amendment would make action much more likely in most states.

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Questions of Senator Tom Coburn, M.D.

Hearing: *"S.J. Res. 7 and H.J. Res. 21: A Constitutional Amendment Concerning Senate Vacancies"*
Subcommittee on the Constitution
United States Senate Committee on the Judiciary
March 11, 2009

1. In the aftermath of September 11th, debate in Congress was about how to preserve continuity of government in case of catastrophic vacancies. The special elections requirement in the House was generally viewed as an impediment to that challenge, while the virtues of temporary appointment in the Senate were extolled. Does this proposed constitutional amendment complicate the problems that may be faced in the event of a catastrophic vacancy? Please explain.

   Campaigns for general elections often begin very early. Special elections, however, are often called unexpectedly, removing the possibility of any early campaigning. Does this put candidates and voters at a disadvantage? How else might candidates and voters be disadvantaged by a special, rather than general, election?

   Is a constitutional amendment necessary to ensure special elections to fill Senate vacancies, or are states already free to enact such requirements?

   Do you agree that this proposed constitutional amendment essentially guarantees that states facing Senate vacancies will have fewer than two senators for a period of time? Under this proposed amendment, is it also possible for states to have no Senate representation at all for periods of time? If so, how is this consistent with the Constitution's establishment of equal representation of the states in the Senate?

In light of the events of September 11, 2001, the potential of a catastrophic vacancy in the Senate is unfortunately a prudent consideration. As your initial question suggests, the amendment under consideration would—if accepted—compromise the integrity of the Senate between the time of the catastrophe and the eventual election of new senators. Elections take time, and in the interim, the Senate would have to function with many states underrepresented or unrepresented. This is particularly significant for the Senate because the Senate is directly responsible under the Constitution for the ratification of treaties and the formation of alliances. In the case of a terrorist attack, a fully-functioning Senate would be essential for combating the aggressors, a responsibility that may be difficult to fulfill under the proposed amendment.

It is true, the House faces a similar difficulty under current law, but there are two factors that distinguish between a special election in the House versus the Senate. First, as a practical matter, the probability that a terrorist attack (or some similar event) would

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incapacitate a large proportion of the House is lower than this potential for the Senate just as a matter of numerical probability—the Senate is a much smaller body than the House. Secondly and more substantively, temporary appointment for representatives is not a viable possibility. As you know, representatives act on the behalf of a specific district, which is almost always drawn up without regard for county or municipal lines. Finding someone to appoint a representative is not feasible—simply put, no one is elected by the same group of constituents as a given representative. Senators, on the other hand, represent their entire state; as such, the 17th Amendment allows for the potential of gubernatorial appointment because a governor, like a senator, is elected by his or her entire state (i.e., by the same constituency). Thus, to the extent that it is possible, I would suggest that we exclude comparisons between the House and the Senate in the current discussion. The risk of vacancies in the House is certainly significant (though not as acute as in the Senate), but this is not a problem that can be ameliorated through temporary appointment.

A shortened special election cycle carries with it distinct disadvantages—voters have less time to study candidates, there is less time for campaigning, candidates are given less warning to prepare for the election, the price of a special election is significant, etc. However, I should note that there are some advantages to a shortened election cycle as well—a shorter election season may discourage petty argument and trivialities, because, under a shortened time frame, substantive debate is given greater priority.

These are considerations that states should account for when deciding their own particular policy apropos senate vacancies. Of course, these considerations will vary from state to state, depending on variables like the state's population, population density, urban/rural population distribution, the efficiency of the state's election process, the technological abilities of the election offices, the funding available for special elections, etc. That is why, when drawing up the 17th Amendment, the framers left these decisions to the individual states. States have a much better grasp of the challenges posed by a quick special election than the federal government. In some cases, states will decide that a special election for each vacancy is realistic and desirable, and that extending the temporary vacancy long enough to hold a special election is acceptable (indeed, this is the case in your home state of Oklahoma); in other cases, a state may decide that a temporary appointment by a governor is more realistic and more efficiently provides for senatorial representation in the Senate. Either way, the principle of federalism would dictate that the states continue to decide for themselves.

As mentioned, the potential of a state going without senatorial representation for a period of time is very real. In fact, according to Oklahoma law, this is exactly what would happen if both of Oklahoma's senators were unable to continue serving—the state would remain unrepresented until a special election took place. As a matter of principle, this is fine, because Oklahomans themselves, through their elected state officials, have chosen this mechanism for filling senate vacancies. What is unacceptable is for the federal government to prescribe mandatory periods of time without representation for every state.

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The right to equal representation is a guarantee that each state be given the same access to representation as every other state, and permits the states to work out for themselves how best to fill this position. (The 17th Amendment further specified that regularly scheduled elections be held statewide and democratically.)

The recommendations of the proposed amendment can (and perhaps should!) be taken up by the states individually. But by totally removing the potential of gubernatorial appointment, the federal government would infringe on the right of states to be represented continuously in the Senate (if they so choose). Insofar as the mandate for special election disallows representation for a period of time—irrespective of the state's wishes—the principle of equal representation is violated. The fundamental question is not whether the Senate is always 100 percent full (although this is certainly a question worth asking); more accurately, we should ask: who should decide the mechanism for filling a vacated seat—the states, or the federal government? This is the heart of the matter at hand.

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Questions of Representative John Conyers, Jr.

U.S. Senate Committee on the Judiciary
Subcommittee on the Constitution
&
U.S. House Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Joint Hearing on S.J. Res. 7 and H.J. Res. 21:
A Constitutional Amendment Concerning Senate Vacancies

1a. In your written testimony, you found that there was "no discussion of the vacancy clause" during the debate of the 17th Amendment. When people hear the word "temporary," most do not think of something lasting two or more years. What do you think the drafters meant by the term temporary appointments?

1b. Is there any Constitutional limit on how long an appointment can last before it stops being temporary?

The drafters meant by temporary that the appointment cannot exceed the next election cycle. The appointment would last until the state filled the vacancy through an election. The length of the temporary appointment would be determined by state legislatures. Elections serve as the mechanism by which an appointment stops being temporary.

2a. You describe the Senate as a "stable" and "deliberative" body. Although there are examples of Governor appointed Senators who have served long distinguished careers, of the 184 appointed Senators, only 60 were eventually elected and served another term.[1] Professor Karlan gives the example of a 24-hour Senator in her written testimony. Doesn't that hurt the Senate's stability?

2b. What weight should we give to this concern?

Stability, due to the longer term limits, is less susceptible to immediate political passions. A key aspect of the Senate's role in the Federal government is its continuity on behalf of the states. This key role is not undermined by gubernatorial appointments. There is no weight to the concern of stability. To the extent that a vacancy causes instability, a

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[1]John Fortier, *No Good Alternative to Appointments*, POLITICO, March 2, 2009.

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gubernatorial appointment stabilizes it. There is no contradiction between the principle of stability and gubernatorial appointments.

3. In your written testimony, you said that the question here is how to balance "the risk associated with . . . a bad appointment . . . and the people of a State not being fully represented in Congress for a period of time." Assuming that a special election could be held within weeks or a month of a vacancy, does that shift the scale in favor of special elections?

No, the proper balancing of these concerns should be left to the states. Each state has particulars which demand different answers. There is no need to impose special elections on a state that has specific circumstances that demand gubernatorial elections. Each state should decide for itself whether it is better to have a gubernatorial appointment or a special election.

4. If the ELECT Act took the form of a Constitutional amendment, would you support it as that would give States immediate representation while capping the length of temporary appointments?

No, the current mechanism allows states to make various decisions regarding their particular circumstances. There is no need to amend the Constitution and make one nationwide standard. This would be imposing on the states options that they already have. There is no controversy that requires a Constitutional amendment; the states can already choose what is best for their particular circumstances.

5. In your written testimony, you express the concern that without immediate appointments, States may not be represented at times of great significance. Former Representative Rahm Emmanuel's seat was only filled at the beginning of March, having been vacated in November. Do you think House vacancies should be filled by Governors for the same reason?

There are several important differences between Senatorial vacancies and House vacancies. First, because the Senate is a much smaller body, the absence of one Senator will be far more keenly felt. Moreover, the Senate has a unique responsibility in the sphere of treaties and foreign policy. In the case of a national emergency, continuity of government in the Senate is a particularly pressing concern. Second, Senators are elected to represent their State, while Representatives are elected to represent the constituents of their district. In most states, there is no executive authority elected by that same constituency, and so there is no one who might legitimately select a replacement. In

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states with only one Representative, however, it might be prudent to allow for gubernatorial appointment in the event of a House vacancy.

6a. If the delays created by special elections hurt a State's interests in Congress, shouldn't we have this same concern in the House where there are no gubernatorial appointments?

6b. Have you seen evidence of this?

6c. Shouldn't we be more concerned with House vacancies considering every person is represented by two Senators but only one Representative?

The premise of your question suggests that representation in the House and Senate differ only in the relative size of their constituencies. This is incorrect. As I stated in my written testimony, Senators represent States as unique, semi-sovereign entities, while Representatives are elected to represent the constituents of their district. As such, a Senatorial vacancy clearly hurts a State's interests, and a vacancy in the House hurts the interests of that district. However, when no other official is elected by the exact constituency that elects a Representative, no one is in a position to appoint a replacement.

7. Sixty-seven appointed Senators, or more than a third of all appointed Senators, did not seek reelection. Without a special election, how can the people make sure that these Senators who do not want reelection are representing their interests?

When Senators are appointed to fill vacancies, they are appointed by the democratically elected Governor of the State, representing the interests of the same exact constituency as the Senator. If the citizens of any State are concerned that their Governor may appoint Senators who do not represent their interests, their State legislatures may mandate special elections for Senatorial seats, as several states have already done.

SUBMISSIONS FOR THE RECORD

Written Testimony of Vikram David Amar
Associate Dean for Academic Affairs and Professor of Law, University of California, Davis School of Law
Before a Joint Hearing of the Committee on the Judiciary, Subcommittee on the Constitution, United States Senate, and the Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights and Civil Liberties, U.S. House of Representatives
March 11, 2009

Chairman Feingold, Ranking Member Coburn, Chairman Nadler, Ranking Member Sensenbrenner, Members of the two Committees:

My name is Vik Amar, and it is my distinct honor and pleasure to be here today to talk with you about S.J. Res. 7 and H.J. Res. 21 – a proposed constitutional amendment introduced by Chairman Feingold concerning Senate vacancies. For over 20 years, beginning with my days as a student at the Yale Law School, I have been studying and writing about the U.S. Senate and the central roles it plays in our constitutional scheme. My Yale Law Journal student Note, "The Senate and the Constitution,"[1] looked at the ways the Senate was more central in the area of constitutional interpretation than even the Supreme Court. One of my tenure pieces at the University of California[2] undertook a structural examination of the Seventeenth Amendment to uncover some unobserved consequences of direct election of Senators, and in one of my most recent law review articles[3] I analyzed the reasons the Seventeenth Amendment prefers Governors to state legislatures and other bodies when it comes to temporarily filling Senate vacancies, which led me to question the constitutionality of Wyoming's vacancy-filling statute – a statute that delegates to political party leaders the task of compiling lists from which a replacement Senator must come.

[1] Vik D. Amar, *The Senate and the Constitution,* 97 YALE L.J. 1111 (1988).
[2] Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment,* 49 VAND. L. REV. 1347 (1996).
[3] Vikram David Amar, *Are Statutes Constraining Gubernatorial Power to Make Temporary Appointments to the United States Senate Constitutional Under the Seventeenth Amendment?* 35 HASTINGS CONST. L. Q. 727 (2008).

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I. Specific Reasons to be Cautious About Amending the Constitution in this Area and What a Prudent Constitutional Amendment Would Make Sure to Include

So my interest in and thinking about Senator Feingold's proposal and things like it go back a long ways. Let me begin by making clear I fully agree with the premise of the proposed constitutional amendment: there is ordinarily no better way to pick Senators than through popular election. While some modern scholars and analysts might question whether the Seventeenth Amendment (and the historical practice of increasingly widespread direct election in many states that preceded it) was, on balance, a good thing, I am not among them: any lamentable reduction in state governmental clout in the federal government occasioned by the move away from state legislative selection is more than offset by the populist virtues of direct election. So if the question were simply whether the people are better than both the state legislatures and state Governors at picking Senators, my answer would be an emphatic: "Yes."

A. The Problem of Extended Vacancies

But there are problems with eliminating temporary appointment power altogether. The first difficulty arises because elections take time. As the Continuity of Government Commission reported in 2003, "under ideal circumstances, states could hold elections within two months [of an unanticipated House or Senate vacancy] if they dispensed with party primaries and drastically accelerated other aspects of the campaign," but a more likely timeframe under real-world constraints might be three months.[4] Three months doesn't sound like a long time, but such a delay in filling vacancies can matter a great deal when, as has been the case of late, the partisan balance in the Senate is close. This is especially true in light of modern filibuster practices and other supermajority rules and conventions. Very recent experience concerning the passage of

[4] Continuity of Government Commission, Preserving Our Institutions: The First Report of the Continuity of Government Commission 19 (Washington, D.C., 2003).

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this year's stimulus package highlights how even one vacant seat from Minnesota and/or one disability from the Massachusetts contingent can shape momentous legislation.

Delay in filling vacancies affects not only Senate actions, but also the states that are temporarily underrepresented and denied the equal suffrage in the Senate the Constitution takes extreme pains to guarantee. Indeed, the difficulty state legislatures experienced in promptly filling Senate vacancies was one of the key factors animating the move towards direct election that culminated in the Seventeenth Amendment.[5] And the unusual representational structure of the Senate can magnify the unfair consequences of a Senate vacancy for a state. By many modern instincts, it is counter-intuitive enough that large states like New York and Texas should receive no more voice in the Senate than small states like Hawaii and Alaska, but the possibility that California should have *half* the voice of Delaware for any appreciable period of time in the Senate borders on the surreal.

The problem of vacancies lasting months is, of course, exacerbated substantially by the specter of terrorism in a post-911 world. As my University of Texas colleague Sandy Levinson has reminded, "[u]nfortunately, it is not fanciful to imagine an attack on Washington that would kill dozens of senators."[6] The scary but not far-fetched prospect of, God forbid, a large number of Senators being killed or incapacitated such that a number of states or even parts of the country might lack Senate representation during the very months when key decisions about how the federal government must respond to crisis must be made should give every American pause before constitutionally eliminating all mechanisms for prompt if temporary replacement of fallen legislators. *At a minimum, then, any constitutional amendment in this area should have a*

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[5] *See* George H. Haynes, THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE 79-117 (1960).
[6] Sanford Levinson, *Political Party and Senatorial Succession: A Response to Vikram Amar on How Best to Interpret the Seventeenth Amendment*, 35 HASTINGS CONST. L. Q. 713, 723 (2008)

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provision for a fallback mechanism that is triggered by some declaration of national emergency or some numerical threshold of Senate vacancy.

B. The Problem of Voter Turnout in Special Elections

A second problem of special elections, related to but beyond the question of delay, is the question of voter turnout. Although I have not undertaken an exhaustive empirical study, there seems to be a broadly shared and eminently plausible intuition that voter turnout when only one contest – even a U.S. House or Senate race – is on the ballot is likely to be much lower on average than when House and Senate races appear along with other state and/or federal office contests and/or ballot measures on a regularly scheduled election ballot. As NYU Professor Clayton Gillette has pointed out in an analogous context, "[i]t is . . . not surprising that voter turnout at special elections . . . is lower than voter turnout at general elections."[7] To cite but one recent, if perhaps somewhat demographically unusual, example of seeming relative apathy in a special election, the voter turnout in the election held to fill only the U.S. Senate seat in Georgia last December was about one-half of the turnout in the regularly-scheduled November election just a month earlier[8] -- and this low December turnout was despite the general understanding that the special election's results could determine whether Democrats would have a filibuster-proof majority in the Senate. The premise with which we began, that popular elections are the best way to pick U.S. Senators – a premise with which I agree – would seem to be most justified only when those popular elections are ones in which a broad cross section of statewide voters are encouraged and likely to participate. The turnout problem may also be more pronounced in some states than others, counseling caution when uniform federal mandates are being considered.

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[7] Clayton Gillette, "Direct Democracy and Debt," 13 Journal of Contemp. Legal Issues 365, 386 (2004).

[8] "Chambliss wins Second Term in U.S. Senate," ATLANTA JOURNAL CONSTITUTION, Metro Section, Dec. 2, 2008, viewable at:http://www.ajc.com/metro/content/metro/stories/2008/12/02/georgia_senate_runoff.html?cxntlid=homepage_tab_newstab.

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Of course, Senator Feingold's proposed constitutional amendment does not require *special* elections to fill Senate vacancies; it requires only that elections – special or regularly scheduled – be the exclusive means of filling such vacancies. But the longer a state waits to have a vacancy-filling election – either to save costs by consolidating the vacancy-filling election with an already-scheduled one and/or to increase voter turnout by combining the vacancy-filling election with other important decisions about which voters care – the longer the state (and the nation) must suffer the consequences of that state being under (or un- , in the case of a dual vacancy) represented in the "greatest deliberative body on earth."

C. Why State Practice and the Debates over the Seventeenth Amendment Demonstrate Governors Are Better than State Legislatures as a Fallback

Recognizing and balancing these concerns, almost all states have chosen to create temporary appointment power rather than use only elections to fill Senate vacancies.[9] It bears noting that under the current Constitution, states are not obligated, but rather are merely authorized, to create temporary appointment power. And yet nearly all have. It is in the best tradition of federalism to recognize wisdom in the common practice of states.

If, then, as seems prudent, there should be some mechanism, either generally available or at the very least triggered by national emergency, for prompt vacancy-filling, we turn to the question of which branch of government is best suited to discharge the vacancy-filling power. Temporary gubernatorial appointment authority seems better than any of the alternatives. Governors are superior to state legislatures (and other bodies) here because Governors (unlike legislatures whose district lines are manipulated for partisan and other reasons) are elected by and directly accountable to the exact same statewide electorate that elects Senators.[10] Governors can also gather information privately about possible candidates and act quickly when time is of

[9] *See generally* Amar, *supra* note 3.
[10] *Id.*

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the essence. As Joseph Story said in this connection, "[c]onfidence might justly be reposed in the state executive, as representing at once the interests and wishes of the state, and enjoying all the proper means of knowledge and responsibility, to ensure a judicious judgment."[11]

D. The Shape and Size of a Prudent Constitutional Amendment (Including a Provision Concerning House Vacancies)

To summarize thus far, I argue that any constitutional change that requires elections be held to fill vacancies contain, at a minimum, an exception that would authorize prompt gubernatorial appointments in times of national emergency. And indeed even outside emergency situations, if special elections were constitutionally mandated to be held within a specified time thought to be shortest practicable period necessary to organize them, it might nonetheless be advisable to retain gubernatorial appointment power to fill vacancies during the interim.[12] After all, as noted above, even short vacancies can seriously prejudice underrepresented states as well as the nation as a whole.

Furthermore, if the Constitution were to be amended concerning Senate vacancies in these ways, I would recommend amending the provisions concerning House vacancies as well, to create a mechanism for prompt gubernatorial vacancy-filling power, at least in times of national emergency. Although vacancies of non-trivial duration in the House raise less severe democratic problems than do vacancies in the Senate, they are still undesirable. Constitutional amendments are invariably hard to pass and ratify; dealing with closely related problems in a single

[11] Joseph Story, COMMENTARIES ON THE CONSTITUTION 264-65 (Hillard, Gray and Company, 1833). One intriguing possibility is that the Constitution could be amended such that a Senator herself would be required to name (and advertise to voters before she is elected) her would-be successor(s) (in rank order), who would then fill the seat should she depart the Senate before her term ends. Such apostolic succession (as we have in effect in the White House) is an intriguing possibility, but also one that might be unduly complex and/or create some opportunity for gamesmanship; such an approach would warrant much more study before adoption.

[12] And if there were a concern that temporary appointees had too much incumbency advantage in the subsequent election, provision could be made to the effect that anyone appointed by a Governor to fill a Senate vacancy would be ineligible to be voted on for the Senate at the next election.

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amendment is eminently reasonable, both in terms of constitutional structure and esthetics as well as enactment strategy. Providing for temporary gubernatorial appointment power in the House would undoubtedly require a constitutional amendment, since there is no provision in the current Constitution akin to the Seventeenth Amendment allowing anything other than elections to fill House vacancies.

II. How a Well-Crafted Statute Would Cure Most or All of the Perceived Defects in the Current System and Why Such a Statute Would be Constitutionally Permissible

That brings me to the question of whether improvements concerning the Senate (unlike the House) require any constitutional change at all. My own tentative view is that a statute along the lines of the bill promoted by Congressman Aaron Schock currently entitled the "Ethical and Legal Elections for Congressional Transitions Act (E.L.E.C.T.)" is the wisest course to pursue. That bill, in the tradition of the Continuity in Representation Act, would require that an election to fill a Senate vacancy generally be held within 90 days of the vacancy's creation, but would not disturb any existing state law mechanisms for a temporary gubernatorial appointment to be made during the 90-day period. The bill would also provide states some money to help defray the costs of special elections.

Although one might quibble with some of the proposed statute's details (including the choice of 90 days, rather than 120 days, etc.), I believe the basic approach is sound, and that statutes are superior to constitutional amendments in this area. A statute would be easier to enact than a constitutional amendment, and could also be more easily perfected in the coming years as more data is gathered based on actual experience in the states. In general, the only substantial reason to prefer constitutional amendment to statutory enactment would be to lock in the new legal regime and prevent Congress from subsequent legislative amendment or repeal. But I see no particular reason to distrust Congress in this particular area, and any subsequent statutory

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amendment would probably be an attempt to act on new information and would not likely represent an illicit Congressional effort to undo a worthy law.

An important issue becomes, then, would a law such as E.L.E.C.T. be constitutionally permissible? I think it would. Surely Congress can require vacancy-filling elections to take place within a certain period of days with respect to House vacancies (as in the Continuity in Representation Act) under its Article I, Section 4 power to "alter or make" regulations concerning the "time, place and manner" of federal legislative elections. There is no question but that a 90-day time-frame is a regulation of the "time" of an election the Constitution already requires states to hold. Nor does the fact that a time requirement would apply to vacancy-filling House elections rather than regularly-scheduled biannual House elections affect the analysis; Article I, Section 4, enacted at the same time as Article I, Section 2's requirement that Governors issue writs of election to fill House vacancies, textually speaks to Congress' power to regulate the time of all House and Senate elections.

The question of Congressional power over vacancy-filling Senate elections may seem a bit trickier. Certainly, Congress under the original Constitution had the power to regulate the timing of all Senate elections done by state legislatures, including elections done by state legislatures to fill unexpected vacancies. Indeed, Congress in 1866 passed an Act that regulated the manner and timing of *all* state legislative elections of U.S. Senators. The Act said that whenever there was a Senate vacancy of any kind, both houses of a state legislature, on the second Tuesday they were in session, must vote to fill the vacancy, and if no person was elected,

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both houses must continue to vote at least once each and every day thereafter of the legislative session.[13]

Do the text and timing of the Seventeenth Amendment change any of this? I think the answer is "no." As for text, it is true that the last words of the vacancy-filling provision of the Seventeenth Amendment – "by election as the legislature may direct" – suggest that state legislatures enjoy discretion.[14] To be sure, the phrase "as the legislature[] thereof may direct"[15] or "as the Congress may direct"[16] used elsewhere in the Constitution connote broad independence and leeway. For example Article II's use of the phrase "as the legislature[] thereof may direct" has been interpreted by the Supreme Court in *Bush v. Gore*[17] as giving state legislatures extremely wide latitude in picking Presidential electors. But the key difference is that in the Presidential election context, state legislative discretion is not superseded by explicit Congressional power embodied in Article I, Section 4. Article I, Section 4 itself says state legislatures have power to prescribe times, places and manners – broad leeway – but that such power can be overridden by Congressional exercise. So even though the "as the legislature may direct" language of the Seventeenth Amendment connotes state legislative power, if that power is constrained by Article I, Section 4, then the Seventeenth Amendment provides no barrier to statutes like E.L.E.C.T.

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[13] For a discussion of this Act, see Haynes, *supra* note 4, at 85. *See also*, Robert Byrd, VOLUME I, THE SENATE, 1787-1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE 392 (1988).
[14] U.S. CONST., amend. XVII, § 2. In this regard, it might be worth noting that the original Constitution directly empowered state governors to make temporary appointments, whereas the Seventeenth Amendment authorizes state legislatures to empower state governors, an option known to but rejected by the original framers in 1787. *See* Story, *supra* note 10, at 264.
[15] U.S. CONST., art. II, § 1, cl. 2.
[16] U.S. CONST., amend.XXIII § 1.
[17] 531 U.S. 98 (2000).

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But can we apply Article I, Section 4 Congressional power to a provision of the Constitution enacted *after* Article I was adopted? Grammatically we surely can. Article I, Section 4, speaks broadly of Congress' power to "alter or make" "at any time" the regulations concerning the time of "holding elections for Senators and Representatives" – not just some temporal or geographical subset of Senators or Representatives.

Moreover, everyone seems to agree that we can and do apply Article I, Section 4 to regularly scheduled (every six year) Senate elections held by the people of each state, even though these popular elections are created and provided for only in the Seventeenth Amendment, adopted *after* Article I, Section 4. And there is nothing in the text of the Seventeenth Amendment that distinguishes regular popular elections from vacancy-filling popular elections. If Article I, Section 4 applies to the former, it ought to apply to the latter as well, and there are no words in or legislative history of the Seventeenth Amendment to suggest otherwise.

Indeed, the legislative history strongly favors applying Article I, Section 4 to all of the Seventeenth Amendment's provisions. Southern Senators attempted, during the latter stage debates over the Seventeenth Amendment, to insert language that would have freed popular elections of Senators from Congressional control under Article I, Section 4. Although these attempts ultimately failed, the members of Congress who debated the matter at length seemed to assume and/or agree that without such language qualifying the Seventeenth Amendment, all of the popular elections it provided for would indeed be subject to Congressional Article I, Section 4 time and manner oversight.[18] And even though the subjective understandings of the Amendment's drafters may not necessarily bind us today, their public proclamations of those understandings certainly informed what intelligent observers of the day likely understood the words to mean.

[18] *See* Haynes, *supra* note 4, at 108-115; Byrd, *supra* note 12, at 400-402.

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Finally, it bears noting that in the only other instance in which the post-1789 Constitution explicitly empowers states to do something they lacked power to do beforehand – the Twenty-First Amendment – the newly created state power is subject to preexisting federal legislative power to preempt. Section Two of the Twenty-First Amendment empowers states to create essentially federal laws concerning the in-state importation and distribution of alcohol, and yet the Supreme Court has held that this state empowerment does not abrogate Congress' Commerce Clause powers with regard to liquor: "The argument that "the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause" for alcoholic beverages has been rejected."[19]

For these reasons, E.L.E.C.T. is constitutional, and thus to my mind preferable, to changing the Constitution.[20] And if there were any doubt about whether a statute such as E.L.E.C.T. might be struck down, a fallback severability clause could easily be added to the effect that if the requirement of a 90-day election were invalidated, then any state that chose not to comply with the 90-day timeline would lose not only federal funding for its special elections, but also federal funding for a large subset of its elections more generally. Although some care might be taken to comply with *South Dakota v. Dole*,[21] it seems very likely a statute whose funding conditions would pass muster could be written in a way so as to encourage every state to comply with the 90-day time frame.

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[19] *Granholm v. Heald* 544 U.S. 460, 486-487 (2005) (citing, among others, *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).
[20] One potentially helpful thing a constitutional amendment could do that a federal statute could not is prevent a temporarily appointed Senator from running for the Senate seat in the next election. Article I, section 4's time and manner power would not extend to regulating the qualifications to be elected.
[21] 483 U.S. 203 (1987).

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Testimony of Alaska Senator Mark Begich

**Joint Hearing of the Senate Judiciary Constitution Subcommittee
And the House Judiciary Subcommittee on the Constitution,
Civil Rights and Civil Liberties
on Constitutional Amendments Regarding Senate Vacancies
10 a.m.; March 11, 2009; Hart 216**

Chairman Feingold, Chairman Conyers and members of the committees, thank you for the opportunity to testify today. I am Senator Mark Begich, the newly elected senator from Alaska.

I am honored to be an original co-sponsor of Senate Joint Resolution 7, along with Senator McCain. When Senator Feingold proposed a constitutional amendment requiring that states hold special elections to fill Senate vacancies, I believe I was the first to agree to co-sponsor.

I did so for two reasons. The first is that my constituents feel very strongly about this issue. Just five years ago, they voted overwhelmingly to require a special election in the case of a vacancy in Alaska's U.S. Senate seats. That vote, in response to a citizen-run initiative, was nearly 56 percent in favor.

That's a huge margin in my state, which is famous for close elections. When I was first elected mayor of Anchorage in 2003, my margin of victory was 18 votes over the threshold necessary to avoid a run-off. And I won this Senate seat by a little over 1 percent out of the more than 327,000 votes cast. They don't call me Landslide Begich for nothing.

The second reason I support this amendment is a more personal one. Some members of these subcommittees may know that my father was a member of the United States House of Representatives in Alaska's at-large seat. In October 1972, Congressman Nick Begich was campaigning for re-election to his second term in the House.

His small Cessna 310 left Anchorage on a stormy night bound for our state capital of Juneau. It never arrived.

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Also lost were House Majority Leader Hale Boggs of Louisiana, who was campaigning with my father, my father's aide and the pilot. I was 10 years old, left with my mother and five brothers and sisters.

Besides the terrible loss for our family, I recall this tragedy today for what happened next. As the largest aviation search in Alaska's history up to that time continued, the already scheduled state general election was held about three weeks later.

Despite his disappearance, Congressman Begich was re-elected with better than 56 percent of the vote. A margin, by the way, that I've never achieved in the many times I've stood before Anchorage and Alaska voters.

In late December, my father was officially declared deceased and a special election was set for March 1973. The two political parties nominated candidates, an abbreviated campaign took place and Don Young was elected Alaska's sole United States congressman, a seat he has held ever since.

Throughout this ordeal, Alaskans were officially without representation in the House of Representatives. But my recollection – and my review of news reports from that era – show no outcry for the appointment of a new congressman.

Alaskans then - like Alaskans now - feel strongly that their elected representatives in the federal government should be exactly that – elected. The residents of my state believe that they alone have the power to select those who represent them in the United States House and Senate.

I know a number of arguments will be advanced in opposition to this proposed amendment to our constitution: that a special election costs too much or that a state's citizens will be disenfranchised during a vacancy.

When balancing the relatively modest cost of a special election against one of the most fundamental principles of our democracy – the election of representatives of the people - I believe the expense is certainly justified.

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And as recent examples have shown us with drawn-out and controversial appointment scenarios, I believe the time required to mount a special election is far preferable to a gubernatorial selection.

Mr. Chairman, to me and my constituents, this issue is a simple one: United States senators should be elected by the voters of their states.

Thank you for the opportunity to testify in favor of this important proposed amendment to our constitution.

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Written Testimony of
Jennifer Brunner, Ohio Secretary of State
U.S. Senate Committee on the Judiciary, Subcommittee on the Constitution
U.S. House of Representatives Committee on the Judiciary, Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Chairman Feingold and Chairman Conyers and members of the United State House and Senate Committees on the Judiciary: thank you for providing the opportunity to present written testimony on Senate Joint Resolution 7 and House Joint Resolution 21 regarding a change in the way United State Senate vacancies are filled.

SJR 7 and HJR 21 would remove the ability of a governor to appoint an individual of his or her choosing to a vacant U.S. Senate seat, opting instead for a special election in which the voters of the state could decide whom would represent them.

It is my opinion that direct election of Senators to vacant U.S. Senate seats is preferable to permanent special appointment by the governor of the state. Recent events have provided greater attention to and scrutiny of the appointment process of U.S. Senate vacancies due to the perceived partisan nature in which some of these appointments were made. This perception undermines voter confidence in the selection process of elected officials and in democratic foundations of our nation as a whole.

While I fully support the removal of gubernatorial authority with regard to U.S. Senate vacancies, I do not think that holding a special election to fill these vacant seats is the most financially prudent approach. Simply put, special elections are prohibitively expensive, especially during the dire financial times in which we find ourselves. During my time as Ohio's Secretary of State, two members of our congressional delegation passed away and special elections were held to elect their replacements. The special election to replace Congressman Paul Gilmore cost the taxpayers of Ohio $612,400.96 and the special election to replace Congresswoman Stephanie Tubbs Jones cost $2,088,362.34 respectively.

These additional costs to an already cash-strapped state budget could be avoided if a temporary candidate is selected to hold the vacant senate seat until the next regularly-scheduled general election where a special election could then be held without any

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additional cost to taxpayers. This system would ensure that a vacant senate seat is not left empty, and citizens left unrepresented, until a special election can be held, while still giving voters the right to determine the ultimate successor to the vacant seat. As Ohio's Chief Elections Official and a steward of taxpayer dollars, it is my responsibility to run fair, free, open and honest elections in a financially responsible manner. This amendment would enable me to do that.

Thank you again for the opportunity to submit my thoughts on SJR 7 and HJR 21.

Statement of Senator Tom Coburn, M.D.

Hearing: *"S.J. Res. 7 and H.J. Res. 21: A Constitutional Amendment Concerning Senate Vacancies"*
Subcommittee on the Constitution
United States Senate Committee on the Judiciary
March 11, 2009

Mr. Chairman, today marks the first hearing of the Senate Judiciary Subcommittee on the Constitution in the 111th Congress, but also the first hearing I have attended as ranking member of this important subcommittee. I consider it a high honor to serve in this role, as matters within this subcommittee's jurisdiction — such as constitutional amendments and rights, separation of powers and federalism, and civil rights and liberties — are among the Senate's most awesome responsibilities.

I also consider it an honor to serve alongside Chairman Feingold, whose command of the law I have always respected. I look forward to working with the Chairman and other members of this subcommittee.

It is fitting that our first order of business is a proposal to amend the Constitution. The matter at hand serves as a reminder of the gravity of our responsibilities as members of this subcommittee.

Like the chairman, I do not consider constitutional amendments lightly. Modifying the nation's founding document should only be done in the most compelling circumstances. Just this week, some seven proposed constitutional amendments were referred to this subcommittee. While it is highly unlikely that all will be considered, our responsibility as members of this subcommittee is to thoroughly vet and debate such proposals before they advance in Congress.

After all, constitutional amendments are relatively rare. Since 1789, more than 5,000 proposals to amend the Constitution have been introduced in Congress, yet only 33 have gone to the states for ratification.[1] By design, the Constitution is difficult to alter. The Founders struck a brilliant balance by creating a document that is amendable, yet authoritative, and their design has served the republic well.

In reality, proponents of this — and any other — constitutional amendment face overwhelmingly unfavorable odds. Fortunately, proponents of the amendment at issue today do not have to wait for approval of supermajorities in the House and

[1] Heritage Guide to the Constitution, at pg. 285.

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Senate and three-fourths of the states. The Constitution permits what the amendment would require.

Although this hearing is intended to advance S.J. Res. 7 and H.J. Res. 21, it may also lead to further discussion within the states about the most prudent way to fill their own Senate vacancies. These discussions began in light of the inordinate number of vacancies created after the 2008 presidential election. Most notably, the scandal sparked by Illinois Governor Rod Blagojevich's efforts to fill the seat of our newly-elected president exposed the potential for corruption in gubernatorial appointments. Although calls for a special election in Illinois were rejected at the time, the fallout from that appointment continues, and we find ourselves here today, debating a proposal that would require for all states what one state would not do for itself.

It is important to note that the vast majority of states have chosen to exercise their constitutional right to allow gubernatorial appointments. Ironically, the chairman and I represent two of the small handful of states that do not allow such appointments. While the citizens of Wisconsin and Oklahoma have clearly determined that special elections are their own preferred course, whether the same approach is right for all of the other states is an open question.

Although the witness panel includes diverse perspectives, there are many important voices not present in today's debate. To that end, I would like to submit statements from governors who oppose this amendment, including the governors of Texas and Idaho. I have yet to hear anyone espouse the virtues of appointed representation over elected representation, but I have heard legitimate concerns raised about the practical implications this amendment may have for the states. It is important that we carefully consider all sides of this debate before moving forward on this amendment, and I invite others to weigh in on this proposal, even after the hearing is over.

I look forward to the witness testimony and thank the chairman for convening this hearing.

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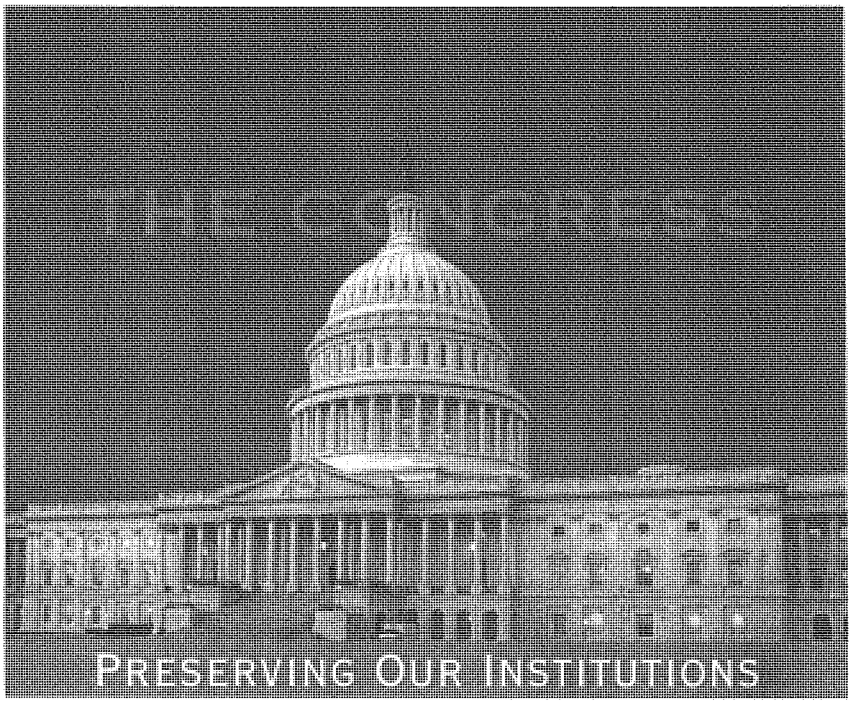

THE FIRST REPORT OF THE
CONTINUITY OF GOVERNMENT COMMISSION

PRESERVING OUR INSTITUTIONS

THE CONTINUITY OF CONGRESS

THE FIRST REPORT OF THE CONTINUITY OF GOVERNMENT COMMISSION

MAY 2003

Continuity *of* Government Commission

Continuity *of* Government Commission

www.continuityofgovernment.org

The Continuity of Government Commission is deeply dedicated to ensuring that our three branches of government would be able to function after a catastrophic attack that killed or incapacitated large numbers of our legislators, executive branch officials, or judges. It was, of course, the attacks of September 11th that prodded us to consider how an attack on our leaders and institutions might debilitate our country just at the very time strong leadership and legitimate institutions were most needed. In the aftermath of September 11th, our nation was able to call on the statesmanship and resolve of public officials operating through normal constitutional channels. If the attack had been more horrible, we might not have been able to respond so effectively.

Our first report—Preserving Our Institutions: The Continuity of Congress—addresses the continuity of our first branch of government. The commission will issue subsequent reports on the continuity of the presidency and the Supreme Court. We chose to begin with Congress because it is the institution least able to reconstitute itself after a catastrophic attack. While some protections exist for reconstituting the presidency pursuant to the Presidential Succession Act, under our current constitutional framework, Congress would have a far more difficult time filling large numbers of its own vacancies after an attack. It might not function well or at all for many months. Ensuring the continuity of Congress is now a more pressing need than at any previous time in our history. According to two of the 9/11 plotters, the fourth plane that crashed in Pennsylvania was headed for the Capitol, and it is entirely conceivable that Congress will again be a target.

To understand the threat to Congress and consider proposed solutions, our commission has held two all-day hearings. We have consulted with current and former members of Congress as well as with legal, constitutional, and institutional scholars. We have also received testimony and counsel from other former public officials and many private citizens who are concerned about the vulnerability of Congress and who have made thoughtful proposals to ensure its continuity. All of the testimony, proposals, and background information, as well as this report, can be found on our website at www.continuityofgovernment.org.

It is surely not pleasant to contemplate the possibility of future catastrophic attacks on our governmental institutions, but the continuity of our government requires us to face this dire danger directly. We hope and pray that no such attack occurs, but it would be a derogation of civic duty and wholly irresponsible not to prepare now for such a contingency.

Sincerely and Respectfully Submitted,

Lloyd Cutler
Co-chairman

Alan Simpson
Co-chairman

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ACKNOWLEDGMENTS

This Commission is a joint project of the American Enterprise Institute (AEI) and the Brookings Institution. The first to identify and pursue these issues was our senior counselor, Norman Ornstein of AEI, who alerted the world to the vulnerability of Congress just two weeks after September 11th with a piece in *Roll Call*. Our other senior counselor, Thomas Mann of Brookings, and our executive director, John Fortier of AEI, became engaged in the issue at an early stage and along with Ornstein researched and wrote about continuity of government issues and were involved in the founding of the commission. The commission would not have functioned smoothly without our assistant director Caroline Rieger, who oversaw the day-to-day operations. Kimberly Spears, our research assistant, investigated a wide range of topics and was integrally involved in the editing of this report.

The commission is funded by the Carnegie Corporation of New York, the William and Flora Hewlett Foundation, the John D. and Catherine T. MacArthur Foundation and the David and Lucille Packard Foundation. We thank these institutions for their commitment to the public good at a time of great national trepidation.

AEI and Brookings, their staff, and their presidents Christopher DeMuth and Strobe Talbott, have steadfastly supported the commission. Before the formal creation of the commission, AEI and Brookings hosted a series of informal discussions on these issues, and received insightful comments from Walter Berns, Bill Clinger, Robert Dove, Robert Goldwin, Richard Hertling, Daniel Meyer, Eric Peterson, and Sula Richardson. Michael Davidson, Alton Frye, Michael Glennon, and Don Wolfensberger participated in these discussions as well, and contributed much more. They drafted proposals, presented testimony, and critiqued much of the commission's work. Bill Frenzel participated in an early forum on the continuity of Congress and provided us with thoughtful comments. Randy Moss testified before our commission and was a source of wisdom on many of the difficult legal and constitutional issues in this report.

The commission's work was greatly strengthened by parallel efforts on Capitol Hill. At the same time Norm Ornstein was writing about the conti-

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nuity of Congress in the days just after September 11th, Congressman Brian Baird (D-WA) identified the issue and began drafting a solution. He introduced a constitutional amendment to allow governors to make temporary appointments to fill mass vacancies in the House. His persistent work on the issue generated further congressional interest. The Subcommittee on the Constitution of the House Judiciary Committee, under chairman Steve Chabot (R-OH) and ranking member Jerry Nadler (D-NY), held a hearing on the issue. The House Administration Committee and its chairman Bob Ney (R-OH) and ranking member Steny Hoyer (D-MD) held a hearing on how Congress would communicate and reconstitute itself after an attack. Bills to amend the Constitution were introduced by Senator Arlen Specter (R-PA) and Representative Zoe Lofgren (D-CA).

In the spring of 2002, the majority and minority leadership of the House of Representatives created a bipartisan working group to address continuity issues. Christopher Cox (R-CA) and Martin Frost (D-TX) chaired the effort. The working group held a series of weighty public and private hearings that addressed many aspects of the problem. They have issued initial recommendations and facilitated helpful House rules changes. We look forward to additional findings from the group.

Several members also testified before our commission at our first hearing: Cox, Baird, and Vic Snyder (D-AR). Representative James Langevin (D-RI) has identified how technology might aid Congress in communicating and functioning after an attack, and he testified at our second hearing.

The many individuals who contributed to the work of this commission have shared with us a variety of views, but it has been clear that they agree on the pressing need to strengthen Congress and ensure its continuity, even or especially, under the most grim circumstances.

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COMMISSIONER BIOGRAPHIES

HONORARY CO-CHAIRMEN

President Jimmy Carter
President Gerald R. Ford

CO-CHAIRMEN

Lloyd Cutler is senior counsel and founding partner of Wilmer, Cutler & Pickering. He served as counsel to Presidents Jimmy Carter and Bill Clinton. Cutler also served as special counsel to the president on ratification of the Salt II Treaty (1970-1980); President's special representative for maritime resource and boundary negotiations with Canada (1977-1979); and senior consultant of the President's Commission on Strategic Forces (Scowcroft Commission, 1983-1984). Cutler founded and co-chaired the Lawyers' Committee on Civil Rights Under Law. He has served as chairman of the board of the Salzburg Seminar; co-chairman of the Committee on the Constitutional System; a member of the Council of the American Law Institute; a trustee emeritus of the Brookings Institution; and an honorary bencher of the Middle Temple.

Alan K. Simpson served in the United States Senate from 1978 to 1997, acting as Minority Whip for ten of those years. He was an active force on the Judiciary Committee, Finance Committee, Environment and Public Works Committee, and a Special Committee on Aging. He also served as chair of the Veteran Affairs Committee. He is currently a visiting lecturer at the University of Wyoming. Before his election to the Senate, Simpson served as Majority Whip and later Majority Floor Leader in the Wyoming House of Representatives. In 1977 he became Speaker of the Wyoming House of Representatives. Simpson served as director of the Institute of Politics at Harvard University's John F. Kennedy School of Government from 1998 to 2000.

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Philip Chase Bobbitt is the A.W. Walker Centennial Chair in Law at the University of Texas School of Law. Bobbitt has served as Associate Counsel to the President, the Counselor on International Law at the State Department, Legal Counsel to the Senate Iran-Contra Committee, Director for Intelligence, Senior Director for Critical Infrastructure and Senior Director for Strategic Planning at the National Security Council. He serves on the Editorial Board of Johns Hopkins University's *Bioterrorism and Biosecurity: Biodefense Strategy, Practice, and Science*, as well as the

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Advisory Board for Texas Tech's Center for Biodefense, Law, and Public Policy. Bobbitt is a former member of the Oxford University Modern History Faculty and the War Studies Department of Kings College, London.

