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## **NOTES ON PROPOSED CONSTITUTIONAL AMENDMENTS ON TEMPORARY APPOINTMENTS OF MEMBERS OF THE HOUSE**

Two proposed constitutional amendments – H.R.J. Res. 67, introduced by Representative Baird on October 10, 2001, and S.J. Res. 30, introduced by Senator Specter on December 20, 2001 – would provide for appointment of Members of the House by the Governors of their States to serve temporarily until special elections are held to fill vacancies caused by the death or incapacity of significant numbers of Members. The amendments have been referred to the House and Senate Committees on the Judiciary, each of which has a subcommittee with jurisdiction over proposed constitutional amendments. These notes collect historical information that may be of some use in the consideration of these proposals or variations of them.

### 1. The Proposed Amendments

The proposed amendments each provide for a triggering circumstance, a threshold percentage of Members of the House who are “unable to carry out their duties because of death or incapacity.” H.R.J. Res. 67 sets that amount as 25 percent or more of the House (109 or more Members); S.J. Res. 30 doubles the triggering threshold to 50 percent or more (218 or more).

Once the authority is triggered, under both proposals Governors “shall” appoint qualified individuals to take the place of dead or incapacitated members “as soon as practicable” but not later than 7 days after death or incapacity “has been certified.” Neither resolution indicates who will have the power to make those certifications. Appointed individuals shall serve “until a member is elected to fill the vacancy resulting from the death or incapacity” in elections held during the 90-day period that begins with a temporary appointment, except for a special rule that applies when a regularly scheduled election falls within the 90-day period or 30 days thereafter. Temporary appointees shall be eligible to seek election in a special or regularly scheduled election. They shall have all powers and duties of members of the House.

S.J. Res. 30 (but not H.R.J. Res. 67) would provide that temporary appointees “shall be a member of the same political party as the Member of the House of Representatives who is being replaced.” Both provide “Congress shall the power to enforce this article by appropriate legislation.”

### 2. The Constitution (Before the Seventeenth Amendment)

The principle of election of House Members “by the People of the several States” has four primary applications. First, representatives are apportioned among the states “according to their respective numbers,” amend. XIV, § 2 (amending Art. I, § 2, cl. 3), based on a decennial “actual Enumeration,” Art. I, § 2, cl. 3. Second, the Supreme Court has determined that in drawing congressional district lines within states “the command of Art. I, § 2 that Representatives be chosen ‘by the People of the several States’ means that, as nearly as is practicable, one man’s vote in a congressional election is to be worth as much as another’s.” *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). Third, the regular method of selecting Members is by biennial elections “by the People,” in which the electorate is defined as broadly as the state defines it for the most populous branch of the state legislature, Art. I, § 2, cl. 1, plus the requirements of voting rights amendments on race, gender,

poll tax, and minimum age. Fourth, “[w]hen vacancies happen” in any state’s representation, “the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.” Art. I, § 2, cl. 4.

The Senate began in a different place. No matter what the state’s population, the Senate is “composed of two Senators from each State,” who would be “chosen by the Legislature thereof.” Art. I, § 3, cl. 1. As adopted, the Constitution made no provision for filling a vacancy that arose while a state legislature was in session, for presumably the legislature would proceed to fill that vacancy. But “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.” Art. I, § 3, cl. 2.

At the Convention, a provision on filling House vacancies first appeared in the August 6 report of the Committee of Detail: “Vacancies in the House of Representatives shall be supplied by writs of election from the executive authority of the State, in the representation from which it shall happen.” James Madison, *Notes of Debates in the Federal Convention of 1787*, at 387 (Norton, reissued 1987) (“Madison”). Madison records (at 414) that the Convention agreed to the provision without discussion. In its September 12 report, the Committee on Style proposed the language finally adopted. Madison, at 617. By providing that State Executives “shall” issue writs of election when vacancies happen, the final text of the Constitution makes it their obligation to do so.

