

# Extracting Lessons from Illinois' 2010 Special Election Fiasco: A Closer Look at the Seventh Circuit's Decision in *Judge v. Quinn* and the Special Election Requirement of the Seventeenth Amendment

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## I. INTRODUCTION

Prior to 2008, Senate vacancies<sup>1</sup> aroused little debate or controversy.<sup>2</sup> However, the presidential election of 2008 sparked interest in the Senate vacancy process because it created the highest number of senate vacancies associated with a presidential election.<sup>3</sup> One of those vacancies occurred on

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1. A vacancy occurs when there is "a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected." 2 U.S.C. § 8(a) (2006).

2. THOMAS H. NEALE, CONG. RESEARCH SERV., R40421, FILLING U.S. SENATE VACANCIES: PERSPECTIVES AND CONTEMPORARY DEVELOPMENTS 1 (2009) ("Of Senate appointments that have occurred since 1913, the vast majority have been filled by temporary appointments, and the practice appears to have aroused little controversy during that 96-year period.").

3. *S.J. Res. 7 and H.J. Res. 21: A Constitutional Amendment Concerning Senate Vacancies: Joint Hearing Before the Subcomm. on the Constitution of the Comm. on the Judiciary U.S. S. and H.R., Comm. on the Judiciary Subcomm. on the Constitution, Civil Rights, and Civil Liberties*, 111th Cong. 14 (2009) (testimony of Thomas H. Neale, Specialist in American National Government, Congressional Research Service), available at [http://judiciary.house.gov/hearings/printers/111th/111-34\\_54105.PDF](http://judiciary.house.gov/hearings/printers/111th/111-34_54105.PDF) (last visited Dec. 29, 2010) [hereinafter *Joint Hearing Report*] ("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."); see also Bruce Reed, *The Wisdom of Crowds*, SLATE (Dec. 17, 2008), <http://www.slate.com/id/2207046> ("The four seats opening up next month will be the most in one year since 1962."). Four vacancies were created in the Senate: Barack Obama from Illinois resigned to become President, Joe Biden from Delaware resigned to become Vice President, Hilary Clinton from New York resigned to become Secretary of State, and Ken Salazar from Colorado resigned to become Secretary of the Interior. See Kathy Gill, *Overview – 111th Congress (2009-2011): Learning about the United States Congress*, ABOUT.COM (2009), [http://uspolitics.about.com/od/thecongress/a/111th\\_Congress.htm](http://uspolitics.about.com/od/thecongress/a/111th_Congress.htm) (last

November 16, 2008, when then-Senator from Illinois, Barack Obama, resigned from the Senate to become President of the United States.<sup>4</sup> When Obama resigned, there were two years and forty-eight days left in his term.<sup>5</sup> Under Illinois' Election Code, special elections for senate vacancies must be held in conjunction with the next general election, which was to be November 2, 2010.<sup>6</sup> To fill the vacancy, then-Governor Rod Blagojevich appointed Roland Burris on December 30, 2008.<sup>7</sup> Shortly thereafter, the Illinois legislature impeached Governor Blagojevich, and Lieutenant Governor Pat Quinn assumed the office of Governor.<sup>8</sup> Neither Blagojevich nor Quinn ever issued a writ of election to fill Obama's Senate seat—the practical effect being that Burris would complete Obama's term, and the senator elected in the next general election would begin a new term on January 3,

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visited Dec. 29, 2010). All of these vacancies were subsequently filled by temporary appointments in their respective states. *Id.*

4. Jeff Mason, *Obama Resigns Senate Seat, Adds White House Staff*, REUTERS (Nov. 16, 2008), <http://www.reuters.com/article/idUSTRE4AE1QU20081116>.

5. *Judge v. Quinn*, 612 F.3d 537, 541 (7th Cir. 2010); Harrison Crumrine, *Want to Be a Senator, but Hate Those Pesky Elections? Just Become a 'Temporary' Appointee*, STATE OF ELECTIONS BLOG (Nov. 2, 2010), <http://electls.blogs.wm.edu/2010/11/02/two-elections-in-one-the-17th-amendment-and-illinois-senate-seat>.

6. Kevin Lee, *Judge: Special Election Needed to Replace Burris*, ILL. STATEHOUSE NEWS (June 17, 2010), <http://illinois.statehousenewsonline.com/3303/judge-special-election-needed-to-replace-burris/>. Here, Barack Obama's resignation came after the 2008 general elections had already occurred. Illinois's statute prescribed the next general election as the date the special election would occur; both would occur in conjunction. Illinois Election Code provides:

When a vacancy shall occur in the office of United States Senator from this state, the Governor shall make temporary appointment to fill such vacancy until the next election of representatives in Congress, at which time such vacancy shall be filled by election, and the senator so elected shall take office as soon thereafter as he shall receive his certificate of election.

10 ILL. COMP. STAT. 5/25-8 (2011).

7. Rick Pearson & Ray Long, *Blagojevich Snubs Senate, Taps Burris for Seat*, CHI. BREAKING NEWS CENTER (Dec. 30, 2008), <http://www.chicagobreakingnews.com/2008/12/blagojevich-to-name-burris-to-senate.html>. See Deanna Bellandi, *Roland Burris: Blagojevich Appoints Former Attorney General to Obama's Senate Seat*, HUFFINGTON POST (Dec. 30, 2008), [http://www.huffingtonpost.com/2008/12/30/blagojevich-to-appoint-ro\\_n\\_154240.html](http://www.huffingtonpost.com/2008/12/30/blagojevich-to-appoint-ro_n_154240.html) (providing information on controversies that arose immediately after the appointment).

8. The Blagojevich scandal was widely publicized. See Ray Long & Rick Pearson, *Impeached Illinois Gov. Rod Blagojevich has Been Removed from Office*, CHI. TRIB. (Jan. 30, 2009), <http://www.chicagotribune.com/news/local/chi-blagojevich-impeachment-removal,0,5791846.story>. The Senate voted 59-0 to impeach Blagojevich. *Id.* The House voted 114-1 in favor of impeachment earlier. Christopher Wills, *Blagojevich Impeached: House Votes Against Governor 114-1*, HUFFINGTON POST (Jan. 9, 2009), [http://www.huffingtonpost.com/2009/01/09/blagojevich-impeachment-h\\_n\\_156515.html](http://www.huffingtonpost.com/2009/01/09/blagojevich-impeachment-h_n_156515.html).

2011.<sup>9</sup> This was practical because Obama's term was to end on January 3, 2011, anyway; even if a special election was held with the next general election, the winner would not take office until the following January, the date Obama's term would have effectively ended.<sup>10</sup> Illinois' Election Code therefore allows an appointee to serve the remainder of a senate term when a vacancy occurs in the final one-third of the term.<sup>11</sup> Illinois' statute is similar to thirty-five other states, most giving similar practical effect to their statutes in the final one-third of a senate term.<sup>12</sup>

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9. See *Judge*, 612 F.3d at 541. As will be discussed in this article, the Seventeenth Amendment to the U.S. Constitution requires that a special election be held to fill senate vacancies. Illinois accepted that this was the practical effect of their statute. See Memorandum from the Illinois Attorney General, Lisa Madigan, to the Illinois Legislature, No. 09-001, 2009 WL 530827, at \*2 (Feb. 25, 2009) [hereinafter Attorney General Memorandum] ("Under the current language of section 25-8, U.S. Senator Burris's temporary appointment will conclude in January 2011 following an election in November 2010, the next election of representatives in Congress.").

10. Attorney General Memorandum, *supra* note 9, at \*2. While this was the current state of the law (i.e., the natural application of Section 25-8 of the Illinois Election Code), the memorandum written from the Illinois Attorney General to the Illinois legislature addressed whether the statute could be changed to conduct a special election earlier in the term, rather than letting the statute run its natural course. See *id.* The primary issue was whether the temporary appointee, Roland Burris, had a vested right in the temporary appointment that would require the law not be changed. *Id.* at \*3-4. Ultimately, the Illinois Attorney General opined that the law could be changed because Burris had no vested right in the seat. See *id.* at \*7. Nonetheless, a special election was not held earlier, thereby letting the statute take its natural course; multiple reasons have been cited as to why the Illinois legislature ultimately decided against it. See Ray Long, *Democrats Vote Down Special Election for Roland Burris Senate Seat*, CHI. TRIB. (March 5, 2009), [http://newsblogs.chicagotribune.com/clout\\_st/2009/03/democrats-vote-down-special-election-for-roland-burris-senate-seat.html](http://newsblogs.chicagotribune.com/clout_st/2009/03/democrats-vote-down-special-election-for-roland-burris-senate-seat.html) ("Why target the only black U.S. senator in the country?" [Illinois State Senator Rickey] Hendon asked.); Caryn Rousseau, *Illinois Can't Afford Special Election: State Officials*, HUFFINGTON POST (Dec. 15 2008), [http://www.huffingtonpost.com/2008/12/15/illinois-cant-afford-spec\\_n\\_151173.html](http://www.huffingtonpost.com/2008/12/15/illinois-cant-afford-spec_n_151173.html) (citing exorbitant costs—between thirty million to fifty million dollars—as the primary reason why Illinois would not hold a special election). But others suspect the Democratic Party as the reason why Illinois did not hold a special election. See John Gizzi, *Why Illinois Dems Won't Permit Special Election*, HUMAN EVENTS (Dec. 23, 2008), <http://www.humanevents.com/article.php?id=30025> ("Democrats are holding up a special election because they fear that under the present political circumstances, a Republican could win the Senate seat.").