Kenneth M. Duberstein served as President Ronald Reagan's Chief of Staff in 1988 and 1989, following his previous service as Deputy Chief of Staff. From 1981 to 1983 he served as both an Assistant and Deputy Assistant to the President for Legislative Affairs. His earlier government service included Deputy Under Secretary of Labor during the Ford Administration and Director of Congressional and Intergovernmental Affairs at the U.S. General Services Administration. He serves on the boards of several corporate and nonprofit organizations, including the Boeing Company, Fannie Mae, Kennedy Center for the Performing Arts as Vice Chairman, the Council on Foreign Relations, the Brookings Institution, and others. He is currently Chairman and Chief Executive Officer of the Duberstein Group.

Thomas Foley is a partner at Akin, Gump, Strauss, Hauer, & Feld, LLP. Ambassador Foley is currently the chairman of the Trilateral Commission. He served as the twenty-fifth U.S. ambassador to Japan from 1997 to 2001. Before taking up his diplomatic post, Foley served as the forty-ninth Speaker of the House of Representatives. He was elected to represent the state of Washington's fifth congressional district fifteen times, serving his constituents from January 1965 to December 1994. Foley served as Majority Leader from 1987 until his election as Speaker in 1989. From 1981 to 1987 he served as Majority Whip. Foley is currently a member of the Council on Foreign Relations. Before his appointment as ambassador, he served as chairman of the President's Foreign Intelligence Advisory Board.

Charles Fried is Professor of Law at Harvard Law School, where he has taught since 1961. From 1985 to 1989 he was Solicitor General of the United States and from 1995 to 1999 he was an Associate Justice of the Supreme Judicial Court of Massachusetts. He has taught courses on appellate advocacy, commercial law, constitutional law, contracts, criminal law, federal courts, labor law, torts, legal philosophy, and medical ethics. His major works include *Order and Law: Arguing the Reagan Revolution* (which has appeared in over a dozen collections); *Contract as Promise: A Theory of Contractual Obligation*; and *An Anatomy of Values*. He is a member of the National Academy of Sciences Institute of Medicine, the American Academy of Arts and Sciences, and the American Law Institute.

Newt Gingrich is a senior fellow at AEI and a visiting fellow at the Hoover Institution at Stanford University. He was named a distinguished visiting scholar at the National Defense University in 2001. He is also the chief executive officer of the Gingrich Group, an Atlanta-based consulting firm, and a political commentator and analyst for the Fox News Channel. Gingrich serves on the Board of Directors of the Juvenile Diabetes Research Foundation and the Wildlife Conservation Society and is a member of the Secretary of Defense's National Security Study Group. A member of Congress for twenty years and Speaker of the House from 1995 to 1999, Gingrich is credited as being the chief architect of the Contract with America, which led to the 1994 Republican congressional victory and the first GOP majority in forty years.

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Jamie S. Gorelick is Vice Chair of Fannie Mae, which she joined in May 1997. Before joining Fannie Mae, Gorelick was Deputy Attorney General of the United States, a position she assumed in March 1994. From May 1993 until she joined the Justice Department, Gorelick served as General Counsel of the Department of Defense. From 1979 to 1980 she was Assistant to the Secretary and Counselor to the Deputy Secretary of Energy. In the private sector, from 1975 to 1979 and again from 1980 to 1993, Gorelick was a litigator in Washington, D.C. She served as President of the District of Columbia Bar from 1992 to 1993. She is a member of the Council on Foreign Relations and the American Law Institute. Gorelick currently serves on the Central Intelligence Agency's National Security Advisory Panel, as well as the President's Review of Intelligence.

Nicholas deB. Katzenbach served first as deputy U.S. Attorney General under President John F. Kennedy, then, under President Lyndon B. Johnson, as U.S. Attorney General (1964-66). In the Johnson Administration he also served as Under Secretary of State. Following his government service, Katzenbach served as Senior Vice President and General Counsel of IBM Corporation. He left IBM in 1986 to become a partner in Riker, Danzig, Scherer, Highland & Perretti until 1994. He practiced law in New Jersey and New York and taught law first at Yale Law School and then at the University of Chicago Law School. He has published (with Morton A. Kaplan) *The Political Foundations of International Law* (1961), as well as many articles for professional journals.

Robert A. Katzmann* is a United States Circuit Judge for the U.S. Court of Appeals for the Second Circuit. He is a political scientist and lawyer by training. After clerking on the U.S. Court of Appeals for the First Circuit, he joined the Brookings Institution Governmental Studies Program where he was a fellow and acting program director. He was the Walsh Professor of Government, Professor of Law, and Professor of Public Policy at Georgetown University; served as a public member of the Administrative Conference and as a director of the American Judicature Society; and was Vice Chair of the Committee on Government Organization and Separation of Powers of the ABA Section on Administrative Law. He served as special counsel to Senator Daniel Patrick Moynihan on the confirmation of Justice Ruth Bader Ginsburg. His many writings include *Courts and Congress* (1997). He is a founder of the Governance Institute.

Lynn Martin is chair of Deloitte & Touche's Council on the Advancement of Women and is an adviser to the accounting firm. She was the Secretary of Labor under President George H. W. Bush. Before serving as Secretary of Labor, she represented the sixteenth congressional district of Illinois in the U.S. House of Representatives from 1981 to 1991. She was the first woman to achieve an elective leadership post when she was chosen as Vice Chair of the House Republican Conference, a position she held for four years. During her ten-year tenure, Martin served on the House Rules Committee, the House Armed Services Committee, the House Budget Committee, the Committee on Public Works and Transportation, and the Committee on the District of Columbia.

Kweisi Mfume is President and CEO of the NAACP. He served as a U.S. Representative to

* Participating as a commissioner on matters relating to the judiciary only

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Maryland's seventh congressional district for ten years. As a member of Congress, Mfume sat on the Banking and Financial Services Committee; held the ranking seat on the General Oversight and Investigations Subcommittee; served as a member of the Committee on Education; and as a senior member of the Small Business Committee. While in office, he was chosen to serve on, and later chaired, the Ethics Committee and the Joint Economic Committee of the House and Senate. Mfume was chairman of the Congressional Black Caucus and later chaired the CBC's Task Force on Affirmative Action. In his last term of Congress, the House Democratic Caucus appointed him Vice Chairman for Communications.

Robert H. Michel is Senior Advisor for Corporate and Governmental Affairs at Hogan & Hartson L.L.P. He served thirty-eight years in Congress as a Representative from Illinois. His first leadership position was Chairman of the Congressional Campaign Committee in 1972. He then served as Republican Party Whip from 1974 until 1980, when he was elected and served for fourteen years as House Minority Leader. Mr. Michel served for twenty-one years as a member of the House Appropriations Committee. Mr. Michel serves on the boards of BNFL, Inc., the Dirksen Leadership Center, Bradley University, and the Capitol Hill Club. He also serves as co-chair of the National Commission on Federal Election Reform. In 1989 Mr. Michel was presented with the Citizens Medal. In 1994, he was awarded the Presidential Medal of Freedom—our nation's highest civilian honor.

Leon Panetta is Director of the Leon and Sylvia Panetta Institute for Public Policy at California State University, Monterey Bay. Panetta served as White House Chief of Staff during the Clinton Administration from July 1994 to January 1997. Before assuming that role, he served as director of the Office of Management and Budget. Before his move to the White House, he was a U.S. Representative from California's sixteenth congressional district from 1977 to 1993, representing the Monterey Bay area. During his years in Congress, Panetta chaired several committees and subcommittees such as the House Committee on the Budget and the House Agriculture Committee's Subcommittee on Domestic Marketing, Consumer Relations, and Nutrition. His House tenure included four years as chairman of the Budget Committee.

Donna E. Shalala served as Secretary of Health and Human Services in the Clinton Administration from 1993 to 2001. Before joining the Clinton Administration, Shalala served as Chancellor of the University of Wisconsin-Madison. She has taught political science at Syracuse University, Columbia, the City University of New York, and the University of Wisconsin-Madison. In the Carter Administration, she served as Assistant Secretary for Policy Development and Research, U.S. Department of Housing and Urban Development. She is currently a professor of Political Science and President of the University of Miami.

SENIOR COUNSELORS

Norman J. Ornstein is a resident scholar at AEI. He also serves as an election analyst for CBS News. Ornstein writes regularly for *USA Today* as a member of its Board of Contributors and writes a column called "Congress Inside Out" for *Roll Call*. He co-directs the Transition

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to Governing Project and also serves on the Council on Foreign Relations First Responders Task Force on Homeland Security. He appears often on television programs such as *Nightline*, *Today*, *Face the Nation*, and *The NewsHour* with Jim Lehrer. He writes frequently for the *New York Times*, the *Washington Post*, and other major newspapers and magazines. His books include *Vital Statistics on Congress, 2001-2002*, with Thomas E. Mann and Michael J. Malbin (2002) and *The Permanent Campaign and Its Future*, with Thomas E. Mann (2000).

Thomas E. Mann is the W. Averell Harriman Chair and Senior Fellow in Governance Studies at The Brookings Institution. Between 1987 and 1999 he was Director of Governmental Studies at Brookings. Before that, he was executive director of the American Political Science Association. Mann, a fellow of the American Academy of Arts and Sciences, is also working on projects dealing with campaign finance (in the U.S. and other countries) and election reform (including redistricting). His books include *Vital Statistics on Congress, 2001-2002*, with Norman J. Ornstein and Michael Malbin (2002); *The Permanent Campaign and Its Future*, with Norman J. Ornstein (2000); and *Inside the Campaign Finance Battle: Court Testimony on the New Reforms*, with Anthony Corrado and Trevor Potter (2003).

EXECUTIVE DIRECTOR

John C. Fortier is a research associate and political scientist at AEI, where he is the project manager of the Transition to Governing Project. He is also a regular participant in "Election Watch," AEI's election analysis forum. Fortier has taught at Boston College, Harvard University, and the University of Delaware. He has published articles in the *Review of Politics*, *PS: Political Science and Politics*, *The University of Michigan Journal of Law Reform* (forthcoming), *State Legislatures Magazine*, the *New York Times*, *TechCentralStation*, the *Newark Star Ledger*, and the *Washington Times*. Mr. Fortier has provided commentary for BBC radio and television, CTV (Canadian television), Fox News, C-SPAN, WBUR (NPR, Boston), WAMU (NPR, Washington), and WNYC (NPR, New York).

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PREFACE: THE CONTINUITY OF GOVERNMENT

It is 11:30 A.M., inauguration day. Thousands await the noon hour when a new president will take the oath of office in the presence of members of Congress, the Supreme Court, family, and supporters. The outgoing president is meeting at the White House with his cabinet and top aides for a final farewell before attending the swearing in ceremony where the reins of power will switch hands. Television networks have their cameras trained on the West Front of the Capitol, beaming live coverage of the event into millions of homes around the world.

Suddenly the television screens go blank! Al Qaeda operatives have detonated a small nuclear device on Pennsylvania Avenue halfway between the White House and the Capitol. A one-mile-radius circle of Washington is destroyed. Everyone present at the Capitol, the White House, and in between is presumed dead, missing, or incapacitated. The death toll is horrific, the symbolic effect of the destruction of our national symbols is great, but even worse, the American people are asking who is in charge, and there is no clear answer.

The incoming president and vice president are surely dead, so the presidency passes through the line of succession to the Speaker of the House and then to the President Pro Tempore of the Senate. But both of them were at the inaugural ceremony, as protocol requires, so the presidency passes to the cabinet officers—but which cabinet? The president-elect never took office and never confirmed a cabinet. The presidency passes through the line of succession to the cabinet officers of the departing administration, assuming they have not resigned by January 20th, as is standard procedure, and assuming that they were not at the White House bidding farewell to the outgoing president. Perhaps the Secretary of Veterans Affairs, or another lesser-known cabinet member, was not in the area; then he or she would become president. Or maybe no one in the line of succession is alive, and a number of generals, undersecretaries, and governors claim that they are in charge.

Congress has been annihilated as well, with only a few members who did not attend the ceremony remaining. It will be many months before

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Congress can function. Our Constitution requires a majority of each house of Congress to constitute a quorum to do business, and no such majority of the House or Senate exists. In addition, because of a series of past parliamentary rulings, there is confusion about whether there are enough members to proceed. The House's official interpretation of the quorum requirement is a majority of the living members, a proposition that scholars have questioned. Under this interpretation, if only five House members survive, a group of three might proceed with business and elect a new Speaker who would become president of the United States, bumping any cabinet member who had assumed the presidency and remaining in office for the rest of the four-year term.

Because the House of Representatives can fill vacancies only by special election, the House might go on for months with a membership of only five. On average, states take four months to hold special elections, and in the aftermath of a catastrophic attack, elections would likely take much longer. Under the Seventeenth Amendment governors can fill vacancies within days by temporary appointment, therefore the Senate would reconstitute itself much more quickly than the House.

Imagine in this chaotic situation that all these events are taking place without access to normal organization, procedure, and communication channels. The confusion might very well lead to a conflict over who would be president, Speaker of the House, or commander in chief, and a cloud of illegitimacy would likely hang over all government action. The institution that might resolve such disputes is the Supreme Court. However, it is likely that the entire Court would be killed in such an attack, leaving no final tribunal to appeal to for answers to questions about succession and legislative and executive action. A new court could be appointed by a new president and confirmed by a new Senate, but which president, which Senate, and how soon? Further, would we want the entire Supreme Court appointed for life tenure by a disputed or unelected president?

As terrible as the events of September 11th were, we were fortunate that in the aftermath, our government was able to function through normal constitutional channels. It almost was not so. In interviews broadcast on the Al-Jazeera network, the 9/11 plotters have claimed that the fourth plane, United Flight 93, was headed for the Capitol (see Appendix II). This fourth plane took off forty-one minutes late, which allowed the passengers to contact loved ones by cell phone and learn that their flight was on a suicide mission. Passengers stormed the cockpit, ultimately bringing down the plane and preventing it from hitting its target.

If United Flight 93 had departed on time and the hijackers had flown to Washington without interference, the plane might have hit the Capitol between 9:00 and 9:30 A.M. At nine o'clock the House met with Speaker J. Dennis Hastert (R-IL) presiding and recognized Representative Earl Blumenauer (D-OR), who spoke about the World Health Organization. Representative Tim Johnson (R-IL) took over the chair and recognized Representative Cass Ballenger (R-NC), who discussed the budget surplus. The chair then recognized Representative Peter DeFazio (D-OR), who talked about the Social Security Trust Fund. The floor was not heavily populated that Tuesday morning, with most business scheduled later that day, but there were still a number

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of members on the floor and many others in leadership offices or in private meetings in the Capitol. How many members of the House were in the building that morning is difficult to calculate, but it is clear that many would have perished. Had the attacks occurred a little later in the day, the toll would have been even greater. What if the plane had hit the Capitol the week before, on September 6, 2001, when Mexican President Vicente Fox addressed a joint session of Congress with the vice president and the president's cabinet in attendance? What if the attack had been carried out during a major vote when almost all members were present?

The inauguration scenario described above is admittedly dire, but even less calamitous scenarios could plunge our constitutional government into chaos. Imagine a House of Representatives hit by an attack killing more than half the members and unable to reconstitute itself for months. Imagine any attack killing the president and vice president, subjecting us to a new president who had not been elected by the people. Imagine a biological attack that prevented Congress from convening for fear of spreading infectious agents. A few years ago, these were fanciful notions, the stuff of action movies and Tom Clancy novels. Now they are all too realistic.

THE CONTINUITY OF THE THREE BRANCHES OF GOVERNMENT

The mission of the Continuity of Government Commission is to make recommendations to ensure the continuity of our three branches of government after a terrorist attack on Washington. While we hope and pray that the United States never faces such an attack, we believe it is imperative to plan for such a scenario. Given the events of September 11th, we must prepare for an orderly and legitimate succession of governance after a catastrophic event.

What are the problems of continuity associated with the three branches of government?

Congress. The greatest hole in our constitutional system is the possibility of an attack that would kill or injure many members of Congress, thereby preventing the branch from operating or alternatively, causing it to operate with such a small number that many people would question its legitimacy. The problem is acute in the House of Representatives. Because the House can only fill vacancies by special election, not by temporary appointment, it would take over four months to reconstitute the full membership of the House. In the interim, the House might be unable to meet its quorum requirement and would be unable to proceed with business. Alternatively, due to ambiguities regarding the definition of a quorum, a very small number of representatives might be able to conduct business for many months, possibly electing a Speaker who could become the president of the United States. A House consisting of only a few members would raise serious questions of legitimacy. Finally, it is possible that an attack, severely injuring but not killing large numbers of members, would threaten the continuity of both the House and the Senate. Because it is very difficult to replace incapacitated members, many House and Senate seats would remain effectively vacant until the next general election. If anyone doubts the importance of Congress in

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times of crisis, it is helpful to recall that in the days after September 11th, Congress authorized the use of force in Afghanistan; appropriated funds for reconstruction of New York and for military preparations; and passed major legislation granting additional investigative powers and improving transportation security. In a future emergency, Congress might also be called upon to confirm a new vice president, to elect a Speaker of the House who might become president of the United States, or to confirm Supreme Court justices for lifetime appointments. In the event of a disaster that debilitated Congress, the vacuum could be filled by unilateral executive action—perhaps a benign form of martial law. The country might get by, but at a terrible cost to our democratic institutions.

The President. Presidential succession is the most visible aspect of continuity of government. Nothing is more important than having a credible and legitimate president leading the nation in the aftermath of a catastrophic attack. In this area, the country has some existing protection in the Constitution and in the Presidential Succession Act of 1947, which provide for the transfer of power to legitimate authorities. But the law defining presidential succession is by no means perfect, and there are a number of scenarios that would leave doubt as to who is president or elevate an obscure claimant to the office. There are at least seven significant issues with our presidential succession law that warrant attention. First, all figures in the current line of succession work and reside in the Washington, D.C. area. In the nightmare scenario of a nuclear attack, there is a possibility that everyone in the line of succession would be killed. Second, a number of constitutional scholars doubt that it is constitutional to have the Speaker of the House and the President Pro Tempore of the Senate in the line of succession, because they do not meet the constitutional definition of "Officers" of the United States. Third, regardless of its constitutionality, some question the wisdom of putting the President Pro Tempore of the Senate in the line of succession, because this largely honorific post is traditionally held by the longest serving senator of the majority party. Fourth, some suggest that congressional leaders of the president's party should be in the line of succession; the current law allows for a switch in party control of the presidency if the Speaker of the House or President Pro Tempore of the Senate is from a different party than the president. Fifth, the line of succession proceeds through the cabinet members in order of the dates of creation of the departments that they head. While several of the most significant departments are also the oldest, it may not make sense to rely simply on historical accident rather than an evaluation based on present circumstances in appointing a successor. For example, should the Secretary of the Interior be ahead of the Secretaries of Commerce, Energy, or Education? Sixth, if the line of succession passes to a cabinet member, the law allows for the House of Representatives to elect a new Speaker (or the Senate a new President Pro Tempore) who could bump the cabinet member and assume the presidency at any time. Seventh, the Twenty-fifth Amendment provides for several instances of presidential disability when the vice president can act as president, but it does not cover circumstances when the president is disabled and the vice presidency is vacant. In this case, the Presidential Succession Act allows congressional leaders and cabinet officers to act as president for a short time, but only if they resign their posts.

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This commission will issue detailed recommendations on presidential succession later this year. The aim of the recommendations will be to ensure that there is a legitimate and expeditious transfer of power to individuals clearly designated in advance. It is not acceptable to face a situation when no one in the line of succession survives or when there are competing rivals for the presidency or a presidency that shifts numerous times from one individual to another.

The Supreme Court. The deliberative schedule of the Supreme Court of the United States is generally predictable and measurable over a period of months: from the time petitions are filed, to the time a case might be argued, to the time a decision would be delivered by the Court. There have been, however, extraordinary cases that require the Court's immediate attention. If such a case arose during a national crisis involving, for example, separation of powers issues or presidential succession issues, the Supreme Court might be needed to make a prompt ruling. Thus, the continuity of the Supreme Court during a period of crisis also deserves attention.

Congress has provided that a quorum of the Supreme Court is six justices. In the absence of a quorum, there are provisions for sending cases to the lower courts. Additionally, lower courts routinely rule on constitutional issues. If the entire Supreme Court were eliminated, however, there would be no final arbiter to resolve differences in the lower courts' opinions for a period of time. This situation could add to feelings of instability in the country. Moreover, the appointment process of an entirely new Court by a potentially un-elected president (serving in the line of succession) presents other issues that need to be addressed.

The Continuity of Government Commission will address succession in each branch of government. This first report focuses on the continuity of Congress, the biggest hole in our constitutional system. Our second and third reports will cover the presidency and the judiciary.

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CONTINUITY OF CONGRESS: THE PROBLEM

In the aftermath of an attack that killed or severely injured a large number of representatives and senators, there is a high probability that there would be no functioning Congress, or a Congress with such a small membership as to call into question the legitimacy of its actions. A catastrophic attack that killed many members would directly affect the House of Representatives because the Constitution effectively prevents the swift filling of vacancies in that body. An equally problematic scenario would be an attack that left many members incapacitated, which would affect both the House and Senate because neither chamber can easily replace living, but incapacitated, members until the next general election. The twin problems of mass death and incapacitation would threaten the functioning of Congress just at the time our country is most in need of strong leadership.

I. THE PROBLEM OF MASS VACANCIES

The House of Representatives would be severely affected by mass vacancies caused by a catastrophic attack. The difficulty is rooted in our Constitution, which prescribes different methods for filling vacancies in the House and Senate. For vacancies in the House of Representatives, ARTICLE 1, SECTION 2, CLAUSE 4, provides that "when vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies." A special election is the only method for filling House vacancies. By contrast, the Seventeenth Amendment, which governs vacancies in the Senate, provides that "when vacancies happen in the representation of any state in the Senate, the executive authority of such state shall issue writs of election to fill such vacancies; provided, that the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct." Because almost all state legislatures have given their governor the power to make temporary appointments until an election is held, Senate vacancies are, in practice, filled almost immediately by gubernatorial appointment.

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The House of Representatives would have many seats vacant for a significant period of time in the aftermath of an attack because the process of filling vacancies by special election takes on average four months. In the 99th through the 107th Congress, the average time it took states to hold special elections to fill House vacancies caused by death was 126 days. Some of these vacancies were filled in as little as two and a half months, while others lasted for over nine months (see Appendix IV). Differences in state laws and the circumstances of the vacancy greatly affect the time it takes to hold a special election. Some states dispense with primaries for special elections. Others give the governor broad discretion on the timing of the election. The timing of the election is often affected by when in the course of the term the vacancy occurs. Some states do not fill vacant seats if they occur in the last six months of a term (see Appendix V).

There are good reasons for the length of time it takes to hold special elections. Candidates need a significant period of time to qualify for the ballot (e.g., by securing a number of signatures). Many states require political party primaries rather than allowing the parties to select their candidates directly. A real campaign requires time for candidates to communicate with voters, debates to take place, the media to scrutinize the candidates, etc. Finally, there are logistical limitations on setting up polling places and printing ballots.

How quickly could states hold special elections if they adopted new laws that expedited those elections? Under ideal circumstances, states that dispense with primaries and streamline their special election process might be able to complete one within two months. The commission estimates, however, that in the chaos after an attack, it would be difficult for even the most expedited elections to take place within three months. Not only might there be an initial period of confusion that would delay the election, but there is also no precedent for holding hundreds of special elections at the same time. One problem along these lines was identified by a House working group chaired by Representatives Christopher Cox (R-CA) and Martin Frost (D-TX)—there are a limited number of ballot printing companies, and they are not prepared to print ballots on a moment's notice for more than a few races at a time. There would be similar issues in setting up polling places.

Under the current constitutional arrangement, there is no effective way to begin filling House vacancies in less than three months after an attack. Given this limitation, how would an attack that kills hundreds of members affect the workings of Congress?

Mass Vacancies Could Prevent the House from Operating at All: The Quorum Requirement

Like any legislative body, the United States Congress has a quorum requirement, a provision to ensure that a minimum number of members is present for the consideration of important business. Without such a requirement, a few members might meet and pass legislation, even though the voting members would represent only a fraction of the American people. But Congress' quorum requirement is more rigid than those in other legislative bodies because it is embedded in the United States Constitution and cannot be

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changed without a constitutional amendment. ART. 1, SEC. 5 provides that "...a Majority of each [House] shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide." It is clear from the text of the Constitution and subsequent precedents that once it is established that no quorum is present, the only actions that the House or Senate may take are to adjourn or to compel the attendance of absent members. No other business can be conducted.

Under the most commonsense reading of this clause, the Constitution requires that a majority of the whole number of each house of Congress be present in order for that house to hold votes of substance. The authors of the Constitution knew how to express the difference between a majority of those present and a majority of the whole number, as they did in the clauses providing for impeachment trials and for the advice and consent of the Senate to treaties where two-thirds of the "members present" are required. The Framers' understanding of the clause as requiring a majority of the whole number of each body to constitute a quorum prevailed until the Civil War. Today, under this interpretation, if fewer than 218 members of the House of Representatives were alive, then Congress could not function until special elections filled enough vacancies to reach the constitutional quorum requirement. Mass vacancies would mean that no legislation could be passed, as all legislation requires the assent of both houses. No appropriations could be made; no declaration of war; no laws passed to assist in the gathering of intelligence or apprehension of terrorists. If the Speaker of the House was killed, the House could not elect a new Speaker—who would be the third person in the line of succession? If the president or vice president were killed, no new vice president could be confirmed, as the appointment of a new vice president requires the consent of both the House and Senate. Given the length of time it takes to hold special elections, Congress could not function in these important areas for months.

Mass Vacancies Could Call into Question the Legitimacy of Congress: Ambiguities in the Quorum Requirement Might Allow a Few Members to Act for the Whole Congress

In practice, the official interpretations by the House and the Senate of their quorum requirements have not been as stringent as the constitutional language would seem to require. Parliamentary rulings in the House and Senate, beginning during the Civil War, have defined the quorum more liberally than a majority of the members of each house. The quorum requirement in the House is now defined by precedent as a majority of the members who are "chosen, sworn *and living*."

The evolution of the interpretation of the quorum rule is a long and complicated story. In brief, the first change to the interpretation of the House quorum rule occurred in 1861 when there was a depleted House membership due to Southern secession. Speaker Galusha Grow noted that a "majority of all the possible Members of the House," could not be obtained. He ruled that

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the quorum would consist of a majority of those legitimately chosen, which exempted the seats on the Southern states from the count. The Senate adopted the same rule in 1864 for similar reasons.

In 1868, the Senate modified its interpretation of the quorum rule to be a majority of those "duly chosen and sworn." The occasion of the change was post-war confusion surrounding new governments in the South and uncertainty about when the Southern states would be fully represented in Congress.

From 1879 to 1890, there were several instances when the Speaker expressed a personal opinion that the House quorum rule was a majority of those "chosen and living." It was not, bowever, until 1891 that Speaker Reed issued an official opinion to this effect. The occasion was a vote of minor importance. Because several members of the chamber bad died, there would have been no quorum present if a majority of the whole number was counted, but there was a majority if one excepted the deceased members. Finally, in 1906, Speaker Cannon modified the interpretation of the quorum rule to be a "majority of those Members chosen, sworn, and living, whose membership has not been terminated hy resignation or by action of the House." The addition of "sworn" paralleled the Senate's change of 1868. Again, the occasion for the change was a vote of minor importance. A few members had not yet been sworn in, and exclusion of their seats from the counting of the quorum meant that a quorum could be achieved for that vote. The current House interpretation of the quorum rule is a "majority of those Members chosen, sworn, and living, whose membership has not been terminated by resignation or by action of the House." The current Senate interpretation of the quorum rule is "a majority of the Senators duly chosen and sworn."

The most significant aspect of the current interpretation for the purposes of continuity of government is the provision that only a majority of the living members needs to be present for a vote rather than a majority of the whole number of seats. In the case of a few deaths in the House, the change in the number needed for the quorum would be insubstantial. (If 2 members of the 435 were dead the quorum requirement would be 217 instead of the 218 with no deaths and a full membership.) But in the case of a large number of deaths, the current interpretation of the quorum requirement would have serious consequences. On the one hand, it would ensure that the House could operate with a quorum even after a massive death toll. But at the same time, it would allow the House to operate with just a handful of members. Take, for example, an attack that kills all but nine members of Congress. Five of those nine would constitute a quorum, and that tiny, unrepresentative group could pass legislation out of the House. More troubling is the intersection of the Presidential Succession Act with an attack on Congress. In the case of the death of the president and vice president, a nine member House could then elect a new Speaker, who would become president of the United States for the remainder of the term. Many would question the legitimacy of that president and the actions of the House with a severely diminished membership.

The issue of the quorum is one of the most significant for a Congress after a catastrophic attack. A strict interpretation of the constitutional quorum requirement would mean that the House would be unable to act for many months

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until sufficient vacancies were filled. A looser interpretation would mean that the House of Representatives might continue to function, but that very few members, representing a small portion of the country, could purport to take charge.

The most troubling aspect of the quorum rule is the confusion surrounding its interpretation and application. For example, if a small number of remaining members decided to forge ahead with legislative initiatives, and then six months later, a House replenished by special elections, challenged these initiatives, would these actions stand? If no one objected to the absence of a quorum, but it was clear that no quorum could be formed because of deaths and/or incapacities, would the actions of such a House be legitimate or subject to challenge? In the fog of an attack, the murky nature of the quorum requirement threatens to undermine confidence in the legitimacy of government actions.

Aside from the question of the proper interpretation of the quorum requirement, there are other quorum issues that might arise in the aftermath of an attack. The absence of a quorum is only noted if a member calls for a quorum—a call that any single member is entitled to make during any vote. Even if a strict interpretation of the quorum requirement were adopted, Congress could proceed if no one objected to the absence of a quorum. This is a sensible procedure for Congress during normal times, but it creates great uncertainty in a post-attack Congress. If only 100 members survived an attack, would someone object to the absence of a quorum with the hope of stopping all votes? Conversely, if only a few members survived, would they proceed without a quorum call and go on to do business as if they had a full quorum available?

Finally, there are several scenarios that would not affect the issue of calling a quorum, but would be troubling nonetheless. An attack that killed 200 members of the House of Representatives would not cripple the Congress, but it might drastically alter the political and geographical balance of the Congress. An attack might occur when one party caucus was meeting, effectively wiping out most of one party but not the other. It is also possible that an attack would hit when state or regional delegations were meeting, thus eliminating representation for a part of the country for many months.

II. The Problem of Incapacitated Members

In the past, there has been little concern about the long-term disability or incapacitation of members of Congress, and no provisions exist in rules, law, or the Constitution about defining incapacitation or replacing such members, temporarily or permanently, if they are unable to perform their duties for extended periods of time. This is partly because the Framers barely considered the consequences of incapacitation for any office. There is a fleeting mention in ART. 2, SEC. 1 that Congress could provide for officers who might act when the president was incapacitated. But none of our presidential succession acts have defined incapacity or dealt with it in a substantive way. It was only with the Twenty-fifth Amendment in 1965 that incapacity was seriously addressed. That amendment was not in place to deal with serious incapacity issues in the Garfield and Wilson presidencies, as well as a number of other lesser incidents. The question of incapacity was not considered at all for mem-

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bers of Congress, as the loss, even for months or years, of one, two, or three members out of 100 or 435 would not be a debilitating event.

But the loss for weeks, months, or years of tens or hundreds of incapacitated lawmakers is another story. The secret creation of a bomb and radiation-proof bunker for Congress at the Greenbrier resort in West Virginia during the Cold War was based on the assumption that a nuclear attack on Washington would kill, not incapacitate most members of Congress. The objective then was assuring, with the notice available from the time missiles were launched in Siberia until they arrived in Washington, that Congress could evacuate the 200 miles or so to the Greenbrier. No contingency plans existed for an attack without notice, or one that caused not death, but widespread incapacitation.

The threat from terrorism is different. Not only could there be an attack—including a nuclear one—with no notice, but the threat of chemical and biological warfare, or exploding jet fuel, also makes widespread temporary incapacitation a more likely scenario, and perhaps a more vexing problem. In the event of multiple deaths, the Senate at least can quickly fill vacancies via gubernatorial appointments. But neither the House nor the Senate can fill vacancies due to temporary incapacitation. For incapacitated members, the relevant seats would be effectively vacant until the member recovers, resigns, or dies and is replaced, or until the next general election. In this case, the quorum problem looms larger, since even under the expansive definition of a majority of those lawmakers "chosen, sworn, and living," incapacitated members would be included in the definition but unable to help constitute the quorum. For example, if 220 members of the House of Representatives were alive but unable to perform their duties, there could be no quorum.

An Attack that Leaves Members of Congress Incapacitated

Because of the availability of chemical and biological agents, the possibility of mass incapacitation is real. A chemical attack might leave thousands in burn units or with respiratory and neurological injuries. If such an attack were centered on Congress, many members could be in hospital intensive care units for months. Or imagine if the anthrax attack on the Senate had been undetected and particles had dispersed widely through the ventilation system. Senators and their staffs might have survived the attack, but the recovery period would have been many months. More troubling is the possibility of an infectious disease such as smallpox. If even a few members of Congress contracted the disease, the members might choose not to convene for fear of spreading the disease. Finally, even a conventional attack might leave hundreds of members in hospitals or burn units—alive, but unable to perform their duties for a significant period of time.

How Incapacitation Affects Congress

When vacancies occur in Congress, there are established processes for filling them (special election in the House; gubernatorial appointment followed by special election in the Senate). When a member of Congress is alive but unable to perform his or her duties, there is no way to fill what is in effect a temporary vacancy. Under

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normal circumstances, this does not pose a problem for the functioning of government. If a handful of Senators are incapacitated, the institution can function, short a few votes. But if there are large numbers of incapacitated members, the continuity of Congress is threatened. In the House of Representatives, no special election is called until a seat is declared vacant. Similarly, in the Senate, no gubernatorial appointment or special election can occur if there is no vacancy. Mass incapacitation brings with it all the problems that mass vacancies in the House of Representatives would, but it is worse in three respects. First, mass incapacitation affects both the House and the Senate. Second, the temporary vacancies caused by incapacitation would not be filled for an indefinite amount of time, only until the member recovers, resigns, dies, or the term of office ends. Third, mass incapacitation makes it virtually certain that Congress would be unable to reach its quorum requirement even under its most lenient interpretation.

Precedents for Members with Long Term Incapacity Remaining in Congress

Under normal circumstances, neither house of Congress attempts to determine the capacity of individual members. Many members have stayed in their elected positions for months or longer, while comatose or clearly unable to perform their duties. There has been only one recent case of a seat declared vacant while held by a living member—that of Representative Gladys Noon Spellman (D-MD). But the Spellman case is extraordinary. Spellman fell into a deep and irreversible coma on October 21, 1980, while campaigning for re-election. While incapacitated, she was re-elected by the people of her district. She was not sworn in when the new Congress commenced in January 1981, though her name appeared on the first rollcall. On February 23, 1981, the House passed H. Res. 80 declaring the seat vacant because of her "absence and continuing incapacity."

A somewhat similar case occurred in 1972 with House Majority Leader Hale Boggs (D-LA) and Representative Nicholas Begich (D-AK), when both were lost in a plane crash. Because the accident occurred close to the next election, their names remained on the ballot, and certificates of election were issued showing their electoral victory. While the bodies were never found, the seats were declared vacant after an Alaska court officially determined that they were presumed dead.

There have also been many cases of members of Congress who have been unable to perform their duties but have remained in office. Octogenarian Senator Carter Glass (D-VA) was absent for over four years in the 1940s. Similarly, the Republican Conference declared Senator Karl Mundt's (R-SD) committee slots vacant in February of 1972, but he remained formally in his Senate seat until the end of his term in 1972 despite suffering a severe stroke in late 1969 that left him unable to perform his senatorial duties. The only precedent for declaring a seat vacant because of incapacity is the Spellman case, and in that instance, the House only made the declaration when she was physically unable to attend her swearing in at the beginning of the next term. There has never been a case of a seat declared vacant due to incapacity during the current term of a sworn occupant.

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The only other way that Congress could fill the seats of incapacitated members is by expelling the incapacitated member by a two-thirds vote. But this presumes that the remaining members of Congress were sufficient to constitute a quorum. It would also mean that incapacitated members would not return to their duties upon recovery. They would be supplanted by replacements.

Ignoring incapacity is understandable for a Congress operating during normal times. As with the vacancy provision, Congress would not cease functioning if a few members were unable to perform their duties. There is also the danger of abuse of an incapacity provision, with congressional leaders or governors tempted by political or other reasons to replace members by declaring them incapacitated.

Incapacitation could cause the House and/or Senate to stop functioning. It could also distort the membership of either body if 20 or 30 percent of the members were incapacitated. Finally, since widespread incapacitation could go on indefinitely, the effect on the legislative branch could continue for months or years.

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CONTINUITY OF CONGRESS: RECOMMENDATIONS

Since a catastrophic attack could prevent Congress from functioning or cause it to operate with a small, unrepresentative number, the Continuity of Government Commission finds the status quo unacceptable. There is a gaping hole in our constitutional fabric that would allow large numbers of vacancies in Congress to continue for a significant period of time. The threat of terrorism remains high, and it is clear that our governing institutions remain prime targets. It is an urgent matter to repair that constitutional hole.

It is essential that large numbers of congressional vacancies be filled shortly after they occur to ensure that in the event of a catastrophic attack, Congress can continue to function in a way that properly represents the American people. In our study, the commission consulted with current and former members of Congress as well as legal and constitutional scholars. We held two public meetings where we heard testimony from experts. In the course of our investigation, we explored a wide range of options short of a constitutional amendment to ameliorate or solve these problems. The commissioners share distaste for frivolous or unnecessary amendments to the Constitution. Unfortunately, because the Constitution dictates the way that vacancies are to be filled in the House and Senate, there is no way to establish a procedure to quickly fill mass vacancies without a constitutional amendment. The expeditious filling of vacancies cannot be accomplished through accelerated special elections or by altering the quorum requirement. There is simply no effective way, short of a constitutional amendment, to replace members of the House who die, or to temporarily replace members of Congress who are incapacitated.

CENTRAL RECOMMENDATION

A constitutional amendment to give Congress the power to provide by legislation for the appointment of temporary replacements to fill vacant seats in the House of Representatives after a catastrophic attack and to temporarily fill seats in the House of Representatives and Senate that are held by incapacitated members.

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The commission recommends an amendment that adheres to the following principles:

hen a large number of members are killed or incapacitated, temporary replacements shall be made immediately, to fill vacant seats and to stand in for incapacitated members. The cleanest constitutional solution for filling vacancies in the House of Representatives would be to adopt the same procedure the Senate has employed since the ratification of the Seventeenth Amendment: providing for the filling of all vacancies, even those occurring on a routine basis, with members appointed temporarily by the governor until a special election is held. It is not necessary for the continuity of Congress to fill routine vacancies, but it is essential to fill mass vacancies. Many current and former House members believe that temporary appointments should be made only in extraordinary circumstances to preserve the character of the House as the "people's house." The commission believes that a constitutional amendment should give Congress the power to provide by legislation for the filling of vacancies; to decide whether they need to be filled under routine or extraordinary circumstances; and to determine how many vacancies should trigger an emergency appointment procedure. Congress must act to fill mass vacancies, but it should be allowed the leeway to determine exactly when the power to fill vacancies would be exercised.

With its understandable sensitivity to the status of the House as an elected body, Congress may well determine that a provision for temporary appointments should only be triggered by a major emergency, leaving in place existing procedures for the replacement of lawmakers during ordinary times.

Temporary appointments, in cases of both vacancies and death, should be made by governors, or selected from a succession list drawn up in advance by the member who holds the seat, or some combination of these two methods. These methods for selecting temporary replacements would be swift, legitimate, and decisive—the three most important criteria for such a selection. The second method, a succession list drawn up in advance by the member who holds the seat, would alleviate concerns that temporary replacements might hold radically different views and party affiliation than the members they replaced.

In the case of incapacitated members, replacements should stand in for the incapacitated member until the member recovers, the member dies and the vacancy is filled, or until the end of the term. It is essential that members of Congress who are incapacitated be able to return to their posts when they recover. Incapacitation should not serve as a reason to oust legitimately elected representatives.

The commission prefers a concise amendment that allows Congress to provide for many of the details of the temporary appointment procedure in legislation. A constitutional amendment can be comprehensive, laying out all the details of the temporary appointments procedure, or it can be concise, granting Congress the power to enact legislation to address the problem. The commission prefers a concise amendment that gives Congress the power to shape a legislative solution within broad boundaries laid out in the amendment. This approach has the advantage of keeping the Constitution free of minute detail, and it affords Congress the

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opportunity to adjust the legislation as circumstances change. The commission prefers a short amendment that delegates to Congress the power to legislate a procedure for filling vacancies in either House when a significant number of members are killed or become incapacitated as a result of a natural disaster or an act of terrorism. This would enable Congress over time to adjust and improve the legislation it initially adopts, and to remedy procedures that experience proves to be impractical or unpopular. Such corrections are much easier to make by the legislative process than if the corrections require the adoption of another constitutional amendment.

The amendment and/or accompanying legislation must specify:

- exactly when the procedure for the emergency method of temporary appointments shall begin and end
- the qualifications of the temporary replacements
- the method of appointment
- limitations on the length of service of the temporary appointees

The Rationale for a Constitutional Amendment

The commission recommends a constitutional amendment to provide for the filling of large numbers of vacancies in the aftermath of a catastrophic attack. It was only after careful consideration of other alternatives that the commission decided to recommend a constitutional amendment. The United States Constitution is not the Napoleonic Code; it does not contain a copious list of particulars. Our Constitution is broadly written and meant to last for the ages without significant tinkering. The founding generation ratified the original Constitution and quickly added the first ten amendments that we call the Bill of Rights. After those initial amendments, we have only amended our Constitution seventeen times in more than 200 years. Such a history makes it incumbent on any legislator to consider alternatives short of amending the Constitution before embarking on such a rare course. Moreover, constitutional amendments are exceedingly difficult to enact, with the most common method being passage by a two-thirds majority of both houses of Congress and ratification by three-quarters of the states' legislatures. Constitutional amendments are also not desirable because they may have unintended effects (as in the case of Prohibition), which once realized are difficult to undo given the arduous nature of the amendment process.

Despite all of the disadvantages of a constitutional amendment, the commission favors one because it is the only solution that adequately addresses the problem of filling mass vacancies in Congress quickly after a catastrophic attack. Our survey of alternative approaches persuades us that no other option provides more than a partial and inadequate fix to the problem.

History of Attempts to Amend the Constitution to Provide for Temporary Appointments, 1947-1965

The idea of a constitutional amendment to provide for temporary appointments to fill House

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vacancies has a history. From 1947 to 1965, during the Cold War, over thirty constitutional amendments were introduced in the House and Senate to give governors the power to make temporary appointments to fill vacant House seats when there were large numbers of vacancies. The House and Senate held several hearings on the subject, and several constitutional amendments passed the Senate. The concerns of that era were similar to today, but with some important differences. The primary fear then was of a massive nuclear strike from the Soviet Union that would kill a large number of House members. The problem of vacancies in the House today is more or less the same as it was during the Cold War, but there is a much greater likelihood of an attack incapacitating large numbers of members. Most of the proposed constitutional amendments in the earlier era dealt only with vacancies, and not with incapacity.

Three constitutional amendments passed the Senate by overwhelming margins. In 1954, a constitutional amendment introduced by Senator Knowland (R-CA) passed the Senate 70 to 1. The amendment granted governors the power to make temporary appointments to fill House vacancies when more than 145 seats of the House were vacant. The House took no action on the amendment. In 1955, a constitutional amendment introduced by Senator Kefauver (D-TN) passed the Senate 76 to 3. Again, the House took no action on the subject. The amendment granted governors the power to make temporary appointments to fill House vacancies when more than a majority of seats of the House were vacant. In 1960, the Senate passed S.J. Res. 39, a three-part constitutional amendment, by a vote of 70 to 18. The amendment provided for (1) District of Columbia voting in presidential elections; (2) eliminating the poll tax; and (3) granting governors the power to make temporary appointments to fill House vacancies when more than a majority of the seats were vacant. That year the House of Representatives passed the first provision of S.J. Res. 39 allowing for D.C. voting in presidential elections, which became the Twenty-third Amendment. The following Congress passed the second provision eliminating the poll tax, which became the Twenty-fourth Amendment. The House took no action on the third provision granting governors the power to make temporary appointments to fill vacancies.

The following is the amendment proposed by Senator Knowland, S.J. Res. 39 (1954) (for other such proposals see Appendix VI):

> SECTION 1. Whenever, in time of any national emergency or national disaster, the number of vacancies in the House of Representatives shall exceed one hundred and forty-five, the Speaker of the House of Representatives shall certify that fact to the President. In case there is no Speaker, or in the event of the inability of the Speaker to discharge the powers and duties of his office, such certification shall be made by the Clerk of the House of Representatives. Upon receipt of such certification, the President shall issue a proclamation declaring such fact. The executive authority of each State shall then have power to make temporary appointments to fill any vacancies in the representation of his State in the House of Representatives which may exist at any time within sixty days after the insurance of such a proclamation. Any person temporarily appointed to any such vacancy shall serve

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until the people fill the vacancy by election as the legislature may direct.

SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Additional Measures Congress Should Consider

While a constitutional amendment to allow temporary appointments is the only effective way to fill mass vacancies expeditiously, there are other issues that Congress should address that would supplement an amendment and be very helpful in emergency circumstances.

Congress should consider changing its rules to ensure that it could be effectively reconvened after an attack. Congress could be in session, in recess, or in recess subject to being called back, when an attack occurs. In each of those cases, there should be a mechanism for calling Congress back into session if there is a catastrophic attack. In particular, Congress must consider the possibility that the leadership of both chambers who may be tasked with reconvening the House may not survive the attack. Another point of concern is the meeting place for Congress. The Constitution requires the consent of both houses of Congress to move its location. Congress should consider clarifying whether a change of location could be ratified after reconvening elsewhere. It should revisit and update a law passed in 1793 that authorizes the president to move Congress in times of grave danger.

