Written Testimony of The Honorable Aaron Schock
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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

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*)*

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.

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

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, Sec 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.