11. See Attorney General Memorandum, *supra* note 9, at \*2; *Judge*, 612 F.3d at 544 ("The State of Illinois appears to agree that this will be the practical effect of the state's system."). The Seventh Circuit also noted that "the Illinois State Board of Elections's [sic] current list of offices that will appear on the November 2, 2010, ballot in Illinois does not specify that there will be an election on that date to fill the balance of President Obama's senate term." *Id.*

12. These thirty-five other states are: AZ, CA, CO, DE, FL, GA, HI, ID, IN, IA, KS, KY, ME, MD, MI, MN, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OH, PA, SC, SD, TN, UT, VA, WV, and WY. See NATIONAL CONFERENCE OF STATE LEGISLATURES, FILLING

Voters in Illinois brought suit alleging Illinois' Election Code violated the Seventeenth Amendment to the U.S. Constitution.<sup>13</sup> Prior to this lawsuit, states' election codes had rarely, if ever, been struck down under the Seventeenth Amendment.<sup>14</sup> However, a unanimous Seventh Circuit panel held that Illinois' governor was commanded to issue a writ of election by the Seventeenth Amendment and that states did not have the discretion to skip the special election that would elect a replacement for the senate seat.<sup>15</sup>

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VACANCIES IN THE OFFICE OF UNITED STATES SENATOR, (2009), <http://www.ncsl.org/default.aspx?tabid=18423> (last visited Dec. 25, 2010), compiled from COMMITTEE ON RULES AND ADMINISTRATION, SENATE ELECTIONS LAW GUIDEBOOK 2000, S. Doc. No. 106-14 (2d Sess. 2000), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106\\_cong\\_documents&docid=f:sd014.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_documents&docid=f:sd014.pdf) ("In the following 36 states [including Illinois], the governor makes an appointment to fill a U.S. Senate vacancy, and the appointee serves until the next regularly-scheduled, statewide general election. The person elected at that next regularly-held general election serves for the remainder of the unexpired term, if any. If the term was set to expire at that general election, the person elected serves a full six-year term."). This Guidebook provides the statutes of all fifty states. Because this document was compiled in 2000, some of the statutes have since been changed, though the vast majority of states have retained the same statute. See *id.* The only states that have recently changed their statutes are Connecticut and Rhode Island. See *id.*; see CONN. GEN. STAT. ANN. § 9-211 (West 2010) (requiring governor to make temporary appointment until special election, which must be held within 150 days, or in conjunction with a regularly-scheduled general election if the vacancy occurs within a certain number of days to the general election); R.I. GEN. LAWS ANN. § 17-4-9 (West Supp. 2003) (requiring a special election to fill the vacancy in "as early a date" as possible; not allowing temporary appointment in the meantime).

13. *Judge*, 612 F.3d at 541, 544. The court stated:

The plaintiffs allege that Governor Quinn's failure to issue a writ of election will injure them because without a writ of election, an election to fill the senate vacancy left by President Obama will never take place—not on November 2, 2010, or any other date. The plaintiffs argue that, if things remain as they are now, Senator Burris will serve until the next Congress begins on January 3, 2011, at which time an entirely new term for one of Illinois's senators will begin.

*Id.*

14. See *Gietzen v. McMillon*, 857 F. Supp. 777, 782 (D. Kan. 1994) ("Since the Supreme Court's decision in *Rodriguez*, challenges to statutes prescribing the means of filling vacancies in elected positions have generally been unsuccessful"). *Gietzen* discusses multiple cases to support this proposition, including *Rodriguez* and *Valenti*. See *infra* Part II.E.

15. Although a unanimous panel of the Seventh Circuit felt the statute was unconstitutional in its practical effect, the plaintiffs were denied injunctive relief because they could not show irreparable harm. See *Judge*, 612 F.3d at 555-57.

There is still time for the governor to issue a writ of election that will call for an election on the date established by Illinois law and that will make it clear to the voters that they are selecting a replacement for Senator Obama. The district court can easily reach and resolve the merits of this request before any of the harm that the plaintiffs forecast comes to pass.

When Illinois requested a rehearing en banc, or alternatively, an amended opinion, the Seventh Circuit denied rehearing and amended its opinion to explicitly state that Illinois had to conduct a special election.<sup>16</sup> In light of the Seventh Circuit's amended opinion, Illinois expeditiously conducted a special election in conjunction with the general election held on November 2, 2010.<sup>17</sup>

This Article analyzes the Seventh Circuit's decision in *Judge v. Quinn* and discusses how the language used by that court runs counter to established U.S. Supreme Court and Seventh Circuit case law on related issues as well as the legislative history of the Seventeenth Amendment.<sup>18</sup> Most recently, the Supreme Court denied Illinois' petition for writ of certiorari thereby rendering *Judge* as valid precedent.<sup>19</sup> Consequently, this Article proposes the considerations necessary for states to update their senate vacancy statutes to comply with *Judge*.<sup>20</sup>

To acquire a better understanding of what changes were intended by the Seventeenth Amendment in regards to senate vacancies, Part II first provides a brief history of the original vacancy provision and the Seventeenth Amendment.<sup>21</sup> It then provides an overview of a senate term to facilitate the discussion of *Judge v. Quinn* and gives a breakdown of states' senate vacancy statutes to highlight which statutes are affected by the Seventh Circuit's decision.<sup>22</sup> Part II next discusses case law that utilizes a Seventeenth Amendment analysis to determine the constitutionality of states'

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*Id.* at 557. No special election was required in the original Seventh Circuit decision because the plaintiffs' request was denied on other grounds. *See id.*

16. *Judge v. Quinn*, 387 F. App'x 629, 629-30 (7th Cir. 2010) (amended opinion) ("On consideration of the petition, so understood, all of the judges on the original panel have voted to deny rehearing, and no judge in active service has requested a vote on the petition for rehearing *en banc*.").

17. Rick Pearson, *Illinois to Have Two Senate Elections in November: 60-Day Term to Fill Obama Seat and 6-Year Term to Be on Nov. 2 Ballot*, CHI. TRIB. (July 29, 2010), [http://articles.chicagotribune.com/2010-07-29/news/ct-met-senate-race-lawsuit-20100729\\_1\\_burris-appointment-burris-attorney-obama-vacancy](http://articles.chicagotribune.com/2010-07-29/news/ct-met-senate-race-lawsuit-20100729_1_burris-appointment-burris-attorney-obama-vacancy); Monica Davey, *For One Senate Seat in Illinois, Two Elections on the Same Day*, N.Y. TIMES (July 31, 2010), <http://www.nytimes.com/2010/08/01/us/politics/01illinois.html>.

18. *See* discussion *infra* Part IV (discussing various reasons why *Judge* was erroneously decided).

19. *See infra* note 295 (noting that the Supreme Court denied Illinois's petition for a writ of certiorari on June 6, 2011).

20. *See* discussion *infra* Part V (discussing which statutes are affected by *Judge* and will need to be updated or otherwise clarified).

21. *See* discussion *infra* Parts II.A-B (discussing legislative history of both senate vacancy clauses and why those respective systems of appointing senators were ratified).

22. *See* discussion *infra* Parts II.C-D (providing an overview of a senate term and the diverse statutes that have been adopted by the states).

vacancy statutes.<sup>23</sup> Part II finally describes the congressional efforts made thus far to curb states' rights to appoint temporary senators.<sup>24</sup> Part III discusses the Seventh Circuit's decision in *Judge v. Quinn*, and provides the procedural history and subsequent amended opinion and injunctive order by the district court.<sup>25</sup> Part IV argues that *Judge* was erroneously decided in light of the prior precedent.<sup>26</sup> Part IV also stresses that *Judge* is inconsistent with the legislative history of the Seventeenth Amendment.<sup>27</sup> Part V then argues that states should modify their statutes to prevent the possibility of their statutes being challenged in the months before the election.<sup>28</sup> It then proposes various considerations states should take to update their senate vacancy statutes.<sup>29</sup> Part VI provides a brief conclusion by reiterating the importance of *Judge v. Quinn* in the larger context of senatorial elections and the importance of abiding by the Seventh Circuit's decision.<sup>30</sup>

## II. BACKGROUND

This section provides a brief history of how senate vacancies were filled in the original Constitution as well as after the ratification of the Seventeenth Amendment.<sup>31</sup> It also provides the information necessary to truly understand the inconsistencies in *Judge v. Quinn* and the implications this decision could have on senate special elections.<sup>32</sup> Part A discusses the rati-

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23. See discussion *infra* Part II.E (discussing Supreme Court precedent (*Valenti v. Rockefeller*, 292 F. Supp. 851 (W.D.N.Y. 1969); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1892)); and Seventh Circuit precedent (*Lynch v. Ill. State Bd. of Elections*, 682 F.2d 93 (7th Cir. 1982); *Jackson v. Ogilvie*, 426 F.2d 1333 (7th Cir. 1970)) that weigh against the Seventh Circuit's opinion in *Judge v. Quinn*).

24. See discussion *infra* Part II.F (discussing a bill proposed in the House of Representatives and a constitutional amendment proposed in the Senate, and noting that both have lost momentum and will likely not pass).

25. See discussion *infra* Part III (providing thorough discussion of *Judge v. Quinn* and all related opinions before and after).

26. See discussion *infra* Parts IV.A-E (providing five arguments why *Judge* is inconsistent with prior Supreme Court and Seventh Circuit precedent).

27. See discussion *infra* Part IV.F (arguing that permanent appointments by a Governor were not foreclosed by the legislative history nor the evil sought to be avoided by the Framers of the Seventeenth Amendment).

28. See discussion *infra* Part V.A (providing which states' statutes will need to be updated in light of *Judge*).

29. See discussion *infra* Parts V.B-C (providing two steps states will need to undertake to update statutes).

30. See discussion *infra* Part V (arguing that *Judge* will impact senatorial special elections in the years to come).

31. See discussion *infra* Parts II.A-B (providing history of how senators were elected in colonial America and since the passage of the Seventeenth Amendment).