Congress should consider providing in advance for the possibility of short-term appropriations for the executive branch if Congress is unable to meet. Congress should re-examine its procedures at the beginning of a new Congress to address the possibility that an attack at that time would disrupt the organization of Congress. Finally, both chambers should revisit their practices on inauguration day. They might consider keeping several designated members away from the ceremony. The Senate should also consider ways to confirm non-controversial cabinet appointments of a new president almost immediately following the swearing in of the president to ensure that the line of succession is preserved.

Several of these issues have already been addressed by a bipartisan congressional working group chaired by Representatives Christopher Cox (R-CA) and Martin Frost (D-TX) and were enacted into House rules for the 108th Congress. For example, the rules now allow the Speaker to reconvene the Congress to another location and provide for successors to do the same.

Most of these aforementioned considerations could be accomplished by amending the rules of the House and Senate. The implementation of these measures could begin immediately, before Congress passes and the states ratify a constitutional amendment to provide for the filling of mass vacancies. These changes do not address the central problem of a catastrophic attack causing mass vacancies and incapacitation of members of Congress, but they would be very helpful in reducing the confusion after an attack.

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Alternatives to Constitutional Amendment Do Not Solve the Problem of Mass Vacancies

Why Expediting Special Elections is Helpful but not Sufficient

The commission considered the possibility of expediting special elections. The states have the power to alter their laws to hold special elections to fill vacancies more quickly. In addition, Congress could preempt state laws under the "times, places, and manner" power of ART. 1, SEC. 4. For example, Congress might pass a law that requires that all special elections be held within ninety days of a vacancy. While the states and Congress could pass laws to speed up elections, the commission does not believe that such laws would solve the central problem that threatens the continuity of Congress (i.e., mass vacancies in Congress caused by death or incapacity that last for a significant period of time). There is a lower limit as to how quickly elections could be held. The commission estimates that under ideal circumstances, states could hold elections within two months if they dispensed with party primaries and drastically accelerated other aspects of the campaign. After a catastrophic attack, with large numbers of special elections taking place simultaneously, the commission estimates that even the most expedited elections would take a minimum of three months. Three months is too long to continue without a functioning Congress. The president would act without a check, extraconstitutionally in some cases, until Congress reconstituted itself. In addition, there is the possibility that a Congress of greatly reduced size would act and that the vast majority of Americans could view this Congress as illegitimate. Shorter special election cycles would not eliminate any of these problems, but only slightly shorten their duration. Finally, the commission does not believe that expedited special elections are appropriate for every state. Some states dispense with primaries in special elections, but many do not. A severely shortened election is likely to provide little choice for the voters. Only the most well-known and well-funded candidates would be able to gain name recognition in an abbreviated campaign. The commission prefers that mass vacancies be filled quickly hy temporary appointments and that special elections take place within 120 days, giving states the ability to hold primaries if they choose.

Several members of our commission served on the Ford-Carter National Commission on Election Reform. Lloyd Cutler and Robert Michel chaired the commission and Leon Panetta served as a member. Their service on the commission impressed upon them the importance of well-devised laws and procedures for election administration. States do not often have the occasion to revisit their laws respecting special elections to fill vacancies in Congress, but September 11th is a reason for doing so. The commission recommends that the states consider thoroughly their election procedures with special attention to how they would hold special elections in the aftermath of a terrorist attack, and revise their laws accordingly. Along these lines, the Cox-Frost working group recommended specifically a House resolution encouraging states to revisit their laws to provide for expedited special

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elections. The House passed such a resolution in the fall of 2002. The commission supports this resolution, but it notes that it would have a small effect in reducing the length of vacancies and that the various states will come to different conclusions as to the manner and the length of time in which they will hold special elections.

Why Clarifying the Quorum Requirement is not a Solution

Many of the problems surrounding a post attack Congress involve the quorum requirement. After a catastrophic attack, the House of Representatives may be unable to assemble the "majority of the body" required by the Constitution, making it impossible to conduct business. After an attack there is also a question of legitimacy with regard to the quorum because the House and Senate interpret their requirement as a majority of the living members. This allows for the possibility of very few members proceeding with business if, for example, three of the five living members were present. Incapacity poses another concern for the quorum, as large numbers of disabled members might prevent the formation of a quorum of living members. There are some who suggest that the House and Senate might adopt rules that would make the quorum requirement more lenient, thus ensuring that there would never be the absence of a quorum and Congress could always proceed with business. For example, a quorum might consist of a majority of those living and not incapacitated.

The commission sees the value of clarifying the interpretation of the quorum requirement, but it does not believe that making the requirement more lenient will ensure the constitutional continuity of Congress; quite the opposite. A lenient quorum requirement might result in a small number of members acting as the whole Congress and calling into question the legitimacy of congressional actions. The reason that the quorum requirement poses a concern after a catastrophic attack is that a large number of members may be killed or incapacitated. The solution is to fill the vacancies so that Congress can proceed with a nearly full membership, not to lower the quorum threshold so the few remaining members can claim a quorum is present.

The commission does favor clarification of the quorum requirement, but not as a substitute for a constitutional amendment that would fill vacancies by temporary appointment. The commission is concerned that the current interpretation in House and Senate rulings that a majority of the living members constitutes a quorum does not square with the constitutional quorum requirement of a majority of the whole body. It would oppose an attempt to make the quorum even less stringent by exempting incapacitated members from the calculation of the quorum. Finally, the commission believes that the House and Senate should not be able to proceed without a quorum, even if no one objects, if it is clear that so many members are dead or incapacitated that a quorum could not be assembled. In normal times, when no one objects to the absence of a quorum, it is implied that a quorum could materialize if the matter were sufficiently important to members. However, after a catastrophic attack, there is no plausible argument that a majority could be assembled under any circumstances. Thus, it would pose a grave threat to legitimacy for either body to proceed with business on the fiction that such a majority could appear. Furthermore, if Congress were to proceed with no

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one objecting to the absence of a quorum, then each member would be given the power of extortion over the others. At any time, one member, if his or her wishes were not fulfilled, could cause Congress to stop functioning by raising the objection that there was no quorum.

WHY CHANGES TO HOUSE RULES ALONE CANNOT FILL VACANCIES

Some have suggested that temporary appointments to the House could be made by changes in House rules and that a constitutional amendment is not necessary. The commission has studied this argument, and believes that such an approach would be unconstitutional. In addition, the commission believes that it would be destabilizing to adopt an approach that would surely be challenged as unconstitutional after an attack at a time when we need clarity and legitimacy for Congress.

The argument for temporary appointments by House rules is as follows. The House could provide by rule that its current members supply a list of successors who would serve as temporary replacements for the members in case of a catastrophic attack. The argument rests on the fact that the courts have shown great deference to House rules because they are internal matters that do not concern the other branches of government. Further, even if the arrangement were of dubious constitutionality, no one would question it in the midst of such a grave emergency. The American people would be grateful that vacancies would be filled by a method that legitimately reflects the wishes of Congress before the attack. The difficulty with such an argument is twofold. First, the Constitution is very clear that there is only one method for filling vacancies in the House of Representatives—by special election. ART. 1, SEC. 2, CL. 4 provides that "when vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies." History is consistent with the Constitution, as no House vacancy has ever been filled by any other method since the adoption of the Constitution in 1789. While it is true that the Court grants great deference to the House and Senate in the rules they adopt to govern themselves, they have also been clear about the limits of such deference.

Advocates of deference to House rules often cite *U.S. v. Ballin* and this sweeping pronouncement regarding the determination of whether a quorum is present: "...within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate, or even more just." The Court goes on to note that the House's power to make its own rules is "within the limits suggested, absolute and beyond the challenge of any other body or tribunal."[1] Both of these broad statements of support for the power of congressional rule making are, however, circumscribed by "limits," and it is the limits that are significant here. The limitations the Court noted are that Congress "may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained."[2] The Court was very clear that House rules could not violate constitutional restraints. The House could no more provide for the filling of vacancies by method other than special

1 *U.S. v. Ballin* 144 U.S. 1, 12 S.Ct.507, 36 L. Ed. 321.

2 Ibid.

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elections than it could decide by House rule that less than a two-thirds vote is needed to override a presidential veto or pass a constitutional amendment.

Second, as for the argument that no one would question potentially extraconstitutional congressional procedures after a catastrophic event, as such procedures would allow the House to go forward, the commission believes that this process would undermine the legitimacy of Congress. It would open any congressional action to constitutional challenge at a time when the legitimacy of our institutions is paramount.

The commission does recommend that it is necessary to fill vacancies expeditiously with temporary appointments and that there is merit to the method of members indicating who would succeed them in the case of a catastrophe. The only way to effect this change, however, is by amending the Constitution.

Arguments Against Temporary Appointments

The People's House: Appointments Would Change the Democratic Character of the House

The most substantial argument against a constitutional amendment to allow temporary appointments to fill mass vacancies is that it would change the character of the House of Representatives. The House of Representatives is rightly called the "people's house," as it is the representative body closest to the people with elections held every two years. The democratic character of the House is also found in the fact that the people have elected every member of the House, while many Senators have been appointed.

The commission's recommended constitutional amendment is sensitive to preserving the character of the House in two ways.

First, in the case of mass vacancies, large portions of the country would be unrepresented for many months at a time when momentous decisions would be made. The House's fundamental character as the "people's house" rests primarily on the fact that it represents all the people, with each member representing a roughly equal number of people. The Senate, on the other hand, represents the people through the states. An individual senator from California represents over sixty times the number of people that are represented by a senator from Wyoming, a vast contrast to the equal representation of the House. If mass vacancies were not filled after a catastrophic attack, a few representatives representing only their constituents would act in the name of all the people. Mass vacancies distort the representative role of Congress. While the elected character of the House is extremely important, the principle that all the people should be equally represented is essential to its democratic character.

Second, the commission considered but does not take a position on whether temporary appointments should be made to fill vacancies in the House under ordinary circumstances like the procedure currently in effect for the Senate. Instead, we note that it is essential that temporary appointments to fill vacancies in the House

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be made in the case of mass vacancies. We recommend that a constitutional amendment should allow Congress to set the circumstances under which temporary appointments shall occur. Given the strong opinions of many members of Congress that appointments for routine vacancies would change the character of the "people's house," it is likely that Congress would choose to fill vacancies with appointments only in the extraordinary case of many vacancies at one time. Under this system, the several seats in the House of Representatives that become vacant each Congress would continue to be filled by special elections. The appointments system would be insurance against a catastrophic attack. The bottom line is that the commission favors putting the decision about the exact circumstances for filling vacancies in Congress's hands.

THE POTENTIAL FOR POLITICIZATION AND CHANGING THE PARTISAN BALANCE OF POWER

During the commission's deliberations, we heard the concern that the appointment process would become politicized and the balance of political power would illegitimately shift from one party to another.

This concern is related to the question of who designates temporary appointments and what limitations are placed on those appointments. In the Senate, governors have nearly always appointed members of their own party as temporary replacements to fill vacant Senate seats. Consequently, when a governor is of the opposite party of the senator who vacated a seat, the seat switches from one party to the other, at least until a special election is held. House members fear a scenario in which a governor fills vacancies with members of his or her party. The likelihood of this is much greater in the House than in the Senate, as governors and senators have the same constituencies, but House members may represent parts of a state that are different from the dominant political makeup of the state. If for example, the entire California delegation was killed by a terrorist attack, the Democratic governor might appoint Democrats to all fifty-three seats, changing twenty seats from Republican to Democrat. Similarly, if the Texas delegation was killed in an attack, the Republican governor might appoint Republicans to all thirty-two seats, changing seventeen seats from Democrat to Republican.

The commission understands the concern about the change in partisan balance after an attack. It does not, however, recommend a requirement that a temporary appointee be of the same party as the member who vacated the seat. There are several reasons the commission does not recommend such action. First, in the event of a devastating attack, the commission feels that governors would not try to play politics in a time of national crisis. Second, the system of requiring appointments of a particular political party has not worked in practice. Certain government commissions require a specified number of members of each party to act as commissioners. In practice, these restrictions have been deliberately flouted. Appointees have declared themselves to be affiliated with one party to get the appointment even though their true allegiance is with the other party. Finally, ideology must also be considered. It would be easy for a governor to replace a liberal Democrat with a conservative one or a conservative Republican with a liberal

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one, respecting party orientation but not the underlying views of the member who held the vacated seat. Further, a party provision would preclude those individuals who declare themselves to be independent from serving as a temporary appointee.

If the constitutional amendment, or implementing legislation, addresses the issue of the political party of potential appointees, the commission recommends a system where members of Congress draw up a list in advance of those who might be appointed as temporary successors. This was a familiar Cold War-era provision of states such as Delaware (see Appendix VII). Presumably, members of Congress would choose successors who shared their political views, and the resulting Congress would not shift in party or political philosophy. The commission, however, also supports a simple appointment of replacements by a governor because it believes that there would be little political gamesmanship in the crisis atmosphere of a catastrophic attack. A fuller discussion of the merits of these two types of appointments is found in a subsequent section on who should appoint temporary replacements.

Response to the Argument for a More Limited Constitutional Amendment Dealing Only with Vacancies Caused by Death not Incapacity

The commission recommends a constitutional amendment to address mass vacancies in the House and mass incapacitation in the House and Senate. Mass incapacitation affects both the House and the Senate, making it insufficient for the House to simply adopt the Senate's method for filling vacancies (i.e., gubernatorial appointments to fill vacancies). A constitutional amendment must address the temporary vacancies caused by severely injured representatives and senators unable to perform their duties.

The Form of a Constitutional Amendment

A constitutional amendment that is consistent with the commission's recommendations could take a number of forms. There are specific issues that must be remedied, but these issues could be addressed in the amendment itself or in legislative language that accompanies a more general amendment. The commission prefers that the amendment be concise, granting Congress the power within certain broad limits to legislate provisions for temporary appointments to fill vacancies.

The simplest amendment might take this form:

> Congress shall have the power to regulate by law the filling of vacancies that may occur in the House of Representatives and Senate in the event that a substantial number of members are killed or incapacitated (see also amendment proposal by Michael Glennon-Appendix VI).

Such an amendment would give Congress the power to legislatively handle many of the intricate problems of filling vacancies. In this case, the legislation would have to answer a number of questions: Who would make the appointments? What would be the threshold for a "substantial"

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number of members? What constitutes incapacity and who decides when that incapacity is lifted? Would there be time limits on the appointments? Who would be eligible to be appointed?

At the other end of the spectrum is an amendment that lays out all the details in the amendment itself. For example, an amendment proposed by Norman Ornstein, senior counselor to the commission, reads as follows:

> Section 1. In the event of an emergency, the executive authority of each state shall determine the condition of its Representatives and Senators. If the offices of a majority of the Representatives apportioned to that state or of both of the Senators are vacant or occupied by members unable to discharge the powers and duties of their office, the executive authority of that state shall issue a proclamation to that effect. The proclamation shall be sent to the Speaker of the House, the president of the Senate and other officers that shall be specified by law. If within a [...]-day period, executive authorities of the majority of states have issued such a proclamation, an emergency appointment authority shall commence, whereby the executive authority shall make temporary appointments to fill vacancies in the House of Representatives and make appointments of acting members to discharge the function of Representatives and Senators unable to perform their duties, while their disability persists. The emergency appointment authority shall remain in effect until the end of the next session.
>
> Section 2. In accordance with the emergency appointment procedure in this article, each member of the House of Representatives and each Senator shall designate in advance not fewer than 3 nor more than 7 emergency interim successors to the member's powers and duties. All designated interim successors shall meet the qualifications for the office so designated. Each member shall review and, as necessary, promptly revise the designations of emergency interim successors to insure that at all times there are at least 3 such qualified emergency interim successors. Members and Senators shall submit their lists of designated successors to the Speaker of the House, the president of the Senate and the executive authority of their state.
>
> Section 3. Upon commencement of the emergency authority provided for by this article, the Executive Authority of each State shall appoint Temporary Members to fill vacancies in the House of Representatives, selecting from the list of designated successors. For the period of their appointment, Temporary Members shall be members of the House of Representatives for all purposes under this Constitution, the laws made in pursuance thereof, and the rules of the House of Representatives. The appointment of a Temporary Member shall end upon the filling of the vacancy by election.
>
> Section 4. In the case of a vacancy in the House of Representatives under this article, the writ of election that shall issue under ART. 1 of this Constitution shall provide for the filling of the vacancy within [.....] days of its happening, except that if a regularly scheduled election for the office will be held during such period or [.....] days thereafter, no special election shall be held

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and the member elected in such regularly scheduled general election shall fill the vacancy upon election.

Section 5. In the case of a Representative, who is unable to discharge his or her duties, the executive authority in each state shall, under the emergency authority of this article, appoint as an Acting Member an individual, selecting from the list of designated successors, to discharge the powers and duties of a Representative who is unable to discharge those functions. The appointment of an Acting Member shall end upon the transmission to the Speaker or other Officer designated by the House of Representatives an affirmation in writing by the member that no inability exists. Upon the transmission of the affirmation the member shall resume all the powers and duties of the Office.

Section 6. In the case of a Senator, who is unable to discharge his or her duties, the executive authority in each state shall, under the emergency authority of this article, appoint as an Acting Senator an individual, selecting from the list of designated successors, to discharge the powers and duties of a Senator who is unable to discharge those functions. The appointment of an Acting Senator shall end upon the transmission to the president of the Senate or other Officer designated by the Senate an affirmation in writing by the Senator that no inability exists. Upon the transmission of the affirmation the Senator shall resume all the powers and duties of the Office.

Finally, there are many possible amendments that would specify certain areas that Congress might fill in with legislation.

> Congress shall have the power to regulate by law the filling of vacancies that may occur in the House of Representatives and Senate in the event that a substantial number of members are killed or incapacitated. Provided that Congress shall not define a substantial number as less than 20 percent of either chamber, provided that incapacitated members shall be allowed to return to their seats upon proof of their fitness for office.

Forty-two years ago, one of our commissioners, Nicholas Katzenbach, then Assistant Attorney General, Office of Legal Counsel, testified before the House Judiciary Committee on several proposed constitutional amendments to provide for temporary appointments to fill House vacancies. In response to a question from a member of the committee, Katzenbach suggested the "possibility of a relatively short constitutional amendment enabling Congress by legislation to provide for various contingencies." The advantage of such an approach would be to "give a desirable flexibility within the constitutional framework determined to be correct and would not mean every time you had a problem of this kind you had a constitutional question. It would be capable of clarification by legislation."[3] The commission strongly agrees with these comments.

3 *Constitutional Amendments for Continuity of Representative Government During Emergency: Hearing on H.J. Res. 29, et al. Before Subcommittee No.2 of the House Committee on the Judiciary*, 87th Cong., 1st Sess. (1961), p.25.

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Essential Elements for Temporary Appointments

Defining the Threshold

What should the threshold be for triggering an emergency procedure to allow for temporary appointments? Who should determine if the threshold is met? These two questions are significant because the commission believes that temporary appointments are essential under emergency conditions, but not in the event of routine vacancies.

The question of the threshold weighs two competing priorities. On the one hand, the threshold for vacancies should he sufficiently high to constitute an emergency where extraordinary means for ensuring the continuity of Congress are needed. On the other hand, the threshold should not be so high as to prevent Congress from functioning in a normal manner. The commission does not set a particular number of vacancies that triggers enactment of the emergency provisions, but it should fall between 15 and 50 percent of seats vacant. If more than 50 percent of the seats of one chamber are vacant, the quorum question looms large. Conversely, it should be larger than fifteen percent, as Congress could adequately function with even fairly significant numbers of vacancies. The commission supports a determination of the threshold not only on the hasis of an absolute number of vacancies, but also by the determination that there have been significant numbers of vacancies in state delegations. For example, the temporary appointment provision might commence when a majority of the state delegations have each lost one quarter or one half of their membership.

Who should determine the threshold has been met? A number of constitutional amendments were proposed and three passed the Senate between 1947 and 1965. The amendments took different approaches as to who would count the deaths or incapacitations to determine if the threshold had been met. Who, for example, would determine that one-quarter of the membership of the House of Representatives was dead or incapacitated? There are a number of options: the remainder of Congress, an independent officer, an agency, the president, and the courts. Most of these options, however, have two serious drawbacks. First, the determination of an exact number may be extremely difficult. In the confusion after an attack, it might be difficult to identify the dead and the missing. Determination of incapacity could be even more subjective. It is possible that there would be a significant delay in determining that the emergency procedure for appointments would take effect, and the purpose of having such a procedure in the first place is to hasten the replenishment of Congress after an attack. Second, the one who is designated to determine if the threshold is met may be indisposed after an attack, particularly if it is a Washington figure or hody. For example, if the remainder of Congress is to determine whether the threshold has been met, and an attack wipes out three-quarters of the members, then Congress itself may be incapahle of meeting its quorum requirement to determine whether the threshold has been met. Or, under a looser quorum interpretation, a small number of members might be tasked with making that decision, therefore

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raising questions of legitimacy. Another point for consideration is that any delegation of this function to the executive or judicial branches would raise separation of powers issues.

The commission recommends that governors survey their own state's delegation to determine if a sizable fraction of their state's representatives are dead or incapacitated. Once a number of governors, say a majority, make such a determination, then the emergency provision would be triggered. The commission recommends this approach for a variety of reasons. First, governors are not Washington-based figures and would likely survive an attack. If some do not survive, there are established lines of succession in the states. Second, it is much easier to determine if a fraction of a state delegation is dead or incapacitated than it would be to survey loss within the whole of Congress. Third, since this proposal requires a declaration by a number of governors, it would take the decision-making power out of one hand and limit the ability for political gamesmanship.

Who Should Make Temporary Appointments?

The commission has considered a number of options for who should make temporary appointments, two of which it favors. Either governors should make the appointments, or the appointments should be made from a list drawn up in advance by the member who vacates the seat. A third alternative is to combine the two methods. Governors would have a limited choice—they could appoint anyone on the list of successors drawn up by the member.

The commission's primary objective is that appointments be made swiftly, legitimately, and decisively. The commission received numerous suggestions on this matter, including many proposals submitted by concerned citizens through our website and through the results of a poll conducted by *Reader's Digest*. Some of the suggestions made intuitive sense, but we did not feel they met all three criteria. Examples include appointments made by a committee of state legislators who represent parts of the district of the vacated seat, or by the state legislatures, or the remainder of Congress. California, for example, has a provision for emergencies where the remaining members of the legislature appoint temporary replacements. These options allow for local input in the selection of a replacement member, but ultimately, they are unwieldy and may delay the appointment. State legislatures may not be in session. Legislatures can deadlock on a choice, as in the 19th century when state legislatures selected U.S. Senators. It would also be complicated to assemble a group of legislators representing the district. Each district would have a different number of people representing parts of the district. How much weight would the vote of each person be given?

The president or the courts could make the appointments, but the commission believes that due to the separation of powers, this would undermine the legitimacy of the selection. Furthermore, with the president and the Supreme Court also based in Washington, it would be imprudent to leave the appointment power in their hands.

The two options the commission recommends are gubernatorial appointment or appointment

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from a list drawn up in advance by the member. Appointments of either type could be made quickly. They would be made by legitimate authority: by the highest ranking constitutional officer in the state or by the deceased or incapacitated member. Both of these methods of selection would also be decisive, as there would be no committee or body that would split its vote for a nominee. A combination of the two methods would also meet the commission's criteria.

How Long Should Appointments Last?

The commission respects the differences in the political cultures of states and the time it takes to fill vacancies by special election. In the case of temporary appointments to fill vacated seats, we believe that the appointment should last until the special election is held to fill the seat, but that the special election shall be held within 120 days of the vacancy. This 120-day window allows states to have primaries if they choose, but it emphasizes the importance of placing an elected member in the seat with dispatch.

In the case of temporary appointments that stand in for incapacitated members, the appointment should last until the member recovers, the member dies or resigns and a special election is held to fill the seat, or until the end of the term of office. Such a timeframe is warranted because the circumstances of incapacitation may vary widely and because the commission finds it is essential for the member to return to his or her seat if he or she recovers during the term.

Members Return From Incapacitation on Their Own Declaration

The commission recommends that members who are declared incapacitated shall return to their seats when they declare themselves fit to return to office. The commission believes that the best scenario is for original members to return to their seats if recovered.

Another option would be for an independent body to declare members incapacitated and then to declare them fit for office. But this option is unwieldy, subject to politicization and challenge, and potentially very slow. If we allow governors to declare members of Congress temporarily incapacitated, there should be a safeguard to members that they can return on their own declaration as soon as they are recovered.

Should Temporary Appointees Be Eligible to Run Again?

The commission recommends that temporary appointees be able to seek the office they hold in a special election or in a future general election.

There is some concern that a temporary appointment will lead inevitably to the election of the temporary member. This would cut against the character of the House that all representatives are elected, for appointed members would have a leg up on others who would seek the seat. This incumbent advantage could be avoided if temporary appointments were barred from running in a special election or in the next general election for office. The commission opposes this

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plan for several reasons. First, the evidence in appointments made to the Senate does not support the thesis that appointed members win elections. In fact, only fifty percent of senators appointed in recent years won subsequent special elections (see Appendix VIII). Second, it is an unwise precedent to limit within the Constitution the eligibility of certain individuals who meet all qualifications for office. Third, if temporary appointees were not eligible to run for office, some of the better candidates might not choose to serve as temporary appointments, thus depriving the nation of the best political leadership at the time it is needed most.

Constitutional Amendment Should be Ratified in Two Years

The commission hopes that we never need to use the provisions of a constitutional amendment to allow Congress to reconstitute itself after an attack. It is, however, imperative to enact such an amendment expeditiously for two reasons. First, it is necessary to fill the hole in our constitutional fabric to ensure that the institution of Congress could continue after a catastrophic attack. Second, the enactment of an amendment would be a deterrent to an attack on Congress. Terrorists look for the weakest security link where they could inflict the most harm. We should pass an amendment to send the message that we have addressed issues in the continuity of government and that an attack on Congress would not produce chaos and inaction.

In modern times, it has become customary to add a proviso to constitutional amendments that they must be ratified by three-quarters of the states within seven years. Given the dangerous times we live in, the commission believes that a speedy ratification is essential. We propose that the states be given two years to ratify the amendment.

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CONCLUSION

Congress is the first branch of government, its powers set out in ARTICLE I of the Constitution. It is the branch closest to the people. Yet, it is the most constitutionally vulnerable of the three branches to a massive disruption from a terrorist attack. Our current constitutional framework does not allow the House of Representatives to be reconstituted quickly after a large number of deaths. The only method for filling vacancies is by special election, which takes many months to complete. In addition, neither the Senate nor the House is prepared for the possibility of large numbers of their members to be alive, but severely incapacitated and unable to perform their duties. Either of these scenarios could result in no Congress in the months after an attack, or one that is unrepresentative and of questionable legitimacy. In addition, the continuity of the Congress and the presidency are intertwined because the Presidential Succession Act includes the Speaker of the House and the President Pro Tempore directly after the president and vice president in the line of succession. With a badly wounded Congress, it might mean that no Speaker or President Pro Tempore could step forward to fill the presidency, or it could mean that a Speaker or President Pro Tempore newly elected by a handful of members would assume the presidency at a time of crisis and serve the entire term. More problematic than any of these particular scenarios is the confusion that would occur after an attack and potential conflicts between competing leaders trying to fill a vacuum.

The commission believes that it is essential to address this problem. In formulating this report the commission consulted numerous experts and current and former officeholders. The exact details of a solution are less important than that the problem be addressed seriously and expeditiously. The only way to address the problem of restoring Congress after a catastrophic attack is to amend the Constitution to allow immediate temporary appointments to Congress until special elections can be held to fill vacancies or until matters of incapacitation can be resolved. It is our hope that such an emergency provision of the Constitution will never be utilized, but it is our best insurance against the chaotic aftermath of an attack. It serves as a warning to those who would seek to topple the United States that our institutions are stronger than those who would try to destroy them.

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APPENDIX I

COMMISSION-SPONSORED PUBLIC EVENTS

INAUGURAL PRESS CONFERENCE

Thursday, September 19, 2002
American Enterprise Institute
1150 Seventeenth Street, N.W.
Washington, D.C. 20036

Participants:
Lloyd Cutler, Wilmer, Cutler & Pickering
Thomas Foley, Akin, Gump, Strauss, Hauer & Feld, LLP
Thomas Mann, Brookings Institution
Norman Ornstein, American Enterprise Institute

FIRST COMMISSION HEARING

Monday, September 23, 2002
House Administration Committee
1310 Longworth House Office Building
Capitol Hill

Morning Session
Witnesses appearing before the commission:
Michael Davidson, former Senate Legal Counsel
James Duff, former Administrative Assistant to Chief Justice Rehnquist
John Fortier, American Enterprise Institute
Thomas Mann, Brookings Institution
Norman Ornstein, American Enterprise Institute

Afternoon Session
Witnesses appearing before the commission:
Representative Brian Baird (D-WA)
Representative Chris Cox (R-CA)
Norman Ornstein, American Enterprise Institute
Representative Vic Snyder (D-AR)

SECOND COMMISSION HEARING

ednesday, October 16, 2002
The Brookings Institution
1775 Massachusetts Avenue, N.W.
Washington, D.C. 20036

Witnesses appearing before the commission:
Michael Davidson, former Senate Legal Counsel
John Fortier, American Enterprise Institute
Alton Frye, Council on Foreign Relations
Michael Glennon, The Fletcher School, Tufts University
Representative James Langevin (D-RI)
Thomas Mann, Brookings Institution
Randy Moss, Wilmer, Cutler & Pickering
Norman Ornstein, American Enterprise Institute
Donald Wolfensberger, Woodrow Wilson International Center for Scholars

Transcripts for all events are available at www.continuityofgovernment.org

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APPENDIX II

THE CAPITOL AS A SEPTEMBER 11TH TARGET

From an interview regarding the plan for the September 11th attacks:

Mr. Yosri Fouda (Al-Jazeera):
"The White House was in the list, but then was later taken off the list for navigation reasons, according to Khalid Sheik Mohammed."

Kate Seeyle (NPR):
"And replaced by the U.S. Capitol, adds Fouda, the fourth target presumably of the hijacked jet that crashed in Pennsylvania."
Transcript: "Two Senior Al-Qaeda Leaders Give Interviews to Al-Jazeera," Morning Edition *(10:00 AM ET) National Public Radio, September 13, 2002.*

The two terrorist plotters [Khalid Sheikh Mohammed and Ramzi Binalshibh] reveal:
"The fourth target of the hijackers was Capitol Hill and not the White House. United Airlines flight 93 was heading for Congress when the passengers overpowered the terrorists and the plane crashed into the Pennsylvanian countryside."
Nick Fielding, "Masterminds of 9/11 reveal terror secrets," Sunday Times *(London), September 8, 2002, p. 1.*

"About three weeks before September 11, targets were assigned to four teams, with three of them hearing a code name: The U.S. Capitol was called 'The Faculty of Law;' the Pentagon became 'The Faculty of Fine Arts;' and the North Tower of the World Trade Center was code-named by Atta as 'The Faculty of Town Planning.'"
"Al-Jazeera Offers Accounts of 9/11 Planning," http://cnn.worldnews.printthis.clickability.com, September 12, 2002.

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APPENDIX III

RELEVANT CONSTITUTIONAL PROVISIONS

CONSTITUTIONAL PROVISION FOR FILLING VACANCIES IN THE HOUSE OF REPRESENTATIVES

ARTICLE 1, SECTION 2, CLAUSE 4

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

CONSTITUTIONAL PROVISION FOR FILLING VACANCIES IN THE SENATE

AMENDMENT XVII

Passed by Congress May 13, 1912.
Ratified April 8, 1913.

The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

CONSTITUTIONAL PROVISION FOR THE QUORUM REQUIREMENT

ARTICLE 1, SECTION 5, CLAUSE 1

Section 5. ...and a Majority of each [House] shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

* Article I, section 3, of the Constitution was modified by the 17th Amendment.

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APPENDIX IV

SPECIAL ELECTIONS IN THE CASE OF DEATH FOR THE UNITED STATES HOUSE OF REPRESENTATIVES FROM THE 99TH TO 107TH CONGRESS

Congress	District	Representative-elect	Date of death	Primary date[a]	Primary runoff	Special election	Swearing-in	Successor	Days
100	California 5th	Sala Burton	2/1/1987	4/7/1987	6/2/1987	6/9/1987	Nancy Pelosi	128
100	Connecticut 4th	Stewart B. McKinney	5/7/1987	7/21/1987	8/18/1987	9/9/1987	Christopher Shays	125
100	Virginia 5th	Dan Daniel	1/23/1988		6/14/1988	6/21/1988	L. F. Payne	150
100	New Jersey 3rd	James J. Howard	3/25/1988	6/7/1988	11/8/1988	1/13/1989	Frank Pallone Jr.	294
100	Illinois 12th	Melvin Price	4/22/1988	3/15/1988[c]	8/9/1988	8/11/1988	Jerry F. Costello	111
100	Tennessee 2nd	John J. Duncan	6/21/1988		11/8/1988	1/3/1989	John J. Duncan Jr.	196
100	Alabama 3rd	Bill Nichols	12/13/1988	3/7/1989	4/4/1989	4/11/1989	Glen Browder	126
101	Florida 18th	Claude Pepper	5/30/1989	8/24/1989	9/26/1989	10/7/1989	Ileana Ros-Lehtinen	99
101	Texas 18th	Mickey Leland	8/7/1989		12/9/1989	1/23/1990	Craig Washington	169
101	Mississippi 5th	Larkin Smith	8/13/1989	10/3/1989	10/17/1989	10/24/1989	Gene Taylor	72
102	Massachusetts 1st	Silvio O. Conte	2/8/1991	4/30/1991	6/4/1991	7/10/1991	John Olver	130
103	Michigan 3rd	Guy F. G. Henry	7/31/1993	11/2/1993	12/7/1993	1/25/1994	Vernon J. Ehlers	178
103	Kentucky 2nd	William H. Natcher	3/29/1994		5/24/1994	5/26/1994	Ron Lewis	58
104	Missouri 8th	Bill Emerson	6/22/1996	(indep.)	11/5/1996	1/8/1997	Jo Ann Emerson	200
105	Texas 29th	Frank Tejeda	1/30/1997	3/18/1997	4/12/1997	4/17/1997	Gene D. Rodriguez	77
105	California 22nd	Walter H. Capps	10/28/1997	3/13/1998	3/10/1998	3/17/1998	Lois Capps	140
105	California 44th	Sonny Bono	1/5/1998		4/7/1998	4/21/1998	Mary Bono	106
105	New Mexico 1st	Steven Schiff	3/25/1998	4/13/1998[d]	6/23/1998	6/25/1998	Heather Wilson	92
106	California 12th	George P. Brown Jr.	7/13/1999	9/21/1999	11/16/1999	11/18/1999	[illegible]	126
107	California 22nd	Julian C. Dixie	2/8/2000	3/16/2001	6/5/2001	6/6/2001	Doug [illegible]	181
107	Virginia 4th	Norman Sisisky	3/29/2001	4/29/2001[e]	6/19/2001	6/26/2001	J. Randy Forbes	89
107	Massachusetts 9th	John Joseph Moakley	[illegible]	[illegible]	[illegible]	[illegible]	Stephen F. Lynch	143

a If no primary date is given, the state held no primary or the information was unavailable. b No primary election was held, the candidates were selected by delegation. c Costello had already won the regularly scheduled primary before the death of Price. d Heather Wilson was nominated by convention. e Forbes was nominated by convention. f Case was not sworn into until after a second special election on January 4, 2003. Mink was elected to the 103rd Congress despite her death, but Case won the winner-takes-all election to fill the two years of Mink's term.

APPENDIX V

TIME REQUIREMENTS FOR FILLING CONGRESSIONAL VACANCIES ACCORDING TO STATE LAWS

ALABAMA

Code of Ala. § 17-18-1 through 7

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe
- If Congress will not be in session prior to the next general election, no special election is held

ALASKA

Alaska Stat. § 15.40.010 through 220

- A special general election must be held no less than 60 days, and no more than 90 days, after a vacancy occurs
- A special primary election must be held no less than 30 days after the vacancy occurs
- If the vacancy occurs less than 60 days before or is on or after the date of the primary election in general election years, no special election is held

ARIZONA

A.R.S. § 16-201, § 16-221 through 223, and § 16-342

- A special general election must be held no less than 110 days, and no more than 150 days, after the vacancy occurs
- A special primary election must be held no less than 75 days, and no more than 105 days, after the vacancy occurs
- If the vacancy occurs within 6 months of a regularly scheduled general election, no special election is held

ARKANSAS

A.C.A. § 7-7-105

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe

CALIFORNIA

Cal Elec Code § 10700

- A special election must occur no less than 112 days, and no more than 119 days, after the governor issues the writ of election
- The governor must issue the writ of election no later than 14 days after the vacancy occurs
- If the vacancy occurs within 180 days of a regularly scheduled election, the special election may coincide with that regularly scheduled election

In the event of a catastrophe –
Cal Elec Code § 10733 (2003)

- A special election must occur no less than 56 days, and no more than 63 days, after the governor issues the writ of election
- If the vacancy occurs within 90 days of a regularly scheduled election, the special election may coincide with the regularly scheduled election

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COLORADO

C.R.S. 1-12-201 through 208

- A special election must occur no less than 75 days, and no more than 90 days, after the vacancy occurs
- If the vacancy occurs within 90 days of a regularly scheduled general election, no special election is held

CONNECTICUT

Conn. Gen. Stat. § 9-211 through 224b and § 9-450

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe

DELAWARE

15 Del. C. § 7103 through 7112 and 15 Del. C. § 7301 through 7306

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe

FLORIDA

Fla. Stat. § 100.111

- The governor fixes the date of a special first primary election, a special second primary election, and a special election with a minimum of 2 weeks between each election
- There is no specification as to when the governor must issue the writ of election after the vacancy occurs
- If Congress will not be in session prior to the next general election, the special election may coincide with the regularly scheduled election

GEORGIA

O.C.G.A. § 21-2-540 through 545

- A special election must be held no less than 30 days after the governor issues the writ of election
- The governor must issue the writ of election no later than 10 days after the vacancy occurs

HAWAII

HRS § 17-2

- A special election must be held no less than 60 days after the chief election officer issues the writ of election
- There is no specification as to when the chief election officer must issue the writ of election after the vacancy occurs

IDAHO

Idaho Code § 34-106, § 34-106, and § 59-911

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe

ILLINOIS

10 ILCS 5/25-7

- A special general election must occur no more than 115 days after the governor issues the writ of election
- The governor must issue the writ of election no later than 5 days after the vacancy occurs
- If the vacancy occurs within 180 days of a regularly scheduled general election, no special election is held

INDIANA

Burns Ind. Code Ann. § 3-10-8-1 through 9 and § 3-13-3-2

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe
- If the vacancy occurs less than 30 days before a regularly scheduled general election, no special election is held

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IOWA

Iowa Code § 43.83 and § 69.14

- A special election must be held no less than 40 days after the governor issues the writ of election
- The governor must issue the writ of election no later than 5 days after the vacancy occurs
- If Congress will not be in session prior to the next general election, no special election is held

KANSAS

K.S.A. § 25-3501 through 3505

- A special election must be held no less than 45 days, and no more than 60 days, after the governor issues the writ of election
- The governor must issue the writ of election no more than 5 days after the vacancy occurs
- If the vacancy occurs no less than 30 days, and no more than 90 days, before a regularly scheduled general or primary election, the special election coincides with the regularly scheduled election

KENTUCKY

KRS § 118.720

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe

LOUISIANA

La. R.S. 18:1279

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe

MAINE

21-A M.R.S. § 366 and § 392

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe
- If the vacancy occurs while Congress is in session, the special election must be held "as soon as reasonably possible"
- If the vacancy occurs when Congress is not in session, the special election must be held before the next regular or called session

MARYLAND

Md. Ann. Code art. 33, § 8-710

- A special general election must be held no less than 72 days after the governor issues the writ of election
- A special primary election must be held no less than 36 days after the governor issues the writ of election
- The governor must issue the writ of election no later than 10 days after the vacancy occurs
- If the vacancy occurs less than 60 days before the regularly scheduled primary election, no special election must be held

MASSACHUSETTS

ALM GL ch. 54, § 140

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe

MICHIGAN

MCLS § 168.145, § 168.631, and § 168.633

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe
- There must be at least 20 days between the special primary election and the special general election
- If the vacancy occurs more than 30 days before a regularly scheduled general election, the special election may coincide with the regularly scheduled election

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MINNESOTA

Minn. Stat. § 204D.17 through § 204D.27

- A special election must be held no more than 28 days after the governor issues the writ of election if Congress is in session
- A special primary election must be held no more than 14 days prior to the special general election
- The governor must issue the writ of election no more than 5 days after the vacancy occurs if Congress is in session
- If Congress will not be in session prior to the next general election, no special election is required

MISSISSIPPI

Miss. Code Ann. § 23-25-853

- A special election must be held no less than 40 days after the governor issues the writ of election
- The governor must issue the writ of election no more than 60 days after the vacancy occurs

MISSOURI

§ 105.030 R.S.Mo.

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe

MONTANA

Mont. Code Anno., § 13-25-203

- A special general election must be held no less than 75 days, and no more than 90 days, after a vacancy occurs
- If the vacancy occurs within 150 days of a regularly scheduled primary election or between the primary and general elections in odd numbered years, the special election coincides with the regularly scheduled primary or general election
- If the vacancy occurs between the regularly scheduled primary and the general election in even numbered years, the candidate elected to the office for the succeeding full term shall immediately take office

NEBRASKA

R.R.S. Neb. § 32-564

- A special general election must be held no less than 48 days, and no more than 58 days, after the governor issues the writ of election
- A special primary election must be held no less than 20 days, and no more than 30 days, after the governor issues the writ of election
- There is no specification as to when the governor must issue the writ of election after the vacancy occurs
- If Congress will not be in session prior to the next general election, no special election is held

NEVADA

The state code does not specifically address vacancies in the U.S. House of Representatives

- If a vacancy occurs in the House of Representatives, the state defers to U.S. Constitution Article 1, Section 2
- The governor shall issue a writ of election

NEW HAMPSHIRE

RSA § 661:6

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe

NEW JERSEY

N.J. Stat. § 19:27-6

- A special general election must be held no less than 111 days, and no more than 123 days, after the governor issues the writ of election

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- A special primary election must he held no less than 65 days, and no more than 71 days, after the governor issues the writ of election
- There is no specification as to when the governor must issue the writ of election after the vacancy occurs
- If the vacancy occurs within 65 days prior to the day for holding the next primary election for the general election, the special election coincides with the regularly scheduled election

NEW MEXICO

N.M. Stat. Ann. § 1-15-18.1

- A special election must be held no less than 84 days, and no more than 91 days, after a vacancy occurs
- Each qualified political party may nominate a candidate to fill the vacancy at least 56 days preceding the special election
- The governor must issue the writ of election 10 days after the vacancy occurs
- If the vacancy occurs between the regularly scheduled primary and the general election, the special election coincides with the regularly scheduled election

NEW YORK

NY CLS Pub O § 42

- A special election must be held no less than 30 days, and no more than 40 days, after the governor issues the writ of election
- There is no specification as to when the governor must issue the writ of election after the vacancy occurs
- If the vacancy occurs after the first day of July of the last year of the term of office, no special election is held

NORTH CAROLINA

N.C. Gen. Stat. § 163-13

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe

NORTH DAKOTA

N.D. Cent. Code § 54-07-01

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe

OHIO

ORC Ann. 3521.03

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe
- A special primary election must be held no less than 15 days prior to the special general election

OKLAHOMA

26 Okl. St. § 12-101

- The governor must issue the writ of election no more than 30 days after the vacancy occurs
- If the vacancy occurs after March 1 of an even numbered year, no special election is held, but the candidate elected to the office for the succeeding full term shall be appointed by the Governor to fill the unexpired term

OREGON

ORS § 188.120

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe
- If the vacancy occurs after the 62nd day before the general election but on or before the general election, and if the term of that office is not regularly filled at that election,

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the special election is held as soon as practicable after the general election

PENNSYLVANIA

25 P.S. § 2777

- A special election must be held no less than 60 days after the governor issues the writ of election
- The governor must issue the writ of election no more than 10 days after the vacancy occurs
- If Congress will not be in session prior to the next general election, no special election is held

RHODE ISLAND

R.I. Gen. Laws § 17-4-8

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe
- If the vacancy occurs between April 1 and October 1 in an even year, the special election may coincide with the next regularly scheduled general election

SOUTH CAROLINA

S.C. Code Ann. § 7-13-190

- A special election must be held on the 18th Tuesday after a vacancy occurs
- A special primary election must be held on the 11th Tuesday after a vacancy occurs
- A special runoff primary must be held on the 13th Tuesday after a vacancy occurs
- If the 18th Tuesday after the vacancy occurs is within 60 days of a regularly scheduled general election, the special election coincides with the regularly scheduled election

SOUTH DAKOTA

S.D. Codified Laws § 12-11-1

- A special election must be held no less than 80 days, and no more than 90 days, after a vacancy occurs
- The governor must issue the writ of election no later than 10 days after the vacancy occurs
- If the vacancy occurs within 6 months of a regularly scheduled primary or general election, the special election coincides with the regularly scheduled election

TENNESSEE

Tenn. Code Ann. § 2-14-102 and § 2-16-101

- A special general election must be held no less than 100 days, and no more than 107 days, after the governor issues the writ of election
- A special primary election must be held no less than 55 days, and no more than 60 days, after the governor issues the writ of election
- The governor must issue the writ of election no later than 10 days after the vacancy occurs
- If the vacancy occurs within 30 days of a regularly scheduled primary or general election, the special election may coincide with the regularly scheduled election

TEXAS

Tex. Elec. Code § 203.001 through 005 and § 204.021

- A special general election must be held no less than 36 days, and no more than 50 days, after the governor issues the writ of election
- There is no specification as to when the governor must issue the writ of election after the vacancy occurs

UTAH

Utah Code Ann. § 20A-1-502

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe

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VERMONT

17 V.S.A. § 2352 and § 2621

- A special general election must be held no more than 3 months after a vacancy occurs
- A special primary election must he held no less than 40 days, and no more than 46 days, prior to the date of the special general election
- If the vacancy occurs within 6 months of a regularly scheduled general election, the special election may coincide with the regularly scheduled election

VIRGINIA

Va. Code Ann. § 24.2-209

- The governor decides the date of the special election; the State Code does not indicate any specific timeframe

WASHINGTON

Rev. Code ash. (ARC) § 29.68.080

- A special general election must be held no less than 90 days after the governor issues the writ of election
- A special primary election must be held no less than 30 days before the special general election
- The governor must issue the writ of election no later than 10 days after the vacancy occurs
- If the vacancy occurs within 6 months of a regularly scheduled general election and before the second Friday following the close of the filing period for that general election, the special primary and general elections coincide with the regularly scheduled election

WEST VIRGINIA

. Va. Code § 3-10-1 through 4

- A special general election must be held no less than 30 days, and no more than 75 days, after the governor issues the writ of election
- The governor must issue the writ of election no later than 10 days after the vacancy occurs

WISCONSIN

is. Stat. § 8.50

- A special election must be held no less than 62 days, and no more than 77 days, after the chief election officer issues the writ of election
- If a primary election is required, it must be held 28 days before the special election
- There is no specification as to when the chief election officer must issue the writ of election after the vacancy occurs
- If the vacancy occurs between the second Tuesday in May and the second Tuesday in July in an even numbered year, the special primary and general elections shall be filled at the regularly scheduled election

WYOMING

yo. Stat. § 22-18-103 through 105

- A special general election must be held no more than 40 days after a vacancy occurs
- The governor must issue the writ of election no later than 5 days after the vacancy occurs
- If the vacancy occurs within 6 months of a regularly scheduled general election, the vacancy shall be filled at the regularly scheduled general election

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APPENDIX VI

TEXT OF PROPOSED CONSTITUTIONAL AMENDMENTS

Proposal by: Senator Knowland
S.J. Res. 39 (1954)

Proposing an amendment to the Constitution giving governors the power to make temporary appointments for vacancies that exist within sixty days after a proclamation from the President, certified by the Speaker, stating that there are more than 145 vacancies in the House of Representatives. Temporary appointees would serve until their seats were filled by election. This amendment passed the Senate by a vote of 70-1 on June 4, 1954.