Justice Story observed that the House vacancy clause “does not seem to have furnished any matter of discussion, either in, or out of the convention.” “It was obvious,” he wrote, “that the power ought to reside somewhere; and must be exercised by the state or national government, or by some department thereof.” Friends of the states preferred resting the power with state executives while those of the national government were willing to do so “if other constitutional provisions existed sufficient to preserve its due execution.” In any event, the procedure for filling House vacancies “has the strong recommendation of public convenience, and facile adaptation to the particular local circumstances of each state. Any general regulation would have worked with some inequality.” Joseph Story, *Commentaries on the Constitution of the United States* § 344, p. 248 (Rotunda & Nowak ed. 1987).

The Committee of Detail’s provision on temporary Senate appointments – that “[v]acancies may be supplied by the Executive until the next meeting of the Legislature,” Madison, at 387 – prompted a debate in the Convention on August 9. James Wilson objected unsuccessfully that filling vacancies by executive rather than legislative action “removes the appointment too far from the people.” *Id.* at 415. In support of the committee’s temporary appointment proposal, Randolph “thought it necessary to prevent inconvenient chasms in the Senate.” Some state legislatures met only once a year. Because the Senate would be smaller than the House and also have greater responsibilities, (the committee’s August report would have vested in the Senate the power to appoint Ambassadors and Judges of the Supreme Court), vacancies in the Senate “will be of more consequence.” *Id.* The Convention agreed temporary appointments by governors during recesses of state legislatures..

In a different immediate context, namely, how many senators each state should have, Justice

Story highlighted issues about vacancies that may also bear on temporary appointments. It was “indispensable” that the Senate “should consist of a number sufficiently large to ensure a sufficient variety of talents, experience, and practical skill for the discharge of all their duties.” Story, § 359, p. 256. Additionally, “a state should not be wholly unrepresented in the national councils by mere accident, or by the temporary absence of its representative.” *Id.*, § 360, p. 257. “In critical cases,” Story continued, “it might be of great importance to have an opportunity of consulting with a colleague or colleagues, having a common interest and feeling for the state.” *Id.* at 257-58.

### 3. The Seventeenth Amendment

The Seventeenth Amendment provides that senators for each state shall be “elected by the people thereof,” as representatives are. As for House elections, the electorate in Senate elections is to be as extensive as the electorate for the most numerous branch of the state’s legislature, Amend. XVII, par. 1, in addition to requirements of the Constitution’s voting rights amendments.

The Seventeenth Amendment also changed the method for filling “vacancies” in the representation of any state in the Senate. Just as the Constitution always provided for the House, “the executive authority of such State shall issue writs of election to fill such vacancies.” As in the original Constitution, the Seventeenth Amendment provided for temporary appointments to the Senate pending special elections, although it changed the method of making them. Rather than giving directly to each state’s Executive the power to make temporary Senate appointments, the amendment provides 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.” Amend. XVII, par. 2.

The story of the adoption of the Seventeenth Amendment is detailed in 1 Robert C. Byrd, *The Senate 1789-1987*, at pp. 389-406 (1994). Two points about the history of the Seventeenth Amendment may bear on the present question.

First, although the call for direct democracy was the engine that ultimately drove adoption, Senate vacancies were a factor: “Another objection to the selection of Senators by legislatures was that often a State went unrepresented or only half-represented in the U.S. Senate because of the inability of many State legislatures to agree on any one candidate.” *Amendments to the Constitution: A Brief Legislative History*, S. Prt. 99-87, at 25 (1985).

Second, although the amendment concerned election to the Senate, not the House, neither the initiative for nor substance of it was ever thought to be more the province of the Senate than the House. As Senator Byrd relates, the first resolution on popular election of senators was introduced in the House in 1826. *Byrd*, at 390. Between 1893 and 1902, the House passed five resolutions on direct Senate elections. *Id.* at 398. In the Congress that finally passed it, the House again kicked off consideration by sending a resolution to the Senate. *Id.* at 401. Because the two chambers had different views on an important matter, agreement to the amendment ultimately required a House-Senate conference. *Id.* at 402.