32. *Judge* has very far-reaching implications for the states in regards to how they can conduct special elections. Almost all states will need to update their senate vacancy

fication of the original senate vacancy clause that was in the Constitution before the ratification of the Seventeenth Amendment.<sup>33</sup> Part B then discusses the legislative debate on the senate vacancy clause of the Seventeenth Amendment in the 62nd Congress—the Congress that ratified the Amendment.<sup>34</sup> Part C provides a brief overview of a senate term to facilitate the discussion of senate elections, generally.<sup>35</sup> Part D provides a breakdown of states' special election statutes to fill senate vacancies.<sup>36</sup> Part E provides a synopsis of the case law discussing states' vacancy statutes under a Seventeenth Amendment analysis.<sup>37</sup> Finally, Part F briefly discusses efforts in Congress that have been made to curb states' power to appoint replacements in the Senate.<sup>38</sup>

A. THE CONSTITUTIONAL CONVENTION OF 1787 AND STATE LEGISLATURE'S ELECTION OF SENATORS

To acquire a better understanding of why the Seventh Circuit's interpretation of the Seventeenth Amendment in *Judge* is inaccurate, it is first essential to understand the original senate vacancy clause—the clause that governed senate vacancies before the Seventeenth Amendment.<sup>39</sup> In colonial America, Senators were chosen by state legislators.<sup>40</sup> When a vacancy occurred, state governors made temporary appointments until the next

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statutes to at least some extent in order to comply with *Judge*. See discussion *infra* Part V (discussing the updates needed for states to comply with *Judge*). To better understand these implications, it is helpful to have the necessary background.

33. See discussion *infra* Part II.A (discussing Article I, Section 3, Clause 2 of the Constitution that provided for state legislative appointments of senators before the ratification of the Seventeenth Amendment).

34. See discussion *infra* Part II.B (discussing the reasons why the Seventeenth Amendment was ratified by the states and what changes it brought in regards to senate elections as well as senate vacancies).

35. See discussion *infra* Part II.C (discussing how senate elections work and the second paragraph of the Seventeenth Amendment which is the source of states' powers to create senate vacancy statutes).

36. See discussion *infra* Part II.D (discussing states' widely divergent statutes that determine how senate vacancies are filled).

37. See discussion *infra* Part II.E (discussing Supreme Court precedent—*Valenti v. Rockefeller*, 292 F. Supp. 851 (W.D.N.Y. 1969); *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982);—and Seventh Circuit precedent—*Lynch v. Ill. State Bd. of Elections*, 682 F.2d 93, 94-95 (7th Cir. 1982); *Jackson v. Ogilvie*, 426 F.2d 1333 (7th Cir. 1970);—that weigh against the Seventh Circuit's opinion in *Judge v. Quinn*).

38. See discussion *infra* Part II.F (discussing a bill proposed in the House of Representatives and a constitutional amendment proposed in the Senate, albeit pointing out that both have lost momentum and will likely not pass).

39. See *infra* note 46 and accompanying text (providing the language of the pre-Amendment Constitution that governed senate vacancies).

40. "The Senate of the United States shall be . . . chosen by the Legislature thereof." U.S. CONST. art I, § 3, cl. 2, amended by U.S. CONST. amend. XVII.



meeting of the state legislature, at which point, the legislature would fill the vacancy with a permanent replacement.<sup>41</sup> In the Constitutional Convention of 1787, the Framers chose state legislative appointments to safeguard the interests of state governments<sup>42</sup> and with the underlying belief that it would result in better appointments.<sup>43</sup> However, there was little discussion on the original vacancy provision.<sup>44</sup> James Madison proposed that state legislatures fill the seat if in session, and during times of recess, a state's executive be allowed to fill the seat until the legislature could meet.<sup>45</sup> The pre-Seventeenth Amendment Constitution's senate vacancy clause states 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."<sup>46</sup> This system was favorable because it prevented "inconvenient chasms" in the Senate since the state legislatures met only once a

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41. "[I]f 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." U.S. CONST. art. I, § 3, cl. 2, *amended by* U.S. CONST. amend. XVII. States diverged in how they picked the Senator. Some states did so by a vote in a joint convention. Others did so by concurrent votes. 1 GEORGE HAYNES, *THE SENATE OF THE UNITED STATES* 81 (Russell & Russell 1960) [hereinafter HAYNES, *THE SENATE*].

42. THE FEDERALIST No. 62 (James Madison), *available at* <http://teachingamericanhistory.org/library/index.asp?document=810> (state legislative election allows the states to secure their authority and form a "convenient link" between the two systems); Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1352 (1996) [hereinafter Amar, *Indirect Effects*] ("Indeed, the legislative election device was explicitly linked to the famous Madisonian compromise by which the States were given equal suffrage in the Senate."). See GEORGE HENRY HAYNES, *THE ELECTION OF SENATORS 1-19* (Henry Holt & Co. 1906) for a discussion on why the Framers chose state legislature appointments.

43. C.H. HOEBEKE, *THE ROAD TO MASS DEMOCRACY ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT* 19 (Transaction Publishers 1995) ("[O]ne of the critical points in favor of the indirect method of electing senators had been that it rendered them less vulnerable to the impulses of their constituents."); THE FEDERALIST No. 62, *supra* note 42 (state legislative election "has the advantage of 'favoring a select appointment'"); Amar, *Indirect Effects*, *supra* note 42, at 1353 ("[S]tate legislators would serve as filters of popular passion and elect a better class of people to the Senate than would be produced by direct election.").

44. Jeffrey D. Mohler, *The Constitutional Requirements for Special Elections*, 97 DICK. L. REV. 183, 186 (1992) ("While the methods of electing Senators were hotly debated, the vacancy provision was barely mentioned."). The primary question that needed to be addressed was under what circumstances an appointee finish the Senate term. But it was generally understood from the language of Article I, Section 3, Clause 2 of the Constitution that a temporary appointee served in the Senate only until the legislature could meet and appoint a replacement to finish the term. See U.S. CONST. art I, § 3, cl. 2, *amended by* U.S. CONST. amend. XVII.

45. 1 JAMES MADISON, *JOURNAL OF THE FEDERAL CONVENTION* 61 (E.H. Scott ed., Scott, Foresman and Co. 1898) (1840); Mohler, *supra* note 44, at 186.

46. U.S. CONST. art I, § 3, cl. 2, *amended by* U.S. CONST. amend. XVII.

year.<sup>47</sup> This system was subsequently adopted by the states and remained intact until the passage of the Seventeenth Amendment in the early 20th century.<sup>48</sup>

B. PASSAGE OF THE SEVENTEENTH AMENDMENT AND THE DIRECT ELECTION OF SENATORS

This system of picking senators changed when the Seventeenth Amendment was ratified in 1913.<sup>49</sup> The Seventeenth Amendment allowed for the direct election of senators by the people.<sup>50</sup> In addition, states were given discretion to determine whether temporary appointments would be allowed where a vacancy occurred, and also the discretion to determine the timing and procedures of a special election.<sup>51</sup> Although the direct election of senators had been proposed on several occasions before the actual pas-

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47. Mr. Edmund Randolph of Virginia, a member of the Committee of Detail, thought the provision was necessary for these reasons, and because the Senate will have more power and consist of a smaller number than the House of Representatives, a vacancy would be more problematic. CREATION OF THE SENATE: FROM THE PROCEEDINGS OF THE FEDERAL CONVENTION PHILADELPHIA, S. DOC. NO. 100-7, at 43 (1937), available at <http://www.senate.gov/artandhistory/history/resources/pdf/SchulzCreationSenate.pdf> (last visited Dec. 29, 2010) [hereinafter CREATION OF THE SENATE]; see also NEALE, *supra* note 2, at 2.

48. The Seventeenth Amendment was passed on 1913, thereby ending state legislators' right to pick senators. See *Direct Election of Senators*, U.S. SENATE, [http://www.senate.gov/artandhistory/history/common/briefing/Direct\\_Election\\_Senators.htm](http://www.senate.gov/artandhistory/history/common/briefing/Direct_Election_Senators.htm) (last visited Feb. 4, 2012).

49. See NEALE, *supra* note 2, at 1 (discussing the passage of the Seventeenth Amendment). See HAYNES, *THE SENATE*, *supra* note 41, at 80-103 (providing a complete discussion of the ratification of the Seventeenth Amendment). Various studies were done in the immediate ratification of the Seventeenth Amendment to see what differences were apparent between the senators elected before the Seventeenth Amendment and those senators elected afterwards (since both served side-by-side in the immediate years after the ratification of the Seventeenth Amendment). See Scott R. Meinke, *Institutional Change and the Electoral Connection in the Senate: Revisiting the Effects of Direct Election*, POL. RES. Q. at 445, 453-54 (Sept. 2008) (finding increased sponsorship and participation among elected senators as compared to legislatively appointed senators).

50. U.S. CONST. amend. XVII § 1 states, in pertinent part: "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof."

51. The second paragraph of the Seventeenth Amendment states:

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*, [t]hat 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.

U.S. CONST. amend. XVII § 2 (emphasis in original).

sage of the Seventeenth Amendment, the proposals never passed.<sup>52</sup> But multiple issues in the early twentieth century led to the direct election of senators,<sup>53</sup> including corruption and bribery charges<sup>54</sup> and the belief that private interest groups had overtaken state legislatures to the point where appointed senators no longer represented the constituency.<sup>55</sup> Indeed, statements by Senators in the years immediately preceding the passage of the

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52. The clamor for change first arose in the House of Representatives. HAYNES, THE SENATE, *supra* note 41, at 96. The proposed amendment had been approved six times between the years of 1893 and 1911 by an overwhelming majority in the House of Representatives. However, it was not allowed to come to a vote in the Senate. George H. Haynes, *The Changing Senate*, 200 N. AM. REV. 222, at 222 (Aug. 1914) [hereinafter Haynes, *Changing Senate*]. See Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500, 536-37 (1997) for a brief summary of these early proposals. These proposals included a proposal just four months prior to the actual ratification of the Seventeenth Amendment in May, 1913. Haynes, *Changing Senate*, *supra* note 52, at 222-23 (noting that the proposed amendment was brought to the floor at the first session of the 62nd Congress, but was defeated).

53. The Senate even received multiple direct petitions from farmers' associations, labor groups, and other citizen groups calling for direct election. HAYNES, THE SENATE, *supra* note 41, at 97; Ralph A. Rossum, *California and the Seventeenth Amendment*, 6 NEXUS 101, 112 (2001). This issue became increasingly common in Democratic and Populist platforms at the state level but was eventually taken up by national parties as well. HAYNES, THE SENATE, *supra* note 41, at 97.