86TH CONGRESS — 1ST SESSION
S.J. RES. 39

IN THE SENATE
OF THE UNITED STATES
FEBRUARY 6, 1953

Mr. KNOWLAND introduced the following joint resolution; which was read and referred to the Committee on the Judiciary

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States to enable the Congress, in aid of the common defense, to function effectively in time of emergency or disaster

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States:

Article—

SECTION 1. Whenever, in time of any national emergency or national disaster, the number of vacancies in the House of Representatives shall exceed one hundred and forty-five, the Speaker of the House of Representatives shall certify that fact to the President. In case there is no Speaker, or in the event of the inability of the Speaker to discharge the powers and duties of his office, such certification shall be made by the Clerk of the House of Representatives. Upon receipt of such certification, the President shall issue a proclamation declaring such fact. The executive authority of each State shall then have power to make temporary appointments to fill any vacan-

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cies in the representation of his State in the House of Representatives which may exist at any time within sixty days after the insurance of such a proclamation. Any person temporarily appointed to any such vacancy shall serve until the people fill the vacancy by election as the legislature may direct.

SECTION 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Proposal by: Senator Kefauver
S.J. Res. 8 (1955)

Proposing an amendment to the Constitution giving governors the power to make temporary appointments when there is more than a majority of vacancies in either House. Temporary appointees would serve until their seats were filled by election. This amendment passed the Senate by a vote of 76-3 on May 19, 1955.

84TH CONGRESS — 1ST SESSION
S.J. RES. 8

IN THE SENATE OF
THE UNITED STATES
JANUARY 6, 1954

Mr. KEFAUVER introduced the following joint resolution; which was read and referred to the Committee on the Judiciary

JOINT RESOLUTION
To amend the Constitution to authorize governors to fill temporary vacancies in the Congress caused by a disaster.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That in the event of a disaster that causes more than a majority of vacancies in the representation of the several States in the Senate and in the House of Representatives the executives thereof shall make temporary appointments to fill such vacancies, until the people of the States shall fill them by election. Pending such appointments, a majority of Members of each House duly chosen, sworn, and living shall constitute a quorum to do business.

Article—
SECTION 2. This article shall be inoperative unless it shall have heen ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

Proposal by: Senator Kefauver
S.J. Res. 39 (1960)

Proposing an amendment to the Constitution giving governors the power to make temporary appointments when the total number of vacancies in the House of Representatives exceeds half of its membership. Following this occurrence, the governor has sixty days to make his appointments that will ultimately be filled by election. This amendment passed the Senate by a vote of 70-18 on February 2, 1960.

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86TH CONGRESS — 1ST SESSION
S.J. RES. 39

IN THE SENATE
OF THE UNITED STATES
JANUARY 29, 1959

Mr. KEFAUVER, and Mr. DODD, introduced the following joint resolution; which was read and referred to the Committee on the Judiciary

JOINT RESOLUTION

Proposing to authorize Governors to fill temporary vacancies in the House of Representatives, to abolish tax and property qualifications for electors in Federal elections etc.

[Relevant Section]

On any date that the total number of vacancies in the House of Representatives exceeds half of the authorized membership thereof, and for a period of sixty days thereafter, the executive authority of each State shall have power to make temporary appointments to fill any vacancies, including those happening during such period, in the representation from his State in the House of Representatives. Any person temporarily appointed to fill any such vacancy shall serve until the people fill the vacancy by election as provided for by article I, section 2, of the Constitution.

Proposal by: Representative Baird
H.J. Res. 67 (2001)

Proposing an amendment to the Constitution of the United States regarding the appointment of individuals to serve as Members of the House of Representatives in the event that one quarter of the Members are unable to serve at any time because of death or incapacity.

107TH CONGRESS — 1ST SESSION
H. J. RES. 67

IN THE HOUSE OF REPRESENTATIVES
OCTOBER 10, 2001

Mr. BAIRD introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States regarding the appointment of individuals to serve as Members of the House of Representatives in the event a significant number of Members are unable to serve at any time because of a national emergency.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification:

Article—

SECTION 1. If at any time 25 percent or more of the members of the House of Representatives are unable to carry out their duties because of death or incapacity, each Governor of a State represented by a member who has died or

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become incapacitated shall appoint an otherwise qualified individual to take the place of the member as soon as practicable (but in no event later than 7 days) after the member's death or incapacity has been certified.

SECTION 2. An individual appointed to take the place of a member of the House of Representatives under section 1 shall serve until a member is elected to fill the vacancy resulting from the death or incapacity. A member shall he elected to fill the vacancy in a special election to be held at any time during the 90-day period which begins on the date the individual is appointed under section 1, in accordance with the applicable laws regarding special elections in the State involved, except that if a regularly scheduled general election for the office will be held during such period or 30 days thereafter, no special election shall be held and the member elected in such regularly scheduled general election shall fill the vacancy upon election. An individual appointed under section 1 may be a candidate in such a special election or in such a regularly scheduled general election.

SECTION 3. During the period of an individual's appointment under section 1, the individual shall be treated as a Member of the House of Representatives for purposes of all laws, rules, and regulations.

SECTION 4. Congress shall have the power to enforce this article through appropriate legislation.

Proposal by: Representative Lofgren
H.J. Res. 77 (2001)

Proposing an amendment to the Constitution regarding the appointment of individuals to serve as Members of the House of Representatives in the event that thirty percent or more of the Members are vacant because of death or resignation. Congress is ultimately empowered to provide for temporary appointments by law, rather than a provision in the Constitution, to fill vacant seats.

107TH CONGRESS — 1ST SESSION
H. J. RES. 77

IN THE HOUSE OF REPRESENTATIVES
DECEMBER 5, 2001

Ms. LOFGREN introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States regarding the appointment of individuals to serve as Members of the House of Representatives when, in a national emergency, a significant number of Members are unable to serve.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution

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when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification:

Article—

SECTION 1. Congress may by law provide for the appointment of temporary members of the House of Representatives to serve during any period in which 30 percent or more of the seats of the House of Representatives are vacant due to death or resignation.

SECTION 2. Any temporary member appointed pursuant to a law enacted to carry out this article shall serve until a member is elected to fill the vacancy in accordance with the applicable laws regarding special elections in the State involved.

Proposal by: Senator Specter
S.J. Res. 30 (2001)

Proposing an amendment to the Constitution of the United States regarding the appointment of individuals to serve as Members of the House of Representatives in the event that half of the Members are unable to serve at any time because of death or incapacity.

107TH CONGRESS — 1ST SESSION
S. J. RES. 30

IN THE SENATE
OF THE UNITED STATES
DECEMBER 20
(legislative day, DECEMBER 18), 2001

Mr. SPECTER introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States regarding the appointment of individuals to serve as Members of the House of Representatives in the event a significant number of Members are unable to serve at any time because of death or incapacity.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within 7 years after the date of its submission by the Congress:

Article—

SECTION 1. If at any time 50 percent or more of the Members of the House of Representatives are unable to carry out their duties because of death or incapacity, each Governor of a State represented by a Member who has died or become incapacitated shall appoint a qualified individual to take the place of the Member as soon as practicable, but no later than 7 days, after the Member's death or incapacity has been certified.

An individual appointed to take the place of a Member of the House of Representatives under this section shall be a member of the same political party as the Member of the House of Representatives who is being replaced.

SECTION 2. An individual appointed to take the place of a Member of the House of Representatives under section 1 shall serve until an indi-

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vidual is elected to fill the vacancy resulting from the former Member's death or incapacity.

A Member shall be elected to fill the vacancy in a special election to be held at any time during the 90-day period which begins on the date the individual is appointed under section 1, in accordance with the applicable election laws of the State involved. However, if a regularly scheduled general election for the office will be held during such 90-day period, or 30 days thereafter, no special election shall be held and the Member elected in such regularly scheduled general election shall fill the vacancy upon election.

An individual appointed under section 1 may be a candidate in such a special election or in such a regularly scheduled general election.

SECTION 3. During the period of an individual's appointment under section 1, the individual shall have all the powers and duties of a Member of the House of Representatives.

SECTION 4. Congress shall have the power to enforce this article by appropriate legislation.

Proposal by: Norman J. Ornstein
Resident Scholar, American Enterprise Institute

A constitutional amendment that grants governors the power to make temporary appointments to fill vacant house seats when a majority of the nation's governors determine that a majority of the state's representatives or both Senators are dead or incapacitated. In the case of vacancies, Governors would make temporary appointments that would last until a special election could be held. In the case of incapacitated members, Governors would make interim appointments who would serve until the incapacitated member recovers. Governors shall select temporary and interim members from a list of designated successors drawn up by each individual member.

JOINT RESOLUTION

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification.

SECTION 1. In the event of an emergency, the executive authority of each state shall determine the condition of its Representatives and Senators. If the offices of a majority of the Representatives apportioned to that state or of both of the Senators are vacant or occupied by members unable to discharge the powers and duties of their office, the executive authority of that state shall issue a proclamation to that effect. The proclamation shall be sent to the Speaker of the House, the president of the Senate and other officers that shall be specified by law. If within a [...]-day period, executive authorities of the majority of states have issued such a proclamation, an emergency appointment authority shall commence, whereby the executive authority shall make temporary appointments to fill vacancies in the House of Representatives and make appointments of acting members to discharge the function of Representatives and Senators unable to perform

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their duties, while their disability persists. The emergency appointment authority shall remain in effect until the end of the next session.

SECTION 2. In accordance with the emergency appointment procedure in this article, each member of the House of Representatives and each Senator shall designate in advance not fewer than 3 nor more than 7 emergency interim successors to the member's powers and duties. All designated interim successors shall meet the qualifications for the office so designated. Each member shall review and, as necessary, promptly revise the designations of emergency interim successors to insure that at all times there are at least 3 such qualified emergency interim successors. Members and Senators shall submit their lists of designated successors to the Speaker of the House, the president of the Senate and the executive authority of their state.

SECTION 3. Upon commencement of the emergency authority provided for by this article, the Executive Authority of each State shall appoint Temporary Members to fill vacancies in the House of Representatives, selecting from the list of designated successors. For the period of their appointment, Temporary Members shall be members of the House of Representatives for all purposes under this Constitution, the laws made in pursuance thereof, and the rules of the House of Representatives. The appointment of a temporary Member shall end upon the filling of the vacancy by election.

SECTION 4. In the case of a vacancy in the House of Representatives under this article, the writ of election that shall issue under Article I of this Constitution shall provide for the filling of the vacancy within [.....] days of its happening, except that if a regularly scheduled election for the office will be held during such period or [.....] days thereafter, no special election shall be held and the member elected in such regularly scheduled general election shall fill the vacancy upon election.

SECTION 5. In the case of a Representative, who is unable to discharge his or her duties, the executive authority in each state shall, under the emergency authority of this article, appoint as an Acting Member an individual, selecting from the list of designated successors, to discharge the powers and duties of a Representative who is unable to discharge those functions. The appointment of an Acting Member shall end upon the transmission to the Speaker or other Officer designated by the House of Representatives an affirmation in writing by the member that no inability exists. Upon the transmission of the affirmation the member shall resume all the powers and duties of the Office.

SECTION 6. In the case of a Senator, who is unable to discharge his or her duties, the executive authority in each state shall, under the emergency authority of this article, appoint as an Acting Senator an individual, selecting from the list of designated successors, to discharge the powers and duties of a Senator who is unable to discharge those functions. The appointment of an Acting Senator shall end upon the transmission to the president of the Senate or other Officer designated by the Senate an affirmation in writing by the Senator that no inability exists. Upon the transmission of the affirmation the Senator shall resume all the powers and duties of the Office.

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Proposal by: Michael Davidson
Former Senate Legal Counsel

An amendment changing the House vacancy procedure to one very similar to the Senate's; however, it limits the temporary appointments to 60 days. The legislature of each state may allow the executive to make the temporary appointments if a vacancy does occur.

JOINT RESOLUTION

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification.

SECTION 1. When vacancies in the House of Representatives happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

SECTION 2. The legislature of any state may empower the executive thereof to make temporary appointments of Members of the House of Representatives until the people fill the vacancies by election as the legislature may direct; Provided, That a temporary appointment shall not last longer than ninety days or until an election to fill the vacancy, whichever is sooner.

Proposal by: Michael Glennon
Professor of International Law, The Fletcher School, Tufts University

A constitutional amendment that would allow Congress, by use of legislation, to regulate the filling of vacancies in House of Representatives when a substantial number of members are killed or incapacitated.

JOINT RESOLUTION

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years after the date of its submission for ratification.

Congress shall have power to regulate by law the filling of vacancies that may occur in the House of Representatives in the event that a substantial number of members are killed or incapacitated.

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APPENDIX VII

EXAMPLES OF EMERGENCY VACANCY PROVISIONS AS LEGISLATED BY STATES

Listed below are three different methods that states use to address vacancies in their legislatures. Both Delaware and California have procedures to deal with mass vacancies in emergency situations. State legislators in Delaware designate a list of successors in advance. In California, the remaining members of the legislature fill the vacancies. North Dakota's normal method for filling vacancies would also operate in an emergency situation. In this case, local party committees are responsible for filling the vacancies.

DELAWARE

DEL. CONST. ART XVII, § 1 (2002)

§ 1. Continuity of state and local governmental operations in periods of emergency resulting from disasters caused by enemy attack

The General Assembly, in order to insure continuity of State and local governmental operations in periods of emergency resulting from disasters caused by enemy attack, shall have the power and the immediate duty (1) to provide for prompt and temporary succession to the powers and duties of public offices whose succession is not otherwise provided for in this Constitution, of whatever nature and whether filled by election or appointment, the incumbents of which may become unavailable for carrying on the powers and duties of such offices, and (2) to adopt such other measures as may be necessary and proper for insuring the continuity of governmental operations. In the exercise of the powers hereby conferred the General Assembly shall in all respects conform to the requirements of this Constitution except to the extent that in the judgment of the General Assembly so to do would be impracticable or would admit of undue delay.

29 DEL. C. § 7802 (2002)

§ 7802. Statement of policy

Because of the existing possibility of attack upon the United States of unprecedented size and destructiveness, and in order, in the event of such an attack, to assure continuity of government through legally constituted leader-

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ship, authority and responsibility in offices of the government of the State and its political subdivisions; to provide for the effective operation of governments during an emergency; and to facilitate the early resumption of functions temporarily suspended, it is found and declared to be necessary to provide for emergency interim succession to governmental offices of this State and its political subdivisions in the event the incumbents thereof (and their deputies, assistants or other subordinate officers authorized, pursuant to law, to exercise all of the powers and discharge the duties of such offices hereinafter referred to as deputies) are unavailable to perform the duties and functions of such offices.

29 DEL. C. § 7803 (2002)

§ 7803. Definitions

Unless otherwise clearly required by the context, as used in this chapter:

(1) "Unavailable" means either that a vacancy in office exists and there is no deputy authorized to exercise all of the powers and discharge the duties of the office, or that the lawful incumbent of the office (including any deputy exercising the powers and discharging the duties of an office because of a vacancy) and the lawful incumbent's duly authorized deputy are absent or unable to exercise the powers and discharge the duties of the office.

(2) "Emergency interim successor" means a person designated pursuant to this chapter, in the event the officer is unavailable, to exercise the powers and discharge the duties of an office until a successor is appointed or elected and qualified as may be provided by the Constitution, statutes, charters and ordinances or until the lawful incumbent is able to resume the exercise of the powers and discharge the duties of the office.

(3) "Office" includes all state and local offices, the powers and duties of which are defined by the Constitution, statutes, charters and ordinances, except the office of Governor and except those in the General Assembly and the judiciary.
(4) "Attack" means any attack or series of attacks by an enemy of the United States causing, or which may cause, substantial damage or injury to civilian property or persons in the United States in any manner by sabotage or by the use of bombs, missiles, shellfire or atomic, radiological, chemical, bacteriological or biological means or other weapons or processes.

(5) "Political subdivision" includes counties, cities, towns, districts, authorities and other public corporations and entities whether organized and existing under charter or general law.

29 DEL. C. § 7804 (2002)

§ 7804. Emergency interim successors for state officers

All state officers, subject to such regulations as the Governor (or other official authorized under the Constitution to exercise the powers and discharge the duties of the office of Governor) may issue, shall, upon approval of this chapter, in addition to any deputy authorized pursuant to law to exercise all of the powers and discharge the duties of the office, designate by title emergency interim successors and specify their order of succession. The officer shall review and revise as necessary designations made pursuant to this chapter to insure their current status. The

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officer will designate a sufficient number of such emergency interim successors so that there will be not less than 3 nor more than 7 such deputies or emergency interim successors or any combination thereof, at any time. In the event that any state officer is unavailable following an attack, and in the event the officer's deputy, if any, is also unavailable, the said powers of the officer's office shall be exercised and said duties of the officer's office shall be discharged by the officer's designated emergency interim successors in the order specified. Such emergency interim successors shall exercise said powers and discharge said duties only until such time as the Governor under the Constitution or authority other than this chapter (or other official authorized under the Constitution to exercise the powers and discharge the duties of the office of Governor) may, where a vacancy exists, appoint a successor to fill the vacancy or until a successor is otherwise appointed, or elected and qualified as provided by law, or an officer (or the officer's deputy or a preceding named emergency interim successor) becomes available to exercise or resume the exercise of the powers and discharge the duties of the office.

29 DEL. C. § 7807 (2002)

§ 7807. Formalities of taking office

At the time of their designation, emergency interim successors shall take such oath as may be required for them to exercise the powers and discharge the duties of the office to which they may succeed. Notwithstanding any other law, no person, as a prerequisite to the exercise of the powers or discharge of the duties of an office to which such person succeeds, shall be required to comply with any other law relative to taking office.

29 DEL. C. § 7808 (2002)

§ 7808. Period in which authority may be exercised

Officials authorized to act as emergency interim successors are empowered to exercise the powers and discharge the duties of an office as herein authorized only after an attack upon the United States, as defined herein, has occurred. The General Assembly by concurrent resolution, may at any time terminate the authority of said emergency interim successors to exercise the powers and discharge the duties of office as herein provided.

29 DEL. C. § 7809 (2002)

§ 7809. Removal of designees

Until such time as the persons designated as emergency interim successors are authorized to exercise the powers and discharge the duties of an office in accordance with this chapter, including § 7808 of this title, said persons shall serve in their designated capacities at the pleasure of the designating authority and may be removed or replaced by said designating authority at any time, with or without cause.

29 DEL. C. § 7810 (2002)

§ 7810. Disputes

Any dispute concerning a question of fact arising under this chapter with respect to an office in the executive branch of the state government shall be adjudicated by the Governor (or other official authorized under the Constitution to exercise the powers and discharge the duties of the office of Governor) and the decision shall be final.

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CALIFORNIA

CAL CONST, ART IV § 21 (2003)

§ 21. Preservation of government during emergency

To meet the needs resulting from war-caused or enemy-caused disaster in California, the Legislature may provide for:

(a) Filling the offices of members of the Legislature should at least one fifth of the membership of either house be killed, missing, or disabled, until they are able to perform their duties or successors are elected.

(b) Filling the office of Governor should the Governor be killed, missing, or disabled, until the Governor or the successor designated in this Constitution is able to perform the duties of the office of Governor or a successor is elected.

(c) Convening the Legislature.

(d) Holding elections to fill offices that are elective under this Constitution and that are either vacant or occupied by persons not elected thereto.

(e) Selecting a temporary seat of state or county government.

CAL GOV CODE § 9004

§ 9004. Filling vacancies caused by war or enemy-caused disaster; Procedure

When the Legislature convenes or is convened in regular or extraordinary session during or following a war or enemy-caused disaster and vacancies exist to the extent of one-fifth or more of the membership of either house caused by such disaster, either by death, disability or inability to serve, the vacancies shall be temporarily filled as provided in this section. The remaining members of the house in which the vacancies exist, regardless of whether they constitute a quorum of the entire membership thereof, shall by a majority vote of such members appoint a qualified person as a pro tempore member to fill each such vacancy. The Chief Clerk of the Assembly and the Secretary of the Senate or the persons designated to perform their duties, as the case may be, shall certify a statement of each such appointment to the Secretary of State, who shall thereupon issue commissions to such appointees designating them as pro tempore members of the house by which they were appointed.

The appointments shall be so made that each assembly or senatorial district in which a vacancy exists shall be represented, if possible, by a pro tempore member who is a resident of that district and a registered elector of the same political party as of the date of the disaster as the last duly elected member from such district.

Where an elected member is temporarily disabled or unable to serve, such elected member shall resume his office when able, and the pro tempore member appointed in his place under this section shall cease to serve. In other cases, each pro tempore member appointed under this section shall serve until the next election of a member to such office as provided by law.

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NORTH DAKOTA

N.D. CONST. ART. 4, § 11

§ 11. The legislative assembly may provide by law a procedure to fill vacancies occurring in either house of the legislative assembly.

N.D. CENT. CODE, § 16.1-13-10 (2002)

§ 16.1-13-10. Vacancy existing in office of member of legislative assembly

If a vacancy in the office of a member of the legislative assembly occurs, the county auditor of the county in which the former member resides or resided shall notify the chairman of the legislative council of the vacancy. The county auditor need not notify the chairman of the legislative council of the resignation of a member of the legislative assembly when the resignation was made under section 44-02-02. Upon receiving notification of a vacancy, the chairman of the legislative council shall notify the district committee of the political party that the former member represented in the district in which the vacancy exists. The district committee shall hold a meeting within twenty-one days after receiving the notification and select an individual to fill the vacancy. If the former member was elected as an independent candidate or if the district committee does not make an appointment within twenty-one days after receiving the notice from the chairman of the legislative council, the chairman of the legislative council shall appoint a resident of the district to fill the vacancy. If eight hundred twenty-eight days or more remain until the expiration of the term of office for that office, the individual appointed to fill the vacancy shall serve until a successor is elected at the next general election to serve for the remainder of the term of office for that office.

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APPENDIX VIII

INITIAL ELECTION RATES FOR SENATORS FOLLOWING A GUBERNATORIAL APPOINTMENT

Year	Number of Appointees Seeking Initial Election	Total Elected	Success Rate
1986	1	1	100.0
1988	1	0	0.0
1990	1	1	100.0
1992	2	1	50.0
1994	1	0	0.0
2000	2	2	100.0
totals	**8**	**4**	**50.0**

From 1986 through 2000, 8 senators who were appointed to fill vacancies in the Senate ran in the next election. Fifty percent of them won.

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SUMMARY OF CENTRAL RECOMMENDATION

PROBLEM: If there were mass vacancies in the House of Representatives or large numbers of incapacitated members of the House or Senate, Congress would be unable to function for many months, leaving a vacuum in constitutional legislative authority. The Constitution provides only one method, a special election, for filling House vacancies. These elections take many months to hold while the seat remains vacant. If there were hundreds of House vacancies, the House might be unable to meet its constitutional quorum requirement of one-half the membership and would be unable to transact business. An alternative scenario, under a lenient quorum interpretation, would be the House continuing to operate with a small number of representatives—leaving most of the country unrepresented. The Constitution also does not provide an effective way for filling temporary vacancies that occur when members are incapacitated. With the real dangers of biological weapons, both the Senate and the House could be crippled if a large number of members were very sick and unable to perform their duties. The continuity of Congress also affects the presidency, as leaders of Congress are in the line of presidential succession. If the House of Representatives, decimated after an attack, elected a new Speaker, that Speaker could become president for the remainder of the term.

RECOMMENDATION: A constitutional amendment to give Congress the power to provide by legislation for the appointment of temporary replacements to fill vacant seats in the House of Representatives after a catastrophic attack and to temporarily fill seats in the House of Representatives and Senate that are held by incapacitated members. The commission recommends an amendment of a general nature that allows Congress to address the details through implementing legislation. It believes it is essential for such a procedure to operate under emergency circumstances if many members of Congress were dead or incapacitated, but the commission leaves Congress to decide the exact circumstances under which the procedure will take effect. It recommends that temporary representatives be appointed by governors or from a list of successors drawn up in advance by each representative or senator. Given the severe consequences of an attack on Congress, the commission believes that the amendment should be adopted within a two-year period.

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CONFRONTING WORST-CASE TERRORIST SCENARIO, CONGRESS SEARCHES FOR WAY TO KEEP OPERATING

By Curt Anderson
Associated Press
May 30, 2002

WASHINGTON (AP) _ In the new age of terrorism, Congress is quietly developing emergency plans to deal with a doomsday scenario in which many lawmakers are killed or injured during an attack.

On one level, the debate is about logistics: Where and how would lawmakers assemble if the Capitol were destroyed, heavily damaged or targeted in a bioterror attack?

The House, in particular, also must resolve sticky constitutional questions. Not the least of them is whether a devastated legislative body could choose a speaker, who would be behind only the vice president in the line of succession to the presidency.

Many lawmakers believe that on Sept. 11, United Airlines Flight 93 was headed for the Capitol, the symbol of American democracy, before an apparent passenger uprising led to its crash in a Pennsylvania field. Just minutes earlier, the biggest symbols of U.S. economic and military might had been attacked in New York City and suburban Virginia.

Both the House and Senate were disrupted a few weeks later when an anthrax-laced letter was opened in the office of Senate Majority Leader Tom Daschle of South Dakota.

Combined with the continuing threat from the al-Qaida network and other terrorists, the events have led to a wholesale re-examination of how Congress would continue if many of the 435 House members and 100 senators were killed or seriously injured.

``Those who believe there will always be time to address this, and we can postpone a solution indefinitely, are engaging in wishful thinking," said Rep. Brian Baird, a Washington Democrat pressing for changes.

House and Senate leaders have discussed a number of sites, such as Fort McNair in the District of Columbia, as temporary emergency meeting places. Other sites up to 1,000 miles away are being considered. House Speaker Dennis Hastert, R-Ill., got $100 million included in a supplemental spending bill last week to build and outfit what would be a de facto capitol with necessary communications and computer technology.

Rep. Jim Langevin, D-R.I., is advocating greater use of the Internet or video conferencing technology as an alternative, especially if lawmakers were stranded in home districts because airlines were grounded and other modes of transportation shut down.

His idea might get a tryout in the months ahead. Each House member already has a new handheld communications device for maintaining contact.

Beyond such post-emergency planning is the more fundamental question of how Congress, and especially the House, would reconstitute itself if many lawmakers were killed or incapacitated.

New senators could be chosen quickly because governors can appoint successors. House members, however, must be chosen by direct elections that can require up to six months.

Lest anyone think the matter trivial, consider the legislation Congress passed quickly after Sept. 11: authorization of military force, emergency rescue aid, airline aid, money for the war on terrorism, assistance to victims and a law enforcement anti-terrorism bill.

Under the Constitution, none of that could

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have been be done by the Senate or a president alone.

``It is hard to argue that at a time of maximum national peril, it would be desirable either to have laws made by an unrepresentative handful of lawmakers or via a benign form of martial law,'' said Norman Ornstein of the American Enterprise Institute.

Baird and 86 others have proposed a constitutional amendment to allow governors to appoint House members for a 90-day term if 25 percent of the House has been killed, disabled or is missing and presumed dead.

Replacements would not have to be of the same political parties as their predecessors. That is an important difference between Baird's proposal and a plan by Sen. Arlen Specter, R-Pa., and that could ensnare the idea in partisan politics.

Passing a constitutional amendment also could take years. An amendment would have to pass both houses of Congress by two-thirds vote and be ratified by three-fourths of the states.

Many lawmakers say Congress should focus instead on changing its rules or passing laws to address the most pressing problems.

For instance, a law could call for expedited election of replacements and address the presidential succession question by preventing a small number of House members from picking a speaker. A rules change could redefine a voting quorum needed to pass emergency legislation.

A bipartisan group of lawmakers plans meetings this summer intended to recommend a course of action. The co-chairman, Rep. Christopher Cox, R-Calif., wants Congress to act this year.

On the Net
Congress: http://thomas.loc.gov
American Enterprise Institute studies: http://www.aeipoliticalcorner.org

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MADE IN THE SHADE;
THE PRESIDENT IS RIGHT TO CREATE A PARALLEL GOVERNMENT IN SECRET.
IS CONGRESS PREPARED FOR THE WORST?

By William Safire
The New York Times
March 14, 2002

Who knows what evil lurks in the hearts of men?" asked the brooding voice of "Lamont Cranston" on a radio series that transfixed Americans about three generations ago. Goosebumpy listeners joined in the answer: "The Shadow knows."

"Shadow Government Is at Work in Secret" was the headline over a recent story by Barton Gellman and Susan Schmidt of The Washington Post. That caused some consternation because the word shadow suggests sinister, dark doings -- although in Britain, the phrase "shadow Cabinet" has been in use since 1903 to describe the government's loyal-opposition counterparts.

But the news of an operation called "continuity in government" (or COG, as it was immediately acronymmed) was happily received by those of us who have been espousing quick action to enable the government to function in the event of catastrophe in the nation's capital.

A hundred or so unexpendable bureaucrats are rotated in and out of bunkers in hidden locations that even journalists feel no need to reveal. That way, if disaster strikes, federal officials in their bunkers (not an "underground government") can properly assume command, responding to attacks, averting cyberterrorist disruptions in the nation's telecommunications and mobilizing the far-flung federal establishment.

"We take the continuity-of-government issue seriously," said President Bush, not at all defensive when the story broke. Such planning has been done since the Eisenhower era; now that we've seen a real threat, we're doing the fire drills realistically.

Grumbling in Congress has been limited to "Why weren't we told?" The leadership had a right to expect to be informed, but that raises a counter-grumble: What is Congress doing to prepare to avert national paralysis in the remote event the Capitol is suddenly destroyed?

One good idea was put forth here last October: Since state governors can replace missing senators by appointment, why not amend the Constitution to enable governors to appoint replacements of casualties in the House as well who would serve until a special election could be held? It takes time to amend the Constitution, and the time to get started is while we still remember our wake-up call.

The Senate should update the Presidential Succession Act by naming its majority leader as president pro tem. The hoary tradition is for the senior member of the Senate to hold that post, but now that the post is third in line to the presidency, good sense requires a change lest we awaken to discover that Strom Thurmond, 99, or Robert Byrd, 84, has become our commander in chief.

Tom Daschle, the present majority leader, disagrees. "If the pope can lead the Catholic Church in his 80s," he tells me, "surely someone of Sen. Byrd's capacity could do the same for our country." He thinks that updating the succession would be "heavy lifting" and "not necessary."

If Daschle is too shy to put himself into the line of succession, let the Senate delay the change's effect until the next majority

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leader. (Soon enough, Daschle will be out on his ear as the Senate majority switches -- or will be president himself, his timidity on this issue notwithstanding.)

The Supreme Court hints it has plans for emergency succession, but won't say; Pat Leahy at the Senate Judiciary Committee should stop rubber-stamping Bush nominees for judgeships long enough to demand to know the Supremes' plans. The suggestion was aired here of "a shadow Supreme Court, made up of the chief judges of the federal appeals courts," which would have "the advantage of geographical dispersion."

Meanwhile, catastrophe contingency is being explored outside government, too. Under the auspices of the Business Roundtable, AT&T is designing a "CEO Link" to provide secure, wireless communications among scores of movers and shakers in times of peril to keep factories running. (But by foolishly seeking tax credits for such anti-terrorism investment, the chief executives dreaming of unprecedented interface may awaken even the somnolent antitrusters at Ashcroft Justice.)

All this public and private preparation for a reaction to potential disaster makes sense. Though some must be secret, it need not be cause for fear of untrammeled power -- provided it has the oversight of watchdog committees and nosy media. Who knows what dangers lurk in countering the axis of evil? The Shadow knows.

William Safire is a syndicated columnist for The New York Times (safire@nytimes.com).

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House Judiciary Committee Chairman John Conyers
Joint Hearing on S.J. Res. 7 and H.J. Res. 21:
A Constitutional Amendment Concerning Senate Vacancies
Wednesday, March 11, 2009, 10 a.m.
216 Hart Senate Office Building

I am pleased to join a bipartisan and bicameral group of colleagues in support of the constitutional amendment to require that Senate vacancies be filled only by elections. This will finally ensure that voters directly elect all Members of Congress, regardless of how seats become vacant.

I would like to highlight three reasons why I have concluded that this constitutional amendment is necessary.

First, the appointment of Senators by Governors is undemocratic – it takes voters out of the equation.

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In 45 states, Governors now appoint Senators when seats become vacant. This practice is a vestige from the time before the 17th Amendment, when State legislatures selected U.S. Senators, and Governors made temporary appointments until the State legislature filled a vacancy.

The 17th Amendment rightly changed how Senators were elected, by requiring direct election by the people. But it left in place the Governor's role to temporarily fill a Senate vacancy, if expressly authorized to do so by the State legislature.

Recent experience has highlighted the need to once again revisit Senate vacancies. With governors having appointed four Senators after the 2008 election, over 12% of our nation's population will be represented in the next two years by a Senator they did not elect.

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In all, 12 States have been represented at some point in the past decade by an unelected Senator.

This is a voting rights issue.

Second, this can't be fixed by legislation. Right in the text of the 17th Amendment, it clearly says that "the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."

Experts say legislation – such as Congressman Aaron Schock's bill, H.R. 899 – would likely be ruled unconstitutional, because it would infringe on the 17th Amendment's grant of authority to the States to direct how Senate vacancies are filled.

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Limiting a constitutional grant of State authority requires a Constitutional amendment.

Third, we should have basic consistency in how our Representatives in Congress are elected. The Constitution has always required that House vacancies be filled by election. The Senate should not be subject to a different standard. Americans should always have a direct say in who represents them in Congress – in both Houses, all of the time.

I applaud my colleagues on their dedication to this important effort and I look forward to working with them to restore the basic ideals of our democracy.

Congressional Research Service

MEMORANDUM March 9, 2009

To: Hon. Russell D. Feingold
Attention: Robert Schiff

From: Jennifer Manning
Information Research Specialist
Knowledge Services Group
Tel: 202.707.0106

Cara Warner
Administrative Support Assistant
Knowledge Services Group
Tel: 202.707.5885

Subject: **Selected Data on Persons Appointed to the United States Senate, or Elected to the United States Senate in Special Elections, since the Ratification of the 17th Amendment to the Constitution in 1913**

As previously discussed, we are transmitting an Excel spreadsheet containing information on the 184 Senate appointments since 1913, and on the 160 Senators who have won special elections to fill unexpired terms since 1913. All of the data in the spreadsheet is derived from three official sources:

The Senate Historical Office's "Appointed Senators" list at http://www.senate.gov/artandhistory/history/common/briefing/senators_appointed.htm

The *Biographical Directory of the United States Congress* at http://bioguide.congress.gov/

The Clerk of the House's "Women in Congress" website at http://womenincongress.house.gov/

From this data, we have compiled the following:

Selected Information about Appointed Senators since 1913

- Total number of Senate appointments: 184
- Total number of persons appointed to the Senate: 181[1]

[1] Three persons have been appointed twice to the Senate.

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- Number of appointed Senators who did not subsequently seek election: 64 (34.8% of total)[2]
- Number who sought election and lost: 56 (30.4%)
- Number who sought election and won: 60 (32.6%)
- Number of Senate appointments that were women: 14 (7.6%)
- Of the 14 women appointees: 7 replaced their husbands; 2 were appointed by their husbands who were sitting governors; 1 replaced (and was appointed by) her father.
- Number of men appointed to replace their fathers: 3 (1.6%)
- Number of appointees who were related [3] to their predecessor, or to the governor who appointed them: 13 (7.1%)
- Number of the 13 appointees related to their predecessor, or to the appointing governor, who had held elective office: 2 (1.1%)
- Number of appointed Senators that had not previously held elected office: approximately 63[4] (34.2%)
- Number of appointed Senators who had previously been elected to Congress:[5] 21 (11.4%)
- Appointments necessitated by death of a Senator:[6] 129 (70.1%)
- Appointments necessitated by resignation of a Senator: 53 (28.8%)
- Appointments necessitated by removal of a Senator: 1 (0.5%)
- Appointed Senators who were of the same political party as their predecessors: 139 (75.5%)
- Appointed Senators who were of a different political party as their predecessors: 45 (24.5%)
- Number of Senate Democrats replaced by appointee of different political party: 25 of 45 (55.6%)[7]
- Number of Senate Republicans replaced by appointee of different political party: 19 of 45 (42%)

Selected Information about Length of Delays in Filling Senate Seats

- Percentage of Senate appointments made within 7 days of vacancy: 47%

[2] Note: 4 currently serving appointed Senators have not yet faced an election.

[3] Wife, Daughter or Son

[4] We can only make an approximation because we have been unable to determine if some of the state or local positions in question were elective or appointive.

[5] House or Senate.

[6] Number does not include Senator Thomas Walsh, who died en route to accepting a Cabinet appointment.

[7] One Farm Labor party Senator was replaced by an appointee of a different party.

- Percentage of Senate appointments made within 14 days of vacancy: 75.5%
- Longest delay in a Senate appointment since 1913: 145 days[8]

Selected Information about Lengths of Appointments

- Average number of days an appointed Senator served before leaving office, or being elected to continue in the position: 301 days (10 months)[9]
- Shortest service of an appointed Senator: 1 day[10]
- Longest service of an appointed Senator: 846 days (2 years, 3 mo., 25 days)[11]

Selected Information about the Resignations of Senators

- Of the 53 Senators who resigned: 10 resigned to become Vice President; 7 resigned to accept Cabinet appointments; 5 resigned to become Governor; 2 resigned to become President; 8 resigned to accept judicial appointments; 3 resigned to accept diplomatic appointments

Selected Information about the States and Appointed Senators

- Number of states with appointed Senators since 1913: 46
- States without an appointed Senator since 1913: Arizona, Maryland, Utah, and Wisconsin
- States with most appointed Senators since 1913: Kentucky (8); South Carolina (7); New Jersey (7); North Carolina (7)
- States with only one appointed Senator since 1913: Hawaii, Maine, and Oklahoma

Selected Information about Senate Special Elections since 1913

- Number of Senators elected by special election: 160
- Number of those Senators who had no major political party opponent: 14 (8.8% of total)
- Average (mean) delay between opening of a seat and election of a successor by special election: 318 days
- Most frequent (mode) delay between opening of a seat and election of a successor by special election: 106 days
- Longest delay between a Senate vacancy and the subsequent election for that seat: 880 days (2 years, 4 mo., 28 days)[12]

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[8] In 1925, 145 days elapsed before Gerald Nye (R-ND) was appointed to replace Edwin Ladd (R-ND).

[9] This figure is based on a sampling of 73 of the appointments.

[10] Rebecca Felton (D-GA), who served for 24 hours in November 1922.

[11] Sen. Charles Goodell (D-NY), who was appointed Sept. 10, 1968 to replace Robert F. Kennedy, and served until Jan. 3, 1971. He was defeated in the Nov. 3, 1970 election for the seat.

[12] In 1968-1970, 880 days elapsed before James Buckley (Conservative-NY) was elected on Nov. 3, 1970 to replace Robert F. (continued...)

- Number of states in which special Senate elections have been held: 48
- Number of special elections held in the month of November: 131 (82%)
- Number of the 160 special election resulting in a political party switch: 45 (28%)
- Number of women elected in Senate special elections: 6[13]

We hope that you find this information helpful. Please feel free to contact us if you have additional questions.

(...continued)

Kennedy (D-NY), who was assassinated on June 6, 1968. Appointed Senator Charles Goodell served in the interim. Senator Buckley did not take office until Jan. 3, 1971. A total of 942 days (2 years, 6 months, 29 days) elapsed between Senator Robert Kennedy's death and the seating of an elected successor.

[13] Two of the women had been appointed previously; three were replacing their husbands.