#### 4. Prior Proposals for Filling House Vacancies

There were more than 30 proposed constitutional amendments, from the end of World War II through 1962, on temporary appointments to fill House vacancies. *House Vacancies: Selected Proposals to Allow for Filling Them Due to National Emergencies*, RS 21068, at 5-6 n.3 (Nov.16, 2001) (Sula Richardson, Government and Finance Division). The greatest number were introduced in the House, which did not pass any. Three proposed amendments passed the Senate, in 1954, 1955, and 1960. The last hearing appears to have been one held in the House in 1961.

##### a. 1950 and 1952 – S.J. Res. 145, 81<sup>st</sup> Congress, and S.J. Res. 59, 82<sup>nd</sup> Congress

In the Senate, the first efforts were by Senator Knowland who introduced amendments in 1950 (S.J. Res. 145) and 1952 (S.J. Res. 59). The major difference between them was that the former provided for filling vacancies “whenever the number of vacancies in the House of Representatives exceeds the number of Representatives in office,” a number that would usually translate to 218, while the latter would have lowered that to 145 (a third of the House). In testimony in 1952, Knowland made clear that his concern was based on the possibility of nuclear explosions. *Constitutional Amendments: Hearings Before a Subcommittee of the Senate Comm. on the Judiciary, 82d Cong., 2d Sess. 2* (March 20, 1952). While “[t]he Senate could be reconstituted within a few days,” the House could not. That, he said, “is a very clear weakness in our constitutional set-up which might break down the legislative process of the Government in time of war.” Knowland asked: “If you could not organize the House, how could you make the necessary appropriations for emergency rehabilitation work which would be required immediately and all of the other legislation this country would require in time of war?” *Id.* at 3.

Senator Kilgore, the subcommittee chairman, observed that the proposal required “a major loss in the House before the [temporary appointment power] could be invoked, whereas the death of one Senator permits the Governor of the State to appoint a successor.” *Id.* Knowland agreed: “I am not proposing here to change the constitutional provision insofar as the normal death or resignation of a Member of the House is concerned, because that is amply taken care of by the Constitution.” *Id.* In response to a question from subcommittee counsel, Knowland made clear that by “vacancies” he meant the death (or resignation) of Members, not their incapacitation, saying “I do not think you can create a vacancy while the man is living.... There was no intention of giving any power to declare a seat vacant of a man who is incapacitated.” *Id.* at 6.

##### b. 1954 – S.J. Res. 39, 83<sup>rd</sup> Congress

The following Congress, Senator Knowland, then serving as Majority Leader, renewed his effort to pass a temporary appointments measure. His proposal, S.J. Res. 39, provided that the Speaker (or Clerk if no Speaker) certify to the President whenever “in time of any national emergency or national disaster” the total number of House vacancies exceeded 145 (one-third of the House). The President shall then issue a proclamation declaring the facts, upon which Governors would have the power to make temporary appointments for vacancies that exist within sixty days after the proclamation. Temporary appointees would serve until their seats were filled by election. *Appointment of Representatives in Time of National Emergency: Hearing on S.J. Res. 39 Before a Subcommittee of*

*the Senate Comm. on the Judiciary, 83<sup>rd</sup> Cong., 2d Sess. 1 (1954).*

Knowland placed in the record an Eisenhower administration letter that “strongly favor[ed] action by Congress to close this gap in our national security” but deferred to Congress on the method for doing it. *Id.* at 5; *see also id.* at 17 (letter from Assistant Secretary of State Thruston Morton expressing his Department’s view that in the event of national emergency “it would be important – from the point of view of legal requirements and national morale – for Congress to be able to meet and legislate promptly without the necessity of special elections throughout the Nation, with the attendant campaign, to fill a very large number of vacant seats in the House.”).