54. It is worth noting that corruption and bribery were the exception rather than the norm, but these cases were highly publicized and undermined support for state legislative elections. Mohler, *supra* note 44, at 191 ("The corruption of the state legislatures was one of the primary concerns of the Senate."); Roger G. Brooks, Comment, *Garcia, the Seventeenth Amendment, and the Role of the Supreme Court in Defending Federalism*, 10 HARV. J. L. & PUB. POL'Y 189, 200 (1987) ("Corruption, of both state legislators and senators, was the greatest evil blamed on the system of indirect election."). In many respects, the need for reform was most apparent in Illinois. The alleged bribery scandal relating to Senator William Lorimer has been coined the "final outrage perpetrated under the former method of electing senators." See HOEBEKE, *supra* note 43, at 91-92. Lorimer was accused of bribing four state legislators to be elected to the Senate seat. *Id.* at 92. He was expelled in 1912, halfway through his term. *Id.*; see also John D. Buenker, *The Urban Political Machine and the Seventeenth Amendment*, 56 J. AM. HIST. 305, 314 (Sept. 1969) ("[T]he Illinois Legislature [became] a symbol for all those who desired . . . direct election."). This corruption was not always present; from the Constitution's founding to 1872, there was only one proven instance of bribery of state legislatures. HOEBEKE, *supra* note 43, at 91 (this instance involved Alexander Caldwell of Arkansas). However, there were fifteen proven instances of bribery in the next three decades. HAYNES, THE SENATE, *supra* note 41, at 187; HOEBEKE, *supra* note 43, at 91.

55. Amar, *Indirect Effects*, *supra* note 42, at 1353 ("The state legislatures were tainted by their reliance on powerful and narrowly private influences, and this taint carried over to the Senators selected as well."). *But see* Todd J. Zywicki, *Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment*, 73 OR. L. REV. 1007, 1055 (1994) [hereinafter Zywicki, *Senators and Special Interests*] (arguing that special interest groups actually profited from the Seventeenth Amendment and it only increased their powers).

Seventeenth Amendment reflected their belief that the old senatorial election system promoted corruption.<sup>56</sup>

At the same time, political deadlocks<sup>57</sup> were increasing, caused by state legislatures' inability to decide on a replacement senator.<sup>58</sup> The Seventeenth Amendment eventually passed because politicians at both the state and national level believed these evils could be cured only by the direct election of senators.<sup>59</sup>

56. Senator Bradley stated:

The People are denied the right to choose their own Senators under this Constitution, which was so framed as to make easy the corrupt election of Senators. It was so framed—not by intent but by its mechanism—as to permit senatorships to be bought with comparative ease and safety; it was so framed . . . by its mechanism—as to permit corruption and successful rascality.

47 CONG. REC. 1919 (1911) (statement of Sen. Bradley). Other Senators believed it would clean the government of special interest groups. *See* 47 CONG. REC. 1921 (1911) (Statement of Senator Owen) (“I am weary of seeing corrupt special interests put their hands secretly upon the governing function . . . through this system of machine politics, where representative government has very nearly met its destruction.”).

57. Deadlocks often resulted when one party controlled the state assembly or house and another the state senate. Rossum, *supra* note 53, at 106.

58. There were 46 deadlocks across 20 states in the period between 1891 and 1905. Todd J. Zywicki, *Beyond the Shell and Husk of History: The History of the Seventeenth Amendment and its Implications for Current Reform Proposals*, 45 CLEV. ST. L. REV. 165, 198 (1997). Deadlocks most commonly led to a disruption of state legislatures' handling of state affairs. Mohler, *supra* note 44, at 187. Where there was a deadlock in the legislature, the animosities that arose projected themselves into even the most non-partisan of issues. HAYNES, THE SENATE, *supra* note 41, at 93. Deadlocks even disrupted the Senate from national matters. Rossum, *supra* note 53, at 109 (The Senate had the “onerous burden of determining whether a state’s senators had, in fact, been properly elected.”). There were a whole host of “perplexing questions” that arose since there was no uniform regulation of the manner of senatorial elections. HAYNES, THE SENATE, *supra* note 41, at 82. One notable example was the election of an Indiana Senator in which a minority of the Indiana Senate, which had been in deadlock with the House, met with a majority of the House and elected a senator. The Senate then had to deal with formal protests from other legislatures that the candidate was not properly chosen. There was a similar case from Pennsylvania as well. HAYNES, THE ELECTION OF SENATORS, *supra* note 42, at 21. Finally, deadlocks deprived a state of representation in the Senate. *See* Rossum, *California and the Seventeenth Amendment*, *supra* note 53, at 111. The most notable example is Delaware, which was represented by only one senator in three Congresses and had no representation from 1901 to 1903. *Id.* Moreover, deadlocks were closely related to bribery in that a deadlock often increased the possibility of bribery to end the deadlock. Haynes, *Changing Senate*, *supra* note 52, at 231 (“[P]rotracted deadlocks have not only aroused bitter animosities, but have often resulted . . . in abundant rumors—too often well-grounded—of bribery and corruption.”); Rossum, *supra* note 53, at 111 (“A second factor [of bribery and corruption] often followed on the heels of the first: Scandal resulted when deadlocks were occasionally loosened by the lubricant of bribe money.”).

59. Haynes, *Changing Senate*, *supra* note 52, at 223 (“By [June 12, 1911,] it had become evident that the amendment was in accord with a rising and imperative public sen-

But like the Constitutional Convention of 1787, debate over the vacancy provision was nonexistent.<sup>60</sup> In Senator Bristow's proposal of the Seventeenth Amendment, he stressed that a writ of election should be filed by the governor and an election should be held;<sup>61</sup> however, there was no debate regarding the circumstances in which a writ would be excused.<sup>62</sup> Moreover, Senator Bristow clarified that his proposal was desirable because "it makes the least possible change in the Constitution to accomplish the purposes desired; that is, the election of Senators by popular vote."<sup>63</sup> In regards to the vacancy provision, no substantial change was intended by Senator Bristow, except where a special election was held, it would be

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timement."); Kris W. Kobach, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 YALE L.J. 1971, 1977 (1994) ("Starting in 1901, various states passed resolutions calling for a national convention to propose an amendment."). The best "pre-Seventeenth Amendment" solution was devised by Oregon, and this "Oregon Initiative" was simulated in various states before the ratification of the Seventeenth Amendment. In Oregon, a law was passed by which the candidate for the U.S. Senate be nominated by voter petitions. To bind state lawmakers to the senate candidate picked by the voters, candidates for state legislatures were asked to sign one of two public statements. The first public statement was a pledge to appoint whichever candidate received the highest number of votes from the people. The second public statement "indicated that the legislator would 'consider the vote of the people [but only] as nothing more than a recommendation.'" Not surprisingly, very few state legislature hopefuls picked the second option. *Id.* at 1978 (quoting 1 GEORGE H. HAYNES, *THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE* 96-97 (1938)). Public support is apparent also by the astounding speed with which this amendment was ratified by the states. The Seventeenth Amendment was submitted to the legislatures of the states on May 16, 1912. By May 31, 1913, three-fourths of the states had approved it. HAYNES, *THE SENATE*, *supra* note 41, at 116. Interestingly, the Seventeenth Amendment wasn't promoted to make the senate system more efficient; it was only to prevent the problems associated with state legislators picking senators. *See* Haynes, *Changing Senate*, *supra* note 52, at 231 ("[T]he Seventeenth Amendment arose far more from observation of the influence of the legislative election of Senators . . . than from optimistic assurance that the personnel or efficiency of the Senate would be notably improved by popular election.").

60. *See* 47 CONG. REC. 1482-86 (1911) (debate regarding Seventeenth Amendment).

61. *Id.* at 1482-83 (statement of Sen. Bristow) (opining that this vacancy clause utilized similar language to the House of Representatives vacancy clause and that a writ of election was necessary).

62. *Id.* at 1483 (statement of Sen. Bristow) ("It is unnecessary for me to make any extended remarks in regard to my substitute for the joint resolution."); *see also* Paul Taylor, *Proposals to Prevent Discontinuity in Government and Preserve the Right to Elected Representation*, 54 SYRACUSE L. REV. 435, 438 n.13 (2004) ("[R]emarks [on the vacancy provision of the Seventeenth Amendment] are quite short, focusing mainly on grammatical points, and they do not include reference to any policy rationale behind the application of the provision.").

63. 47 CONG. REC. 1482 (1911) (statement of Sen. Bristow) ("The only change in section 3 is the substitution of the words 'elected by the people thereof' for the words 'chosen by the legislature thereof.' This certainly is as simple a change as can be made.").

filled by the people rather than state legislatures.<sup>64</sup> Finally, with the appointment power, Senator Bristow opined that it carried over from the previous Constitution, and that no change was intended in his Amendment with how appointments occurred in the past,<sup>65</sup> except that the governor had to issue the writ of election and hold a special election.<sup>66</sup> Senator Bristow thus took a very conservative approach with his constitutional proposal.<sup>67</sup>

Prior debates on the vacancy provision concentrated mostly on the wording of the provision, such as using the singular form of the word “vacancy” rather than the plural form “vacancies” for clarity.<sup>68</sup> However, there is nothing in the debates that could have helped states draft their vacancy statutes or guided courts in their determination as to whether a state’s statute was in compliance with the Seventeenth Amendment.<sup>69</sup> States accordingly had to craft statutes based on their own interpretations of the Seventeenth Amendment.<sup>70</sup>

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64. *Id.* at 1482 (Statement of Sen. Bristow) (“I have used the exact language used in the Constitution prescribing the qualifications of electors who will vote for Senator that is used in prescribing the qualifications of electors who vote for Members of Congress—nothing more and nothing less.”).

65. *Id.* at 1483 (Statement of Sen. Bristow) (“That is practically the same provision which now exists in the case of a vacancy. The governor of the state may appoint a Senator until the legislature elects.”).