History of Special Elections Spreadsheet, Sorted by State

(year)	(mo)	Winner (Last, First)	Party	State	Ran Opposed (Y/N)	Election Date	Predecessor (Last, First)	Pred's Party	Party Swap	Reason for Departure	Departure Date
1970	nov	Stevens, Ted	R	AK	y	3-Nov-70	E.L. Bartlett	D	1	death	11-Dec-68
1914	may	White, Frank S.	D	AL	n	11-May-14	Joseph F. Johnston	D		death	8-Aug-13
1920	nov	Heflin, J. Thomas	D	AL	y	2-Nov-20	John H. Bankhead	D		death	1-Mar-20
1938	apr	Hill, Lister	D	AL	y	26-Apr-38	Dixie Bibb Graves	D		resignation	10-Jan-38
1946	nov	Sparkman, John	D	AL	n	5-Nov-46	John H. Bankhead II	D		death	12-Jun-46
1978	nov	Stewart, Donald W.	D	AL	y	7-Nov-78	James B. Allen	D		death	1-Jun-78
1916	nov	Kirby, William F	D	AR	y	7-Nov-16	James P. Clarke	D		death	1-Oct-16
1992	jan	[redacted]	D	AR	y	12-Jan-92	Theodore H. Caraway	D		death	6-Nov-91
1937	oct	Miller, John E	D	AR	y	18-Oct-37	Joseph T. Robinson	D		death	14-Jul-37
1946	nov	Knowland, William F	R	CA	y	5-Nov-46	Hiram W. Johnson	R		death	6-Aug-45
1954	nov	Kuchel, Thomas H.	R	CA	y	2-Nov-54	Richard M. Nixon	R		resignation	1-Jan-53
1992	nov	[redacted]	D	CA	y	3-Nov-92	Pete Wilson	R	1	resignation	7-Jan-91
1912	jan	Thomas, Charles S.	D	CO	y	15-Jan-12	Charles J. Hughes	D		death	11-Jan-11
1924	nov	Means, Rice W.	R	CO	y	4-Nov-24	Samuel D. Nicholson	R		death	24-Mar-23
1932	nov	Schuyler, Karl C.	R	CO	y	8-Nov-32	Charles W. Waterman	R		death	27-Aug-32
1942	nov	Millikin, Eugene D.	R	CO	y	3-Nov-42	Alva B. Adams	D	1	death	1-Dec-41
1924	dec	Bingham, Hiram	R	CT	y	16-Dec-24	Frank B. Brandegee	R		death	14-Oct-24
1946	nov	Baldwin, Raymond E.	R	CT	y	5-Nov-46	Francis T. Maloney	D	1	death	16-Jan-45
1950	nov	Benton, William	D	CT	y	7-Nov-50	Raymond E. Baldwin	R	1	resignation	16-Dec-49
1952	nov	Bush, Prescott S.	R	CT	y	4-Nov-52	"Brian" McMahon	D	1	death	28-Jul-52
1922	nov	Bayard, Thomas F.	D	DE	y	7-Nov-22	Josiah O. Wolcott	D		resignation	2-Jul-21
1930	nov	Hastings, Daniel O.	R	DE	y	4-Nov-30	T. Coleman du Pont	R		resignation	9-Dec-28
1936	nov	Pepper, Claude	D	FL	n	3-Nov-36	Duncan U. Fletcher	D		death	17-Jun-36
1936	nov	Andrews, Charles O	D	FL	y	3-Nov-36	Park Trammell	D		death	8-May-36
1914	nov	Hardwick, Thomas W.	D	GA	y	3-Nov-14	Augustus O. Bacon	D		death	14-Feb-14
1922	nov	George, Walter F	D	GA	n	7-Nov-22	Thomas E. Watson	D		death	26-Sep-22
1932	nov	Russell, Richard B.	D	GA	n	8-Nov-32	William J. Harris	D		death	18-Apr-32
1972	nov	Nunn, Sam	D	GA	y	7-Nov-72	Richard B. Russell	D		death	21-Jan-71
2000	nov	Miller, Zell	D	GA	y	3-Nov-00	Paul Coverdell	R	1	death	18-Jul-00
1990	nov	Akaka, Daniel K	D	HI	y	6-Nov-90	Spark Masayuki Matsunag	D		death	15-Apr-90
1922	nov	Brookhart, Smith W	R	IA	y	7-Nov-22	William S. Kenyon	R		resignation	24-Feb-22
1926	nov	Stewart, David W.	R	IA	n	2-Nov-26	Albert B. Cummins	R		death	30-Jul-26
1936	nov	Gillette, Guy M.	D	IA	y	3-Nov-36	Richard Louis Murphy	D		death	16-Jul-36
1918	nov	Nugent, John F.	D	ID	y	5-Nov-18	James H. Brady	R		death	13-Jan-18
1928	nov	Thomas, John	R	ID	y	6-Nov-28	Frank R. Gooding	R		death	24-Jun-28

(year)	(mo)	Winner (Last,First)	Party	State	Ran Opposed (Y/N)	Election Date	Predecessor (Last,First)	Pred's Party	Party Swap?	Reason for Departure	Departure Date
1940	nov	Thomas, John	R	ID	y	5-Nov-40	William E. Borah	R		death	19-Jan-40
1946	nov	Dworshak, Henry C	R	ID	y	5-Nov-46	John Thomas	R		death	10-Nov-45
1950	nov	Dworshak, Henry C	R	ID	y	7-Nov-50	Bert H. Miller	D	1	death	8-Oct-49
1962	nov	Jordan, Len B.	R	ID	y	6-Nov-62	Henry C. Dworshak	R		death	23-Jul-62
1928	dec	Glenn, Otis F.	R	IL	y	3-Dec-28	Frank L. Smith	R		resignation	8-Feb-28
1940	nov	Brooks, C. Wayland	R	IL	y	5-Nov-40	James Hamilton Lewis	D	1	death	9-Apr-39
1970	nov	Stevenson, Adlai E. III	D	IL	y	3-Nov-70	Everett M. Dirksen	R	1	death	7-Sep-69
1916	nov	Watson, James E.	R	IN	y	7-Nov-16	Benjamin F. Shively	D	1	death	14-Mar-16
1926	nov	Robinson, Arthur R.	R	IN	y	2-Nov-26	Samuel M. Ralston	D	1	death	14-Oct-25
1944	nov	Jenner, William E.	R	IN	y	7-Nov-44	Frederick Van Nuys	D	1	death	25-Jan-44
1990	nov	Coats, Daniel R.	R	IN	y	3-Nov-90	J. Danforth Quayle	R		resignation	3-Jan-89
1930	nov	McGill, George	D	KS	y	4-Nov-30	Charles Curtis	R	1	resignation	3-Mar-29
1950	nov	Carlson, Frank	R	KS	y	7-Nov-50	Clyde M. Reed	R		death	8-Nov-49
1962	nov	Pearson, James B.	R	KS	y	6-Nov-62	Andrew F. Schoeppel	R		death	21-Jan-62
1996	nov	Brownback, Sam	R	KS	y	5-Nov-96	Robert Dole	R		resignation	11-Jun-96
1914	nov	Camden, Johnson N. Jr.	D	KY	y	3-Nov-14	William O. Bradley	R	1	death	23-May-14
1940	nov	Chandler, Albert B.	D	KY	y	5-Nov-40	Marvel Mills Logan	D		death	3-Oct-39
1946	nov	Cooper, John Sherman	R	KY	y	5-Nov-46	Albert B. Chandler	D	1	resignation	1-Nov-45
1950	nov	Clements, Earle C.	D	KY	y	7-Nov-50	Alben W. Barkley	D		resignation	19-Jan-49
1952	nov	Cooper, John Sherman	R	KY	y	4-Nov-52	Virgil M. Chapman	D	1	death	8-Mar-51
1956	nov	Cooper, John Sherman	R	KY	y	6-Nov-56	Alben W. Barkley	D	1	death	30-Apr-56
1918	nov	Gay, Edward J.	D	LA	n	5-Nov-18	Robert F. Broussard	D		death	12-Apr-18
1936	apr		D	LA	n	21-Apr-36	Huey P. Long	D		death	10-Sep-35
1948	nov	Long, Russell B.	D	LA	y	2-Nov-48	John H. Overton	D		death	14-May-48
1926	nov	Walsh, David I	D	MA	y	2-Nov-26	Henry Cabot Lodge	R	1	death	9-Nov-24
1944	nov	Saltonstall, Leverett	R	MA	y	7-Nov-44	Henry Cabot Lodge, Jr	R		resignation	3-Feb-44
1962	nov	Kennedy, Edward M.	D	MA	y	6-Nov-62	John Fitzgerald Kennedy	D		resignation	22-Dec-60
1913	nov	Lee, Blair	D	MD	y	4-Nov-13	Isidor Rayner	D		death	25-Nov-12
1916	sep	Fernald, Bert M.	R	ME	y	11-Sep-16	Edwin C. Burleigh	R		death	16-Jun-16
1926	sep	Gould, Arthur R.	R	ME	y	13-Sep-26	Bert M. Fernald	R		death	23-Aug-26
1924	nov	Couzens, James	R	MI	y	4-Nov-24	Truman H. Newberry	R		resignation	18-Nov-22
1928	nov	Vandenberg, Arthur H.	R	MI	y	6-Nov-28	Woodbridge N. Ferris	D	1	death	23-Mar-28
1952	nov	Potter, Charles E.	R	MI	y	4-Nov-52	Arthur H. Vandenberg	R		death	18-Apr-51
1966	nov	Griffin, Robert P.	R	MI	y	8-Nov-66	Patrick V. McNamara	D	1	death	30-Apr-66
1923	jul	Johnson, Magnus	DFL	MN	y	18-Jul-23	Knute Nelson	R	1	death	28-Apr-23
1936	nov	Howard, Guy V.	R	MN	y	3-Nov-36	Thomas D. Schall	R		death	22-Dec-35
1942	nov	Nelson, Arthur E.	R	MN	y	3-Nov-42	Ernest Lundeen	R		death	31-Aug-40
1978	nov	Durenberger, Dave	I-R	MN	y	7-Nov-78	Hubert H. Humphrey	D	1	death	13-Jan-78

(year)	(mo)	Winner (Last, First)	Party	State	Ran Opposed (Y/N)	Election Date	Predecessor (Last, First)	Pred's Party	Party Swap	Reason for Departure	Departure Date
1918	nov	Spencer, Selden P.	R	MO	y	5-Nov-18	William J. Stone	D	1	death	14-Apr-18
1926	nov	Hawes, Harry B.	D	MO	y	2-Nov-26	Selden P. Spencer	R	1	death	16-May-25
1960	nov	Long, Edward V.	D	MO	y	8-Nov-60	Thomas C. Hennings, Jr	D		death	13-Sep-60
2002	nov	Talent, James Matthes	R	MO	y	4-Nov-02	[redacted]	[redacted]	[redacted]	death	7-Nov-00
1941	sep	Doxey, Wall	D	MS	y	23-Sep-41	Pat Harrison	D		death	22-Jun-41
1947	nov	Stennis, John C.	D	MS	y	4-Nov-47	Theodore G. Bilbo	D		death	21-Aug-47
1934	nov	Murray, James E	D	MT	y	6-Nov-34	Thomas J. Walsh	D		death	2-Mar-33
1948	nov	Broughton, J. Melville	D	NC	n	2-Nov-48	Josiah W. Bailey	D		death	15-Dec-46
1950	nov	Smith, Willis	D	NC	y	7-Nov-50	J. Melville Broughton	D		death	6-Mar-49
1954	nov	Ervin, Sam J. Jr	D	NC	n	2-Nov-54	Clyde R. Hoey	D		death	12-May-54
1954	nov	Scott, W. Kerr	D	NC	n	2-Nov-54	Willis Smith	D		death	26-Jun-53
1958	nov	Jordan, B. Everett	D	NC	y	4-Nov-58	W. Kerr Scott	D		death	16-Apr-58
1926	jun	Nye, Gerald P.	R	ND	y	30-Jun-26	Edwin F. Ladd	R		death	22-Jun-25
1946	jun	Young, Milton R.	R	ND	y	25-Jun-46	John Moses	D	1	death	3-Mar-45
1960	jun	Burdick, Quentin N.	D	ND	y	28-Jun-60	William Langer	R	1	death	8-Nov-59
1992	dec	Conrad, Kent	D	ND	y	4-Dec-92	Quentin N. Burdick	D		death	8-Sep-92
1934	nov	Hunter, Richard C.	D	NE	y	6-Nov-34	Robert B. Howell	R	1	death	11-Mar-33
1952	nov	Griswold, Dwight	R	NE	y	4-Nov-52	Kenneth S. Wherry	R		death	29-Nov-51
1954	nov	Hruska, Roman L	R	NE	y	2-Nov-54	Hugh Butler	R		death	1-Jul-54
1954	nov	[redacted]	R	NE	y	2-Nov-54	Dwight Griswold	R		death	12-Apr-54
1918	nov	Moses, George H.	R	NH	y	5-Nov-18	Jacob H. Gallinger	R		death	17-Aug-18
1954	nov	Cotton, Norris	R	NH	y	2-Nov-54	Charles W. Tobey	R		death	24-Jul-53
1962	nov	McIntyre, Thomas J.	D	NH	y	6-Nov-62	Henry Styles Bridges	R	1	death	26-Nov-61
1975	sep	Durkin, John A.	D	NH	y	16-Sep-75	John Durkin (himself)	D		election result	8-Aug-75
1918	nov	Baird, David	R	NJ	y	5-Nov-18	William Hughes	D		death	30-Jan-18
1930	nov	Morrow, Dwight W.	R	NJ	y	4-Nov-30	Walter E. Edge	R		resignation	21-Nov-29
1938	nov	Barbour, W. Warren	R	NJ	y	8-Nov-38	A. Harry Moore	D	1	resignation	17-Jan-38
1944	nov	Smith, H. Alexander	R	NJ	y	7-Nov-44	W. Warren Barbour	R		death	22-Nov-43
1921	sep	Bursum, Holm O.	R	NM	y	20-Sep-21	Albert B. Fall	R		resignation	4-Mar-21
1928	nov	Larrazolo, Octaviano A.	R	NM	y	6-Nov-28	Andrieus A. Jones	D	1	death	20-Dec-27
1934	nov	Hatch, Carl A.	D	NM	y	6-Nov-34	Sam G. Bratton	D		resignation	24-Jun-33
1936	nov	Chavez, Dennis	D	NM	y	3-Nov-36	Bronson M. Cutting	R	1	death	6-May-35
1912	jan	Pittman, Key	D	NV	y	29-Jan-12	George S. Nixon	R	1	death	5-Jun-12
1918	nov	Henderson, Charles B.	D	NV	y	5-Nov-18	Francis G. Newlands	D		death	24-Dec-17
1942	nov	Scrugham, J. G.	D	NV	y	3-Nov-42	Key Pittman	D		death	10-Nov-40
1954	nov	Bible, Alan	D	NV	y	2-Nov-54	Patrick A. McCarran	D		death	28-Sep-54
1938	nov	Mead, James M.	D	NY	y	8-Nov-38	Royal S. Copeland	D		death	17-Jun-38
1949	nov	Lehman, Herbert H.	D	NY	y	8-Nov-49	Robert F. Wagner	D		resignation	28-Jun-49

(year)	(mo.)	Winner (Last, First)	Party	State	Rain Opposed (Y/N)	Election Date	Predecessor (Last, First)	Pred. Party	Party Swap?	Reason for Departure	Departure Date
1970	nov	Buckley, James L.	C	NY	?	3-Nov-70	Kennedy, Bobby	D	1	death	6/6/1968
1928	nov	Burton, Theodore E.	R	OH	y	6-Nov-28	Frank B. Willis	R		death	30-Mar-28
1930	nov	Bulkley, Robert J.	D	OH	y	4-Nov-30	Theodore E. Burton	R	1	death	28-Oct-29
1946	nov	Taft, Kingsley A.	R	OH	y	5-Nov-46	Harold H. Burton	R		resignation	30-Sep-45
1954	nov	Bender, George H.	R	OH	y	2-Nov-54	Robert A. Taft	R		death	31-Jul-53
1964	nov	Harris, Fred R.	D	OK	y	3-Nov-64	Robert S. Kerr	D		death	1-Jan-63
1994	nov	Inhofe, James M	R	OK	y	8-Nov-94	David L. Boren	D	1	resignation	15-Nov-94
1918	nov	Mulkey, Fred W.	R	OR	y	5-Nov-18	Harry Lane	D	1	death	23-May-17
1938	nov	Barry, Alexander G.	R	OR	y	8-Nov-38	Frederick Steiwer	R		resignation	31-Jan-38
1944	nov	Cordon, Guy	R	OR	y	7-Nov-44	Charles L. McNary	R		death	25-Feb-44
1960	nov	[redacted]	D	OR	y	8-Nov-60	Richard L. Neuberger	D		death	9-Mar-60
1996	jan	Wyden, Ron	D	OR	y	30-Jan-96	Robert W. Packwood	R	1	resignation	1-Oct-95
1922	nov	Reed, David A.	R	PA	y	7-Nov-22	William E. Crow	R		death	2-Aug-22
1922	nov	Pepper, George Wharton	R	PA	y	7-Nov-22	Boies Penrose	R		death	31-Dec-21
1930	nov	Davis, James J.	R	PA	y	4-Nov-30	William S.Vare	R		other: couldn't	6-Dec-29
1991	nov	Wofford, Harris	D	PA	y	5-Nov-91	Henry John Heinz, III	R	1	death	4-Apr-91
1924	nov	Metcalf, Jesse H.	R	RI	y	4-Nov-24	LeBaron B. Colt	R		death	18-Aug-24
1950	nov	Pastore, John O	D	RI	y	7-Nov-50	J. Howard McGrath	D		resignation	23-Aug-49
1918	nov	Pollock, William P.	D	SC	n	5-Nov-18	Benjamin R. Tillman	D		death	3-Jul-18
1941	sep	Maybank, Burnet R.	D	SC	n	30-Sep-41	James F. Byrnes	D		resignation	8-Jul-41
1956	nov	Thurmond, Strom	D	SC	n	6-Nov-56	Strom Thurmond	D		resignation	4-Apr-56
1966	nov	Hollings, Ernest F.	D	SC	y	8-Nov-66	Olin D. Johnston	D		death	18-Apr-65
1938	nov	[redacted]	R	SD	y	8-Nov-38	Peter Norbeck	R		death	20-Dec-36
1930	nov	Brock, William E.	D	TN	y	4-Nov-30	Lawrence D. Tyson	D		death	24-Aug-29
1934	nov	Bachman, Nathan L.	D	TN	y	6-Nov-34	Cordell Hull	D		resignation	3-Mar-33
1938	nov	Stewart, A. Tom	D	TN	y	8-Nov-38	Nathan L. Bachman	D		death	23-Apr-37
1964	nov	Bass, Ross	D	TN	y	3-Nov-64	Estes Kefauver	D		death	10-Aug-63
1994	nov	Thompson, Fred	R	TN	y	8-Nov-94	Albert Gore, Jr	D	1	resignation	2-Jan-93
1941	jun	O'Daniel, W. Lee	D	TX	y	28-Jun-41	Morris Sheppard	D		death	9-Apr-41
1957	apr	Yarborough, Ralph	D	TX	y	2-Apr-57	Price Daniel	D		resignation	14-Jan-57
1920	nov	Glass, Carter	D	VA	y	3-Nov-20	Thomas S. Martin	D		death	12-Nov-19
1933	nov	Byrd, Harry F.	D	VA	y	7-Nov-33	Claude A. Swanson	D		resignation	3-Mar-33
1946	nov	Robertson, A. Willis	D	VA	y	5-Nov-46	Carter Glass	D		death	28-May-46
1966	nov	Byrd, Harry F. Jr.	D	VA	y	8-Nov-66	Harry Flood Byrd, Sr.	D		resignation	10-Nov-65
1923	nov	Dale, Porter H.	R	VT	y	6-Nov-23	William P. Dillingham	R		death	12-Jul-23
1931	mar	Austin, Warren R.	R	VT	y	31-Mar-31	Frank L. Greene	R		death	17-Dec-30
1933	jan	Gibson, Ernest W.	R	VT	y	16-Jan-33	Porter H. Dale	R		death	5-Oct-32
1940	nov	Aiken, George D.	R	VT	y	5-Nov-40	Ernest W. Gibson	R		death	20-Jun-40

(year)	(mo.)	Winner (Last, First)	Party	State	Ran Opposed (Y/N)	Election Date	Predecessor (Last, First)	Pred's Party	Party Swap*	Reason for Departure	Departure Date
1972	jan	Stafford, Robert T.	R	Vt	y	7-Jan-72	Winston L. Prouty	R		death	10-Sep-71
1983	nov	Evans, Daniel J.	R	WA	y	8-Nov-83	Henry M. Jackson	D	1	death	1-Sep-83
1918	apr	Lenroot, Irvine L.	R	WI	y	2-Apr-18	Paul O. Husting	D	1	death	24-Oct-17
1925	sep	La Follette, Robert M. Jr.	R	WI	y	9-Sep-25	Robert M. La Follette	R		death	18-Jun-25
1957	aug	Proxmire, William	D	WI	y	28-Aug-57	Joseph R. McCarthy	R	1	death	2-May-57
1942	nov	Shott, Hugh Ike	R	WV	y	3-Nov-42	Matthew M. Neely	D		resignation	12-Jan-41
1956	nov	Revercomb, Chapman	R	WV	y	6-Nov-56	Harley M. Kilgore	D	1	death	28-Feb-56
1958	nov	Randolph, Jennings	D	WV	y	4-Nov-58	Matthew M. Neely	D	1	death	18-Jan-58
1930	nov	Carey, Robert D.	R	WY	y	4-Nov-30	Francis E. Warren	R		death	24-Nov-29
1934	nov	O'Mahoney, Joseph C.	D	WY	y	6-Nov-34	John B. Kendrick	D		death	3-Nov-33
1954	nov	O'Mahoney, Joseph C.	D	WY	y	2-Nov-54	Lester C. Hunt	D		death	19-Jun-54
1962	nov	Simpson, Milward L.	R	WY	y	6-Nov-62	Keith Thomson	R		death	9-Dec-60
								SUM:	46		MODE:
								%:	28.6		AVERAGE:

Notes:

Cells highlighted to bring attention to special elections not held in November

Special election the result of initial election being too close to call. Opponent challenged a two vote-margin of victory.

Mel Carnahan was posthumously elected on Nov. 7, 2000, but never served.

Specially elected women

* 1=party switch

(year)	(month)	WINNER (Last, First)	PARTY	STATE	Major Opposition (Y/N)	ELECTION DATE	PREDECESSOR (Last, First)	PRED's PARTY	PARTY SWAP?	REASON
1970	nov	Stevens, Ted	R	AK	y	3-Nov-70	E.L. Bartlett	D	1	death
1914	may	White, Frank S.	D	AL	n	11-May-14	Joseph F. Johnston	D		death
1920	nov	Heflin, J. Thomas	D	AL	y	2-Nov-20	John H. Bankhead	D		death
1938	apr	Hill, Lister	D	AL	y	26-Apr-38	Dixie Bibb Graves	D		resignation
1946	nov	Sparkman, John	D	AL	n	5-Nov-46	John H. Bankhead II	D		death
1978	nov	Stewart, Donald W.	D	AL	y	7-Nov-78	James B. Allen	D		death
1916	nov	Kirby, William F	D	AR	y	7-Nov-16	James P. Clarke	D		death
1932	jan	[redacted]	D	AR	y	12-Jan-32	Thaddeus H. Caraway	D		death
1937	oct	Miller, John E.	D	AR	y	18-Oct-37	Joseph T. Robinson	D		death
1946	nov	Knowland, William F	R	CA	y	5-Nov-46	Hiram W. Johnson	R		death
1954	nov	Kuchel, Thomas H.	R	CA	y	2-Nov-54	Richard M. Nixon	R		resignation
1992	nov	[redacted]	D	CA	y	3-Nov-92	Pete Wilson	R	1	resignation
1912	jan	Thomas, Charles S.	D	CO	y	15-Jan-13	Charles J. Hughes	D		death
1924	nov	Means, Rice W.	R	CO	y	4-Nov-24	Samuel D. Nicholson	R		death
1932	nov	Schuyler, Karl C.	R	CO	y	8-Nov-32	Charles W. Waterman	R		death
1942	nov	Millikin, Eugene D.	R	CO	y	3-Nov-42	Alva B. Adams	D	1	death
1924	dec	Bingham, Hiram	R	CT	y	16-Dec-24	Frank B. Brandegee	R		death
1946	nov	Baldwin, Raymond E.	R	CT	y	5-Nov-46	Francis T. Maloney	D	1	death
1950	nov	Benton, William	D	CT	y	7-Nov-50	Raymond E. Baldwin	R	1	resignation
1952	nov	Bush, Prescott S.	R	CT	y	4-Nov-52	"Brian" McMahon	D	1	death
1922	nov	Bayard, Thomas F.	D	DE	y	7-Nov-22	Josiah O. Wolcott	D		resignation
1930	nov	Hastings, Daniel O.	R	DE	y	4-Nov-30	T. Coleman du Pont	R		resignation
1936	nov	Andrews, Charles O	D	FL	y	3-Nov-36	Park Trammell	D		death
1936	nov	Pepper, Claude	D	FL	n	3-Nov-36	Duncan U. Fletcher	D		death
1914	nov	Hardwick, Thomas W.	D	GA	y	3-Nov-14	Augustus O. Bacon	D		death
1922	nov	George, Walter F	D	GA	n	7-Nov-22	Thomas E. Watson	D		death
1932	nov	Russell, Richard B.	D	GA	n	8-Nov-32	William J. Harris	D		death
1972	nov	Nunn, Sam	D	GA	y	7-Nov-72	Richard B. Russell	D		death
2000	nov	Miller, Zell	D	GA	y	Nov-00	Paul Coverdell	R	1	death
1990	nov	Akaka, Daniel K	D	HI	y	6-Nov-90	Spark Masayuki Matsunag	D		death
1922	nov	Brookhart, Smith W	R	IA	y	7-Nov-22	William S. Kenyon	R		resignation
1926	nov	Stewart, David W.	R	IA	n	2-Nov-26	Albert B. Cummins	R		death
1936	nov	Gillette, Guy M.	D	IA	y	3-Nov-36	Richard Louis Murphy	D		death
1918	nov	Nugent, John F.	D	ID	y	5-Nov-18	James H. Brady	R		death
1928	nov	Thomas, John	R	ID	y	6-Nov-28	Frank R. Gooding	R		death
1940	nov	Thomas, John	R	ID	y	5-Nov-40	William E. Borah	R		death
1946	nov	Dworshak, Henry C	R	ID	y	5-Nov-46	John Thomas	R		death

(year)	(month)	WINNER (Last, First)	PARTY	STATE	Major Opposition (Y/N)	ELECTION DATE	PREDECESSOR (Last, First)	PRED's PARTY	PARTY SWAP?	REASON
1950	nov	Dworshak, Henry C	R	ID	y	7-Nov-50	Bert H. Miller	D	1	death
1962	nov	Jordan, Len B.	R	ID	y	6-Nov-62	Henry C. Dworshak	R		death
1928	dec	Glenn, Otis F.	R	IL	y	3-Dec-28	Frank L. Smith	R		resignation
1940	nov	Brooks, C. Wayland	R	IL	y	5-Nov-40	James Hamilton Lewis	D	1	death
1970	nov	Stevenson, Adlai E. III	D	IL	y	3-Nov-70	Everett M. Dirksen	R	1	death
1916	nov	Watson, James E.	R	IN	y	7-Nov-16	Benjamin F. Shively	D	1	death
1926	nov	Robinson, Arthur R.	R	IN	y	2-Nov-26	Samuel M. Ralston	D	1	death
1944	nov	Jenner, William E.	R	IN	y	7-Nov-44	Frederick Van Nuys	D	1	death
1990	nov	Coats, Daniel R.	R	IN	y	11-Nov-90	J. Danforth Quayle	R		resignation
1930	nov	McGill, George	D	KS	y	4-Nov-30	Charles Curtis	R	1	resignation
1950	nov	Carlson, Frank	R	KS	y	7-Nov-50	Clyde M. Reed	R		death
1962	nov	Pearson, James B.	R	KS	y	6-Nov-62	Andrew F. Schoeppel	R		death
1996	nov	Brownback, Sam	R	KS	y	5-Nov-96	Robert Dole	R		resignation
1914	nov	Camden, Johnson N. Jr.	D	KY	y	3-Nov-14	William O. Bradley	R	1	death
1940	nov	Chandler, Albert B.	D	KY	y	5-Nov-40	Marvel Mills Logan	D		death
1946	nov	Cooper, John Sherman	R	KY	y	5-Nov-46	Albert B. Chandler	D	1	resignation
1950	nov	Clements, Earle C.	D	KY	y	7-Nov-50	Alben W. Barkley	D		resignation
1952	nov	Cooper, John Sherman	R	KY	y	4-Nov-52	Virgil M. Chapman	D	1	death
1956	nov	Cooper, John Sherman	R	KY	y	6-Nov-56	Alben W. Barkley	D	1	death
1918	nov	Gay, Edward J.	D	LA	n	5-Nov-18	Robert F. Broussard	D		death
1936	apr		D	LA	n	21-Apr-36	Huey P. Long	D		death
1948	nov	Long, Russell B.	D	LA	y	2-Nov-48	John H. Overton	D		death
1926	nov	Walsh, David I	D	MA	y	2-Nov-26	Henry Cabot Lodge	R	1	death
1944	nov	Saltonstall, Leverett	R	MA	y	7-Nov-44	Henry Cabot Lodge, Jr	R		resignation
1962	nov	Kennedy, Edward M.	D	MA	y	6-Nov-62	John Fitzgerald Kennedy	D		resignation
1913	nov	Lee, Blair	D	MD	y	4-Nov-13	Isidor Rayner	D		death
1916	sep	Fernald, Bert M.	R	ME	y	11-Sep-16	Edwin C. Burleigh	R		death
1926	sep	Gould, Arthur R.	R	ME	y	13-Sep-26	Bert M. Fernald	R		death
1924	nov	Couzens, James	R	MI	y	4-Nov-24	Truman H. Newberry	R		resignation
1928	nov	Vandenberg, Arthur H.	R	MI	y	6-Nov-28	Woodbridge N. Ferris	D	1	death
1952	nov	Potter, Charles E.	R	MI	y	4-Nov-52	Arthur H. Vandenberg	R		death
1966	nov	Griffin, Robert P.	R	MI	y	8-Nov-66	Patrick V. McNamara	D	1	death
1923	jul	Johnson, Magnus	DFL	MN	y	16-Jul-23	Knute Nelson	R	1	death
1936	nov	Howard, Guy V.	R	MN	y	3-Nov-36	Thomas D. Schall	R		death
1942	nov	Nelson, Arthur E.	R	MN	y	3-Nov-42	Ernest Lundeen	R		death
1978	nov	Durenberger, Dave	I-R	MN	y	7-Nov-78	Hubert H. Humphrey	D	1	death
1918	nov	Spencer, Selden P.	R	MO	y	5-Nov-18	William J. Stone	D	1	death
1926	nov	Hawes, Harry B.	D	MO	y	2-Nov-26	Selden P. Spencer	R	1	death

(year)	(month)	WINNER (Last, First)	PARTY	STATE	Major Opposition (Y/N)	ELECTION DATE	PREDECESSOR (Last, First)	PRED's PARTY	PARTY SWAP?	REASON
1960	nov	Long, Edward V.	D	MO	y	8-Nov-60	Thomas C. Hennings, Jr	D		death
2002	nov	Talent, James Matthes	R	MO	y	4-Nov-02	Mel Carnahan	D	1	death
1941	sep	Doxey, Wall	D	MS	y	23-Sep-41	Pat Harrison	D		death
1947	nov	Stennis, John C.	D	MS	y	4-Nov-47	Theodore G. Bilbo	D		death
1934	nov	Murray, James E	D	MT	y	6-Nov-34	Thomas J. Walsh	D		death
1948	nov	Broughton, J. Melville	D	NC	n	2-Nov-48	Josiah W. Bailey	D		death
1950	nov	Smith, Willis	D	NC	y	7-Nov-50	J. Melville Broughton	D		death
1954	nov	Ervin, Sam J. Jr	D	NC	n	2-Nov-54	Clyde R. Hoey	D		death
1954	nov	Scott, W. Kerr	D	NC	n	2-Nov-54	Willis Smith	D		death
1958	nov	Jordan, B. Everett	D	NC	y	4-Nov-58	W. Kerr Scott	D		death
1926	jun	Nye, Gerald P.	R	ND	y	30-Jun-26	Edwin F. Ladd	R		death
1946	jun	Young, Milton R.	R	ND	y	25-Jun-46	John Moses	D	1	death
1960	jun	Burdick, Quentin N.	D	ND	y	28-Jun-60	William Langer	R	1	death
1992	dec	Conrad, Kent	D	ND	y	4-Dec-92	Quentin N. Burdick	D		death
1934	nov	Hunter, Richard C.	D	NE	y	6-Nov-34	Robert B. Howell	R	1	death
1952	nov	Griswold, Dwight	R	NE	y	4-Nov-52	Kenneth S. Wherry	R		death
1954	nov	[redacted]	R	NE	y	2-Nov-54	Dwight Griswold	R		death
1954	nov	Hruska, Roman L	R	NE	y	2-Nov-54	Hugh Butler	R		death
1918	nov	Moses, George H.	R	NH	y	5-Nov-18	Jacob H. Gallinger	R		death
1954	nov	Cotton, Norris	R	NH	y	2-Nov-54	Charles W. Tobey	R		death
1962	nov	McIntyre, Thomas J.	D	NH	y	6-Nov-62	Henry Styles Bridges	R	1	death
1975	sep	Durkin, John A	D	NH	y	16-Sep-75	John Durkin (himself)	D		election resu
1918	nov	Baird, David	R	NJ	y	5-Nov-18	William Hughes	D		death
1930	nov	Morrow, Dwight W.	R	NJ	y	4-Nov-30	Walter E. Edge	R		resignation
1938	nov	Barbour, W. Warren	R	NJ	y	8-Nov-38	A. Harry Moore	D	1	resignation
1944	nov	Smith, H. Alexander	R	NJ	y	7-Nov-44	W. Warren Barbour	R		death
1921	sep	Bursum, Holm O.	R	NM	y	20-Sep-21	Albert B. Fall	R		resignation
1928	nov	Larrazolo, Octaviano A.	R	NM	y	6-Nov-28	Andrieus A. Jones	D	1	death
1934	nov	Hatch, Carl A.	D	NM	y	6-Nov-34	Sam G. Bratton	D		resignation
1936	nov	Chavez, Dennis	D	NM	y	3-Nov-36	Bronson M. Cutting	R	1	death
1912	jan	Pittman, Key	D	NV	y	29-Jan-13	George S. Nixon	R	1	death
1918	nov	Henderson, Charles B.	D	NV	y	5-Nov-18	Francis G. Newlands	D		death
1942	nov	Scrugham, J. G.	D	NV	y	3-Nov-42	Key Pittman	D		death
1954	nov	Bible, Alan	D	NV	y	2-Nov-54	Patrick A. McCarran	D		death
1938	nov	Mead, James M.	D	NY	y	8-Nov-38	Royal S. Copeland	D		death
1949	nov	Lehman, Herbert H.	D	NY	y	8-Nov-49	Robert F. Wagner	D		resignation
1928	nov	Burton, Theodore E.	R	OH	y	6-Nov-28	Frank B. Willis	R		death
1930	nov	Bulkley, Robert J.	D	OH	y	4-Nov-30	Theodore E. Burton	R	1	death

(year)	(month)	WINNER (Last, First)	PARTY	STATE	Major Opposition (Y/N)	ELECTION DATE	PREDECESSOR (Last, First)	PRED's PARTY	PARTY SWAP?	REASON
1946	nov	Taft, Kingsley A.	R	OH	y	5-Nov-46	Harold H. Burton	R		resignation
1954	nov	Bender, George H.	R	OH	y	2-Nov-54	Robert A. Taft	R		death
1964	nov	Harris, Fred R.	D	OK	y	3-Nov-64	Robert S. Kerr	D		death
1994	nov	Inhofe, James M	R	OK	y	8-Nov-94	David L. Boren	D	1	resignation
1918	nov	Mulkey, Fred W.	R	OR	y	5-Nov-18	Harry Lane	D	1	death
1938	nov	Barry, Alexander G.	R	OR	y	8-Nov-38	Frederick Steiwer	R		resignation
1944	nov	Cordon, Guy	R	OR	y	7-Nov-44	Charles L. McNary	R		death
1960	nov	[redacted]	D	OR	y	8-Nov-60	Richard L. Neuberger	D		death
1996	jan	Wyden, Ron	D	OR	y	30-Jan-96	Robert W. Packwood	R	1	resignation
1922	nov	Pepper, George Wharton	R	PA	y	7-Nov-22	Boies Penrose	R		death
1922	nov	Reed, David A.	R	PA	y	7-Nov-22	William E. Crow	R		death
1930	nov	Davis, James J.	R	PA	y	4-Nov-30	William S.Vare	R		other: couldn
1991	nov	Wofford, Harris	D	PA	y	5-Nov-91	Henry John Heinz, III	R	1	death
1924	nov	Metcalf, Jesse H.	R	RI	y	4-Nov-24	LeBaron B. Colt	R		death
1950	nov	Pastore, John O	D	RI	y	7-Nov-50	J. Howard McGrath	D		resignation
1918	nov	Pollock, William P.	D	SC	n	5-Nov-18	Benjamin R. Tillman	D		death
1941	sep	Maybank, Burnet R.	D	SC	n	30-Sep-41	James F. Byrnes	D		resignation
1956	nov	Thurmond, Strom	D	SC	n	6-Nov-56	Strom Thurmond	D		resignation
1966	nov	Hollings, Ernest F.	D	SC	y	8-Nov-66	Olin D. Johnston	D		death
1938	nov	[redacted]	R	SD	y	8-Nov-38	Peter Norbeck	R		death
1930	nov	Brock, William E.	D	TN	y	4-Nov-30	Lawrence D. Tyson	D		death
1934	nov	Bachman, Nathan L.	D	TN	y	6-Nov-34	Cordell Hull	D		resignation
1938	nov	Stewart, A. Tom	D	TN	y	8-Nov-38	Nathan L. Bachman	D		death
1964	nov	Bass, Ross	D	TN	y	3-Nov-64	Estes Kefauver	D		death
1994	nov	Thompson, Fred	R	TN	y	8-Nov-94	Albert Gore, Jr	D	1	resignation
1941	jun	O'Daniel, W. Lee	D	TX	y	28-Jun-41	Morris Sheppard	D		death
1957	apr	Yarborough, Ralph	D	TX	y	2-Apr-57	Price Daniel	D		resignation
1920	nov	Glass, Carter	D	VA	y	3-Nov-20	Thomas S. Martin	D		death
1933	nov	Byrd, Harry F.	D	VA	y	7-Nov-33	Claude A. Swanson	D		resignation
1946	nov	Robertson, A. Willis	D	VA	y	5-Nov-46	Carter Glass	D		death
1966	nov	Byrd, Harry F. Jr.	D	VA	y	8-Nov-66	Harry Flood Byrd, Sr.	D		resignation
1923	nov	Dale, Porter H.	R	VT	y	6-Nov-23	William P. Dillingham	R		death
1931	mar	Austin, Warren R.	R	VT	y	31-Mar-31	Frank L. Greene	R		death
1934	jan	Gibson, Ernest W.	R	VT	y	16-Jan-34	Porter H. Dale	R		death
1940	nov	Aiken, George D.	R	VT	y	5-Nov-40	Ernest W. Gibson	R		death
1972	jan	Stafford, Robert T.	R	VT	y	7-Jan-72	Winston L. Prouty	R		death
1983	nov	Evans, Daniel J.	R	WA	y	8-Nov-83	Henry M. Jackson	D	1	death
1918	apr	Lenroot, Irvine L.	R	WI	y	2-Apr-18	Paul O. Husting	D	1	death

(year)	(month)	WINNER (Last, First)	PARTY	STATE	Major Opposition (Y/N)	ELECTION DATE	PREDECESSOR (Last, First)	PRED's PARTY	PARTY SWAP?	REASON
1925	sep	LaFollette, Robert M. Jr.	R	WI	y	9-Sep-25	Robert M. La Follette	R		death
1957	aug	Proxmire, William	D	WI	y	28-Aug-57	Joseph R. McCarthy	R	1	death
1942	nov	Shott, Hugh Ike	R	WV	y	3-Nov-42	Matthew M. Neely	D		resignation
1956	nov	Revercomb, Chapman	R	WV	y	6-Nov-56	Harley M. Kilgore	D	1	death
1958	nov	Randolph, Jennings	D	WV	y	4-Nov-58	Matthew M. Neely	D	1	death
1930	nov	Carey, Robert D.	R	WY	y	4-Nov-30	Francis E. Warren	R		death
1934	nov	O'Mahoney, Joseph C.	D	WY	y	6-Nov-34	John B. Kendrick	D		death
1954	nov	O'Mahoney, Joseph C.	D	WY	y	2-Nov-54	Lester C. Hunt	D		death
1962	nov	Simpson, Milward L.	R	WY	y	6-Nov-62	Keith Thomson	R		death

45

1=party switch

Cells highlighted to bring attention to special elections **not** held in November
Special election the result of initial election being too close to call. Opponent challenged a two vote-margin of victory.
[redacted]er date for this special election is a guess, since no date was actually given.
[redacted]ahan was posthumously elected on Nov. 7, 2000, but never served.
[redacted] elected women

DEPARTURE DATE	DAYS BETWEEN
11-Dec-68	692
8-Aug-13	276
1-Mar-20	246
10-Jan-38	106
12-Jun-46	146
1-Jun-78	159
1-Oct-16	37
6-Nov-31	67
14-Jul-37	96
6-Aug-45	456
1-Jan-53	670
7-Jan-91	666
1-Jan-11	735
24-Mar-23	591
27-Aug-32	73
1-Dec-41	337
14-Oct-24	83
16-Jan-45	658
16-Dec-49	326
28-Jul-52	99
2-Jul-21	493
9-Dec-28	695
8-May-36	179
17-Jun-36	139
14-Feb-14	262
26-Sep-22	42
18-Apr-32	204
21-Jan-71	656
18-Jul-00	106
15-Apr-90	205
24-Feb-22	256
30-Jul-26	95
16-Jul-36	110
13-Jan-18	296
24-Jun-28	135
19-Jan-40	291
10-Nov-45	360

STATE	No. of Special Elections
AK	692
AL	187
AR	67
AZ	0
CA	597
CO	434
CT	287
DE	594
FL	159
GA	254
HI	205
IA	154
ID	264
IL	432
IN	394
KS	353
KY	398
LA	216
MA	562
MD	344
ME	54
MI	426
MN	372
MO	381
MS	84
MT	614
NC	434
ND	293
NE	319
NH	233
NJ	318
NM	392
NV	328
NY	139
OH	363
OK	333
OR	287

DEPARTURE DATE	DAYS BETWEEN
8-Oct-49	395
23-Jul-62	106
9-Feb-28	298
9-Apr-39	576
7-Sep-69	422
14-Mar-16	238
14-Oct-25	384
25-Jan-44	287
3-Jan-89	667
3-Mar-29	611
8-Nov-49	364
21-Jan-62	289
11-Jun-96	147
23-May-14	164
3-Oct-39	399
1-Nov-45	369
19-Jan-49	657
8-Mar-51	607
30-Apr-56	190
12-Apr-18	207
10-Sep-35	224
14-May-48	172
9-Nov-24	723
3-Feb-44	278
22-Dec-60	684
25-Nov-12	344
16-Jun-16	87
23-Aug-26	21
18-Nov-22	717
23-Mar-28	228
18-Apr-51	566
30-Apr-66	192
28-Apr-23	79
22-Dec-35	317
31-Aug-40	794
13-Jan-78	298
14-Apr-18	205
16-May-25	535

STATE	No. of Special Elections
PA	239
RI	260
SC	249
SD	688
TN	548
TX	79
UT	0
VA	283
VT	116
WA	68
WI	121
WV	401
WY	387

DEPARTURE DATE	DAYS BETWEEN
13-Sep-60	56
7-Nov-00	727
22-Jun-41	93
21-Aug-47	75
2-Mar-33	614
15-Dec-46	688
6-Mar-49	611
12-May-54	174
26-Jun-53	494
16-Apr-58	202
22-Jun-25	373
3-Mar-45	479
8-Nov-59	233
8-Sep-92	187
11-Mar-33	605
29-Nov-51	341
12-Apr-54	204
1-Jul-54	124
17-Aug-18	80
24-Jul-53	466
26-Nov-61	345
8-Aug-75	39
30-Jan-18	279
21-Nov-29	348
17-Jan-38	295
22-Nov-43	351
4-Mar-21	200
20-Dec-27	322
24-Jun-33	500
6-May-35	547
5-Jun-12	238
24-Dec-17	316
10-Nov-40	723
28-Sep-54	35
17-Jun-38	144
28-Jun-49	133
30-Mar-28	221
28-Oct-29	372

STATE	No. of Special Elections

DEPARTURE DATE	DAYS BETWEEN
30-Sep-45	401
31-Jul-53	459
1-Jan-63	672
15-Nov-94	-7
23-May-17	531
31-Jan-38	281
25-Feb-44	256
9-Mar-60	244
1-Oct-95	121
31-Dec-21	311
2-Aug-22	97
6-Dec-29	333
4-Apr-91	215
18-Aug-24	78
23-Aug-49	441
3-Jul-18	125
8-Jul-43	84
4-Apr-56	216
18-Apr-65	569
20-Dec-36	688
24-Aug-29	437
3-Mar-33	613
23-Apr-37	564
10-Aug-63	451
2-Jan-93	675
9-Apr-41	80
14-Jan-57	78
12-Nov-19	357
3-Mar-33	249
28-May-46	161
10-Nov-65	363
12-Jul-23	117
17-Dec-30	104
5-Oct-33	102
20-Jun-40	138
10-Sep-71	119
1-Sep-83	68
21-Oct-17	163

STATE	No. of Special Elections

DEPARTURE DATE	DAYS BETWEEN
18-Jun-25	83
2-May-57	118
12-Jan-41	660
28-Feb-56	252
18-Jan-58	290
24-Nov-29	345
3-Nov-33	368
19-Jun-54	136
9-Dec-60	697
	106

STATE	No. of Special Elections

Congressional Research Service

MEMORANDUM March 09, 2009

To: Government and Finance Consulting Section
Attention: Jennifer Manning

From: Cara Warner
KSG-ADM

Subject: **General Statistics on Special Elections: Corrected**

Baseline Statistics[1]

Statistics Relating to the Use of Special Elections to Fill Senate Seats Opening Before the End of the Term	
Total number of Senators elected by Special Election:	161
Number of those who ran unopposed:	14 or 8.7%
Average (Mean) delay between opening of a seat and election of a successor by Special Election:	322 days
Most frequent (Mode) delay between opening of a seat and election of a successor by Special Election:	106 days

State-Specific Highlights	
Number of States in which Special Elections have been held:	48 States
Number of States with no Special Elections in their history:	2 States (Arizona and Utah)
States with just one Special Election in their history:	6 States (AK, HI, MD, MT, SD, WA)
States with the most Special Elections in their history:	6 Special Elections: ID and KY
	5 Special Elections: AL, GA, NC, OR, TN, VT

[1] See Tables 1 and 2 on page 3 for the raw data relating to states' use of Special Elections.

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Length of Delay Before Special Election

Unlike Gubernatorial Appointments which occur close on the heals of a seat opening, Special Elections are accompanied by lengthy delays. Of the 161 Special Elections since 1912, a third (55) occurred more than a year after the death or resignation of the incumbent Senator. Nearly 90% (138) occurred no sooner than three months after the opening of the seat, and just two took less than one month.[2] The ten greatest delays were:

1. In 1968, James Buckley (C NY) to replace Bobby Kennedy (D NY): 880 days.
2. In 1942, Arthur Nelson (R MN) to replace Ernest Lundeen: 794 days.
3. In 1913, Charles Thomas (D CO) to replace Charles Hughes: 735 days.
4. In 2002, James Talent (R MO) to replace Mel Carnahan[3]: 727 days.
5. In 1926, David Walsh (D MA) to replace Henry Cabot Lodge: 723 days.
6. In 1942, J. G. Scrugham(D NV) to replace Key Pittman: 723 days.
7. In 1924, James Couzens (R MI) to replace Truman Newberry: 717 days.
8. In 1962, Milward Simpson (R WY) to replace Keith Thomson: 697 days.
9. In 1930, Daniel Hastings (R DE) to replace T. Coleman du Pont: 695 days.
10. In 1970, Ted Stevens (R AK) to replace E. L. Bartlett: 692 days.

[2] The two shortest delays were -7 days when the Special Election of James Inhofe preceded the resignation of David Boren in 1994, and 21 days when Arthur Gould was elected to succeed Bert Fernald in 1926.

[3] Carnahan was posthumously elected, making this a special case indeed.

Table 1. Number of Special Elections in Each State

State	No. of Special Elections
AK	1
AL	5
AR	3
AZ	0
CA	3
CO	4
CT	4
DE	2
FL	2
GA	5
HI	1
IA	3
ID	6
IL	3
IN	4
KS	4
KY	6
LA	3
MA	3
MD	1
ME	2
MI	4
MN	4
MO	4
MS	2
MT	1
NC	5
ND	4
NE	4
NH	4
NJ	4
NM	4
NV	4
NY	3
OH	4
OK	2
OR	5
PA	4
RI	2
SC	4
SD	1
TN	5
TX	2
UT	0
VA	4
VT	5
WA	1
WI	3
WV	3
WY	4

Table 2. Average Length of Delay Before Special Election in Each State

State	Delay in Days
AK	692
AL	187
AR	67
AZ	0
CA	597
CO	434
CT	287
DE	594
FL	159
GA	254
HI	205
IA	154
ID	264
IL	432
IN	394
KS	353
KY	398
LA	216
MA	562
MD	344
ME	54
MI	426
MN	372
MO	381
MS	84
MT	614
NC	434
ND	293
NE	319
NH	233
NJ	318
NM	392
NV	328
NY	386
OH	363
OK	333
OR	287
PA	239
RI	260
SC	249
SD	688
TN	548
TX	79
UT	0
VA	283
VT	116
WA	68
WI	121
WV	401
WY	387

Congressional Research Service

MEMORANDUM March 9, 2009

To: Government and Finance Consulting Section
Attention: Jennifer Manning

From: Cara Warner
KSG-ADM

Subject: **Length of Seat Vacancy Before Gubernatorial Appointment**

Baseline Statistics

In more than one third of all cases of Gubernatorial Appointment to fill a Senate seat, the seat had been open for five days or fewer. Nearly two thirds of all such appointments were made within ten days of the resignation or death that prompted action. And in only 25% of all cases did the seat lie vacant for more than 15 days. That said, 30- and 60-day vacancies are in the severe minority. Of the 184 cases of Gubernatorial Appointment to the Senate, only 9 witnessed vacancies between 26 and 35 days, while just 2 saw a vacancy between 56 and 65 days. (See **Table I** for the raw data, and **Figure I** for an illustration of the distribution of vacancy lengths.)

