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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

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The Heritage Foundation

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

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

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

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

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.

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

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

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.

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.

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.

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

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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