66. *Id.* (Statement of Sen. Bristow) (“That is, I use exactly the same language in directing the governor to call special elections for the election of Senators to fill vacancies that is used in the Constitution in directing him to issue writs of election to fill vacancies in the House of Representatives.”).

67. As will be discussed *infra* Part IV.F, this conservative approach by Senator Bristow weighs against the Seventh Circuit’s interpretation of the senate vacancy clause of the Seventeenth Amendment in *Judge v. Quinn*.

68. As mentioned earlier, this amendment was proposed just a few months prior, but was rejected. See *supra* note 52 and accompanying text. However, there was some debate on this provision, albeit the debate did not discuss complications which could arise and whether there were any circumstances that would excuse the states from conducting a special election. See 47 CONG. REC. 238 (Apr. 13, 1911) (statement of Sen. Mann) (arguing that the word “vacancy” should be used in singular form because it could lead to ambiguity in the future, especially since this will be in the Constitution and difficult to change). These debates were not very helpful.

69. *Valenti v. Rockefeller*, 292 F. Supp. 851, 866 (W.D. N.Y. 1969), *aff’d* 393 U.S. 405 (1969) (“[T]he legislative history of the Amendment sheds little light on the interpretation of the vacancy provision.”); *Trinsey v. Pennsylvania*, 941 F.2d 224, 231 (3d Cir. 1991) (“[T]here does not appear to have been any discussion in the floor debates as to how mid-term vacancies should be filled.”).

70. See NATIONAL CONFERENCE OF STATE LEGISLATORS, *supra* note 12, for states’ breakdown concerning the vacancy provision. However, as mentioned, some states have changed their statutes since this compilation, although the states’ breakdown remains just as diverse. See *supra* note 12 and accompanying text. See discussion *infra* Part II.D. for the breakdown and categorizations of states’ statutes. See discussion *infra* Part III.A for a discussion of Illinois’ statute.

C. OVERVIEW OF A SENATE TERM AS DERIVED FROM THE SEVENTEENTH AMENDMENT AND FEDERAL AND STATE STATUTES

It is first helpful to provide an overview of a senate term to facilitate the discussion of *Judge* and senate elections.<sup>71</sup> Senate terms and elections are governed by the U.S. Constitution, federal statutes, and state election codes.<sup>72</sup> The primary change brought about by the Seventeenth Amendment was the shift from state legislators picking senators to the direct election of senators by the people.<sup>73</sup> The first paragraph of the Seventeenth Amendment provides, in pertinent part: “The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof.”<sup>74</sup> Additionally, Senate terms are divided into groups of thirds to allow for staggered elections.<sup>75</sup> The Constitution also provides wide discretion to state legislatures to determine “[t]he Times, Places and Manner” of holding general election but only insofar as Congress has not regulated it.<sup>76</sup> In accordance with this Section, Congress has established that Senate elections

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71. It is important to understand these details; for example, when general elections are required, when senators typically take office, etc. because these rules for the general election have also come to govern special elections in those states that require the special election occur in conjunction with the general election. *See* discussion *infra* Part II.D (providing breakdown of states’ statutes and which states require conducting the special election with the next general election). This was precisely the case in Illinois. *See* discussion *infra* Part III.A (discussing Illinois’ senate vacancy statute).

72. It is a combination of all of these that govern senatorial elections. The broadest rules are laid out in the Constitution, then by federal statutes, and then state statutes.

73. *See* discussion *supra* Part II.B (discussing the changes brought forth by ratification of the Seventeenth Amendment).

74. U.S. CONST. amend. XVII, § 1.

75. U.S. CONST. art. I, § 3, cl. 2 provides:

[Senators] shall be divided as equally as may be into three classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year.

This clause was not amended by the Seventeenth Amendment. Staggered elections were established for senators to insulate their decisions from the public. *See* Vik D. Amar, *The Senate and the Constitution*, 97 YALE L.J. 1111, 1126-27 (1988) [hereinafter Amar, *Senate and the Constitution*] (“Similarly, while the Court historically may appear to be the most continuous body, the Senate is the only institution that cannot—short of amendment—‘turn over’ at one time . . . because of staggered elections.”). This prevented a scenario where the people voted out of office all of the Senators due to unpopular legislation. *Id.*

76. U.S. CONST. art. I, § 4, cl. 1 (“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 Places of choosing Senators.”).

will occur in the first week of November,<sup>77</sup> and the winner will take office on January 3rd.<sup>78</sup> However, these regulations apply only to general elections, not special elections.<sup>79</sup>

Special elections for senate vacancies<sup>80</sup> are governed by the second paragraph of the Seventeenth Amendment and state election codes.<sup>81</sup> The second paragraph of the Seventeenth Amendment provides:

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: [p]rovided, [t]hat 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.<sup>82</sup>

States have adopted widely divergent statutes in light of the language giving states the option of allowing temporary appointments or leaving the seat vacant until a special election is conducted.<sup>83</sup> The most common interpretation, as adopted by thirty-six states including Illinois, would be challenged in *Judge*.<sup>84</sup>

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77. 2 U.S.C. § 7 (1934) (stating that elections are held “[t]he Tuesday next after the 1st Monday in November”).

78. *Id.* The winner takes office “on the 3d day of January next [year] thereafter.” *Id.*

79. *See generally*, 2 U.S.C. § 7 (2010) (mentioning only general elections as being governed by federal statutes). In contrast, states have the authority to conduct special elections as they see fit. *See infra* notes 82-83 and accompanying text (providing language of second paragraph of Seventeenth Amendment, which provides authority to states to “direct” special elections).

80. A vacancy occurs when there is “a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected.” 2 U.S.C. § 8 (2010).

81. U.S. CONST. amend. XVII, § 2.

82. *Id.*

83. This is clear from the language of the Seventeenth Amendment which states: “Provided, That the legislature of any State *may* empower the executive thereof to make temporary appointments.” U.S. CONST. amend. XVII (emphasis added). *See also* NEALE, *supra* note 2, at 1 (“The 17th Amendment . . . gave states the option of filling Senate vacancies by election or by temporary gubernatorial appointment.”); Eric Zom, *How Other States Fill Senate Vacancies*, CHI. TRIB. (Dec. 3, 2008, 4:03 PM), [http://blogs.chicagotribune.com/news\\_columnists\\_ozorn/2008/12/how-other-states-fill-senate-vacancies.html](http://blogs.chicagotribune.com/news_columnists_ozorn/2008/12/how-other-states-fill-senate-vacancies.html).

84. *See infra* Part III.C for a discussion of *Judge v. Quinn*.



## D. BREAKDOWN OF STATES' SPECIAL ELECTION STATUTES

All fifty states have passed senate vacancy provisions.<sup>85</sup> Five states—the “special elections only” states—bypass temporary appointments and leave the seat vacant until a special election is held within a certain number of days after the vacancy.<sup>86</sup> The remaining forty-five states allow temporary appointments to some extent.<sup>87</sup>

Of these forty-five states, seven states—the “short term appointment” states—allow for temporary appointments but require that special election be held shortly after the vacancy is created.<sup>88</sup> Two states—the “hybrid” states—have adopted a system in which the governor must make a temporary appointment and call for a special election where there is more than one year in the term.<sup>89</sup> However, an appointment is permanent where there

85. See NATIONAL CONFERENCE OF STATE LEGISLATORS, *supra* note 12 (providing a breakdown of the states' statutes).

86. These five states are: AK, OK, OR, RI and WI. *Id.* According to this compilation, only four states (OK, OR, RI and WI) are “special election only” states. *Id.* However, a recent referendum in Alaska amended this statute, which requires that the state conduct a special election “forthwith” but leaves out the provision which granted temporary appointment powers to the governor. See NEALE, *supra* note 2, at 8, in which the author states:

[I]n a referendum passed by the voters of Alaska, a law was adopted that took effect the same day as the legislative enactment, calling for a special election between 60 and 90 days after a United States Senate vacancy but without expressly authorizing the governor to make a temporary appointment.

The Alaska Supreme Court has made clear that this is precisely what distinguishes the referendum statute that was passed from the prior statute that it overturned. See *Trust the People v. Alaska*, 113 P.3d 613, 620 (Alaska 2005) (finding that referendum statute was not “substantially the same” as Alaska statute currently in force because it omitted language that allowed governor to make temporary appointments. Therefore, referendum statute was valid when passed).

87. See NATIONAL CONFERENCE OF STATE LEGISLATORS, *supra* note 12 (noting states that do allow appointments can be further broken into three types).

88. *Id.* These seven states are: AL, AR, CT, MA, TX, VT and WA. Vermont and Washington require a special election within 90 days, Alabama requires a special election “forthwith,” Alaska requires a special election between 60 and 90 days, and Massachusetts requires a special election within 145-160 days. *Id.* Massachusetts used to be in the “special election only” category but changed on the request of ailing Senator Ted Kennedy who did not want his state to go unrepresented while the health care debate was proceeding in the Senate. See *Ailing Ted Kennedy Urges Speedy Replacement Process for Senate Seat*, NY DAILY NEWS (Aug. 20, 2009, 11:45 AM), [http://www.nydailynews.com/news/2009/08/20/2009-08-20\\_ailing\\_ted\\_kennedy\\_urgens\\_speedy\\_replacement\\_process.html](http://www.nydailynews.com/news/2009/08/20/2009-08-20_ailing_ted_kennedy_urgens_speedy_replacement_process.html).