Table I. Statistics on the Delay Between Seat Opening and Gubernatorial Appointment

Number of Days for Which Seat Was Vacant	Number of Cases of Gubernatorial Appointment for Which This Is True	Percentage of All Gubernatorial Appointments Experiencing This Delay
0-5	66	35.9
6-10	48	26.1
11-15	24	13.0
16-20	11	6.0
21-25	8	4.3
26-30	4	2.2
31-35	5	2.7
36-40	0	0.0
41-45	3	1.6
46-50	0	0.0
51-55	2	1.1
56-60	2	1.1
61-65	0	0.0
66-70	0	0.0
71-75	1	0.5

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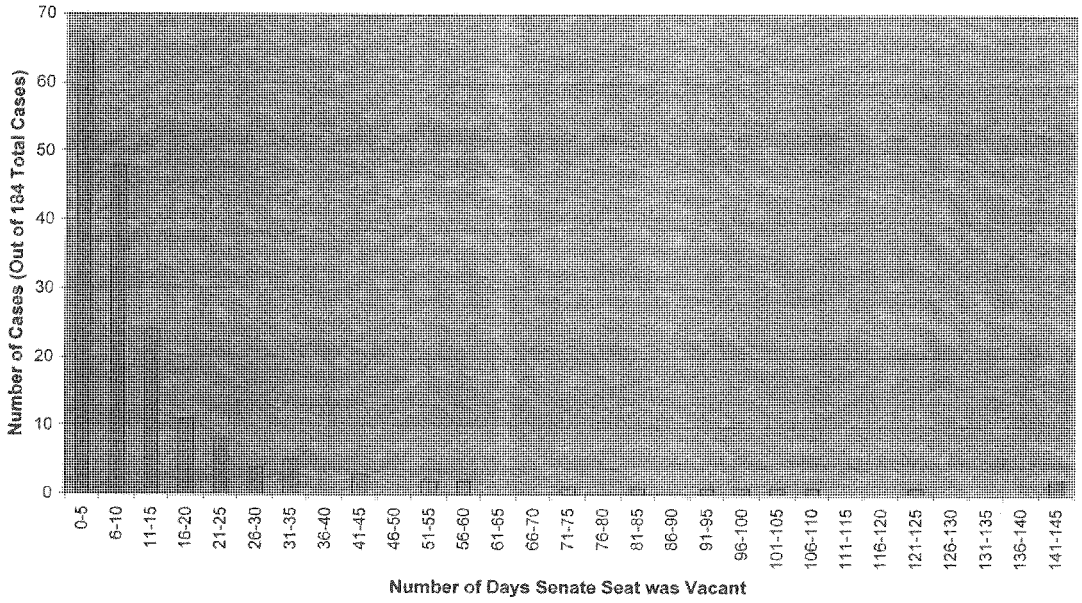
76-80	0	0.0
81-85	1	0.5
86-90	0	0.0
91-95	1	0.5
96-100	1	0.5
101-105	1	0.5
106-110	1	0.5
111-115	0	0.0
116-120	0	0.0
121-125	1	0.5
126-130	0	0.0
131-135	0	0.0
136-140	0	0.0
141-145	2	1.1

Source: Derived from official data made available at: http://bioguide.congress.gov/biosearch/biosearch.asp

Note: The two cases not counted in the above data are: that of Nathan Bachman (D TN), who was appointed 3 days *before* Cordell Hull resigned; and that of Jean Carnahan (D MO) who replaced her husband Mel Carnahan, who was posthumously elected on an unknown date.

Figure 1. Length of Seat Vacancy in Cases of Gubernatorial Appointment



Source: Derived from official data made available at: http://bioguide.congress.gov/biosearch/biosearch

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STATEMENT OF REP. DAVID DREIER

Joint Hearing on "S.J. Res. 7 and H.J. Res. 21: A Constitutional Amendment Concerning Senate Vacancies"

March 11, 2009

If there was ever a time when the American people needed a clear, undiluted voice in Washington, it's now. Working families are facing tremendous economic difficulties and we remain engaged in conflicts across the globe. And yet, the residents of four states — Illinois, New York, Colorado, and Delaware – haven't elected their newest senators. Those same Senators are now voting on the critical economic issues of our time. Some of my colleagues and I believe this is undemocratic. The people of those states, and every state, deserve a voice in their representation. That is why we have proposed a constitutional amendment to require ALL U.S. Senators be duly elected by the people they represent.

We have not proposed this amendment as a reaction to the people chosen to fill the recent Senate vacancies. We have proposed this

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amendment because of the people they represent. They are understandably outraged at some of the gamesmanship that surrounded the most recent Senate appointments. We don't need to recount them here, but suffice it to say, they have brought back to the forefront of American discussion the need for popular elections when deciding our representatives in both bodies of Congress.

Personally, I believe the amendment we are proposing is a "perfecting" amendment to the 17th amendment to the Constitution. After years of backroom deals, this amendment reformed the Senate-selection process by instituting direct elections. However, it left to the states the authority to decide what to do when an out-of-cycle vacancy came up. Most states chose to allow their governors to make appointments. A few, including Wisconsin, chose to leave it to the people, calling for special elections. While our amendment does call for all Senators to be elected, it does not dictate the terms of those elections, leaving that to the states. I view this proposal as the fulfillment of

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the reform effort that began with the 17th amendment nearly a century ago.

Some argue that special elections are too expensive and time consuming. This is an argument I have heard before, and one that has some resonance at a time when State budgets are stretched very thin. However, I do not believe budget constraints nullify the imperative for electing our leaders.

Others, like George Will, have argued that this amendment only weakens the pillars of federalism that the Founders carefully constructed. Mr. Will recently opined in the Washington Post that our Constitution created distinct electors for the three elected bodies of the federal government, in order to enhance the separation of powers that provides the critical checks and balances in our federalist system. The President was to be elected by the electoral college, the Senate by the state legislatures and the House directly by the people.

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With this perspective in mind, the 17th amendment would appear to have undermined the founder's intentions, and today's proposed amendment would undermine them further. I respect George Will's point of view. I, too, look to the founder's original intentions and do not support amending the Constitution lightly. But I believe in addressing this matter we must look at the history of our electoral processes – not just how they were envisioned at our nation's founding, but how they have been conducted in practice.

From a purely academic perspective, it is interesting to consider whether the authors of the 17th amendment could have plotted a reform course that was truer to the founder's intentions. But the reality today is that we now have a nearly 100-year tradition of directly electing our Senators. This practice has become an integral part of American democracy. Trying to undo a century of our history simply is not a viable option. The American people elect their Senators, and would not accept any other method. Yet the current system does have a loophole. The large number of

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sudden vacancies in the Senate this year has made the consequences of this loophole very clear. Today's proposed amendment will address this challenge.

A few years ago, the issue of preserving the direct election of our representatives was raised within the context of a continuity plan for Congress in the event of a catastrophe and the deaths of more than 100 of our members. Congressman Sensenbrenner and I argued vigorously for the direct election of all House members, as the Constitution mandates, under any circumstance. We were joined by an overwhelmingly bipartisan majority of the House. At the time, we argued that holding and participating in elections, even in the event of a catastrophe, was essential to keeping our democracy vital and functioning.

Senate vacancies are no less significant than vacancies in the House. Yes, they should be filled as quickly and fairly as possible. But most important, they should be filled by the American people.

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Statement of Senator Dick Durbin

Hearing before the Senate Committee on the Judiciary,
Subcommittee on the Constitution and the
House Committee on the Judiciary,
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

"S.J. Res. 7 and H.J. Res. 21: A Constitutional Amendment Concerning Senate Vacancies"

March 11, 2009

I commend Senator Feingold and Representative Conyers for chairing today's joint hearing, and I am pleased to be a co-sponsor of S.J. Res. 7, Senator Feingold's proposed constitutional amendment to require direct election of U.S. Senators and to prohibit gubernatorial appointments of U.S. Senators.

In today's U.S. Senate there are four states that will be represented for the next two years by someone the citizens of those states did not elect. Those four states – my home state of Illinois, along with New York, Colorado, and Delaware – comprise over 12% of the U.S. population. There are 45 states that permit gubernatorial appointment of U.S. Senators.

S. J. Res. 7 states the following: "No person shall be a Senator from a State unless such person has been elected by the people thereof. When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies." By requiring that all Senators be directly elected by the people of their state, we would be putting Senators on the same constitutional footing as members of the U.S. House of Representatives, who are required by Article I, Section 2 of the U.S. Constitution to be directly elected by the people.

By requiring special elections when there are Senate vacancies, S. J. Res. 7 would modify the 17th Amendment of the Constitution, whose main purpose was to establish direct popular election of U.S. Senators but which contained a loophole stating that "the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."

The main concern I have about special elections for Senators is the cost. In a large state like my own, such elections could cost millions of dollars. But many states have elections scheduled throughout the year, and the Feingold amendment would give states the flexibility to decide the timing of special elections in order to maximize coordination and minimize cost.

In any event, as Senator Feingold has noted: "weighing the costs associated with the most basic tenet of democracy – the election of the government by the governed – sets us on a dangerous path." Indeed, the Framers of our Constitution had this wisdom in mind when requiring that all members of the U.S. House of Representatives be subject to direct election by the people. One of today's witnesses, Stanford Law School Professor Pam Karlan, supports the Feingold constitutional amendment and observes in her written testimony that "the general principle that vacancies should be filled consistent with the democratic aspirations of our Constitution deserves greater weight than the current regime provides."

Recent events in Illinois provide further evidence of the need for a constitutional amendment that would prohibit gubernatorial appointments of Senators. A vacancy occurred in my home state in November upon the election of Barack Obama to be President of the United States. Few people had confidence in the ability of the former Governor of Illinois – who was arrested in early December during a federal criminal pay-to-play investigation but who remained in office until he was impeached, convicted, and removed in January – to appoint a Senator without there being a taint of corruption and impropriety. That is why I immediately urged the Illinois General Assembly to quickly enact a law to hold a special election to fill the Senate vacancy. But there were procedural complications – such as the ability of the Governor to wait 60 days and then issue a veto of such a law that could not be readily overridden – that undermined the ability to conduct a prompt special election. And despite universal pleas that he refrain from doing so, the Governor exercised his legal right to make a temporary Senate appointment.

Senator Feingold's proposed constitutional amendment would prevent such appointments from occurring in the future. It would remove the power of a governor to sell or attempt to sell a Senate seat, and it would help restore the faith of the American people in our elected officials.

Over a half century ago, Prime Minister Winston Churchill famously said: "No one pretends that democracy is perfect or all-wise. Indeed it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time." The same might be said of special elections to fill vacant U.S. Senate seats – they are the worst way to fill such seats, except for all the others.

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TESTIMONY

Bob Edgar
President and CEO
Common Cause

SENATE COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON THE CONSTITUTION
HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS,
AND CIVIL LIBERTIES

Joint hearing on S. J. Res. 7 and H. J. Res. 2, proposing a constitutional amendment to require that states hold elections to fill Senate vacancies.

March 11, 2009

Chairmen Feingold, Chairman Nadler and members of the committees, thank you for the opportunity to testify today. I am Bob Edgar, President and CEO of Common Cause.

Common Cause is a nonpartisan, grassroots organization with 400,000 members and supporters and 36 state chapters dedicated to restoring the core values of American democracy, reinventing an open, honest, and accountable government that works for the public interest, and empowering ordinary people to make their voices heard.

Common Cause strongly supports S. J. Res. 7 and H. J. Res. 21, proposing a constitutional amendment to require that states hold elections to fill Senate vacancies. We urge Congress to pass this proposed constitutional amendment and send it to the states for ratification. This important modification of the 17th Amendment will fulfill the primary intent of that amendment – that U.S. Senators should be elected by the people.

We believe the Constitution should be amended rarely and with great care, but election of our representatives in Congress is one of those issues that crosses that threshold.

Over the course of its history, the United States has inexorably, though often over strenuous opposition, expanded the voting franchise and more fully embraced the democratic ideal that our representatives are elected by the people. We have left behind many of the outdated exclusionary policies that existed in the early days of our nation.

This proposed amendment is in keeping with those strides toward democracy. It is a small step, but an important one. The 17th Amendment and the campaign to enact it made clear that he American people wanted Senators to be elected, not appointed. Now, we must finish the work done in 1913 and no longer allow a single individual, a governor, to appoint a Senator for a term that can last as long as two years.

Indeed, as Chicago attorney Thomas Geoghegan observed in a January 6, 2009 *New York Times* op-ed, that the 17th Amendment's purpose was to require that Senators are elected, not appointed, "Yet the current practice in virtually every state flips the proviso [for temporary appointments] to override the main clause. Governors don't issue a writ or start the machinery for a special election as the amendment requires, but instead fill the post for up to two years, until the next general election. This frustrates the whole democratic thrust of the amendment." In fact, in some states the appointed Senator could be in office even longer than two years.

We all know this issue has arisen because of the unfortunate experiences in recent months as four Senate seats became vacant subsequent to President Obama's election. As an article in the December 10, 2008 *New York Times* noted, "Given the prestige of a Senate seat and its magnetic allure to politicians, it is perhaps not surprising that when these vacancies come up, the process of awarding the office has become fraught with malfeasance and political peril."

In New York, there was little transparency but many rumors and leaks amidst a media frenzy over the appointment process. In Delaware, the governor appointed a caretaker, whose task apparently is to keep the seat warm until the return of the intended candidate. And in recent

years, we have seen similar cases, including a governor's appointment of his daughter to the Senate. We cite these cases not to disparage the Senators who hold these seats, but to point out that the manner of their appointments inevitably leads to doubts about their qualifications by voters who were left out of the process.

We are all familiar with scandalous situation surrounding the appointment of President Barack Obama's successor in the Senate. Illinois Governor Rod Blagojevich verbalized the worst danger in the appointment process when he was caught by the FBI saying, "Unless I get something real good [for Senate candidate 1], s•••, I'll just send myself, you know what I'm saying. … [a Senate seat] "is a f•••ing valuable thing, you just don't give it away for nothing."

That appointment continues to be a prime example of why we need to completely eliminate gubernatorial power to appoint Senators.

The circumstance surrounding the Blagojevich appointment of Senator Roland Burris (D-IL) may be considered an aberration by some, but in fact the most compelling reasons for the adoption of the 17th Amendment were startlingly similar to what transpired in Illinois. State legislatures, who had the sole authority to appoint Senators – at all times, not just when vacancies occurred – too often degenerated into scenes of blatant corruption as favors were traded and cash handed out for votes in favor of one candidate or the other. As Senator Feingold has pointed out, his colleague Senator Robert Byrd (W-VA), in his authoritative history of the Senate, detailed the numerous cases of "intimidation and bribery" in the selection of Senators.

In Illinois, in many state governments, and too often in Congress itself, there is a prevalent attitude that you must "pay-to-play." We heard it in the most blatant and egregious manner from the mouth of Governor Blagojevich, but even when done more subtly, this way of operating is a danger to democracy. As Illinois attorney and author Scott Turow observed, "One change that is obviously indispensable is overhauling the campaign contribution laws in Illinois, where there are literally no limits on political donations — neither how big they can be or who can give them."

Governor Blagojevich himself, trying to explain his recorded pay-to-play demands, said, "Those are conversations relating to the things all of us in politics do in order to run campaigns and try to win elections. … You guys are in politics. You know what we have to do to go out and run elections."

Governor Blagojevich is the poster child for what is wrong with our system. He may have been unusually brash, but the way he conducted business is not that different from what happens all across America in our self-destructive, pay-to-play political culture. His statements provide a clear indictment of the current political system, in which our elected officials raise millions of dollars in campaign cash from special interests at the same time they are supposed to be making decisions in the public interest.

Common Cause is working in Congress and in states to confront this problem directly by reforming the campaign finance system, establishing a comprehensive reform package to address

the pervasive pay-to-play political environment that threatens to further undermine public confidence in government.

A key reason we support this proposed amendment is that it will take even the occasional appointment to fill a vacancy in the Senate out of the arena where pay-to-play reigns.

The Blagojevich controversy also raises in a stark way another problem with the gubernatorial appointment authority. Democracy is at its best when it's open and transparent. But as we have seen recently, this is not the case when one person makes his or her own decision, behind closed doors, to appoint someone to become a U.S. Senator. In Illinois, but for the ongoing federal investigation of the Illinois governor, we may never have known about Governor Blagojevich's effort to sell the seat to the highest bidder.

In New York, although there were no criminal allegations, the process was marked by selective leaking of information and overall opaqueness in the governor's decision-making. While in some other cases governors have been more open about their decision-making process, too often that is not so. In any event, there are few effective legal requirements for openness. We will support efforts in states to ensure that the appointment process is open and transparent to the public.

We know there are concerns that calling a special election to fill a Senate vacancy will take months, leaving citizens of the state without representation and disrupting the continuity of the federal government. But the states that now require special elections to fill Senate vacancies generally also require a special election be held within a set period of time. We believe that setting a special election within three or four months is reasonable. We do not believe the state or federal government will suffer unduly from the lack of a Senator for that period of time.

We are also acutely aware that some issues come before the Senate that are decided by one or two votes and that a vacant seat could have some bearing on the outcome of critical issues. But we know that Senators are often absent for votes for reasons varying from illness to fundraising. An occasional temporary vacancy will be no more of a problem.

Ironically, lengthy delays in the selection of a Senator was part of the impetus behind the 17th Amendment. According to the Senate's own history, some state legislatures became bogged down in partisan conflict sometimes took years to select a Senator. The authors of the Amendment addressed that problem, but in the provision dealing with appointments with vacancies, did not anticipate that temporary appointments by Governors would be for periods as long as 1 to 2 years, the period until the next regularly scheduled election. The proposed amendment simply fixes an ambiguity in the 17th Amendment that undercuts the clear purpose of the 17th Amendment.

Common Cause is active in state legislatures across the country, so we have considered whether it would be a better strategy to change Senate vacancy laws on a state-by-state basis. The constitutional amendment process can be lengthy and there are many points along the way where it can fail. However, we believe that the constitutional amendment process, while always difficult, is the better choice in this matter.

A constitutional amendment, by providing a uniform way of filling Senate vacancies, would eliminate any resistance to change based on a potential disadvantage to states who choose to hold a special election rather than the generally more timely appointment process.

The obvious political obstacle in the state-by-state strategy would be the governors, some of whom would likely resist this encroachment on their authority and could wield their veto power to stop this reform. On the other hand, state legislators have no role in the process and are more likely to view favorably a constitutional amendment that has strong support with the public.

Requiring elections to fill vacant Senate seats will, in most cases, require a special election, which will impose a cost on the state to hold the election. We realize that the funding for administering any election is already limited and that in this harsh financial environment for states, it is an especially daunting task to find the necessary funds for an unscheduled special election. But we believe that this is a cost a democracy must bear in order to end the un-democratic practice of appointing Senators.

Now is the time to address this issue, while the problems of the status quo are so apparent. We cannot simply wait for the next Senate vacancy and hope that the governor making the appointment will act with honor and transparency in naming someone to represent that state in the U.S. Senate. This proposed constitutional amendment will help ensure that a fundamental tenet of our democracy – that the will of the people is most effectively made known through elections of their representatives – is adhered to in the selection of the members of the U.S. Senate.

S.J. Res. 7 and H.J. Res. 21: A Constitutional Amendment Concerning Senate Vacancies

Hearing before the Senate Judiciary Committee

Statement of Sen. Russ Feingold
March 11, 2009

March 4, 2009 The hearing will come to order. I want to welcome everyone to this joint hearing of the House and Senate Constitution Subcommittees on S.J. Res. 7 and H.J. Res. 21, which are both proposed constitutional amendments concerning Senate vacancies. A special welcome to our colleagues from the House side, especially two long time friends, John Conyers, the Chair of the House Judiciary Committee, who will act as the Chair of the House subcommittee today, and James Sensenbrenner from my own state of Wisconsin, a former Chair of the House Judiciary Committee, who now serves as the ranking member of the House subcommittee.

I want to thank my new ranking member, Senator Coburn, and his staff, for their great cooperation in putting this unusual hearing together. This is the first hearing that Dr. Coburn and I have worked together on, and I look forward to continuing the productive working relationship that we have had on so many issues in the past as he takes on this new role.

Joint hearings of House and Senate Committees are not unprecedented, but they are unusual. I think it is fitting that we are holding this particular joint hearing because the topic is so timely, and so fundamental. There are now four Senators who will serve until the next general election, still 20 months away, who were not elected by their constituents. They serve because of what I have a called a "constitutional anachronism," which allowed the governors of their states to appoint them to serve.

Now I want to be clear, I don't have anything against these newest Senators. I hope and expect that they will serve with great distinction, as quite a few appointed Senators have done in the past. But when over 12% of our citizens are represented by someone in the Senate who they did not elect, I think that's a problem for our system of democracy. And it's a problem that only be fixed by a constitutional amendment.

In 1913, the citizens of this country, acting through their elected state legislatures, ratified the 17th Amendment to the Constitution, providing for the direct election of Senators. That ratification was the culmination of a nearly century long struggle. The public's disgust with the corruption, bribery, and political chicanery that resulted from the original constitutional provision giving state legislatures the power to choose United States Senators was a big motivation for passing the amendment. As we have seen in

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recent months, gubernatorial appointments pose the same dangers. They demand the same solution – direct elections.

The constitutional anachronism was created by the inclusion in the 17th Amendment of a proviso, permitting state legislatures to empower their governors to make temporary appointments in the case of an unexpected vacancy. Since the 17th Amendment, 184 such appointments have been made. So this departure from the principle that was behind the 17th Amendment itself – that the people should elect their Senators -- is by no means an uncommon occurrence.

I believe that those who want to be a U.S. Senator should have to make their case to the people whom they want to represent, not just the occupant of the governor's mansion. And the voters should choose them in the time-honored way that they choose the rest of the Congress of the United States – in an election.

This proposal is not simply a response to these latest cases that have been in the news over the past few months. These cases have simply confirmed my longstanding view that Senate appointments by state governors are an unfortunate relic of the pre-17th Amendment era, when state legislatures elected U.S. Senators, and those legislatures might only meet for a few months a year. I view this issue, at base, as a voting rights question. The people of this country should no longer be deprived, for months or even years, of their right to be represented in the Senate by someone whom they have elected.

Direct election of Senators was championed by the great progressive Bob La Follette, who served as Wisconsin's Governor and a U.S. Senator. We need to finish the job started by La Follette and other reformers nearly a century ago. No one can represent the people in the House of Representatives without the approval of the voters. The same should be true for the Senate. I look forward to the testimony of our witness on this very important topic.

I am pleased to turn now to the ranking member of the Senate subcommittee, Senator Coburn.

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Testimony of Pamela S. Karlan

Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford Law School
Co-Director, Stanford Law School Supreme Court Litigation Clinic

Before the Senate Committee on the Judiciary, Subcommittee on the Constitution
and the
House Judiciary Committee, Subcommittee on the Constitution,Civil
Rights, and Civil Liberties
March 11, 2009

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Thank you for giving me the opportunity to testify today.

In 1913, the Seventeenth Amendment made a decisive change to the original constitutional structure: it decreed that Members of the Senate should be "elected by the people,"[1] rather than "chosen by the Legislature[s]" of the several states.[2] As a matter of fundamental constitutional principle, the United States decided that Senators should be selected through direct election.

But the Seventeenth Amendment has not fully realized this principle because of its retention of gubernatorial appointment as a method of filling vacancies.[3] Over the nearly 100 years since the Amendment's ratification, there have been more than 180 gubernatorial appointments to fill vacancies. Some of these appointees have served for only short periods: Rebecca Latimer Felton of Georgia served for only 24 hours in a purely symbolic gesture.[4] Some of these appointees were later elected to the seats to which they were originally appointed, serving with great distinction – for example, George Mitchell, a former Governor of Maine who was then sitting as a federal district judge was initially appointed to his seat, and was later reelected twice, becoming Senate Majority Leader. But some of these appointments have been

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[1] U.S. Const. amend. XVII.

[2] U.S. Const. art. I, § 3.

[3] The original Constitution provided, in Art. I, § 3, cl. 2, that "if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments, until the next Meeting of the Legislature, which shall then fill such Vacancies." The Seventeenth Amendment replaced this provision with a directive that "When vacancies happen in the representation of any State in the Senate, the executive authority of each State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."

[4] See http://www.senate.gov/artandhistory/history/common/briefing/women_senators.htm (last visited Mar. 9, 2008).

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neither symbolic nor impressive: consider the decision of then-recently elected Governor Frank Murkowski of Alaska to name his daughter to fill the very Senate seat he had just vacated – a decision that prompted passage of a statewide initiative to preclude future appointments.

At the level of principle, vacancies should be filled by the same method used to select Senators in the first place. As the Seventh Circuit explained in a related context, "the people's right to chosen representation is not limited to exercise at a biennial election, but is a continuing right which is not to be defeated by death of a Representative once chosen, or other cause of vacancy."[5] Moreover, experience over years since ratification shows that gubernatorial appointment has reprised some of the same flaws that were evident in the history of legislative selection, while adding some additional perverse consequences of its own.

First, one of the central criticisms of legislative appointment was that it often produced corrupt bargains, ranging from outright allegations of bribery to less illegal, but nonetheless unsavory, political deals.[6] We have unfortunately seen such allegations once again in the post-2008 election vacancy-filling process, with the Governor of Illinois having been charged with essentially trying to sell the President-Elect's seat to the highest bidder.

Second, gubernatorial appointments can distort the representational process. Governors can, and perhaps often do, appoint individuals to fill vacancies who simply would not be the choice of the people. This can occur when the appointing Governor is a member of a different political party than the Senator whose vacated seat she is filling: many voters may prefer members of different parties for national as opposed to state office and if the Governor chooses a

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[5] Jackson v. Ogilvie, 426 F.2d 1333, 1336 (7th Cir.), cert. denied, 400 U.S. 833 (1970).

[6] See, e.g., 1 Robert C. Byrd, The Senate, 1789-1989, at 393 (1988); George H. Haynes, The Senate of the United States:Its History and Practice 86-91, 165 (1938).

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member of her own party, she will saddle voters with a Senator whose views may be anathema to them. And it can also occur when a Governor is motivated by other political desires. For example, a Governor may appoint a Senator not because, even in her judgment, the appointee is the most qualified aspirant, but rather because she wishes to reward a party loyalist. Or she may appoint an avowed "lame duck" – despite the fact that this may undermine the state's interests by preventing the new Senator from acquiring seniority that will carry over to the state's benefit – in order to "keep a seat warm" for a future potential candidate. That, apparently, is what has happened in filling the Vice President's seat. A Senator who has never faced, and has no intention ever of facing, her constituents undercuts the central purpose of having a Senate elected by the people.

Third, gubernatorial appointment can create longer term distortions, by affecting future elections. Members of the appointed Senator's political party may face substantial pressure not to challenge the new incumbent in a primary election, particularly if the consequence might be to split the party and enable the election of the other party's candidate. This may deter candidates from running who would in fact have enjoyed greater popular support than the accidental incumbent. Incumbent Senators often enjoy significant electoral advantages over their potential challengers and these advantages may give an unwarranted boost to the incumbent, even if voters would have preferred to elect someone else in an open-seat election.

At the same time, our experience with special elections to fill Senate vacancies – along with the national experience since 1789 with the requirement that vacancies in the House of

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Representatives be filled *only* by election[7] – shows that special elections can effectively fill these seats.

The arguments against filling Senate vacancies solely by election stem not from principle, but from practicality: proponents of gubernatorial appointment argue that speed is of the essence and that special election alone would leave seats unfilled for too long or would cost too much, particularly if the election to fill a vacant seat could not be coordinated with an upcoming already scheduled election.[8]

It seems to me worth distinguishing between two different scenarios, which might be called the "conventional" and the "catastrophic." The "conventional" Senate vacancy occurs because of a seat-specific event: a sitting Senator dies, or resigns after being confirmed for a Cabinet position or a judgeship, or for some other reason. Some conventional events can be timed to minimize the length of any vacancy while providing adequate notice to potential candidates and their supporters. But even when they cannot, it is important to recognize that the Senator's constituents will continue to be represented in the Senate by the state's other Senator – in contrast to the situation in the House, where each citizen is represented by only a single

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[7] See U.S. Const. art. I, § 2, cl. 4 ("When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.").

[8] Depending on the temporal relationship between the declaration of the vacancy and the regular election schedule, some states permit gubernatorial appointees to serve until a *second* regularly-scheduled election. See, e.g., Conn. Gen. Stat. § 9-211.

Moreover, in some states, there will be no special election at all if the vacancy occurs in relatively proximity to the next scheduled election. For example, in Maryland, if the vacancy occurs less than three weeks before the candidate filing date for the next upcoming election – a date that is itself apparently 70 days before the date of a primary election, see Md. Ann. Code art. EL § 5-303, that is itself months before the general election – then the gubernatorial appointee will serve the entire remainder of the Senate term as long as the general election is in the fourth year of the term. Id. § 8-602. So if a Senate term would expire in 2015, a vacancy occurring in the summer of 2012 would lead to a gubernatorial appointment lasting until then.

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Representative, whose departure leaves him with no representation whatsoever. Moreover, many states have elections scheduled at numerous times throughout the year, and the proposed amendment leaves them free to strike the balance they find most appropriate between rapidly filling a vacancy and minimizing the cost of running elections. The proposed amendment would leave to each state the decision whether to wait until the next scheduled election or to conduct special elections under the circumstances that seem most appropriate in light of the state's demography and other factors. In the meantime, the Senate continues its central role as a great deliberative body all of whose members have been "elected by the people" of the United States. The citizens of the State continue to be represented by at least the other sitting Senator. And the Senate of course retains the ability, through its internal Rules, to modify its procedures to take account of the absence.[9]

To be sure, there is a possibility, however remote, of "catastrophic" vacancies caused by events that incapacitate substantial numbers of Senators simultaneously. For example, if the Senate were subject to a terrorist attack while in session, the nation could find itself without a functioning Senate at all. I urge Congress and the President to consider how to handle such mass vacancies.[10] But the remote possibility of catastrophic vacancies should not serve as a justification for leaving an undemocratic, potentially corrupt, and undeniably distortive system in effect to fill the predictable periodic vacancies that have occurred regularly since 1913.

Prime Minister Winston Churchill once remarked of democracy generally that "[n]o one

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[9] See, e.g., United States v. Ballin, 144 U.S. 1, 6 (1892) (recognizing the deference owed to each House in setting its own internal rules regarding, for example, quorums).

[10] Congress has already recognized, with respect to House vacancies, the need to set "[s]pecial rules" for elections to fill vacancies " in extraordinary circumstances." 2 U.S.C. § 8. And it made provisions for assembling away from the Capitol when necessary in H.R. Con. Res. 1, 108th Cong. (2003).

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pretends that democracy is perfect or all-wise. Indeed it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time."[11] The same might be said of special elections to fill unexpired Senate terms: they are the worst way of filling such vacancies, except for all the others. Perhaps using its existing and plenary Art. I, § 4 powers to "make . . . Regulations" regarding the "Times, Places and Manner of holding Elections for Senators," Congress can devise ways of mitigating, or defraying, any exceptional expenses necessary to fill Senate vacancies. But the general principle that vacancies should be filled consistent with the democratic aspirations of our Constitution deserves greater weight than the current regime provides.

[11] Winston Churchill, Speech in the House of Commons (Nov. 11, 1947).

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Statement of Senator Ted Kaufman,
Hearing before the Senate Committee on the Judiciary Committee,
Subcommittee on the Constitution, and the
House Committee on the Judiciary,
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
March 11, 2009

Thank you, Mr. Chairman, for holding this hearing on such an important and timely topic.

As one of 184 appointed United States Senators in the history of our great nation, and the only one on this committee, allow me to be clear.

I do not believe senators should be appointed.

I favor special elections to replace Senators mid-term for the basic principle I've learned in 36 years in and around public service: in a true democracy, the power should rest with the people. Whenever possible, therefore, the people should select their representatives.

The appointment process, ironically, was borne from an overwhelmingly democratic act. The 17th Amendment to the Constitution – which rightfully created direct election of Senators – contained a clause allowing governors to fill vacancies created mid-term.

The process has garnered scant attention until this year, when an unusual number of senators left the Capitol for President Obama's administration, including my predecessor, Vice President Joe Biden. The sheer number of appointments has created a worthy public discussion, one that hit overdrive when allegations surrounding disgraced Illinois Gov. Rod Blagojevich first surfaced.

While I believe special elections are the best option for filling senate vacancies, I also believe that amending the constitution is not the route we should take – for two reasons.

First, the 17th Amendment leaves the decision to the legislatures and governors of the states. If any state prefers special elections over gubernatorial appointments, it can and should make that the procedure through the simple expedient of appropriate legislation.

Second, Constitutional Amendments have been and should remain rare – we've had only a dozen since the turn of the 20th Century. Our nation's founders

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crafted a remarkable document that laid the foundation for the greatest nation the world has ever seen, one whose values and ideals have withstood the test of time. We should only make alterations in exceptional circumstances; the Equal Rights Amendment was the last time I felt strongly about modifying the constitution.

Changing the process of senate appointments does not rise to the level of urgency for an amendment, especially when there other, swifter, options are at our disposal – the opportunity for each state to change the law is already in the 17th Amendment.

Our Constitution does provide for constitutional amendment. But the founders intentionally, and wisely, made the process an onerous one. Our foundational text ought not be tinkered with lightly.

Representing Delaware in the United States Senate is, as then-Senator Biden said in his farewell address, "a rare and sacred opportunity." It is a chance for me to apply my experiences – whether in the Senate, in international broadcasting, at Duke Law School, the DuPont Company, or as a grandfather – to try and make a difference for the American people.

Our nation has seen appointees become giants in the Senate. True public servants like Sam Ervin and George Mitchell landed in the upper chamber thanks to their governors. But when the election comes next year, as I said when I was appointed, I will not be on the ballot.

The undemocratic process of a gubernatorial appointment would be compounded if I ran; the overwhelming advantage of incumbency should not be bestowed by a governor. As former Governor Ruth Ann Minner said when she appointed me, "In 2010, it should be the voters' decision, not mine, about who should be in the Senate."

Governor Minner's decision was consistent with Delaware and federal law, and since then I have had the luxury of hitting the ground running from my years working in the Senate. But it does not change my mind about the process.

The Declaration of Independence describes "the Right of the People" as the dominant force in a true democracy, the only power-broker in our system our founders so presciently designed. In that spirit, while I wholeheartedly believe that senate vacancies should be filled by special elections, the decision should be left where it already resides: with the people, with the states.

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Testimony of Kevin J. Kennedy
Director and General Counsel
Wisconsin Government Accountability Board

Joint Congressional Hearing

Senate Judiciary Committee
Subcommittee on the Constitution

House Judiciary Committee
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

March 11, 2009

Senate Joint Resolution 7
and
House Joint Resolution 21

A Constitutional Amendment Concerning Senate Vacancies

Chairman Feingold, Chairman Conyers and Subcommittee Members:

Thank you for the opportunity to provide information to the Subcommittees on Wisconsin's procedures for conducting special elections to fill vacancies in the office of United States Senator. It is a special honor to be here. Wisconsin has a long history of relying on special elections to fill vacancies in the office of United States Senator dating back to the ratification of the 17th Amendment to the United States Constitution.

Please allow me to provide a brief background on the organizational structure of elections in Wisconsin followed by a description of our approach to conducting special elections to fill vacancies in the office of United States Senator. I will also provide a history on filling congressional vacancies in Wisconsin along with a discussion of the costs of conducting a statewide special election based on our experience in Wisconsin.

Introduction and Background on Wisconsin Election Administration

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I have served as Wisconsin's non-partisan chief election official for more than 25 years. I am currently appointed by and report to a non-partisan, citizen board comprised of six former circuit court and appellate judges. The Government Accountability Board (G.A.B.) was created in February 2007 by 2007 Wisconsin Act 1. After the appointment and confirmation of the initial members and hiring of its Director and General Counsel, the G.A.B. replaced the bipartisan State Elections Board and non-partisan State Ethics Board on January 10, 2008.

The Board has general supervisory authority over the conduct of elections in the State of Wisconsin. I have compliance review authority over Wisconsin's 1,922 local election officials and their staffs. This means any complaint alleging an election official has acted contrary to law or abused the discretion vested in that official must be filed with the Government Accountability Board before it may proceed in court. I have the authority to order local election officials to conform their conduct to law.

Wisconsin has a voting age population of approximately 4.3 million citizens. There are almost 3.8 million registered voters in our Statewide Voter Registration System (SVRS). The estimated state population is 5.6 million.

The Board establishes training programs for local election officials. The Board is also required to certify the chief election inspector, the individual in charge of each of the state's 2,822 polling places. Wisconsin's elections are administered at the municipal level in our 1,850 towns, villages and cities. The municipal clerk, an elected or appointed non-partisan public official, is responsible for the recruitment and training of poll workers, selecting and equipping polling places, voter registration, absentee voting, acquisition of voting equipment and the conduct of elections. More than 25,000 poll workers, along with special voter registration deputies for Election Day registration, poll managers, runners and greeters, staff the polling places in our November general election every 2 years.

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Wisconsin uses a paper ballot based voting system. Before the 2000 Presidential election, more than 80% of the votes in Wisconsin were cast using optical scan ballots. Currently the state has a mixture of optical scan voting devices (an estimated 90% of the votes cast), direct record electronic (DRE) touch screen voting devices with a voter verified paper trail (an estimated 5% of votes cast) and hand-counted paper ballots (an estimated 5% of votes cast.) All polling places have a supply of paper ballots.

Polling places open at 7:00 am and close at 8 pm for all Wisconsin elections. After the polls close, the results are counted at the polling place. The ballots, voting results and other supplies for state and federal contests are transported to the county clerk the next day. Wisconsin's 72 county boards of canvassers conduct a canvass of the votes within two days of the election and certify the results to our office.

In 71 counties, the county clerk is responsible for printing ballots, programming voting equipment, publishing notices and the conduct of the county canvass for state and federal elections. County clerks are elected on a partisan ticket in presidential years.

In the City of Milwaukee, a bipartisan Board of Election Commissioners oversees the work of Commission staff administering the same duties as the clerk in other municipalities. Similarly, in Milwaukee County, a bipartisan Board of Election Commissioners oversees the work of Commission staff canvassing and certifying the election results.

In the three most recent Presidential elections, Wisconsin was the focus of a spirited campaign between the major party candidates. The margin of victory was extremely narrow in 2000 and 2004. In 2000, less than 6,000 votes separated the two major party candidates out of more than 2.6 million votes cast, a 69% voter turnout. In 2004, less than 12,000 votes separated the two major party candidates out of more than 3 million votes cast, a 73% voter turnout. In 2008, more than 400,000 votes separated the two major party candidates out of almost 3 million votes cast for president, a 71% voter turnout.

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Current Wisconsin Law on Filling U.S. Senate Vacancies

In the event of a vacancy in the office of United States Senator, Wisconsin law requires the vacancy be filled by special election. Wis. Stats. §7.18. See Exhibit 1 for the specific statutory language. Wisconsin also has a detailed set of statutory provisions governing the timing and conduct of special elections. Wis. Stats. §8.50. See Exhibit 1 for the applicable statutory language with respect to conducting special elections to fill vacancies in Congressional offices. The full text of the special election statute is set out in Exhibit 2.

A United States Senator submits his or her resignation to the Wisconsin Secretary of State. Wis. Stats. §17.02 (1). See Exhibit 1 for the specific statutory language. When a vacancy other than by resignation occurs in the office of United States Senator, the county clerk where the Senator resided at the time of election is required to notify the Government Accountability Board. Wis. Stats. §17.17 (1). See Exhibit 1 for the specific statutory language. The vacancy triggers the requirement to hold a special election to fill the office.

The Governor issues the order calling the special election, which is filed with the Government Accountability Board. Wis. Stats. §8.50 (1)(a). There is no deadline for the Governor to issue the order calling the special election. This provides the Governor with considerable flexibility in setting the date of the special election. The agency staff generally works with the Governor's office to determine the wording of the order and the timing of the election.

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Notice of the election is given by publication of the order. The Government Accountability Board transmits a copy of the order to the county clerks, who arrange for immediate publication of the order. The county clerks also notify each municipality in the county of the special election. Wis. Stats. §8.50 (1)(b). The order specifies the office to be filled, the expiration date of the remaining term of office, the date of the election, the earliest date for circulating and the deadline for filing nomination papers, the name of the incumbent before the vacancy occurred and a description of how the vacancy occurred. Wis. Stats. §8.50 (1)(c).

Special elections occur between 9 and 11 weeks from the date the Governor issues the order calling the election. Unless the special election is called to coincide with a regularly scheduled election, at the time of issuing the order the Governor is required to set the date of the election between 62 and 77 days from the date of the order. Wis. Stats. §8.50 (2)(a).

The date of the special election determines the date of the primary along with the period for circulating and the deadline for filing nomination papers. The primary, if required, is held 4 weeks before the day of the special election, unless the special election is held on the day of a regularly scheduled election. The deadline for filing nomination papers and other documents required to appear on the ballot is 4 weeks before the date of the primary or the date on which the primary would be held if required. Nomination papers may be circulated no sooner than the day of the order. Wis. Stats. §8.50 (3)(a).

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Wisconsin has 3 regularly scheduled election dates in its two-year election cycle: the first Tuesday of April in each year (the spring election) and the Tuesday after the first Monday in November of even-numbered years (the general election.) The spring primary is held on the third Tuesday in February if required. The partisan primary for the general election is held on the second Tuesday in September of even-numbered years. There are special provisions if a special election is called to coincide with a regularly scheduled election.

If a special election is called to coincide with a regularly scheduled election, the Governor may not issue the order for the election earlier than 92 or later than 49 days before the date of the regularly scheduled primary election. Wis. Stats. §8.50 (2)(b). This means the last date to order a special election to coincide with a regularly scheduled election is 7 weeks before the date of the primary associated with the regularly scheduled election. If required, the primary for the special election will be held on the same date as the primary for the regularly scheduled election. The deadline for filing nomination papers cannot be later than 5 weeks before the date of the special primary. Wis. Stats. §8.50 (3)(a).

As a practice, the Government Accountability Board staff works with the Governor's office to coordinate the timing of special elections to coincide with a regularly scheduled election if practicable in order to reduce costs. Three of the four special elections held in Wisconsin to fill vacancies in the office of Representative in Congress coincided with a

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spring election. In addition, one special election to fill a vacancy in the office of United States Senator and one for a vacancy for the office of Representative in Congress were scheduled so the primary was held on the date of the regularly scheduled election and the special election was held 4 weeks later.

A primary is required in a special election for a partisan office, such as United States Senator, if there is more than one candidate of a recognized political party. The provisions for determining a political party is recognized and entitled to appear on the primary ballot are set out in Wis. Stats. §5.62. The specific statutory language is not included in the attachments for this testimony but may be found at:
http://www.legis.state.wi.us/statutes/Stat0005.pdf.

The county boards of canvassers convene not later than 9 am on the Thursday following the special election to canvass the election results and certify the vote totals to the Government Accountability Board. The canvass returns must be transmitted by the county clerk no later than 7 days following the primary and no later than 13 days following the special election. Wis. Stats. §8.50 (3)(e).

The only way to contest the election determination as the result of an alleged irregularity, defect or mistake is through a recount. Wis. Stats. §9.01 (11). The deadline for requesting a recount is 5 pm on the 3rd business day following the receipt of the last statement from a county board of canvassers. Wis. Stats. §9.01 (1)(a)1. The specific

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statutory language is not included in the attachments for this testimony but may be found at: http://www.legis.state.wi.us/statutes/Stat0009.pdf.

Wisconsin also has some specific provisions with respect to the timing of special elections for Members of Congress to ensure a vacancy is filled quickly and in a cost efficient manner. In the event the right to hold office ceases after a United States Senator or a Representative in Congress is elected and before the beginning of the term, a special election is called. Wis. Stats. §8.50 (4)(h). If a vacancy occurs after the beginning of the ballot access period for the November general election, the special election must coincide with the general election. If the vacancy occurs after the close of that period, the second Tuesday in July of even-numbered years, the special election is held after the general election. If the vacancy occurs after the second Tuesday in May in the year the office will appear on the ballot, the vacancy is not filled because the office will be filled at the regularly scheduled election.

History of Congressional Vacancies Filled by Special Election

Wisconsin has had 7 special elections to fill vacancies in offices held by Members of Congress. Interestingly, the 3 U.S. Senate vacancies all occurred more than 40 years ago, while the 4 vacancies in the office of Representative in Congress occurred in the last 40 years. The most recent special election to fill a Congressional vacancy was held in May, 1993.

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The first special election to fill a vacancy in the office of Representative in Congress was held on April 1, 1969, when the Honorable David Obey was elected to fill the vacancy created by the resignation of Congressman Melvin Laird to become Secretary of Defense in the Nixon administration. The special election and the primary coincided with the regularly scheduled spring election that year. Similarly, Representative Thomas Petri was elected in a special election on April 3, 1979 that coincided with the regularly scheduled spring election. Representative Petri was elected to fill the vacancy created by the death of Congressman William Steiger on December 4, 1978 shortly after being reelected in November. Both Congressman Obey and Congressman Petri continue to serve Wisconsin in the House of Representatives.