On whether Governors should be required, in order to maintain party balance, to appoint a member of a deceased member’s political party, Knowland told the subcommittee “it would be a mistake to tie the constitutional hands of the Governor. I think it would average out in any event.” *Id.* at 7. Senator Francis Case, in testimony before the subcommittee in support of his own amendment proposal, questioned Knowland’s resolution in one respect. Rather than having a numerical line that would allow temporary appointments if there were 145 or more vacancies but not if there were 144, Senator Case said “[t]he simpler thing, it seems to me, to do is to use the same language as is done in connection with vacancies in the Senate.” *Id.* at 14.

The Committee on the Judiciary recommended passage of S.J. Res. 39. *Appointment of Representatives in Time of National Emergency*, S. Rep. No. 1459, 83d Cong., 2d Sess. 1-2 (1954). In addition to a nuclear threat, it expressed concern that “through germ warfare, or in the course of violent attacks by irresponsible partisans, the House of Representatives would be compelled to function without a majority of its Members.” *Id.* at 2; *see also id.* at 3 (acts of violence may also include “wholesale assassination of Members of the House by less spectacular weapons”). One result is that the House might then lack a quorum for doing business. Even if House rules allowed less than a majority to constitute a quorum, “in such times exceedingly important legislation would be adopted and any disenfranchisement to a substantial portion of our Nation would represent a distinct loss.” *Id.* at 3. While hoping that the authority provided in the resolution might never be used, the committee said “it would be the height of folly to leave a constitutional gap of this nature in a representative government such as ours.” *Id.* at 4.

The proposed amendment passed the Senate by a vote of 70 to 1. 100 Cong. Rec. 7669 (1954); *see id.*, 1758-69 (full debate). During the debate, Senator Case reiterated support “for the filling of vacancies in the House of Representatives in the same way that vacancies in the Senate are filled, to wit, by appointment by the Governor of the State until the vacancy is filled in the way the people of the particular State involved may direct by act of its legislature.” *Id.*, 7661; *see also id.*, 7662 (suggesting that temporary appointments might be limited to 90 days).

Senator Cooper observed that the proposed amendment “expresses a concern that even if the gravest consequences should affect the membership of the Congress,” there be “a constitutional method of meeting the contingency, and of preserving ... a government of laws, rather than a government of men.” *Id.*, 7667. He recognized that the amendment would change “for a limited time” the concept that members of the House are elected not appointed. The reason doing so “derive from circumstances which could not have been foreseen at the time of the adoption of the

Constitution.” *Id.* To hold as closely as possible to the idea that members of the House are elected by the people, “[l]imits on the tenure of the temporary appointment should be provided.” *Id.*, 7668. Senator Knowland acknowledged the benefit of further study of the length of temporary appointments, suggesting it be done when the House considered the amendment. *Id.*

c. 1955 – S.J. Res. 8, 84<sup>th</sup> Congress

In 1955, Senator Kefauver became chairman of the Subcommittee on Constitutional Amendments. In the course of several Congresses, he sought adoption of a temporary House appointment amendment.

As introduced, S.J. Res. 8 would have provided that in the event of a “disaster” that causes “more than a majority of vacancies” in either House, governors shall make temporary appointments that lasted until the people filled the vacancies by election. The subcommittee held what appears to be the fullest hearing on the subject. *Appointment of Representatives: Hearing on S.J. Res. 8 Before a Subcommittee of the Senate Comm. on the Judiciary, 84<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1955)*. The hearing evidently persuaded the Judiciary Committee that the Seventeenth Amendment’s temporary appointment mechanism was sufficient for the Senate and that the proposal should be limited to the House. The statement of a condition in the amendment, that it apply in the event of a “disaster,” was sharply questioned at the hearing, and by the committee in its report. Among the questions were what officer of government would proclaim the disaster; how would that officer determine which vacancies were caused by it; and what if some vacancies had natural causes? S. Rep. No. 229, 84<sup>th</sup> Cong., 1<sup>st</sup> Sess. 3 (1955).

