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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).

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).

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

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.

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).

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).