On April 3, 1984, Gerald Kleczka was elected in a special election to fill the vacancy created by the death of Congressman Zablocki on December 3, 1983. The special election and the primary coincided with the regularly scheduled spring election that year. On May 4, 1993, Peter Barca was elected in a special election to fill the vacancy created by the resignation of Congressman Les Aspin to become Secretary of Defense in the Clinton administration. The special election was called so that the primary coincided with the regularly scheduled spring election that year.

The first two vacancies in the office of a United States Senator from Wisconsin were filled by an election of the Legislature. The first special election to fill a vacancy in the office of a United States Senator from Wisconsin was held on May 2, 1918. Irvine Lenroot was elected to fill the vacancy created by the death of Senator Paul Husting on

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October 21, 1917. The special election was called so that the primary coincided with the regularly scheduled spring election that year.

On September 29, 1925, Robert M. La Follette, Jr. was elected to fill the vacancy created by the death of his father, Senator Robert M. La Follette, Sr. on June 18, 1925. The most recent special election to fill a vacancy in the office of a United States Senator from Wisconsin was held on August 27, 1957 when William Proxmire was elected to fill the vacancy created by the death of Senator Joseph McCarthy on May 2, 1957. Interestingly, this special election led to a statutory change in the manner in which a United States Senate vacancy was filled.

History on Wisconsin Law of Filling U.S. Senate Vacancies

From the time Wisconsin became a state in 1848 until the ratification of the 17th Amendment to the United States Constitution in 1913, United States Senators were selected by the Legislature including the 2 occasions when vacancies occurred during a Senator's term of office. In 1913, the State Legislature provided that vacancies in the office of United States Senator may be filled at a special election. Laws of 1913, Chapter 634. In 1919, the Legislature provided that vacancies in the office of United States Senator shall be filled by special election. Laws of 1919, Chapter 362, Section 30. This requirement continued until 1957.

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Following the death of Senator McCarthy, the Legislature changed the requirement for filling vacancies in the office of United States Senator by special election to a temporary appointment by the Governor until the next regularly scheduled general election. Laws of 1957, Chapter 647. The change was apparently spurred by dissatisfaction with the immediate scheduling of a special election to fill the vacancy caused by Senator McCarthy's death. However, the change was not effective for filling that vacancy since it occurred after the vacancy was created. The change remained in effect until 1986 when the Legislature removed the language providing for a temporary appointment by the Governor and require a special election to fill the vacancy. 1985 Wisconsin Act 304, Section 133g.

Election Related Costs – Primary and General

It is a challenge to get a reliable estimate on the cost of conducting elections because election administration is very labor intensive and because the costs vary by county and municipality. However, based on information currently available, I estimate the cost of a statewide special election in Wisconsin to fill a vacancy in the office of United States Senator would be approximately $3 million. This does not include the cost of conducting the primary which would be less. It also does not include the cost for staff hours related to the conduct of the election that are part of the current salary of those government employees administering the election at the municipal, county and state levels. See Exhibit 3 for a line item listing of estimated costs.

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In Wisconsin a number of government employees are involved in the successful conduct of an election. These employees work in the Elections Division of the Government Accountability Board, in the offices of 71 county clerks and in the offices of 1,849 municipal clerks. In addition, both the city of Milwaukee and Milwaukee County have a full time Election Commission staff.

Government Accountability Board staff are responsible for preparing the election notices for county clerks, processing ballot access documents including nomination papers and certifying candidates for the ballot. The staff generally works with the Governor's office to determine the wording of the order and the timing of the election. Election results are transmitted to the staff for certification and preparation of the certificate of election. In the case of the election of a United States Senator, the certificate of election prepared by the agency staff is signed by the Governor.

About 880 hours of Elections Division staff time would be devoted to the administration and conduct of a statewide special election. This includes set up of the Statewide Voter Registration System (SVRS) to enable local election officials to track absentee voting and print poll lists. This also includes Election Day responsibilities such as fielding inquiries from voters, election officials and the media along with monitoring voting activity and our random Election Day polling place accessibility and security audits.

Wisconsin is a paper based voting jurisdiction. Seventy-one county clerks and the Milwaukee County Board of Election Commissioners are responsible for publishing

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certain election notices, printing the ballots and programming the electronic voting equipment. The counties use a format developed by the Government Accountability Board staff to prepare and publish the Type A Notice of Election and the Type B Sample Ballot and Voting Instructions Notice. Copies of the Type B Notice are also distributed to the municipalities for posting in the polling place on Election Day. The estimated county notice publication costs for a special election are $84,600. This cost may vary due to the number of publications used in a given county.

For a special election to fill a vacancy in the office of United States Senator, counties would prepare as many as two and a half million (2,500,000) optical scan and paper ballots at an estimated cost of twenty cents each. Approximately one and a half million (1,500,000) ballots would be printed for a special primary election because of the projected lower turnout.

Wisconsin uses optical scan voting equipment to count more than 90% of all ballots cast including absentee ballots. In addition the state uses almost 1,000 ballot marking devices and 1,650 DRE touch screen voting devices to ensure individuals with disabilities are able to vote privately and independently. Based on figures provided by voting equipment vendors it would cost counties approximately $540,000 to program the electronic voting equipment used in a special statewide election. Some of this cost would not be a direct charge in those counties who rely on staff resources to program their electronic voting equipment.

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Counties are also responsible for conducting the post-election canvass based on the returns received from the polling places. The official vote totals are then transmitted to the Government Accountability Board for certification.

At least 28,160 hours would be put in by county staff to administer a statewide special election. County staff must prepare and proof election notices for publication, prepare and proof ballots for printing, proof returned ballots, package and distribute them to municipal clerks and test voting equipment. In Wisconsin all counties also assist municipalities with maintaining the Statewide Voter Registration System (SVRS) and printing poll lists. The estimated amount of county staff time is based on the assumption that in 60 counties, 2 persons will put in at least 176 hours (one work month), in 8 larger counties, 3 persons will put in at least 176 hours and in the 4 largest counties, 4 persons will put in at least 176 hours administering a special statewide election.

While Government Accountability Board and county staff play a significant role in administering elections in Wisconsin, our 1,849 municipal clerks and the staff of the Milwaukee City Election Commission are responsible for the actual conduct of the election. These dedicated municipal officials set up and equip the polling places; recruit, train and pay the poll workers; as well as process absentee ballots. When it comes to running elections in Wisconsin, the rubber meets the road at the municipal level.

Municipalities are responsible for preparing and publishing the Type D Notice informing the public of polling place locations and hours. They also prepare and publish the Type E

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Notice providing information on absentee voting for the public. The estimated cost for publishing these notices for a statewide special election is $59,500.

Municipal election officials are responsible for ensuring polling places are staffed with knowledgeable, helpful and dedicated poll workers. Wisconsin has almost 3,000 polling places staffed by a minimum of 3 poll workers. In a statewide special election, it assumed there would be an average of at least 5 poll workers at each polling place. Some smaller municipalities may be able to rely on the minimum staffing level. Wisconsin law requires poll workers receive a reasonable daily compensation. Wis. Stats. §7.03 (1). The amount of compensation varies by municipality with many paying minimum wage, some a daily stipend of less than $75 and others paying a "living" wage. For the purpose of estimating costs for a statewide special election, it was assumed that 15,000 poll workers would receive compensation equal to 16 hours at the state minimum wage. This amount would be less in a special primary because less poll workers would be needed.

Wisconsin has a relatively low number of absentee voters compared to other states. However, the number has steadily increased from less than 5% of all votes cast in elections before 2000 to more than 6% in 2000, more than 12% in 2004 and almost 18% in 2008. Many of these votes are cast in the office of the municipal clerk, but a significant number are cast by mail. Municipal election officials put in an extraordinary amount of hours processing absentee ballots cast in person as well as those cast by mail. For the purpose of estimating the costs of a statewide special election it is assumed at

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least 250,000 absentee ballots will be mailed to voters with return postage included at a total cost of $1.00 per absentee ballot.

The number of local election officials serving at the municipal level varies based on the size of the municipality and whether the clerk is elected or appointed. In the City of Milwaukee there is a core staff of 7 employees which is augmented by temporary staffing for regularly scheduled election events. Many municipal clerks are part time. For some, their municipal clerk duties are done after working a day job elsewhere. This makes it virtually impossible to determine the number of hours municipal election officials, other than poll workers, would put in to administer a statewide special election.

Conclusion

Elections are the cornerstone of our democracy. Since 1913, Wisconsin has committed to filling vacancies in the office of United States Senator by holding a statewide special election. This enables Wisconsin voters to actively participate in determining their federal representative in the United States Senate rather than delegating the selection to their Governor, even for a short period of time until a regularly scheduled election. It comes at a price, but the conduct of fair, transparent elections provides the foundation for public confidence in their elected representatives.

Thank you for the opportunity to share my thoughts with you. I would be happy to answer any questions Subcommittee members may have.

Respectfully submitted,

Kevin J. Kennedy
Director and General Counsel
Wisconsin Government Accountability Board

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Exhibit 1

Wisconsin Statute 8.50 – Special elections. Redacted to show applicable provisions.

Unless otherwise provided, this section applies to filling vacancies in the U.S. senate and house of representatives, ... No special election may be held after February 1 preceding the spring election unless it is held on the same day as the spring election, nor after September 1 preceding the general election unless it is held on the same day as the general election, until the day after that election. If the special election is held on the day of the general election, the primary for the special election, if any, shall be held on the day of the September primary. If the special election is held on the day of the spring election, the primary for the special election, if any, shall be held on the day of the spring primary.

(1) SPECIAL ELECTION ORDER AND NOTICES.

(a) When there is to be a special election, ...and all other special elections shall be ordered by the governor. When the governor or attorney general issues the order, it shall be filed and recorded in the office of the board. ...

(b) Notice of any special election shall be given upon the filing of the order under par. (a) by publication in a newspaper under ch. 985. If the special election concerns a national or state office, the board shall give notice as soon as possible to the county clerks. Upon receipt of notice from the board, ... the county clerk shall give notice as soon as possible to the municipal clerks of all municipalities in which electors are eligible to vote in the election and publish one type A notice for all offices to be voted upon within the county as provided in s. 10.06 (2) (n). ...

(c) The order and notice shall specify the office to be filled, the expiration date of the remaining term of office, the date of the election, the earliest date for circulating and deadline for filing nomination papers, the area involved in the election, the name of the incumbent before the vacancy occurred and a description of how the vacancy occurred, ... Except as otherwise provided in this paragraph, the notice shall include the information specified in s. 10.01 (2) (a).

(d) When the election concerns a national or state office, the board shall transmit to each county clerk at least 22 days before the special primary a certified list of all persons for whom nomination papers have been filed in its office. If no primary is required, the list shall be transmitted at least 42 days prior to the day of the election. Immediately upon receipt of the certified list, the county clerk shall prepare his or her ballots. ... If there is a primary, the county clerk shall publish one type B notice in a newspaper under ch. 10. When a primary is held, as soon as possible after the primary, ... prepare the ballots for the following special election. The clerk shall publish one type B notice in a newspaper under ch. 10 for the election.

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(2) DATE OF SPECIAL ELECTION.

(a) The date for the special election shall be not less than 62 nor more than 77 days from the date of the order except when the special election is held on the day of the general election or spring election. If a special election is held concurrently with the spring or general election, the special election may be ordered not earlier than 92 days prior to the spring primary or September primary, respectively, and not later than 49 days prior to that primary.

(b) If a primary is required, the primary shall be on the day 4 weeks before the day of the special election except when the special election is held on the same day as the general election the special primary shall be held on the same day as the September primary or if the special election is held concurrently with the spring election, the primary shall be held concurrently with the spring primary, and except when the special election is held on the Tuesday after the first Monday in November of an odd-numbered year, the primary shall be held on the 2nd Tuesday of September in that year.

(3) NOMINATION, PRIMARY AND CANVASS.

(a) Nomination papers may be circulated no sooner than the day the order for the special election is filed and shall be filed not later than 5 p.m. 28 days before the day that the special primary will or would be held, if required, except when a special election is held concurrently with the spring election or general election, the deadline for filing nomination papers shall be specified in the order and the date shall be no earlier than the date provided in s. 8.10 (2) (a) or 8.15 (1), respectively, and no later than 35 days prior to the date of the spring or September primary. Nomination papers may be filed in the manner specified in s. 8.10, 8.15, or 8.20. Each candidate shall file a declaration of candidacy in the manner provided in s. 8.21 no later than the latest time provided in the order for filing nomination papers. ...

(b) Except as otherwise provided in this section, the provisions for September primaries under s. 8.15 are applicable to all partisan primaries held under this section, ... In a special partisan primary or election, the order of the parties on the ballot shall be the same as provided under s. 5.62 (1) or 5.64 (1) (b). Independent candidates for state office at a special partisan election shall not appear on the primary ballot. No primary is required ... for a partisan election in which not more than one candidate for an office appears on the ballot of each recognized political party. In every special election except a special election for nonpartisan state office where no candidate is certified to appear on the ballot, a space for write-in votes shall be provided on the ballot, regardless of whether a special primary is held.

(c) Notwithstanding ss. 5.37 (4), 5.91 (6) and 6.80 (2) (f), whenever a special partisan primary is held concurrently with the presidential preference primary, an elector may choose the party column or ballot in which the elector will cast his or her vote separately for each of the 2 primaries. Whenever 2 or more special partisan primaries or one or

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more special partisan primaries and a September primary are held concurrently, the procedure prescribed in ss. 5.37 (4), 5.91 (6) and 6.80 (2) (f) applies.

(d) ...*Special provision for certain municipal vacancies*

(e) In a special election for a state or national office, the county clerk or board of election commissioners shall transmit the statement of the county board of canvassers to the government accountability board no later than 7 days after the special primary and 13 days after the special election.

(4) REGULATIONS ON SPECIAL ELECTIONS.

(b) A vacancy in the office of U.S. senator or representative in congress occurring prior to the 2nd Tuesday in May in the year of the general election shall be filled at a special primary and election. A vacancy in that office occurring between the 2nd Tuesday in May and the 2nd Tuesday in July in the year of the general election shall be filled at the September primary and general election.

(c) ...V*acancies in the office of secretary of state, state treasurer, attorney general or state superintendent.*

(d) ..V*acancy in the office of state senator or representative to the assembly.*

(e) ..*Special provision for certain legislative vacancies.*

(f) ...*Judicial vacancies.*

(fm) ...V*acancy in the office of municipal judge.*

(g) If through neglect or failure, an elected officer who should have been chosen at the spring or general election is not chosen at that election, a special election may be held to fill the vacancy; ...

(h) Whenever the right to office of any person who is elected to the legislature or the U.S. senate or house of representatives ceases before the commencement of the term of office to which he or she is elected, a special election shall be held to fill the vacancy.

(i) When the governor so directs, a special election shall be held to fill any vacancy not provided for in this section. This paragraph does not apply to judicial offices.

(5) *Campaign Finance Laws.*

http://www.legis.state.wi.us/statutes/Stat0008.pdf

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Wisconsin Statute 17.02 - Notice of resignations.

Notice of resignations, in addition to those provided for in s. 17.01, shall be given forthwith as follows:

(1) SENATORS AND MEMBERS OF CONGRESS. Of the resignation of a United States senator or member of congress from this state, by the senator or member of congress to the secretary of state.

http://www.legis.state.wi.us/statutes/Stat0017.pdf

Wisconsin Statute - 17.17 Notice of vacancies.

Notice of vacancies occurring otherwise than by resignation shall be given forthwith as follows:

(1) SENATORS AND MEMBERS OF CONGRESS. In the office of United States senator or member of congress from this state, by the county clerk of the county wherein such officer resided at the time of election, to the government accountability board.

http://www.legis.state.wi.us/statutes/Stat0017.pdf

Wisconsin Statute 17.18 - Vacancies, U.S. senator and representative in congress; how filled.

Vacancies in the office of U.S. senator or representative in congress from this state shall be filled by election, as provided in s. 8.50 (4) (b), for the residue of the unexpired term.

http://www.legis.state.wi.us/statutes/Stat0017.pdf

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Exhibit 2

Wisconsin Statute 8.50 – Special elections. Full text.

Unless otherwise provided, this section applies to filling vacancies in the U.S. senate and house of representatives, executive state offices except the offices of governor, lieutenant governor, and district attorney, judicial and legislative state offices, county, city, village, and town offices, and the offices of municipal judge and member of the board of school directors in school districts organized under ch. 119. State legislative offices may be filled in anticipation of the occurrence of a vacancy whenever authorized in sub. (4) (e). No special election may be held after February 1 preceding the spring election unless it is held on the same day as the spring election, nor after September 1 preceding the general election unless it is held on the same day as the general election, until the day after that election. If the special election is held on the day of the general election, the primary for the special election, if any, shall be held on the day of the September primary. If the special election is held on the day of the spring election, the primary for the special election, if any, shall be held on the day of the spring primary.

(1) SPECIAL ELECTION ORDER AND NOTICES.

(a) When there is to be a special election, the special election for county office shall be ordered by the county board of supervisors except as provided in s. 17.21 (5); the special election for city office shall be ordered by the common council; the special election for village office shall be ordered by the board of trustees; the special election for town office shall be ordered by the town board of supervisors; the special election for school board member in a school district organized under ch. 119 shall be ordered by the school board; the special election for municipal judge shall be ordered by the governing body of the municipality, except in 1st class cities, or if the judge is elected under s. 755.01 (4) jointly by the governing bodies of all municipalities served by the judge; and all other special elections shall be ordered by the governor. When the governor or attorney general issues the order, it shall be filed and recorded in the office of the board. When the county board of supervisors issues the order, it shall be filed and recorded in the office of the county clerk. When the county executive issues the order, it shall be filed in the office of the county board of election commissioners. When the common council issues the order, it shall be filed in the office of the city clerk. When the board of trustees issues the order, it shall be filed in the office of the village clerk. When the town board of supervisors issues the order, it shall be filed in the office of the town clerk. When the school board of a school district organized under ch. 119 issues the order, it shall be filed and recorded in the office of the city board of election commissioners. If a municipal judge is elected under s. 755.01 (4), the order shall be filed in the office of the county clerk or board of election commissioners of the county having the largest portion of the population of the jurisdiction served by the judge.

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(b) Notice of any special election shall be given upon the filing of the order under par. (a) by publication in a newspaper under ch. 985. If the special election concerns a national or state office, the board shall give notice as soon as possible to the county clerks. Upon receipt of notice from the board, or when the special election is for a county office or a municipal judgeship under s. 755.01 (4), the county clerk shall give notice as soon as possible to the municipal clerks of all municipalities in which electors are eligible to vote in the election and publish one type A notice for all offices to be voted upon within the county as provided in s. 10.06 (2) (n). If the special election is for a city, village, or town office, the municipal clerk shall publish one type A notice as provided under s. 10.06 (3) (f).

(c) The order and notice shall specify the office to be filled, the expiration date of the remaining term of office, the date of the election, the earliest date for circulating and deadline for filing nomination papers, the area involved in the election, the name of the incumbent before the vacancy occurred and a description of how the vacancy occurred, or for an election held under sub. (4) (e), the name of the incumbent and a description of how and when the vacancy is expected to occur. Except as otherwise provided in this paragraph, the notice shall include the information specified in s. 10.01 (2) (a).

(d) When the election concerns a national or state office, the board shall transmit to each county clerk at least 22 days before the special primary a certified list of all persons for whom nomination papers have been filed in its office. If no primary is required, the list shall be transmitted at least 42 days prior to the day of the election. Immediately upon receipt of the certified list, the county clerk shall prepare his or her ballots. For a county special election, the county clerk shall certify the candidates and prepare the ballots. If there is a primary, the county clerk shall publish one type B notice in a newspaper under ch. 10. When a primary is held, as soon as possible after the primary, the county clerk shall certify the candidates and prepare the ballots for the following special election. The clerk shall publish one type B notice in a newspaper under ch. 10 for the election.

(2) DATE OF SPECIAL ELECTION.

(a) The date for the special election shall be not less than 62 nor more than 77 days from the date of the order except when the special election is held on the day of the general election or spring election. If a special election is held concurrently with the spring or general election, the special election may be ordered not earlier than 92 days prior to the spring primary or September primary, respectively, and not later than 49 days prior to that primary.

(b) If a primary is required, the primary shall be on the day 4 weeks before the day of the special election except when the special election is held on the same day as the general election the special primary shall be held on the same day as the September primary or if the special election is held concurrently with the spring election, the primary shall be held concurrently with the spring primary, and except when the special election is held on the Tuesday after the first Monday in November of an odd-numbered year, the primary shall be held on the 2nd Tuesday of September in that year.

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(3) NOMINATION, PRIMARY AND CANVASS.

(a) Nomination papers may be circulated no sooner than the day the order for the special election is filed and shall be filed not later than 5 p.m. 28 days before the day that the special primary will or would be held, if required, except when a special election is held concurrently with the spring election or general election, the deadline for filing nomination papers shall be specified in the order and the date shall be no earlier than the date provided in s. 8.10 (2) (a) or 8.15 (1), respectively, and no later than 35 days prior to the date of the spring or September primary. Nomination papers may be filed in the manner specified in s. 8.10, 8.15, or 8.20. Each candidate shall file a declaration of candidacy in the manner provided in s. 8.21 no later than the latest time provided in the order for filing nomination papers. If a candidate for state or local office has not filed a registration statement under s. 11.05 at the time he or she files nomination papers, the candidate shall file the statement with the papers. A candidate for state office shall also file a statement of economic interests with the board no later than the end of the 3rd day following the last day for filing nomination papers specified in the order.

(b) Except as otherwise provided in this section, the provisions for September primaries under s. 8.15 are applicable to all partisan primaries held under this section, and the provisions for spring primaries under s. 8.10 are applicable to all nonpartisan primaries held under this section. In a special partisan primary or election, the order of the parties on the ballot shall be the same as provided under s. 5.62 (1) or 5.64 (1) (b). Independent candidates for state office at a special partisan election shall not appear on the primary ballot. No primary is required for a nonpartisan election in which not more than 2 candidates for an office appear on the ballot or for a partisan election in which not more than one candidate for an office appears on the ballot of each recognized political party. In every special election except a special election for nonpartisan state office where no candidate is certified to appear on the ballot, a space for write-in votes shall be provided on the ballot, regardless of whether a special primary is held.

(c) Notwithstanding ss. 5.37 (4), 5.91 (6) and 6.80 (2) (f), whenever a special partisan primary is held concurrently with the presidential preference primary, an elector may choose the party column or ballot in which the elector will cast his or her vote separately for each of the 2 primaries. Whenever 2 or more special partisan primaries or one or more special partisan primaries and a September primary are held concurrently, the procedure prescribed in ss. 5.37 (4), 5.91 (6) and 6.80 (2) (f) applies.

(d) The requirements for nominations and special primaries under this section apply to the filling of any office for which a municipal caucus is regularly used to nominate candidates.

(e) In a special election for a state or national office, the county clerk or board of election commissioners shall transmit the statement of the county board of canvassers to the government accountability board no later than 7 days after the special primary and 13 days after the special election.

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(4) REGULATIONS ON SPECIAL ELECTIONS.

(b) A vacancy in the office of U.S. senator or representative in congress occurring prior to the 2nd Tuesday in May in the year of the general election shall be filled at a special primary and election. A vacancy in that office occurring between the 2nd Tuesday in May and the 2nd Tuesday in July in the year of the general election shall be filled at the September primary and general election.

(c) A vacancy in the office of secretary of state, state treasurer, attorney general or state superintendent, occurring more than 6 months before the expiration of the current term, may be filled at a special election.

(d) Any vacancy in the office of state senator or representative to the assembly occurring before the 2nd Tuesday in May in the year in which a regular election is held to fill that seat shall be filled as promptly as possible by special election. However, any vacancy in the office of state senator or representative to the assembly occurring after the close of the last regular floor period of the legislature held during his or her term shall be filled only if a special session or extraordinary floor period of the legislature is called or a veto review period is scheduled during the remainder of the term. The special election to fill the vacancy shall be ordered, if possible, so the new member may participate in the special session or floor period.

(e) Whenever a member of the legislature is elected to another office after the commencement of his or her term, and the term of the new office or the period during which the legislator is eligible to assume that office commences prior to the end of the legislator's original term of office, the governor may call a special election to fill the seat of the member in anticipation of a vacancy, upon receipt of a written resignation from that member which is effective on a date not later than the date of the proposed special election.

(f) 1. Except as provided in subds. 2. and 3., a vacancy in the office of justice, court of appeals judge or circuit judge occurring in any year after the date of the spring election and on or before December 1 shall be filled, if in the office of circuit judge, at the succeeding spring election; if in the office of court of appeals judge, at the first succeeding spring election when no other court of appeals judge is to be elected from the same court of appeals district; or, if in the office of justice, at the first succeeding spring election when no other justice is to be elected. A vacancy in the office of justice, court of appeals judge or circuit judge occurring after December 1 and on or before the date of the succeeding spring election shall be filled, if in the office of circuit judge, at the 2nd succeeding spring election; if in the office of court of appeals judge, at the first spring election, beginning with the 2nd succeeding spring election, when no other court of appeals judge is to be elected from the same court of appeals district; or, if in the office of justice, at the first spring election, beginning with the 2nd succeeding spring election, when no other justice is to be elected.

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2. If a vacancy in the office of justice, court of appeals judge or circuit judge occurs after December 1 and on or before the date of the succeeding spring election as the result of the resignation of the incumbent, if an election for that seat is scheduled to be held at the succeeding spring election and if the incumbent is not a candidate to succeed himself or herself, the vacancy shall be filled at the regularly scheduled election.

3. If a vacancy in the office of justice, court of appeals judge or circuit judge occurs after the date of the spring election for that seat and before the succeeding August 1 as the result of the resignation of the incumbent and the incumbent is not elected to succeed himself or herself, the vacancy shall be filled by the individual who was elected at the regularly scheduled election. If no individual is elected at the regularly scheduled election or if the individual who is elected dies or declines to serve, the vacancy shall be filled under subd. 1.

4. All vacancies filled under subds. 1. and 2. are for a full term commencing on August 1 succeeding the spring election at which they are filled.

(fm) A permanent vacancy in the office of municipal judge may be filled by temporary appointment of the municipal governing body, or, if the judge is elected under s. 755.01 (4), jointly by the governing bodies of all municipalities served by the judge. The office shall then be permanently filled by special election, which shall be held concurrently with the next spring election following the occurrence of the vacancy, except that a vacancy occurring during the period after December 1 and on or before the date of the spring election shall be filled at the 2nd succeeding spring election, and except that the governing body of a city or village or, if the judge is elected under s. 755.01 (4), the governing bodies of the participating cities or villages may, if the vacancy occurs before June 1 in the year preceding expiration of the term of office, order a special election to be held on the Tuesday after the first Monday in November following the date of the order. A person so elected shall serve for the residue of the unexpired term.

(g) If through neglect or failure, an elected officer who should have been chosen at the spring or general election is not chosen at that election, a special election may be held to fill the vacancy; but no special election may be held for any school or county officer after the time when the officer's term would have commenced had such person been elected at the proper spring or general election, except as authorized under this section, and no election may be held to fill a vacancy in the office of justice or judge except as authorized in par. (f).

(h) Whenever the right to office of any person who is elected to the legislature or the U.S. senate or house of representatives ceases before the commencement of the term of office to which he or she is elected, a special election shall be held to fill the vacancy.

(i) When the governor so directs, a special election shall be held to fill any vacancy not provided for in this section. This paragraph does not apply to judicial offices.

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(5) CAMPAIGN FINANCE LAWS. All laws and rules promulgated under ch. 11 governing campaign finance and reporting, including all deadlines for filing reports and statements, are applicable to special elections, except as otherwise specifically provided.

http://www.legis.state.wi.us/statutes/Stat0008.pdf

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Exhibit 3

Estimated Costs for Conducting a Statewide Special Election

Election Notices	
Type A Notice of Election $475 per county (County pays) (Municipality pays)	$34,200
Type B Sample Ballot and Voting Instructions $700 per county (County pays)	$50,400
Type D Notice of Polling Place Location and Hours $500 per county plus $500 for 13 largest cities (50,000 or more) (Municipality pays)	$42,500
Type E. Informational Notice on How to Vote Absentee $200 per county plus $200 for 13 largest cities (50,000 or more) (Municipality pays)	$17,000
Ballots	
2,500,000 optical scan and paper ballots @ 20 cents (County pays)	$500,000
Voting Equipment Programming	
5,000 voting devices @ $100 per device (County pays)	$540,000
Absentee Ballot Postage	
250,000 absentee ballots @$1.00 (Municipality pays)	$250,000
Poll Workers	
15,000 poll workers @ $104.00 Assume 16 hours @ $6.50 (current state minimum wage) (Municipality pays)	$1,560,000
Total Estimated Costs	**$2,994,100**

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State Elections Division Staff Hours

880

County staff hours

28,160

Municipal Staff Hours

Indeterminate

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Congress of the United States
House of Representatives
Washington, DC 20515

COMMITTEES:
JUDICIARY
SUBCOMMITTEES:
COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY
IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SECURITY, AND INTERNATIONAL LAW
CRIME, TERRORISM AND HOMELAND SECURITY

HOMELAND SECURITY
SUBCOMMITTEES:
CHAIR
TRANSPORTATION SECURITY AND INFRASTRUCTURE PROTECTION
BORDER, MARITIME, AND GLOBAL COUNTERTERRORISM

FOREIGN AFFAIRS
SUBCOMMITTEES:
AFRICA AND GLOBAL HEALTH
MIDDLE EAST AND SOUTH ASIA

SENIOR WHIP
DEMOCRATIC CAUCUS

WHIP
CONGRESSIONAL BLACK CAUCUS

CHAIR
CONGRESSIONAL CHILDREN'S CAUCUS

CONGRESSWOMAN SHEILA JACKSON LEE, OF TEXAS

THE HOUSE JUDICIARY COMMITTEE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES AND THE SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION

"S. J. RES. 7 AND H. J. RES. 21: A CONSTITUTIONAL AMENDMENT CONCERNING SENATE VACANCIES"

MARCH 11, 2009 AT 10:00 A.M.

216 HART SENATE OFFICE BUILDING

Thank you, Chairman Feingold, Ranking Member Coburn, Chairman Nadler, and Ranking Member Sensenbrenner, for holding today's very important hearing regarding vacancies in the United States Senate. I am looking forward to hearing the testimony from the witnesses. This subject is of great moment given the recent gubernatorial

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appointments that have occurred as a result of the change in Administration and the transition that has resulted from certain Senators accepting positions with President Barack Obama's administration.

This hearing provides an opportunity for the Subcommittee on the Constitution, Civil Rights, and Civil Liberties to consider the merits of a Constitutional amendment to require the direct election of Senators in the event of any vacancy. The issue of temporary gubernatorial appointments of Senators has particular importance given that the people of four states, representing 12 percent of the population, will be represented by someone that they did not elect for a period of two years.

Pursuant to the Constitution, Art. I, sec. 3, which provides "The Senate of the United State shall be . . .chosen by the legislatures thereof.), Senators were chosen by the State Legislatures. This was changed in 1913, when the Seventeenth Amendment was ratified.

The Seventeenth Amendment requires that Senators be directly elected by the people. In pertinent part, the Seventeenth Amendment provides:

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"When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."

In the event of a Senate vacancy, there must be filled by election by the people. However, if authorized by the State Legislature, the Governor can temporarily appoint a person to fill the vacant Senate seat until an election is held, as directed by State law. Forty-five states permit their Governor to fill Senate seats. Only Massachusetts, Oklahoma, Oregon, and Wisconsin require a special or general election.

Before the Seventeenth Amendment was ratified, 187 resolutions were proposed in Congress seeking to change how Senators were elected. Since the Amendment was ratified, 184 Senators have been appointed by their State's Governor. Of those, 117 subsequently ran for election and roughly half of those Senators won.

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The Resolutions before us today, S.J. Res/H.J. Res. 21, propose a constitutional amendment requiring the direct election of Senators in the event of a vacancy. In addition, we are considering H.R. 899, the Ethical and Legal Elections for Congressional Transitions (ELECT) Act. This Act requires a special election within 90 days of a Senate vacancy. It allows for Governors to still make appointments prior to the 90 days. The person selected would have to stand for election to stay in office after that period. Additionally, the federal government would reimburse states for 50 percent of reasonable costs related to the election.

There are a number of witnesses before us today. Witnesses on the first panel include Representative David Dreir (R-CA) and Representative Aaron Schock (R-IL). Witnesses on the second panel include Mr. Tom Neale, of the Congressional Research Service, Professor Pamela Karlan, Stanford Law School; Professor Vikram Amar, U.C. Davis School of Law; Mr. Kevin Kennedy, Director and General Counsel, Wisconsin Government Accountability Board; the Honorable David Segal, Rhode Island Representative and FairVote

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analyst; Mr. Matthew Spalding, Director of Heritage Center; and Mr. Bob Edgar, President/CEO of Common cause and former Representative of PA.

Again, I welcome today's distinguished panelists and I welcome their testimony and insights on this subject.

Thank you. I yield the remainder of my time.

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Testimony of Thomas H. Neale, Congressional Research Service
Before the House of Representatives Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Civil Liberties and the
Senate Judiciary Committee, Subcommittee on the Constitution
March 11, 2009

Chairman Conyers, Chairman Feingold, my name is Thomas Neale. I am a member of the staff of the Government and Finance Division of the Congressional Research Service. Thank you for giving me the opportunity to testify this morning on the question of Senate vacancies, and the means by which they may be filled. I have prepared testimony in the form of my report, *Filling Senate Vacancies: Perspectives and Contemporary Developments*, which is available for inclusion in the record.

The presidential election of 2008 resulted, directly and indirectly, in the highest number of Senate vacancies within a short period in more than 60 years. The election of incumbent Senators as President and Vice President, combined with subsequent cabinet appointments, resulted in four Senate vacancies, in Colorado, Delaware, Illinois and New York, all states in which the governor is empowered to appoint a temporary replacement. Protracted controversies surrounding the replacement process in two of these states have drawn scrutiny and criticism of not only these particular circumstances, but of the temporary appointment process itself.

While the process of appointing temporary replacements to fill Senate vacancies has come under examination since the presidential election, the practice itself is as old as the Constitution, having been incorporated in the original document by the founders at the Constitutional Convention.

The practice was revised by the 17th Amendment, which became effective in 1913. The amendment's primary purpose was to substitute direct popular election of Senators for the original provision of election by state legislatures, but it also changed the requirements for filling Senate vacancies, by specifically directing the state governors to "issue writs of election to fill such [Senate] vacancies." At the same time, it preserved the appointment option by authorizing state legislatures to "empower the executive thereof (i.e., the state governor) to make temporary appointments until the people fill the vacancies by election as the legislature may direct." The record of congressional deliberations shows that the appointments provision was not controversial, but that, rather, the primary conflict centered on a proposal that would have eliminated the Article I Section 4 power of Congress to override state provisions regarding the "Times, Places, and Manner of holding Elections for Senators "

Since the 17th Amendment was ratified in 1913, the appointment by governors of interim Senators has remained the predominant practice in the states, with the appointees serving until a special election is held. State provisions differ as to when the special election should be scheduled, but appointed Senators generally serve well under two years, and their terms usually expire immediately upon certification of the special election results. At present 45 states follow some variation of this practice.

Most state governors have broad authority to fill Senate vacancies, provided the appointee meets constitutional requirements for the office, but here again, variations exist

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in state practice. Four states seek to guarantee that a departed incumbent will be replaced by one of the same party, thus respecting the public's choice in the previous election. Arizona requires appointed Senators to be of the same political party as the prior incumbent, while Hawaii, Utah and Wyoming require the governor to choose a temporary Senator from a list of three names submitted by the previous incumbent's party apparatus. It should be noted that some legal commentators have questioned these provisions, suggesting that they place additional qualifications beyond the constitutional ones of age, citizenship and state residence at the time of election.

Over the 96 years since ratification of the 17th Amendment, 184 Senate vacancies have been filled by the appointment of 181 individuals -- three individuals have been appointed twice to fill Senate vacancies. This appointments process has generated relatively few controversies, prior to the present. Most of these centered on occasions when the incumbent state governor resigned after a Senate vacancy occurred, and was appointed to fill the vacancy by his successor. In almost all such instances, the governor-turned-appointed-Senator was defeated in the subsequent election.

At present three states -- Massachusetts, Oregon and Wisconsin -- do not permit gubernatorial appointments, requiring special elections to fill Senate vacancies. A fourth, Oklahoma, allows the governor to appoint only the winner of a special election, and then, only to fill out the expiring term. A fifth state, Alaska has passed both legislation and a referendum item providing for special elections, but the statute retained the governor's power to appoint in the interim, while the referendum eliminated it entirely. Given the conflict, the official reviser's notes cast doubt on the governor's appointment authority.

As the controversy surrounding gubernatorial appointments has grown since the 2008 presidential election, legislation that would curtail or eliminate the governor's appointment power has been introduced in the current sessions of no fewer than eight state legislatures: Colorado, Connecticut, Illinois, Iowa, Maryland, Minnesota, New York and Vermont.

A number of factors may suggest themselves to Congress as the committees consider Senate Joint Resolution 7 and House Joint Resolution 21. These may include, but will almost certainly not be limited to, arguments in favor of a more democratic means of filling vacancies compared with those of preserving a traditional state option; questions of the costs associated with special Senate elections, which would be borne by state and local governments; and, in the post-9-11 era, the comparative advisability of appointments as opposed to special elections in the event of an attack resulting in the death or incapacity of a large number of Senators.

I thank the chairmen and members of the committees for their attention and would be happy to respond to any questions.

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STATEMENT
OF
GOVERNOR C.L. "BUTCH" OTTER
BEFORE
THE SENATE COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON THE CONSTITUTION AND
THE HOUSE COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON THE CONSTITUION, CIVIL RIGHTS, AND CIVIL LIBERTIES
UNITED STATES SENATE
MARCH 11, 2009

Chairman Leahy and Chairman Conyers, Ranking Members Senator Specter and Congressman Smith, distinguished members of these Committees, thank you for inviting testimony today from the Government of the State of Idaho as you consider the matter of Senate Joint Resolution 7 and House Joint Resolution 21: "A Constitutional Amendment Concerning Senate Vacancies." As Governor of Idaho, I respectfully oppose the proposed constitutional amendment.

The Constitution of the United States is not a living document. It was intended to be amended only with great caution, care and deliberation. The fact is that the system as it now exists – including the 17th Amendment – has admirably served the needs of the people, the states and the federal government. It would be unwise and unwarranted to tamper with the role of the states in filling United States Senate vacancies, as Senate Joint Resolution 7 proposes.

The prerogative over whether to require special elections should be left up to the legislatures. If those bodies – representing the will of the people of their states – determine to require special elections, as four states have done, that is their privilege and a right guaranteed by the 10th Amendment. Congress should not seek to impose its impatience on a nation that still values a deliberative process in considering changes to the social contract with its people.

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STATEMENT
OF
GOVERNOR RICK PERRY
BEFORE
THE SENATE COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON THE CONSTITUTION AND
THE HOUSE COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON THE CONSTITUION, CIVIL RIGHTS, AND CIVIL LIBERTIES
UNITED STATES SENATE
MARCH 11, 2009

Chairman Leahy and Chairman Conyers, Ranking Members Senator Specter and Congressman Smith, distinguished members of these Committees, thank you for inviting testimony today from the Government of the State of Texas as you consider the matter of Senate Joint Resolution 7 and House Joint Resolution 21: "A Constitutional Amendment Concerning Senate Vacancies." As Governor of Texas, I respectfully oppose the proposed constitutional amendment.

The United States Constitution currently gives states an appropriate amount of flexibility in determining for themselves how appointments should be made. Texas's appointment system allows the governor to temporarily fill a vacant Senate seat until a special election is held. This system has served Texas well. In January 1961, for example, Governor Price Daniel appointed William Blakley to the Senate to fill the vacancy left by Lyndon Johnson when he became Vice-President. In a special election four months later, Texans voted for John Tower to fill the Senate seat. The first Republican U.S. senator since Reconstruction, Senator Tower served for 24 years before retiring. In January 1993, Governor Ann Richards appointed Robert Krueger to fill the vacancy left by Lloyd Bentsen. Five months later, Texans for the first time in state history voted a woman into office. Senator Kay Bailey Hutchison continues to serve today. Far from being a broken system, the 17th Amendment protected the right of Texans to full representation in the Senate while completely groundbreaking special elections were held. In each case, this was democratic process at its finest.

Before Congress takes the extraordinary leap straight to amending the Constitution, the more circumspect approach would be revisiting this issue after state governments have had a chance to correct any inequality or inefficiency brought to light by recent events. We certainly can agree – and in fact do urge – state governments to work with their members of Congress in reducing periods of temporary Senate appointment to the absolute minimum required for conducting a meaningful special election.

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Washington
Secretary of State
SAM REED

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Olympia, WA 98504-0220
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March 10, 2009

Senate Judiciary Committee
Subcommittee on the Constitution

Dear Chairman Feingold and Chairman Conyers,

As the chief elections official for the State of Washington I am writing in support of Senate Joint Resolution 7, a constitutional amendment concerning Senate vacancies. As it stands now, a single person has the power to appoint the position of a United States Senator upon the creation of a vacancy. I argue our democratic system was built on the right of the people to elect such an important position.

In my 31 years of public service I have seen firsthand how candidates running for any office are required to have a strong working knowledge of the issues and circumstances facing their constituencies. It is critical to a thriving democracy for its representatives to answer directly to the people.

Permitting a single partisan official to hand-pick a U.S. Senator is unfair to the voters. It creates an incumbency and, therefore, gives a disproportionate advantage at the next election.

Direct participation of our citizens in electing their representatives to the different arms of government is the lifeblood of the American form of democracy. I support and strongly urge the passage of this constitutional amendment.

Sincerely,

SAM REED
Secretary of State

Written Testimony of The Honorable Aaron Schock
Congressman, 18th Congressional District of Illinois

Before the Joint hearing U.S. Senate Judiciary Subcommittee on the Constitution and the U.S. House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties on United States Senate Vacancies

March 11, 2009

Chairman Feingold, Ranking Member Coburn, Chairman Nadler, and Ranking Member Sensenbrenner, I want to thank you for holding this important hearing today regarding vacancies in the United States Senate. I appreciate the opportunity to come before you today to testify on this most important and germane topic. My goals today are twofold: to first highlight the need to change the current system which disenfranchises large portions of our nation's citizens, and second to present a practical means of ensuring the direct election of all U.S. Senators by working within the current structure of the Constitution.

I would first like to comment that nothing I am presenting here today is intended to question any Members' ability to serve, but rather to present a possible solution to a long standing problem that is now more apparent than ever. Currently the American public is kept in the dark about the deal makings that occur when Governors are allowed to hand select senatorial replacements. This process is not open, not transparent, and as we have seen in my home state of Illinois, riddled with the possibility of fraud, abuse, and outright bribery. The tribulations of my home state have been well documented and need no rehashing, but they do serve to remind us of the injustice that is done to the American people each time their power to elect those who represent them is taken out of their hands and subjected to backroom deals, handshakes and overall political mischief.

The fact that only 33% of appointed Senators win their first general election bid[1] speaks to the fact that the will of the people is not being represented when politicians are allowed to hand select other "elected" leaders.

[1] *Congressional Quarterly Weekly*, January 12, 2009. Page 55

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Even those making these appointments have lamented the process; Governors David Paterson of New York and Pat Quinn of Illinois have both expressed their desire for a special election[2] to deal with their respective Senate vacancies. Additionally, a number of states have already done away with gubernatorial appointments of U.S. Senators all together, mandating special elections for any vacancy.

The example of Illinois, along with New York, Colorado, Delaware and briefly New Hampshire has highlighted the need for Congress to act with appropriate speed and regard for the law. Is it unfair to the American people to have their representatives ascend to such positions through monetary contributions, political promises, or private agreements.

While I could easily spend my entire time here today highlighting the injustice and democratic hypocrisy that takes place each time a Member is hand selected to this representative body, I am also here to express my belief that we need to address this issue in the most responsible manner possible.

Trying to end appointments to the United States Senate is a complex issue. On one side are those seeking to amend the Constitution to end this outdated practice, and on the opposing side are those who think the Federal government should play no role in this decision. What I, along with a number of my colleagues in the House are proposing, is what we believe to be a common sense middle ground approach; the type of middle ground that is unfortunately often not popular here in Washington as it tries to work with both sides and is most often the loneliest place.

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[2] *"I would prefer this was not even my choice, it would be fine with me if the voters made this choice in a special election"* –Governor of New York, David Paterson (Interview on CBS 1/20/09)
"Quinn also said he supports a measure that calls for a special election to fill a vacant Senate seat to be held within 60 days of when a vacancy occurs. In the meantime, the governor would have the power to pick a temporary replacement.... "At no time should our state go without full and fair representation in the United States Senate." -Governor of Illinois, Pat Quinn (*Springfield Journal Register* 2/23/09)

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I am asking you today to consider H.R. 899, the Ethical and Legal Elections for Congressional Transitions, or ELECT Act, as that middle ground approach. This legislation works within the letter and spirit of the Constitution to change the manner in which Senate vacancies are filled. The ELECT Act uses the congressional authority granted in Article I, Section IV, Clause 1 of the Constitution to allow Congress to at anytime make or alter regulations pertaining to elections. This legislation complies with the 17th Amendment by allowing for interim appointments before the 90 day special election. It also should be noted that the possibility of gubernatorial appointments discussed in the 17th Amendment is not a new concept, but rather a reintroduction of the idea from Article I, Section IV. As such, the origin of state election laws in the underlying Constitution is simply reiterated by the 17th Amendment and does not conflict with Congress' original, and still current power, to supersede those laws. This method is supported by legislative precedent and several constitutional scholars, some of which you will hear from today. The ELECT Act uses these currently existing statutory options to put an end to extended gubernatorial appointments to the Senate while also incorporating a few key other provisions which make it a more practical and sensible option. By leaving the option open for State Legislatures to allow Governors to appoint someone to the Senate for the 90 day window between an announced vacancy and the actual Special Election, the ELECT Act allows that a Senate seat may never actually be vacant, that the people are always represented. This provision also serves the dual purpose of allowing our government to continue to function effectively should a large scale terrorist attack in Washington result in the need to fill a large number of seats rapidly.