The committee kept the requirement that temporary appointments could be made only if the total number of House vacancies exceeded half the body’s authorized membership. It reported to the Senate that “having eliminated reference to a disaster the committee wanted to be sure that utilization of this authority would be sufficiently restricted, so that it would remain an emergency measure for the preservation and continuity of representative government. The maintenance of a large number of vacancies as a prerequisite to the use of the power, constitutes insurance that it will be used only in the event of a disaster.” *Id.* at 3.

The committee received letters from the House and Senate parliamentarians that described established precedents that only living Members are counted in determining the total number of which a majority constitutes a quorum. *Hearing* at 23-26 (letters from Lewis Deschler and Charles Watkins). The precedents persuaded the committee that any point of order in the House to a quorum objecting to a quorum based only on the number of living, chosen and sworn members would probably not be sustained. *See* S. Rep. No. 229, at 2. Nevertheless, it reiterated the view expressed in its 1954 report that even if the House could proceed without a majority of its authorized members, during such times important legislation would be adopted and the disenfranchisement of a substantial portion of the nation would represent a loss. *Id.* at 2-3. And, as the committee noted, there might be a quorum problem if the number of incapacitated yet living members made it difficult to convene even a truncated quorum. *Id.* at 3. While this would “not necessarily mean chaos in this country, for the Chief Executive would undoubtedly step into the

breach and act without legislative sanction in the national interest,” the committee urged that “there need be no departure from constitutional, representative government if precautionary steps are taken in advance of atomic catastrophe.” *Id.*; *see also id.* at 4.

At the hearing and in a written submission in the record, the subcommittee heard suggestions from three constitutional scholars recommending consideration of simply making applicable to House vacancies the temporary appointment mechanism of the Seventeenth Amendment. *Id.* at 20-21 (statement of C. Herman Pritchett, Chairman, Department of Political Science, University of Chicago); *id.* at 30-31 (statement of C.D. Robson, Chairman, Department of Political Science, University of North Carolina); *id.* at 35-35 (letter from William W. Crosskey, University of Chicago Law School). That, of course, was, the suggestion that had been offered by Senator Case the preceding year.

Professor Pritchett offered the practical point that Governors “wouldn’t have to wait until there had been a counting of noses to know that you had actually lost more than half” of the membership. *Id.* at 21. In response to Senator Kefauver’s observation that the Constitution’s different methods for the House and Senate of filling vacancies may have originated “from the concept that the Senate represented the States and the House Members represented the people,” Pritchett noted that the difference originated when “there was no direct election of Senators.” *Id.*

Professor Crosskey wrote “I do not perceive very well just why the governors should not be required to make temporary appointments as a matter of course in the case of every vacancy.” *Id.* at 35. But if ordinary vacancies were not of enough importance, “the tolerated percentage of vacancies ... ought to be determined by a practical judgment as to how large a percentage of vacancies can be sustained without a serious loss of efficiency by the House.” He thought that 50 percent was high, and that 25 percent would also be high: “[t]en percent would seem about right to my uninformed judgment.” *Id.*

The Senate passed S.J. Res. 8 by a vote of 76 to 3. 101 Cong. Rec. 6625-29 (1955).

d. 1960 – S.J. Res. 39, 86<sup>th</sup> Congress

In the 86<sup>th</sup> Congress, the report of the Committee on the Judiciary again stated the case for a temporary appointment amendment. After some background material, the committee told the Senate that circumstances had changed since the founding: “When the Constitution was drafted, the ability to destroy people on a mass basis by use of weapons of war had not been developed. It was, therefore, highly unlikely that the membership of the House of Representatives could be so decimated as to render that body incapable of exercising its constitutional functions. Indeed, the Founding Fathers had no basis on which to predicate any such assumption.” S. Rep. No. 561, 86<sup>th</sup> Cong., 1<sup>st</sup> Sess. 1 (1959). Now, however, “advance in the technique of destruction has necessitated a reexamination of the ability of our representative Government to function in time of national disaster.” *Id.* at 2.