89. See NATIONAL CONFERENCE OF STATE LEGISLATORS, *supra* note 12. These two states are: LA and MS. See *id.* When there is more than a year left in the term, they are essentially the same as the “short term appointment” states. See *supra* note 88 and accompanying text.

is less than one year left in the term.<sup>90</sup> The remaining thirty-six states, including Illinois—the “joint election only” states—require that the governor pick a temporary appointment until the next general election, at which point, both the general election and the special election occur in conjunction.<sup>91</sup> Most of these “joint election only” states also do not allow the special election to occur in conjunction with the general election when the vacancy occurs within a certain number of days to a general election; in such an instance, the appointment would remain in office until the *next* general election.<sup>92</sup> It is thus possible for a temporary appointee to stay in office for up to thirty months.<sup>93</sup> Whenever a special election was held in these states, the elected candidate would take office when the next Congressional session started.<sup>94</sup> So in a scenario where the special election would occur si-

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90. See LA. REV. STAT. ANN. §18:1278 (2010) (“If a vacancy occurs in the office of United States senator and the unexpired term is more than one year, an appointment to fill the vacancy shall be temporary.”); MISS. CODE ANN. § 23-15-855 (2010) (“[T]he Governor shall . . . issue his proclamation for an election to be held in the state to elect a Senator to fill such unexpired term as may remain, provided the unexpired term is more than twelve (12) months.”).

91. See NATIONAL CONFERENCE OF STATE LEGISLATORS, *supra* note 12.

92. See, e.g., IDAHO CODE ANN. § 59-910 (West 2007) (requiring the vacancy occur at least thirty days before the general election for the joint election to occur, otherwise, the state must wait until the next general election); GA. CODE ANN. § 21-2-542 (West 2010) (requiring vacancy occur at least forty days before the general election, otherwise, the state must wait until the next general election). Such a cut-off period was reasonable because if the vacancy occurred too close to the general election, it would require that the state take shortcuts to hold the two elections simultaneously, such as bypassing filing periods and primaries, and it could also lead to voter confusion. See discussion *infra* Part II.E for a discussion of *Valenti*.

93. NEALE, *supra* note 2, at 10 (“[A]ppointed Senators from these states ‘could theoretically serve as long as 30 months.’”) (quoting S. COMM. ON THE JUDICIARY, SUBCOMM. ON THE CONST., HOW STATES FILL U.S. SENATE VACANCIES: A SURVEY OF STATE LAWS 3 (Feb. 2009)); *Valenti v. Rockefeller*, 292 F. Supp. 851, 867-68 (W.D. N.Y. 1969), *aff’d* 393 U.S. 405 (1969) (statute allowing up to a 29-month appointment was constitutional). *Valenti* is discussed *infra* Part II.E. Today, the longest vacancy is created by Ohio’s statute. See OHIO REV. CODE ANN. § 3521.02 (West 1995) (“The appointee shall hold office . . . succeeding the next regular state election that occurs more than one hundred eighty days after the vacancy happens.”). Accordingly, the vacancy must occur 180 days before the general election in order for a joint election to occur, otherwise, voters must wait until the next general election. *Id.* This could lead to a vacancy for two years and six months if, for example, the vacancy occurred in May of an even-numbered year. See *id.*

94. Some states explicitly stated that an appointee would last until the next congressional session started on January 3. See, e.g., S.C. CODE ANN. § 7-19-20 (2010) (“Governor may fill the place by appointment which shall be for the period of time intervening between the date of such appointment and January third following the next succeeding general election.”); WYO. STAT. ANN. § 22-18-111 (West 2010) (“[T]emporary successor [will] serve until a successor for the remainder of the unexpired term is elected at the next general election and takes office on the first Monday of the following January.”). Some states explicitly allow an appointment to be permanent where the term was to end the January after the gen-

multaneously with a general election in the year immediately preceding the end of the term, the natural effect of these statutes is to allow the temporary appointee to finish the term.<sup>95</sup> This practice would be challenged under the Seventeenth Amendment in *Judge*.<sup>96</sup>

E. CASE LAW ON THE CONSTITUTIONALITY OF STATES' SENATE VACANCY STATUTES

Only a handful of cases have assessed states' vacancy statutes under a Seventeenth Amendment analysis prior to the Seventh Circuit's decision in

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eral election anyways. *See, e.g.*, CAL. ELEC. CODE § 10720 (West 2010) ("However, whenever a vacancy occurs within a term fixed by law to expire on the third day of January following the next general election, the person so appointed shall hold office for the remainder of the unexpired term."); S.D. CODIFIED LAWS § 12-11-1 (2010) ("No special election, to fill a vacancy, may be held if the term of office of the appointed senator expires in the month of January immediately following the next general election that would occur after the vacancy."). But even though most statutes did not explicitly state the appointee would serve until the following January, this was the practical effect of the statutes, as exemplified by Illinois' statute. *See, e.g.*, Attorney General Memorandum, *supra* note 9, at \*2 ("Under the current language of section 25-8, U.S. Senator Burris's temporary appointment will conclude in January 2011 following an election in November 2010, the next election of representatives in Congress."). Illinois was not alone in its dilemma; this situation also arose in two other states and both states gave similar effect to their statutes. First, in Florida, Governor Charlie Crist appointed his Chief of Staff, George LeMieux, to serve out the end of Senator Mel Martinez's seat. Brendan Farrington, *George LeMieux Picked by Crist to Replace Sen. Mel Martinez*, HUFFINGTON POST (Aug. 28, 2009, 6:57 PM), [http://www.huffingtonpost.com/2009/08/28/george-lemieux-picked-by-n\\_271274.html](http://www.huffingtonpost.com/2009/08/28/george-lemieux-picked-by-n_271274.html). Senator LeMieux will serve out the remainder of the term and Marco Rubio, the winner of the Senate race, will be sworn in on January 3, 2011. *Id.* Second, in Colorado, Governor Bill Ritter appointed Michael Bennet to serve out the remainder of Ken Salazar's Senate seat (Salazar had resigned to become Secretary of Interior under Obama). Steven K. Paulson, *Michael Bennett Appointed Colorado Senator, Will Replace Ken Salazar*, HUFFINGTON POST (Jan. 3, 2009, 8:59 PM), [http://www.huffingtonpost.com/2009/01/03/michael-bennet-appointed-n\\_155009.html](http://www.huffingtonpost.com/2009/01/03/michael-bennet-appointed-n_155009.html). Here too, no special election was held and Bennet served out the remainder of the term. *Id.* In essence, the only difference between Illinois, Florida, and Colorado, is that this practice was challenged in Illinois but was not challenged in Florida or Colorado. This scenario is not uncommon; it occurred two more times in recent history. New Jersey appointed Robert Menendez in January, 2006, and he was appointed to a full six year term ten months later. *See* Laura Pedrick, *Robert Menendez*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/people/m/robert\\_menendez/index.html](http://topics.nytimes.com/top/reference/timestopics/people/m/robert_menendez/index.html) (last visited Dec. 28, 2010). Finally, Lisa Murkowski was appointed to finish a senate term in Alaska in 2002. *See Lisa Murkowski Biography*, USNEWS, <http://www.usnews.com/congress/murkowski-lisa> (last visited Dec. 28, 2010).

95. The Seventh Circuit, in *Judge*, noted that of the 193 vacancies that have occurred between the ratification of the Seventeenth Amendment to the election of President Obama, twenty-seven of those vacancies were filled by appointees who served the remainder of the senate term in question. *Judge v. Quinn*, 612 F.3d 537, 556 (7th Cir. 2010). A special election never took place in those twenty-seven cases. *Id.*

96. *Id.* at 537.

*Judge*.<sup>97</sup> This case law has been largely favorable to the states.<sup>98</sup>

States have substantial discretion to determine when a special election will be held, even if it allows a temporary appointee to remain in office for up to twenty-nine months.<sup>99</sup> In *Valenti v. Rockefeller*, a three-judge district court panel held that a New York election statute that required that a senate special election occur in conjunction with the next general election was constitutional under the Seventeenth Amendment.<sup>100</sup> The United States Supreme Court summarily affirmed the decision.<sup>101</sup>

The district court reasoned that the vacancy provision of the Seventeenth Amendment grants states reasonable discretion concerning the timing of vacancy elections.<sup>102</sup> New York's decision to wait until the next general election was reasonable because it: (1) maximized voter turnout; (2) made financing a campaign easier since it is more difficult to do in an off-

97. Temporary appointments have generally aroused little controversy. See *supra* note 2 and accompanying text.

98. See NEALE, *supra* note 2 and accompanying text. This section discusses *Valenti* and *Rodriguez*—two Supreme Court cases, and *Lynch* and *Jackson*—two Seventh Circuit cases. All of these are largely favorable to states, except *Jackson*, which requires a special election when a vacancy occurs in the House of Representatives. See *infra* Part II.E (discussion of *Jackson*).

99. *Valenti v. Rockefeller*, 292 F. Supp. 851, 867-68 (W.D. N.Y. 1969), *aff'd* 393 U.S. 405 (1969).

100. *Id.* In *Valenti*, the vacancy was created by the assassination of Robert F. Kennedy on June 6, 1968. *Id.* at 853. New York Election Code provided that special elections must be held in conjunction with the next general election if the vacancy occurs within sixty days of the primary. *Id.* New York's statute could cause up to a twenty-nine month delay before a replacement senator was chosen since the statute required that New York wait until the next general election where the vacancy occurs less than 60 days prior to the primaries. See *id.* New York's statute is similar to the one challenged in Illinois in *Judge v. Quinn*. See discussion *infra*, Part III.A (Illinois requires that special elections occur in conjunction with the next general election).

101. *Valenti v. Rockefeller*, 393 U.S. 405 (1969). A summary affirmance is uncommon in the Supreme Court, albeit not rare. It occurs when the Supreme Court affirms the lower court's decision without issuing an opinion. It adopts the reasoning of the lower court. However, the Supreme Court has opined that a summary affirmance extends no further than the "precise issues" in that case. See *Anderson v. Celebrezze*, 460 U.S. 780, 784-85 n.5 (1983) ("[T]he precedential effect of a summary affirmance extends no further than 'the precise issues presented and necessarily decided by those actions.'"). However, lower courts will give more weight to summary affirmances when the Supreme Court discusses portions of those lower court opinions in subsequent opinions. See discussion *infra* Part III.B (stating that *Valenti* was not merely "an aside" unrelated to *Rodriguez*, but played a meaningful part in the Court's analysis in *Rodriguez*).