As has been recently documented in Illinois, one of the main concerns when considering a special election for any state is the associated costs. While we should never place a price on good governance and democratic freedoms, the cost to states and local entities must be taken into consideration. As such, the ELECT Act provides for important cost-sharing between the state and federal government. This ensures that states are not burdened by new unfunded mandates and that the excuse of "cost" can never again be used to dismiss the democratic right of free and fair elections.

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Mr. Chairman, let there be no mistake, should an amendment to the Constitution to end gubernatorial appointments to fill Senate vacancies, come before this Congress for a vote, I will support it. This issue is too important, and the current system is too flawed to let the means be the standard for not supporting the ends. That said, it is the responsibility of this body to exhaust all other options before moving to such a drastic step.

As Chairman John Conyers said in 2004 when Congress looked at this similar issue:

> *"I generally believe that we should avoid amending the Constitution, when a statutory response is available. Such an approach is quicker, more likely to be passed into law, and avoids amending our most sacred national charter."*[3]

While I have confidence that preexisting court cases[4] and other legal precedent makes my legislation Constitutional, the mere fact that we are having this debate or that the potential exists for this legislation shows that the concept embodied in the ELECT Act has some merit and it is the obligation of this body to exhaust these statutory options before looking to amend the document which outlines the foundations of our democracy. Time and time again we have drawn upon the wisdom found in this document to answer some of our nation's most difficult questions. Shouldn't we again give the Constitution the validation it has earned to trust that it has the capabilities to answer this question now?

That said, my intent with this legislation and coming before you today is to show the need to change the current outdated system of gubernatorial appointments and to present the means to accomplish that outside of amending our nation's Constitution. I am willing to work with the committees, the Chairmen, Ranking Members and other interested parties to find improvements to the legislation, however, I do feel that the idea behind the legislation is the most practical and responsible option currently available to us and as such, should be considered before amending the United States Constitution.

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[3] Prepared Statement of the Honorable John Conyers, Jr., House Judiciary Committee Report 108-404, Part II Continuity in Representation Act, H.R. 2844

[4] *Oregon v. Mitchell 400* U.S. 112

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H.R. 899, the Ethical and Legal Elections for Congressional Transitions Act (E.L.E.C.T.)

How is this bill constitutional?

- Congress has constitutional authority to enact such legislation under article I, section IV, clause 1 of the Constitution, which states that:

Article I, See IV: "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."

The bottom line is that this is a cleaner and quicker way to end gubernatorial appointments than a constitutional amendment.

- The proposal satisfies the 17th Amendment:

17th Amendment: "When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."

Allows the Governor or State Legislature to appoint, for that short period of time, before the 90 days expires, but that whoever they appoint must run in a special election to maintain control of that seat (within 90 days).

The 17th Amendment says nothing about the time frame regarding elections after an appointment.

The ELECT Act provides the conditions that allow a Senate seat to never physically be vacant, as after an announcement, the governor can appoint someone to hold that seat until the election occurs 90 days later…thus the people are never not represented… (provision also provides for a representational safeguard against a large terrorist attack in DC).

The alternative sets up a system where a Senate seat is vacant for an extended period of time as an election waits to occur.

- The vacancy provision mentioned in the above Seventeenth Amendment simply carried over the concept of Governor Appointments from Article I, Section IV. That original Article I provision did not conflict with Congress' original (and still current power) to trump State election laws ("but the Congress may at any time by Law make or alter such Regulations" – Article I, Section IV). The Seventeenth Amendment's vacancy provision (which simply carried over the original Governor appointment provision "shall be prescribed in each State by the Legislature thereof" -Article I, Section IV) also should not be read to conflict with Congress's power to trump state election laws. Therefore, Congress retains the power to require sped-up special elections to fill Senate vacancies.

- In the 1970 ruling of Oregon v. Mitchell, the Supreme Court noted that Article IV, Section I gives Congress the power to provide a complete code of regulation for House and Senate selection. The Court did not see the 17th Amendment as any bar to a law permitting those between the ages of 18-21 to vote if otherwise qualified.

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(Original Signature of Member)

111TH CONGRESS
1ST SESSION

H. R. _____

To require States to hold special elections in the event of a vacancy in the office of a Senator representing the State, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. SCHOCK introduced the following bill; which was referred to the Committee on _____

A BILL

To require States to hold special elections in the event of a vacancy in the office of a Senator representing the State, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Ethical and Legal Elections for Congressional Transitions Act".

SEC. 2. REQUIRING SPECIAL ELECTION IN CASE OF VACANCY IN OFFICE OF A SENATOR.

(a) SPECIAL ELECTION.—

(1) IN GENERAL.—Except as provided in subsection (b), if the President of the Senate issues a certification that a vacancy exists in the office of a Senator, the chief executive of the State represented by the Senator shall issue a writ of election to fill the vacancy by special election.

(2) TIMING OF ELECTION.—A special election under this subsection shall be held not later than 90 days after the President of the Senate issues the certification described in paragraph (1).

(3) APPLICATION OF STATE LAWS.—A special election under this subsection shall be held in accordance with applicable State law governing special elections in the State.

(b) EXCEPTION FOR VACANCIES OCCURRING NEAR DATE OF REGULARLY SCHEDULED ELECTION.—Subsection (a) shall not apply in the case of a vacancy in the office of a Senator if the President of the Senate issues the certification described in such subsection—

(1) during the 90-day period which ends on the date a regularly scheduled general election for the office is to be held; or

(2) during the period which begins on the date of a regularly scheduled general election for the office and ends on the first day of the first session of

1 the next Congress which begins after the date of
2 such election.
3 (c) RULE OF CONSTRUCTION.—Nothing in this sec-
4 tion shall be construed to affect the authority of a State
5 under the Constitution of the United States to authorize
6 the chief executive of the State to make a temporary ap-
7 pointment to fill a vacancy in the office of Senator until
8 a special election is held for the office, or to affect the
9 authority of an individual who is appointed to fill such
10 a vacancy until an individual is elected to the office in
11 the special election.
12 **SEC. 3. REIMBURSEMENT OF PORTION OF COSTS IN-**
13 **CURRED BY STATE IN HOLDING SPECIAL**
14 **ELECTION.**
15 (a) PAYMENTS TO REIMBURSE STATES FOR PORTION
16 OF SPECIAL ELECTION COSTS.—Subtitle D of title II of
17 the Help America Vote Act of 2002 (42 U.S.C. 15401 et
18 seq.) is amended by adding at the end the following new
19 part:

1 **"PART 7—PAYMENTS TO REIMBURSE PORTION**
2 **OF COSTS INCURRED IN HOLDING SPECIAL**
3 **ELECTIONS TO FILL SENATE VACANCIES**
4 **"SEC. 297. PAYMENTS TO STATES TO REIMBURSE PORTION**
5 **OF COSTS INCURRED IN HOLDING SPECIAL**
6 **ELECTIONS TO FILL SENATE VACANCIES.**
7 "(a) PAYMENTS AUTHORIZED.—In accordance with
8 the procedures and requirements of this section, the Com-
9 mission shall make a payment to each eligible State to
10 cover a portion of the costs incurred by the State in hold-
11 ing a special election required under the Ethical and Legal
12 Elections for Congressional Transitions Act to fill a va-
13 cancy in the office of a Senator representing the State.
14 "(b) ELIGIBILITY.—A State is eligible to receive a
15 payment under this part if it submits to the Commission,
16 at such time and in such form as the Commission may
17 require, a statement containing—
18 "(1) a notice of the reasonable costs incurred or
19 the reasonable costs anticipated to be incurred by
20 the State in holding the special election described in
21 subsection (a), including the costs of any primary
22 election held for purposes of determining the can-
23 didates in the special election; and
24 "(2) such other information and assurances as
25 the Commission may require.

"(c) AMOUNT OF PAYMENT.—The amount of a payment made to a State under this section shall be equal to 50 percent of the reasonable costs incurred or the reasonable costs anticipated to be incurred by the State in holding the special election described in subsection (a), as set forth in the statement submitted under subsection (b).

"(d) TIMING OF PAYMENTS.—The Commission shall make the payment required under this section to a State not later than 30 days after receiving the statement submitted by the State under subsection (b).

"(e) RECOUPMENT OF OVERPAYMENTS.—No payment may be made to a State under this section unless the State agrees to repay to the Commission the excess (if any) of—

"(1) the amount of the payment received by the State under this section with respect to the election involved; over

"(2) the actual costs incurred by the State in holding the election involved.

"SEC. 297A. AUTHORIZATION OF APPROPRIATIONS.

"There are authorized to be appropriated to the Commission such sums as may be necessary for fiscal year 2009 and each succeeding fiscal year for payments under this part.".

1 (b) CLERICAL AMENDMENT.—The table of contents
2 of the Help America Vote Act of 2002 is amended by add-
3 ing at the end of the items relating to subtitle D of title
4 II the following:

"PART 7—PAYMENTS TO REIMBURSE PORTION OF COSTS INCURRED IN HOLDING SPECIAL ELECTIONS TO FILL SENATE VACANCIES

"Sec. 297. Payments to States to reimburse portion of costs incurred in holding special elections to fill Senate vacancies.
"Sec. 297A. Authorization of appropriations.".

The Center for
Voting and Democracy

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Testimony before joint hearing of the Senate Judiciary Committee,
Subcommittee on the Constitution and the House Judiciary Committee,
Subcommittee on the Constitution, Civil Rights, and Civil Liberties,
On March, 11, 2009, relative to
"S.J. Res. 7 and H.J. Res. 21: A Constitutional Amendment Concerning Senate Vacancies"

Introduction:

My name is David Segal. I am a member of the Rhode Island House of Representatives and an analyst for FairVote. FairVote is honored to have the opportunity to testify before your Subcommittees on the important matter of how states fill vacancies in their representation in the United States Senate, and in support of "S.J. Res. 7 and H.J. Res. 21: A Constitutional Amendment Concerning Senate Vacancies." A non-profit, non-partisan organization, FairVote was founded in 1992 and operated for several years as the Center for Voting and Democracy. FairVote's mission is to achieve universal access to participation in elections, a full spectrum of meaningful ballot choices, and majority rule with fair representation for all. As a catalyst for change, we work towards a constitutionally protected right to vote, universal voter registration, a national popular vote for president, instant runoff voting and proportional representation.

FairVote's testimony today will focus primarily on why a constitutional amendment, as opposed to state-by-state reforms, is so important to achieve the goal of the legislation before you: a U.S. Senate composed of Senators elected by the people whom they represent.

As the Senators and Members are aware, the issue of Senate vacancy appointments has recently risen to the fore of public consciousness, following several controversial such appointments, especially the high-profile appointment to fill the Illinois seat vacated by now-President Barack Obama. While the issue has achieved new prominence of late, the appointment of senators has been a regularity, even after the ratification of the 17th Amendment. For any of a number of reasons – appointments to cabinet posts, runs for other offices, scandal, poor health, or death – the U.S. Senate yields a regular rhythm of vacancies; in fact, nearly one-quarter of all U.S. Senators who

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have first taken office after the ratification of the 17th Amendment (182/788) have achieved office via gubernatorial appointment.

Three states – Massachusetts, Oregon, and Wisconsin – today do not allow for gubernatorial appointments of Senators. Oklahoma only allows appointment of a Senator who has won a regularly scheduled election that takes place after a vacancy was created close to the end of a Senator's term. In Alaska, voters approved a referendum prohibiting gubernatorial appointments, but the measure's legality is untested. Eight additional states call for relatively quick special elections, but allow for temporary gubernatorial appointments, until the resolution of said elections. The remaining states allow governors to make appointments, though sometimes with restrictions such as requiring that the appointee be of the same party as the Senator who held the seat that became vacant.

Such appointments are frequently characterized by back-room wheeling and dealing, influenced by any of a variety of motives: consolidation of a power base, political favors, horse-trading, kinship – blood or otherwise, and, as evinced by the Illinois debacle, a desire for personal enrichment. Even when not explicitly corrupt or otherwise nefariously motivated, the selection of Senators by governors is necessarily problematic: The appointment of our nation's most powerful legislators is anathema to the democratic values that are held in common by most Americans, that underpin our government, and that imbue it with its very legitimacy. Quite simply, representative democracy is founded on voters electing their representatives.

Constitutional Amendment Necessary:

FairVote is active at the local level in several states, and has a broad network of state-level partner organizations and allies; we have followed state legislative attempts to end senatorial vacancy appointments – some efforts new, others longer-standing – and will focus our testimony on rebutting the notion that the vacancy appointment issue, and any problems arising therefrom, are better resolved via state legislation than via constitutional amendment. State legislation is important and, for the moment, necessary, but it is far from sufficient: Such legislation seems unlikely to yield broad-based Senate vacancy reform, which is why we so strongly support the constitutional amendment track.

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It has been suggested that passage of S.J. Res. 7 and H.J. Res. 21 would be an affront to pluralism or federalism. FairVote contends that it is not pluralism or federalism as such that would make it difficult for states to reform Senate vacancy laws: Rather, the major obstacle is the natural tendency of powerful, self-interested actors to strive to maintain their authority. We believe that the proposal before your committee respects federalism, insofar as it provides states with wide latitude in determining how best to implement vacancy elections. We also note that states, per those mechanisms set forth by our nation's founders, will play a critical role in the ratification of any constitutional amendment relative to this matter. Amendment of the Constitution is not an affront to federalism – it is an exercise therein.

FairVote has identified nine states in which legislation requiring U.S. Senate vacancies be filled by special election has been introduced this year; we believe this to be an exhaustive, or nearly-exhaustive, account of such states at this time, though additional legislation may be introduced in coming weeks and months. (Note: Not all such state legislation precisely captures the intent of the resolutions before the Subcommittees. For instance, some bills would allow for very brief temporary appointments, until the special election is held.)

It is worth noting our surprise at the relative lack of formal consideration of this issue by state legislatures, despite the prominence in the national discourse of Senate vacancies, and what appears to be broad popular support, editorial support from prominent newspapers like the *Washington Post* and *New York Times* and support by many government reform groups like FairVote and state branches of Common Cause. Even at this relatively early moment in most legislative sessions, it is evident that few of the aforementioned bills stand a chance of passage this year. We attribute this state of affairs largely to the awkward, frequently tense, intra- and inter-party political dynamics endemic to most state governments. The predicament in Illinois is the most loaded, and remains fluid and unpredictable, but let us consider the various other scenarios.

First, states in which the legislature is dominated by the same party as the governor – especially those with political dynamics that are relatively stable – are unlikely to perceive an urgency to act on the Senate vacancy issue without all states moving in concert. The party that rules the legislature is hesitant to strip authority from a Governor of the same party; individual members might fear

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being ostracized or other retribution for participating in such efforts. Consider:

- In Colorado, where Democrats control the legislature and the governor's seat, special election legislation was introduced by Republican State Senator Michael Kopp; the legislation died in committee on a 3-2 party-line vote. Democrats openly acknowledged that passage of the legislation was politically unpalatable because it would appear to be a demonstration of disapproval of Governor Bill Ritter's recent appointment of Senator Michael Bennet to fill the vacancy created Ken Salazar's appointment as Secretary of the interior.
- In Maryland, Democratic Delegate Saqib Ali introduced legislation to require special elections -- but only beginning after 2015, when Democratic Governor Martin O'Malley will certainly have vacated his office. This has reduced any sense of urgency to pass the legislation, and it appears unlikely to move forward this session.
- In New York, Republicans have lined up behind legislation to require special elections. Democrats control both houses of the Assembly, and passage of the legislation would no doubt be seen as a referendum on Governor David Patterson's appointment of Kirsten Gillibrand to fill the seat that had been held by Hillary Clinton.

Second, in the remaining states in which power is shared by Democrats and Republicans, the parties typically have competing interests that tend to complicate the case for holding vacancy elections, hurting chances of passage. Legislative chambers might be controlled by different parties, or a single party might control both chambers, but not have enough votes to override a likely gubernatorial veto.

- In Vermont, Democratic State Representative Jason Lorber has proposed legislation that would require special elections whenever a Senate vacancy occurs, replacing Vermont's so-called "hybrid" system, which requires a special election within three months (unless the vacancy occurs within six months of a general election) but allows for interim appointments by the Governor. The Vermont House and Senate are firmly controlled by Democrats, but Republican Governor Jim Douglas has said that he thinks the status quo "is a pretty good

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system" and sees no reason to change it. It is unclear whether Republicans in the legislature will support Rep. Lorber's proposal.

- Connecticut Democrats, who handily control both legislative chambers, have proposed to strip Republican Governor Jodi Rell of the ability to appoint senators. Such legislation has been filed for four consecutive years. Rell's office has called the move a "political maneuver" and a "political ploy, and the Connecticut Republican Party has called it "nothing more than a power grab by Democrats." Likelihood of passage remains unclear at this stage in the session.
- In Mississippi, Democrats control the House and the Senate by a narrow margin, while Republican Haley Barbour is Governor. Special elections legislation there, as introduced by a Democratic senator, has already died in committee – this despite controversies over vacancy elections in the state in 2007-2008, after Trent Lott resigned his U.S. Senate seat.
- Minnesota is another state in which consideration of Senate elections and vacancies is especially contentious. Democrats control the legislature, but not by a veto-proof margin. Independent Dean Barkley was appointed by then-Governor Jesse Ventura to fill the final few months of Paul Wellstone's term upon Wellstone's death in 2002. Norm Coleman won election to the seat that November and last year ran for re-election against Barkley and Democrat Al Franken. The state remains embroiled in a contentious recount, with questions having been raised about Republican Governor Tim Pawlenty's possible authority to appoint a temporary senator, to serve until the 2008 election is resolved. (The current consensus is that he does not have such authority.) Legislation has been introduced to require special elections to fill future vacancies, but in the midst of a contentious multi-party scrum and expensive recount, it appears that this legislation will not advance.

Such dynamics at the state level appear to confirm the hypothesis that a constitutional amendment is more likely to achieve widespread adoption of this reform than would individualized, state-by-state bills. One state serves as the proverbial "exception that proves the rule." For reasons that are intuitive, it appears that the greatest likelihood of passage is in a state with an unusual political dynamic: a legislature controlled by a super-majority of one political party, but a governor of the opposite political affiliation.

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My state of Rhode Island is the most extremely imbalanced state in this regard. Approximately 90% of seats in the General Assembly are held by Democrats, and the Governor is a relatively unpopular second-term Republican. It should be unsurprising that Rhode Island has acted on the Senate vacancies issue more swiftly than has any other state. A measure to require special elections has passed the House Judiciary Committee, and vote by the full House is scheduled for Tuesday, March 10 – just after our testimony was due to be submitted to the Subcommittees. Should the measure pass, a likely gubernatorial veto would stand a reasonable chance of being overridden.

Congress's formal proposal to the states of the constitutional amendment under consideration today would surely catalyze a national effort to achieve its ratification and serve to depoliticize the state-by-state dynamics. As governors have no role in the ratification of constitutional amendments, the threat of vetoes would be removed. A national movement, and national branding of the push as a "good government" effort, would lessen the appearance (or reality) that action or inaction by a given legislature would serve as a referendum on any particular governor, or on any particular appointee to the Senate. Passage by only 38 states would, once and for all, put an end to this vestige of the oligarchical politics of a century-gone-by.

Addressing Likely Counter-Arguments:

We expect that a number of other arguments will be suggested by those who oppose the proposal and adoption of this amendment, which we address below:

1) *Argument:* "Elections will require that seats be left vacant for an unduly long period of time"
Response:

a. First and foremost, under no circumstances should a drive for speediness allow for a Senate seat to be held by an appointee for two years or more, as is often the case under the current procedures for filling Senate vacancies.

b. Special elections have governed U.S. House vacancies since the establishment of Congress. A handful of states have made regular use of special elections for U.S. Senate vacancies, yielding no major problems of which we are aware – and the burden of proof should be placed on those who make the extraordinary assertion that Americans should not elect our leaders, rather than on those who assert that we should.

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c. Our society has regularly accepted senators' missing large periods of time when ill.

d. As practiced in some state legislative vacancy elections, states could explore allowing a Senator to announce his or her resignation prospectively, and hold special elections prior to the effective date of said resignation. While this obviously would not be feasible in case of death, it would, for instance, have allowed Vice President Jose Biden to announce his resignation ahead of time – effective on a given date in January – and to start the process of electing their replacements during the interim. Certainly will are all familiar with a "lame duck" Senator or House Member not running for re-election, but continuing to serve in office

e. Those who are concerned that states not be left without effective representation in the Senate need only observe the current dynamic – relative to Illinois in particular – to recognize that quick appointments are no assurance of due representation. Even under circumstances less severe than those now facing the people of Illinois, there is reason to believe that appointed Senators typically serve with less clout than do their elected colleagues. Their constituents haven't gotten to know them as they would through an election and they don't take office with any particular mandate from the voters. These facts help explain the relatively poor record of appointed Senators running for re-election.

f. Innovative voting methods, such as instant runoff voting (IRV), could be employed to address this concern. As actively backed by both Sen. John McCain and then Illinois state senator Barack Obama in 2002 advocacy efforts, IRV allows for primary and general elections (or for general and runoff elections) to be compressed into a single act of voting, by letting voters rank their choices in order of preference and using said rankings to simulate successive rounds of runoffs. IRV is used by countless civics organizations, by several governmental jurisdictions abroad and by overseas voters during state runoff elections in Arkansas, Louisiana and South Carolina. It has been adopted by many municipalities across the United States, most recently by 71% of voters in Memphis, Tennessee, and has been incorporated into special elections legislation pending before the Vermont Legislature.

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2) *Argument*: "Special elections can be costly"

Response:

a. Democracy does indeed cost money: There is always a trade-off between efficiency – of time and money – and democratic governance. The abstract costs to our democracy of allowing for unaccountable governance – and the potential real-world costs of governance run amok – are far greater than the few dollars-per-voter that it would cost to run a special election.
b. There is a qualitative cost – in terms of increased cynicism and decreased likelihood of future participation in democracy – to allowing for appointed, unaccountable governance. It would be speculative, but not unreasonable, to contend that such decreased faith in the legitimacy of government has other, more quantifiable, ramifications – such as decreased propensities to pay taxes, obey laws and volunteer for military service.
c. Voting methods such as instant runoff voting would allow states to reduce the cost of running special elections – for instance, by doing away with the need for lopsided general elections, as likely in the current campaign to fill the Illinois District-5 U.S. House seat left vacant by Rahm Emanuel's resignation.

3) *Argument*: "Quick special elections will mean candidates with better name recognition and money will have an advantage"

Response:

a. For better or worse, candidates with broad name-recognition and/or high fundraising capacity already have an advantage in electoral politics. The history of U.S. House vacancy elections would suggest that such candidates have no special advantage in vacancy elections as compared to regularly scheduled elections.
b. The election of a candidate with such advantages is preferable to a choice made out of political expedience, with little or no public input.

4) *Argument*: "A special elections requirement would make presidents less likely to appoint senators to cabinet posts"

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Response:

a. Perhaps this is true under certain circumstances, but there are more than three hundred million people in the United States, and the notion that those who have served in the U.S. Senate are so disproportionately qualified for cabinet posts is untrue, elitist, and oligarchical.
b. The reverse might in fact be the case, as U.S. Senators whose governors are of another party are probably unduly discouraged from leaving the Senate to serve in appointed posts.

5) *Argument*: "Crowded fields can yield vote-splitting and plurality winners, as was the case in last week's Illinois District-5 election primaries"

Response:

a. It is true that there is a propensity for many candidates to file to run in special elections, but this is also true of open seats, more generally.
b. While vote-splitting is a concern, a plurality victor is still preferable to a Senator chosen largely for political expedience, via back-room dealing, with little or no popular support.
c. The ratification of the constitutional amendment in question would allow states that are particularly concerned about vote-splitting to implement runoffs or instant runoff voting.

Conclusion:

FairVote reiterates its gratitude at being afforded the opportunity to testify today; we are happy to serve as a resource for the Subcommittees in the future. We wish the best to the sponsors and cosponsors of "S.J. Res. 7 and H.J. Res. 21: A Constitutional Amendment Concerning Senate Vacancies" in their advocacy efforts, and hope that in their wisdom, the Subcommittees, Committees, House, and Senate see fit to advance this important democratic reform.

More information about our organization may be accessed online at www.FairVote.org. Rob Richie, executive director, may be reached at (301) 270-4616 / rr@fairvote.org. David Segal, analyst, may be reached at (401) 499-5991.

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Hearing Statement of Constitution Subcommittee Ranking Member
F. James Sensenbrenner Jr.

Joint Senate-House Constitution Subcommittee Hearing on Senate Vacancy Amendments (S.J.Res. 7 and H.J.Res. 21)

March 11, 2009

Currently, the Constitution's Seventeenth Amendment provides for the popular election of Senators, but it provides an exception in which States can allow State Governors to appoint Senators to fill vacancies until a special election is held. As we have seen recently, such an appointment process is not only undemocratic, but it is prone to abuse.

The time has come for Congress to pass an amendment to the Constitution that would require all Senate vacancies be filled by special election. I am grateful to Rep. David Dreier and my Wisconsin colleague on the other side of the Capitol, Senator Feingold, who have introduced such an amendment, which we will consider today. I am an

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original cosponsor of the amendment.

The amendment would correct a constitutional anomaly that has too often been overlooked. When the Senate was first created, Senators were elected by state legislatures, not the people of the several states. Because state legislatures were often in session only a few months a year, the original Senate provision of the Constitution included a means of replacing Senators when the state legislatures were not in session. That mechanism was the temporary appointment by Governors of replacement Senators.

Then came a series of notorious instances of corrupt deals between state legislators and those whom they selected as Senators. As the Senate Historical Office points out, "Intimidation and bribery marked some of the states' selection of senators. Nine bribery cases were brought before the Senate between 1866 and 1906."

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The result was passage of the Seventeenth Amendment in 1913, which provided for the popular election of Senators.

However, in an effort to change as little of the original constitutional language as possible, the sponsors of the Seventeenth Amendment simply carried over the state governor's appointment authority in the case of vacancies that was contained in the original Article I, Section 3. They did so with little debate, even though the removal of state legislatures from the election process rendered the original rationale for allowing temporary appointments obsolete.

Indeed, the only direct mention of the "vacancies" provision of the Seventeenth Amendment during Congressional debate on that amendment in both the House and Senate was made by Congressmen Mann and Rucker. Their remarks are exceedingly short, focusing mainly on grammatical points, and they do not include reference to any policy rationale behind the decision to retain the provision that allows

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Governors to appoint replacement Senators. That is not surprising, as there remained little policy rationale for the provisions.

Consequently, it is clear from the historical record that the debate over the Seventeenth Amendment focused entirely on the policy of requiring the direct election of Senators, and not at all on the ability of Governors to appoint people to fill Senate vacancies.

Today, however, with the recent example of the former Democratic Governor of Illinois and his appointee, Congress can no longer ignore the constitutional anomaly created by the Seventeenth Amendment. It is now clear that the gubernatorial appointment provision can be subject to abuse as well, and it is time for Congress to belatedly address that issue.

My own state of Wisconsin recognized the importance of codifying elections as an essential element of Senate Membership the

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very same year the Seventeenth Amendment was ratified. In 1913, Wisconsin passed a law requiring all Senate seats to be filled by special election, on an expedited basis. That provision has been successfully administered since then. The amendment we consider today would allow the rest of the country, however belatedly, to consider amending our shared founding document to fully enshrine elections as a prerequisite for serving the people in our democracy.

I look forward to hearing from all our witnesses today, and I would like to extend a special welcome to Kevin Kennedy of the Government Accountability Board of my own state of Wisconsin.

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CONGRESSIONAL TESTIMONY

Constitutional Amendment Concerning Senate Vacancies

Testimony before the

Subcommittee on the Constitution

Senate Judiciary Committee

and the

Subcommittee on the Constitution, Civil Rights and Civil Liberties

House Judiciary Committee

March 11, 2009

Matthew Spalding, Ph.D.

Director, B. Kenneth Simon

Center for American Studies

The Heritage Foundation

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Thank you for inviting me to testify to you concerning Senate Joint Resolution 7 and House Joint Resolution 21, proposing an amendment to the Constitution of the United States relative to the election of Senators.

I am Dr. Matthew Spalding, Director the B. Kenneth Simon Center for American Studies at The Heritage Foundation, a non-profit and non-partisan public policy research foundation here in Washington, D.C. My background and expertise is in constitutional history and structure, especially at it relates to the foundational principles of our democratic republic.

In my testimony, I will argue against the proposed amendment on the grounds that it fails to recognize the nature of the Senate in the American constitutional system, that it is unnecessary as a correction to a constitutional flaw or problem and that it is inconsistent with core political principles of American government. Before making those specific arguments, however, I would like to consider briefly that importance of constitutional amendments and the historical pattern of previous amendments, so that the proposed amendment can be placed in proper context.

The Importance of Constitutional Amendment

"It seems to have been reserved to the people of this country," Alexander Hamilton wrote in *The Federalist* No. 1, "to decide the important question, whether societies of men are really capable or not of establishing good government from *reflection* and *choice*, or whether they are forever destined to depend for their political constitutions on *accident* and *force*." The amending process of Article V of the Constitution seeks to resolve this dilemma, reconciling the revolutionary principles of the Founding with an overarching intent to more firmly establish the stable, constitutional rule of law necessary for republican self-government. By cultivating and allowing the deliberative, popular will to assert, by constitutional means, its sovereign authority over the legislative, executive and

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judicial branches of government, the amending process affirms the rule of law and links our highest law back to the democratic idea that government ultimately derives its just powers and legitimate authority from the consent of the governed, and that the governed can alter their government to affect their safety and happiness.

The practical purpose of Article V is to provide a means of change that will allow for the correction of errors or structural mistakes in the original document, the readjustment of the balance of powers within government and the reform of the document to adapt it to the changing circumstances of the nation. A constitution that provides "no means of change, but assumes to be fixed and unalterable," Justice Joseph Story once noted, "must, after a while, become wholly unsuited to the circumstances of the nation; and it will either degenerate into a despotism, or by the pressure of its inequalities bring on a revolution."

But we must also be cognizant of the fact that the Constitution established in the name of the people must to some extent be above the people, that is, independent and superior to the immediate popular will. "As every appeal to the people would carry an implication of some defect in the government," James Madison argued, "frequent appeals would, in a great measure, deprive the government of that veneration which time bestows on every thing, and without which perhaps the wisest and freest governments would not possess the requisite stability." While "a constitutional road to the decision of the people ought to be marked out and kept open, for certain great and extraordinary occasions," changing the document too often and for frivolous reasons would weaken the Constitution, and cause it to be treated as mere law, subject to the passions of the moment.

The challenge was to create an amendment process, consistent with the principle of popular consent, which worked against narrow interests and the passions of the moment but encouraged a deliberative process, building on and protecting a widespread national consensus for change. The result has been an overwhelming success. Neither an exclusively federal nor an exclusively state action, the amendment process is a shared responsibility of both Congress and the states representing the American people. To

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succeed, an amendment proposed by Congress must have the votes of two-thirds each of the House of Representatives and the Senate, or two-thirds of the states must call for a constitutional convention to propose amendments; in either case the proposal must then be ratified by three-quarters of the states.

Article V has the double effect of affirming the Constitution's foundation in democratic self-government, yet making the amending task sufficiently difficult and necessarily broad-based to protect the document and elevate it to the status of higher law. This forces the development of overwhelming and long-term majorities, and serves to assure that constitutional amendments will be rare and pursued only after careful and serious consideration, when it is necessary to address an issue of great national magnitude, consistent with the deeper principles of American constitutionalism and when there is a broad-based consensus among the American people, throughout the states.

Patterns of Existing Amendments

Since 1789, over 5,000 bills proposing to amend the Constitution have been introduced in Congress. No attempt by the states to call a convention has ever succeeded, though some have come within one or two states of the requisite two-thirds. (The movement favoring direct election of senators was just one state away from an amending convention when Congress proposed the Seventeenth Amendment.)

Of those proposed in Congress, only thirty-three amendments have been sent to the States for ratification. Twenty-seven of those proposed amendments have been ratified, and are now amendments to the Constitution. Three earlier proposed amendments remain pending today. The first—actually the first amendment ever proposed—would create fixed apportionment ratios for the House of Representatives. The second pending amendment was proposed in 1810 and would extend the ban on accepting titles of nobility from federal officeholders to all citizens. The third amendment, proposed in 1861, was an attempt to prevent disunion by purportedly banning any future anti-slavery constitutional amendments. The other two amendments proposed to the states failed for

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lack of ratification. Congress passed the Equal Rights Amendment in 1972, but the proposal was three states short at the end of the seven-year deadline for ratification; Congress extended the deadline, but no new states ratified, and some have attempted to rescind ratification. In 1978, Congress passed a DC Voting Rights Amendment, but only 16 states had ratified the amendment by its seven-year deadline.

Not counting the original ten amendments, collectively the Bill of Rights, there have been only seventeen amendments to the Constitution. Three amendments were passed in the five years after the Civil War (the Thirteenth, Fourteenth, and the Fifteenth), resolving constitutional issues central to that conflict. The circumstances of the Civil War, and the fact that the consensus behind these amendments was forged by and in the aftermath of that war, make these amendments, as a practical matter, less exemplary today.

Forty-five years later, four amendments (the Sixteenth, Seventeenth, Eighteenth and Nineteenth) were passed between 1913 and 1920, each associated with different aspects of the Progressive Movement: the income tax created the revenue source for modern administrative government; the direct elections of senators was presented as a pro-democracy anti-political party corruption reform; prohibition represented the Protestant moralism of the Progressive Movement, tinged with a bit of anti-Catholicism; and the extension of the right to vote for women was the culmination of the women's suffrage movement. Because of their extensive popular support, especially the Seventeenth and Nineteenth Amendments, these amendments can be said to mark the modern era of constitutional amendment. Both of these efforts had widespread, popular support in the form of various groups and organizations forming a "movement" for the amendment. The Twentieth Amendment (1933), shortening the length of the "lame duck" session of Congress after an election, can be seen as an extension of progressive government reform efforts and also had widespread popular support.

The passage of Prohibition was an exception, as proven by its repeal fourteen years later by the Twenty-First Amendment. Support had been largely regional, and though there had long been a temperance movement in the United States, it only later focused on law

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and constitutional amendments as it became associated with the broader progressive reform movement. Indeed, a settled, widespread consensus on this issue seems to have come into being only after the original amendment was ratified, in support of its repeal.

Although there were several proposals to codify a two-term limit for the presidency, its wider popularity coalesced when Franklin Roosevelt broke the tradition in 1940. The Twenty-Second Amendment was first passed in 1947, and ratified within four years. The Twenty-Fourth Amendment is an example of Congress following a national consensus. Although the amendment was introduced in 1947, by the time it was passed in 1961 (and ratified in 1964) most states had already abolished the practice of poll taxes. Although there had long been proposals to address presidential succession, this interest was swiftly constitutionalized after the assassination of John F. Kennedy, and the Twenty-Fifth Amendment was passed by Congress almost unanimously in 1965 and then ratified in 1967. Although there were proposals to lower the voting age as early as 1942, the issue crystallized during the Vietnam War and the amendment was ratified within three months of its approval by Congress. The Twenty-Seventh Amendment is an outlier, as it was proposed without a ratification deadline by James Madison in 1789, "revived" in the 1980s and ratified in 1992.

Four amendments have reversed decisions made by the Supreme Court. The Eleventh Amendment overturned *Chisholm v. Georgia* (1793); the Thirteenth Amendment overturned *Scott v. Sandford* (1857); the Sixteenth Amendment overturned *Pollock v Farmers' Loan & Trust* (1895) and the Twenty-Sixth Amendment overturned *Oregon v. Mitchell* (1970). It is interesting to note that all of the amendments to reverse a Supreme Court decision also resolved a state-federal question, and that the Supreme Court has upheld an amendment's ability to change that balance in accord with the amendment's purpose (see the *National Prohibition Cases* of 1920).

In the case of the Twenty-Sixth Amendment, Congress first tried to lower the voting age by legislation, but in anticipation of a Supreme Court decision that would strike down that action, began hearings to consider a constitutional amendment to override the Court.

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As a result, when the decision was handed down in December of 1970, the amendment was approved in March of 1971 and ratified on July 1 of that year—the fastest approval yet for a constitutional amendment.

In the end, there is no one pattern for the seventeen amendments ratified after the Bill of Rights. Most do not deal with rights per se, but address structural issues. A few are practical reforms, and several restrict government power at both the state and federal levels. Other than the Thirteenth and the Fourteenth Amendments, which both extend and restrict rights, the several amendments that extend rights all concern the right of citizens to vote. The amendments fall in to three categories: correcting a flaw in the original text, correcting a judicial mistake or making a fundamental change in the constitutional structure and system. What is clear is that each successful amendment represents the codification of a national consensus that was able to cross the hurdles set out in Article V to assure that that consensus was deliberative, reasonable and legitimate.

An Amendment Concerning Senate Vacancies

In light of the significance and history of constitutional amendments, the proposed constitutional amendment to require that all vacancies in the Senate be filled by election does not in my view past muster. I would like to make three arguments against the proposed amendment.

The first is based on the nature of the United States Senate and its unique role representing States in our constitutional structure. This understanding goes back to the Constitutional Convention's design of a bicameral legislature, with a House of Representatives based on popular representation and a Senate based on equal representation of all of the States, a fact guaranteed to the States in Article V. Unlike the House, which is intended to be responsive to the ebb and flow of popular opinion, the Senate—with its longer terms of office and larger and distinct constituency—was to be more stable, deliberative and oriented toward long-term state and national concerns. It is because of the nature of the Senate that the chamber is given unique responsibilities

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concerning the approval of executive appointments (judges, ambassadors and all other officers of the United States) and treaties with other countries. Equal representation in the Senate guarantees to each State a special role in the conduct of the executive branch and the judicial branch, as well as United States foreign relations. It is in the interest of individual States—and, given the responsibilities of the Senate, in the interest of the nation—that representation in the Senate be maintained.

Even with the direct election of Senators under the Seventeenth Amendment, Senators still represent States as unique, semi-sovereign entities. During the debate over the Seventeenth Amendment, no one made the argument that direct election would change that fact. States are still represented as States in the federal system; they are still guaranteed equal representation in the Senate.

This proposed amendment, by preventing States from supplying immediate appointed representation to the national legislature if they so choose, would be detrimental to the States. States are guaranteed representation in the Senate, and so it is their right, if they so choose, to make sure that that representation is immediate and continuous. This requires temporary appointment.

Abolishing the option of a gubernatorial appointment process places an undue burden on States whose Senate seats become vacant, because a fair and truly democratic special election takes time, and while the election is being organized, the state has less representation in the Senate. The intent of the Seventeenth Amendment was for Senators to be directly elected by the people, but it is also the case that temporary gubernatorial appointments were intended and not considered to be in violation of direct election. The reason for these temporary appointments was so that the State would not lack representation while it was in the midst of the process of election.

Although there was no discussion of the vacancy clause at the time of consideration of the Seventeenth Amendment, it did come up at the Constitutional Convention. James Wilson objected to granting governors the power to make appointments to the Senate if

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there were a sudden vacancy and the legislature was not in session, as he thought the device contrary to the separation of powers. Edmund Randolph, however, declared that the provision was "necessary in order to prevent inconvenient chasms in the Senate" and the Convention agreed. That is, the appointments clause here has to do with the necessity of maintaining Senate representation not circumventing elections.

This argument is still significant. Without the possibility of temporary appointments, the Senate could be prevented by vacancies from being able to conduct its business in a timely fashion, subject to fluctuating numbers and representation. The proposed amendment leaves States unrepresented (or at least underrepresented) potentially at times of great significance to that State, but also—considering the Senate's role in confirmations, treaty-making and the like—the nation. Several vacancies of several months, at a time of international crisis, could well have a detrimental effect on our national security.

It should be noted in this context that the temporary appointment of Senators by the State governor is appropriate and consistent with this understanding of the Senate. Indeed, the State governor is the only elected representative with the same constituency, representing the whole State, and thus in a position to make such a decision.

In short, the proposed amendment further erodes the status of States as States in our federal system, disregarding their unique role as states as well as the unique responsibility of the Senate in policy making.

Second, the proposed amendment is unnecessary under current circumstances.

Over the course of the forty years between 1866 and 1906, according to Senator Feingold, there were nine know cases of bribery concerning the appointment of United States Senators. Beginning in 1826, there were some 200 proposals, and 31 state petitions, for the direct election of senators; it was approved in 1913.

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Over the course of the ninety-five years between the passage of the Seventeenth Amendment and today—during which there have been 184 appointments to fill Senate vacancies—there has been only one known case of a corrupt governor selling a Senate seat. As appalling as this case appears to be, this is neither a pattern of corruption nor a crisis of constitutional proportion. Indeed, the corruption seems to have more to do with the particulars of Chicago politics than the nature of gubernatorial appointment, which is why the Illinois legislature was correct in pursuing impeachment proceedings. A single case does not justify federal intervention, by either legislation or constitutional amendment.

At the same time, gubernatorial appointment in the case of vacancy is not *per se* a sign of political corruption. In not a few cases, an initial appointment has led to a distinguished Senate career, as was the case with Arthur Vandenburg of Michigan, Sam Ervin of North Carolina, Walter Mondale of Minnesota, and George Mitchell of Maine. But the fact is that since 1913, appointed Senators have rarely stood for election and, if they did, have rarely been elected. The vast majority—until more recently—serve as temporary appointments until the popular election of a new Senator.

What the recent case in Illinois suggests is that each State may well wish to review its process for filling vacancies in the United States Senate and perhaps remove that power from the governor altogether or change its laws determining the conditions, if any, under which a temporary appointment may be made and how quickly it should be followed by a special statewide election. This reconsideration is allowed under the current constitutional arrangement.

In the end, the proposed amendment is simply not necessary. It does not correct a flaw in the constitutional process, it does not correct a judicial error, and it does not make a significant structural change for which there is a broad national consensus.

My third reason for opposing the proposed amendment is that it undermines rather than supports core political principles of American government.

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The argument is made that the current arrangement for filling vacancies violates the principle of democracy and that this principle overrides all other considerations. I would suggest to the contrary that it is a practical solution to substantive problem and so an exception that upholds the rule. It is a perfectly reasonable option for making the Senate work in the context of our democratic government. Indeed, there is nothing in the current arrangement that takes away or jeopardizes fundamental voting rights.

While the proposed amendment seems to advance the principle of democracy, it would do at the expense of the principles of federalism, self-government and democratic constitutionalism. The amount of time necessary for a statewide special election differs state to state, depending on the size, demographics and urbanization of the individual state. As a result, there is variance in current state laws. As it is now, states have discretion to determine the conditions under which a governor may, or may not, make a temporary appointment. They could choose immediate elections without a temporary appointment. But they could also decide that a temporary appointment, even under conditions where a special election could be called prior to the next general election, best serves the interests of the people of that State. This is as it should be, with the decision left to the discretion of lawmakers. It seems to me that Senators ought to be protecting their State's ability to make such decisions.

The question here is not one of democracy versus these other principles. It seems to me that it is a question between the risk associated with the possibility of a bad appointment, on the one hand, and the people of a State not being fully represented in Congress for a period of time, on the other. Different States have and will judge this question differently. The fact that most states have opted for temporary gubernatorial appointment in these cases, especially given the fact that it is already in their power if they so choose to do what this amendment would require, suggests that they believe that vacancy is the greater harm.

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Individual States—meaning the democratically elected representatives of the people acting in state legislatures—are in the best position to determine their own interests, weighing this question between the possibility of a poor appointment and the temporary loss of Senate representation. They ought to be allowed to make that decision for themselves. Otherwise, they are being forced to do something they have mostly decided is not in the common good of their State.

As it stands now, States have the prerogative to choose how best to proceed, balancing their immediate concerns about representation in the Senate with the general requirement for democratic election. In my opinion the best process for resolving the question—balancing democratic election and the importance of on-going state representation in the Senate—is already in place.

Let me say something about removing the temporary appointment option by legislation. The Time, Place and Manner Clause of Article I, Section 4 allows Congress to regulate certain questions having to do with the process and procedures of elections for national offices. It does not grant Congress general authority over the substantive issues of elections, a point underscored by the several constitutional amendments, including the Seventeenth Amendment. Even if it did, as a matter of construction, the general clause is overridden by specific clauses that determine specific requirements or make specific grants of power relative to the general clause. This is the case with the clear meaning of the appointments clause of the Seventeenth Amendment, *which reserves to the legislature of each state* the power to authorize governors to make temporary appointments until the people fill the vacancies by election *as the legislature may direct.* As such, removing this option by federal legislation, in addition to being bad policy, is also unconstitutional. The appropriate place for such legislation in this case is in state legislatures, not Congress.

One last practical point. The argument that state legislatures would have to make changes in the appointments process in the face of gubernatorial vetoes, thereby justifying a federal constitutional amendment to get around that political problem, strikes

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me as rather undemocratic. Heightened concern right now would make it ripe for such consideration and hard for a governor to oppose. Besides, it would be more democratic for this question to be deliberated and decided by each State according to how they so choose. It might be the case that, despite the risk of a bad selection, state legislatures still might choose temporary gubernatorial appointment as the best option to immediately fill vacancies in the Senate.

Conclusion

As designed by the framers of the U.S. Constitution, the amendment process is neither an exclusively federal nor an exclusively state action: It is a shared responsibility of both Congress and the states representing the American people. By intention, it is a very difficult process. To succeed, an amendment proposed by Congress must have the votes of two-thirds each of the House of Representatives and the Senate, and it must then be ratified by three-quarters of the states. This assures that constitutional amendments will be rare and pursued only after careful and serious consideration, when it is necessary to address an issue of great national magnitude and when there is a broad-based consensus among the American people, throughout the states.

The proposed amendment does not rise to that level of serious consideration. This is not a great and extraordinary occasion, to say the least. Nor is there any underlying consensus about either a problem or a solution to justify pursuing a constitutional amendment. In both practice and principle, the best mechanism for balancing democratic principles and representation, and for weighing the risk of a bad appointment against the temporary loss of representation in the case of vacancies in the United States Senate, is already in place. As such, Congress should not proceed to amend the Constitution for this purpose.

Thank you.

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