Senator Kefauver’s remarks to the Senate at the outset of the floor debate addressed, among

other things, the idea that the House could function with a loss of members because a quorum would be based on living members. “[I]f a truncated House could operate under its rules,” he responded, “some States – in fact, many States – might be wholly unrepresented. Such disenfranchisement would be most undemocratic. In times of emergency, as in other times, or possibly more so than in other times, our Government should remain a government of the people. Membership should be brought back as closely to the authorized number as quickly as possible.” 106 Cong. Rec. 1382 (1960). Under the Constitution as it now stands, that would require special elections, which would take time. Because attacks on other major centers of population could be expected, “it might not be possible to hold elections in many States for many months. If we are to have representative government during this period, Governors must have the power of appointment.” *Id.*

On February 2, 1960, the Senate passed, for the third time, a proposed constitutional amendment on temporary House appointments. The relevant portion of S.J. Res. 39 (which also contained proposed poll tax and District of Columbia voting rights amendments) provided:

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.

Journal of the Senate, 86<sup>th</sup> Cong., 2d Sess. 82-83 (1960); *see* 106 Cong. Rec. 1764-65 (1960). The House that year acted only on a District of Columbia presidential election amendment, which became the 23<sup>rd</sup> Amendment. The following Congress sent a poll tax amendment to the states.

e. 1961 – H.R.J. Res. 29, et al., 87<sup>th</sup> Congress

In 1961, initiative for a temporary appointments amendment shifted back to the House. Judiciary Committee Chairman Celler, who introduced one of four proposed amendments (H.R.J. Res. 91), led off the testimony. *Constitutional Amendments for Continuity of Representative Government During Emergency: Hearing on H.R.J. Res. 29, et al., Before Subcommittee No. 2 of the House Comm. on the Judiciary, 87<sup>th</sup> Cong., 1<sup>st</sup> Sess. (1961)*. His amendment would have authorized the filling of vacancies by gubernatorial appointment if the total number of House vacancies exceeded House the authorized House membership. *Id.* at 3. The other three would have been triggered when vacancies exceeded 145 members, a third of the House’s membership. *Id.* at 2-3. On that difference, Celler assured the committee that “I am not going to quarrel with the number.” *Id.* at 5.

Celler told the committee that the amendment’s purpose was to enable Congress “to function effectively in time of emergency or disaster.” *Id.* at 4. It was “not born of hysteria, but represents a readiness to continue the orderly processes of government in any and all events. Adoption of this resolution would be a demonstration particularly to the enemies of freedom, that

we mean to carry on our democratic form of government come what may.” He advised the committee that the Department of Justice (of the new Kennedy Administration) “has indicated it is in support of this proposal because it becomes clearer and clearer as tension piles upon tension that to ignore this proposal is to tempt the fates.” *Id.* at 5. On the question whether the House could function in the absence of a majority, Celler said he thought the House could not function, *id.*, but even if it was assumed that three Members were sufficient for operational purposes “that would not constitute representative government.” *Id.* at 6.

Nicholas Katzenbach, then an Assistant Attorney General, presented the views of the Department of Justice, telling the committee “we do believe that this is an extremely important matter and that it should be provided for by constitutional amendment.” *Id.* at 25. If there were a disaster, while “the executive would be forced, under these circumstances, to carry on, it would be extremely difficult to carry on in a way provided by the Constitution” *Id.* But he also told the committee that there practical questions to consider, including “a difficulty in knowing whether or not the number of vacancies occurred, and indeed what constituted a vacancy.” *Id.* at 26. He suggested the benefit of a “briefer form” of resolution such as the Chairman’s, *id.* at 29, and for providing detail by legislation.

The committee did not report a temporary appointments amendment to the House. Later in the Congress it reported a poll tax amendment to the House, which passed it.

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