102. *Valenti*, 292 F. Supp. at 866. Under a "natural reading" of the Seventeenth Amendment, states can control both the timing of the special election and procedures to be used in selecting candidates. *Id.* at 856. This is apparent from the language of the Seventeenth Amendment which allows states to "direct" the logistics of a special election. U.S. CONST. amend. XVII § 2 (a temporary appointment may stay in office until an election is held "as the legislature may direct").

year; and (3) served the states' interests because the inconvenience that would result to the state outweighed any benefit the people would get in getting to vote earlier.<sup>103</sup> But the court clarified that a statute would be problematic if it allowed for the Governor's appointee to serve out the remainder of the term "regardless of its length."<sup>104</sup>

There were also substantial differences between the Senate and the House of Representatives that justified reading the vacancy provisions of the two Houses differently.<sup>105</sup> Most notably, the vacancy provision applicable to the House of Representatives does not authorize temporary appointments.<sup>106</sup> In contrast, when a vacancy occurred in the Senate, a state was still represented by the other senator as well as a temporary appointee.<sup>107</sup>

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103. *Valenti*, 292 F. Supp. at 859. The court also provided other reasons. First, New York required that primaries be held even for a special election. *Id.* This was a decision made by the New York Legislature in light of New York's unique voting history. *Id.* Prior to 1967, New York did not have primaries; instead, a resident voted for delegates to their party's nominating convention which then nominated the candidate. *Id.* However, there was debate over whether this practice resulted in "boss" dominated conventions. *Id.* Subsequently, the New York Legislature enacted a primary system to provide more choices to the voters. *Id.* Ironically, the district court notes that if it required a prompt election in 1968, the candidates would need to be picked by nomination conventions, and this is the exact scenario New York sought to avoid. *Id.* Consequently, even though the vacancy in this instance occurred before the general election, New York voters would have to wait until the next general election since the primaries had passed already. *Id.* Third, New York's decision to hold primaries in the fall rather than the spring was also reasonable. *Id.* New York Legislators believed voter turnout for primaries would be higher in the spring rather than the fall because it created a larger gap between the two occasions when voters would have to vote. *Id.* In addition, the legislature believed it would be beneficial to have additional time after the nominees had been selected, particularly for candidates campaigning against an incumbent. *Id.* Finally, moving the primary to the spring was practical for the courts. *Id.* Under the previous statute, the New York Court of Appeals had to preside almost until Election Day in order to rule on challenges stemming from the fall primary. *Id.* Moving the primary to the spring prevented this inconvenience. *Id.* The court also opined that it was "highly significant" that many states had interpreted the Seventeenth Amendment to grant such authority. *Id.* at 855-56 ("It is highly significant that most legislatures, as indicated by the Senatorial vacancy statutes of the 50 states, have interpreted the Seventeenth Amendment as granting to the states a discretion . . . sufficiently broad to encompass the terms of New York[s] Election Law." (citation omitted)).

104. *Id.* at 856. This dictum by the Court will play a substantial role in the criticism of *Judge v. Quinn*. See *infra* note 211 and accompanying text.

105. *Id.* at 863. This part of the decision was in response to the Plaintiffs' argument that the vacancy clause of the Seventeenth Amendment should be read analogous to the vacancy provision applicable to the House of Representatives. *Id.* at 863.

106. *Id.* House of Representative seats remain empty until the state can organize an election in that district. *Id.* A special election was thus required without delay when a vacancy occurred in the House of Representatives because a district went without representation in the meantime. *Id.*

107. *Id.* Each state is afforded two senators, so the other elected senator represents the state as well. U.S. CONST. amend. XVII.

States therefore can delay a special election for up to twenty-nine months provided that the state had reasonable interests in doing so.<sup>108</sup>

A special election was scheduled in the aftermath of *Valenti* in conjunction with the next general election, but was never actually conducted; the appointee, Charles Goodell was allowed to finish the term.<sup>109</sup>

An appointee can also finish a term where a state has determined that the impracticalities and costs of a special election outweigh the voters' right to an elected representative.<sup>110</sup> In reaching this conclusion in *Rodriguez v. Popular Democratic Party*, the Supreme Court relied almost exclusively on its prior ruling in *Valenti*.<sup>111</sup> Because the Seventeenth Amendment permitted a state to forgo a special election in favor of an appointment, it followed that a state could do the same in its own legislature.<sup>112</sup> Appointments served

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108. *Valenti*, 292 F. Supp. at 867-68. There was a third argument brought up by the plaintiffs that was not accepted by the court. *Id.* at 863. The plaintiffs argued that the vacancy provision should be analogized to the previous vacancy provision in the Constitution. *Id.* This clause stated 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." U.S. CONST. art. I, § 3, cl. 2, amended by U.S. CONST. amend. XVII. However, even under the previous vacancy provision, temporary appointments had served for more than a year, including a vacancy that lasted for 19 months. *Valenti*, 292 F. Supp. at 864-65. Some legislatures in colonial America also met in alternating years, and because a special session of legislature was not required to fill vacancies, it was possible to have vacancies lasting for two years. *Id.*

109. *Judge v. Quinn*, 612 F.3d 537, 556 (7th Cir. 2010) ("Notably, there was never an election to fill the vacancy that was the subject of *Valenti v. Rockefeller*."); *See also* BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, BIOGRAPHY OF CHARLES ELLSWORTH GOODELL, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=G000282> (last visited Dec. 23, 2010) (noting that Goodell "served from September 10, 1968, to January 3, 1971.").

110. *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 14 (1982). In *Rodriguez*, the plaintiffs alleged that a Puerto Rico statute allowing the fallen incumbent's political party to permanently fill the vacant seat in the State Legislative Assembly was unconstitutional because it denied them the right to vote for their representative. *Id.* at 3. Under the applicable Puerto Rico Electoral Law, a vacancy that occurred with less than 15 months remaining in the term could be filled permanently by the party to which the representative belonged. *Id.* Prior to appeal to the Supreme Court, the Puerto Rico Supreme Court held that such an election scheme was constitutional. *Id.* The fact that the Puerto Rico Supreme Court felt it was constitutional influenced the Supreme Court as well. *Id.* at 10.

111. *Id.* at 11.

112. *Id.* Although the vacancy at issue was a state senate seat, the Supreme Court nonetheless utilized the Seventeenth Amendment, opining that it was the base level of vacancy election rights. *See id.* The Court also conceded that this had some effect on voters' rights. *See id.* However, the effect was "minimal" and did not fall disproportionately on any discernible group of voters. *Id.* at 12. ("In this case we are confronted with no fundamental imperfection in the functioning of democracy. No political party or portion of the state's citizens can claim it is permanently disadvantaged" (quoting *Valenti*, 292 F. Supp. at 867)). However, there are several cases in history where otherwise constitutional schemes are

the state's legitimate interest in ensuring vacancies are filled promptly without the expense and inconvenience of a special election.<sup>113</sup> Therefore, a permanent appointment to the state legislature was constitutional under a Seventeenth Amendment analysis.<sup>114</sup>

Moreover, the Seventh Circuit grants these cutoff dates—the date from which permanent appointments will be allowed—considerable discretion, and a permanent appointment is permissible even for a period lasting twenty-five months.<sup>115</sup> In *Lynch v. Illinois State Board of Elections*, the Seventh Circuit adopted the vacancy clause of the Seventeenth Amendment as the base level of vacancy election rights.<sup>116</sup> Relying on *Valenti* and *Rodriguez*, the Seventh Circuit held that vacancies could be filled by appointment, even if the appointee would remain for a period of twenty-five months, lasting the duration of the term.<sup>117</sup> The court found numerous benefits to allowing permanent appointments, such as: lessening voter confusion, increasing voter participation, reducing election costs and providing

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deemed unconstitutional simply because the burden falls on a specific group of citizens. *See Bullock v. Carter*, 405 U.S. 134, 149 (1972) (finding that a filing fee to get one's name on ballot of primary without reasonable alternatives is unconstitutional).

113. *Rodriguez*, 457 U.S. at 12. Moreover, the Court stated in dicta that the process of appointment by the fallen incumbent's political party could be seen as more democratic than appointment by a Governor. *Id.* Here, the permanent appointment was made by the political party rather than the Governor. *Id.*

114. *Id.* at 14.

115. *Lynch v. Ill. State Bd. of Elections*, 682 F.2d 93, 94-95 (7th Cir. 1982). In *Lynch*, voters in Chicago challenged the Mayor's ability to permanently appoint an alderman in their district if the vacancy arose with less than twenty-eight months left in the term. *Id.* at 95. The district court had agreed and ordered that a special election be held. *Id.* On appeal, the Seventh Circuit noted that the district court likely reached this conclusion because it applied strict scrutiny analysis. *Id.* Specifically, it shifted the burden on the defendants to show that state or municipal interests in postponing an election outweighed the right to vote for the residents of Chicago. *Id.* at 95 n.1. In addition, the district court also questioned the validity of the underlying state and municipal interests. *Id.* However, the Seventh Circuit seems to have applied a rational basis test and gives substantial weight to the state's interests. *See id.* at 95-97. Although the vacancy was for one of Chicago's aldermen, the Seventh Circuit nonetheless applied a Seventeenth Amendment analysis. *See id.* For additional information on Illinois' aldermanic system, *see City Council, Your Ward and Alderman*, CITY OF CHICAGO, <http://www.cityofchicago.org/city/en/about/council.html> (last visited Jan. 27, 2012). Chicago has fifty aldermen who represent certain geographic regions of the city. *Id.* Aldermen play a substantial role in local community development. *See id.*

116. *Lynch*, 682 F.2d at 96 (“Plaintiffs attempt to distinguish *Valenti* as being based on the Seventeenth Amendment. The [c]ourt in *Rodriguez*, however, expressly adopted the rationale in *Valenti*.”).

117. *Id.* at 96-97. The relevant statute stated, in pertinent part: “[W]henver a vacancy occurs in any elective municipal office, with at least [twenty-eight] months remaining in a four-year term . . . the office shall be filled for the remainder of the term at that general municipal election.” *Id.* at 94 (quoting 1980 Ill. Laws, P.A. 80-1469, § 4; 1981 Illinois Laws, P.A. 81-1490, § 2). The presumption from that statute is that if less than twenty-eight months remain in the term, no special election is needed. *See id.*

uniformity in the conduct and administration of elections.<sup>118</sup> The court felt that cut-off periods were also reasonable because states have an interest in ensuring governmental processes are not disrupted by vacancies.<sup>119</sup> A twenty-five month cut-off was reasonable in this instance because Illinois had also established this cut-off period for other public offices.<sup>120</sup> This decision constituted a “considered legislative judgment” as to the amount of time remaining in a term that would justify holding a special election.<sup>121</sup> Accordingly, Illinois’ statute fell within the “wide latitude” afforded to states in regards to vacancies under the Seventeenth Amendment.<sup>122</sup> Therefore, a twenty-five month appointment lasting the duration of a term does not violate the Seventeenth Amendment.<sup>123</sup>

However, where a vacancy occurs in the House of Representatives, a state must hold a special election, provided there is ample time to conduct a special election, even if only two months would remain in the term thereafter.<sup>124</sup> The Seventh Circuit noted in *Jackson v. Ogilvie* that even if this special election was held with the next general election on November 3, 1970, it would still leave approximately two months from the verification of the special election results to the end of the term on January 3, 1971. This period would not be considered *de minimis*.<sup>125</sup> But, in light of Illinois’ statute

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118. *Id.* at 97.

119. *Id.*

120. *Id.* The Illinois Legislature adopted the twenty-eight month cut-off for other offices, such as park district trustees, library district trustees, school board and community college board members and township officers. *Id.*

121. *Lynch*, 682 F.2d at 97.

122. *See id.*

123. *Id.*

124. *Jackson v. Ogilvie*, 426 F.2d 1333, 1337 (7th Cir. 1970). In *Jackson*, the plaintiffs sought an election to fill a vacancy that occurred when their district’s representative died in August, 1969. *Id.* at 1334. Illinois statute required at least 162 days to lapse from when the writ of election is filed to when the election could take place. *Id.* at 1333-35. The issue was whether an election was required or whether the period remaining in the term was “*de minimis*.” *Id.* at 1335. In accordance with the statute, the earliest the election could happen was January 23, 1970, which would leave eleven months in the term, or alternatively, if a special election was done in conjunction with the next general election, there would be approximately two months left in the term. *Id.* at 1335, 1337. Illinois argued that the governor had the discretion to forgo a special election when less than a year remained in the term. *Id.* at 1335. The district court found no violation of the plaintiffs’ rights because of the short period of time in which the district would remain unrepresented. *Id.* The district court opinion was handed down on March 16, 1970, and because the state statute required 162 days before an election could be held, the four months that remained after an election occurred was deemed *de minimis* by the court. *Id.* at 1334-35.

125. *Id.* at 1337 (“We are not prepared to say as a matter of law that representation from the time the results of the November 3rd election will be determined to January 3, 1971 is *de minimis*.”); *see also* *Am. Civil Liberties Union of Ohio, Inc. v. Taft*, 385 F.3d 641, 644 (6th Cir. 2004) (concluding that a state could not choose to forgo special election where five months would remain in House of Representative term even though special election would



that requires 162 days before a special election can be held, if the vacancy had occurred with 162 days or less left in the term, then it may excuse the governor's duty to call for an election.<sup>126</sup> This period of time could "truly be deemed *de minimis*."<sup>127</sup> States therefore had to conduct a special election in most instances when a vacancy occurred in the House of Representatives.<sup>128</sup>

F. EFFORTS IN CONGRESS TO REQUIRE A SPECIAL ELECTION FOR SENATE VACANCIES HAVE LOST MOMENTUM

In the aftermath of the 2008 election, both the House of Representatives and the Senate attempted to prevent temporary appointments in the Senate.<sup>129</sup> In the House of Representatives, a bill was proposed that would require that all special elections occur within ninety days of when a vacancy is created in the Senate.<sup>130</sup> States would still have the discretion to provide temporary appointments in the meantime, but would be constrained in regards to the timing of the special election.<sup>131</sup> This bill was referred to the

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be costly and the redistricting, that was already going to take effect for the general elections in 2002, would be difficult); *Fox v. Paterson*, 715 F. Supp. 2d 431, 442 (W.D. N.Y. 2010) (concluding that a writ must be issued to fill a House of Representative seat in New York, but state has discretion to hold a special election along with next general election, even though it would leave only two months in term).

126. *Jackson*, 426 F.2d at 1336.

127. *Id.*

128. *See id.* at 1337.

129. *See infra* notes 130-132 and accompanying text for the legislative bill that was proposed in the House of Representatives. *See infra* notes 133-137 and accompanying text for the constitutional amendment proposed in the Senate. Both of these proposals were made in 2009, after the presidential election of 2008, which directly or indirectly resulted in the largest number of Senate vacancies in Senate history. *See supra* note 3 and accompanying text.

130. Ethical and Legal Elections for Congressional Transitions Act, H.R. 899, 111th Cong. (2009), available at <http://www.govtrack.us/congress/billtext.xpd?bill=h111-899> (last visited Dec. 27, 2010). This bill was proposed by Representative Aaron Schock on February 4, 2009. *Id.*

131. *Id.* § 2(a)(2). States would be given some leeway where the vacancy occurred close to a general election or if the vacancy occurred between the general election and the commencement of the new congressional session. *Id.* § 2(b)(1), (2). As compensation, states would be reimbursed for up to 50% of the expenses of conducting the special election. *Id.* § 297(c). However, as the bill currently stands, an argument could be made that such a bill would also be unconstitutional for infringing on states' rights to conduct special elections. While art. I, § 4, cl. 1 of the Constitution allows Congress to supersede states in regulating the "[t]imes, [p]laces and [m]anner" of elections, this clause only refers to general elections. *See id.* § 2(b); U.S. Const. art. 1, § 4, cl. 9. In contrast, states' powers to regulate special elections are derived from the Seventeenth Amendment. *See supra* note 82 and accompanying text (providing language of Seventeenth Amendment and that the special election occurs "as the legislature may direct"); *see also* discussion *supra* Part II.E (explaining that the Supreme Court has stated in *Valenti* and *Rodriguez* that states are afforded discretion in regards

House Committee on House Administration, but no further action has been taken, and the Bill seems to have lost momentum since then.<sup>132</sup>

In the Senate, Senator Russell Feingold and Senator David Dreier introduced Senate Bill S.J. Res. 7<sup>133</sup> and S.J. Res. 21,<sup>134</sup> respectively, which would amend the constitution to require that “[n]o person shall be a Senator from a State unless such person has been elected by the people thereof.”<sup>135</sup> This proposal was met favorably in a joint hearing before a Senate and House of Representatives Subcommittee.<sup>136</sup> However, when it progressed to

to senate vacancies). In the second paragraph of the Seventeenth Amendment, the second proviso, “as the legislation may direct,” qualifies the word “election” even in its narrowest interpretation (i.e. the interpretation adopted by *Judge*). U.S. Const. amend XVII. *See also* discussion *infra* Part III.C (discussing how *Judge* interprets the Seventeenth Amendment). Accordingly, states have the authority to control aspects of the special election, and this Bill would clearly remove that power from the states.

132. *See* LIBRARY OF CONGRESS, <http://thomas.loc.gov/> (go to “Try the Advanced Search” to find the 111th Congress; then enter name “Ethical and Legal Elections for Congressional Transitions Act” into the search box). There is also little coverage on this Act thus far. *H.R. 899 Ethical and Legal Elections for Congressional Transitions Act*, OPEN CONGRESS, <http://www.opencongress.org/bill/111-h899/show> (last visited Dec. 27, 2010) (“no news coverage found for this bill at this time. This means that this this [sic] bill has not yet been mentioned on a publicly-searchable news website by either its official number . . . or title.”). The Committee on House Administration is the committee charged with the oversight of federal elections and considers proposals to amend federal election law. *See About, COMM. ON HOUSE ADMIN.*, <http://cha.house.gov/about> (last visited Dec. 27, 2010) for additional information about the House Committee.

133. *See S.J.Res.7 – A Joint Resolution Proposing an Amendment to the Constitution of the United States Relative to the Election of Senators*, OPEN CONGRESS, <http://www.opencongress.org/bill/111-sj7/show> (last visited Dec. 27, 2010) for the latest discussion on the legislation.

134. *See H.J.Res.21 - Proposing an Amendment to the Constitution of the United States Relative to the Election of Senators*, OPEN CONGRESS, <http://www.opencongress.org/bill/111-hj21/show> (last visited Dec. 27, 2010) for the latest discussion on the legislation.

135. *See* LIBRARY OF CONGRESS, THOMAS HOME, *S.J.RES.7 – Proposing an Amendment to the Constitution of the United States Relative to the Election of Senators*, <http://thomas.loc.gov/cgi-bin/query/z?c111:S.J.RES.7>: (last visited Dec. 27, 2010); *see also* NEALE, *supra* note 2, at 14.

136. NEALE, *supra* note 2, at 14-15. This joint session of the two subcommittees was held on Jan. 29, 2009, after the 2008 presidential election. Ben Pershing, *Should All Senators be Elected?*, WASH. POST (Mar. 11, 2009), [http://voices.washingtonpost.com/capitol-briefing/2009/03/should\\_all\\_senators\\_be\\_elected.html](http://voices.washingtonpost.com/capitol-briefing/2009/03/should_all_senators_be_elected.html). The full subcommittee report can be obtained online. *See S.J. Res. 7 and H.J. Res. 21: A Constitutional Amendment Concerning Senate Vacancies: Hearings Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary and the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 14 (2009), available at [http://judiciary.house.gov/hearings/printers/111th/111-34\\_54105.PDF](http://judiciary.house.gov/hearings/printers/111th/111-34_54105.PDF) ) [hereinafter *Joint Hearing Report*]. The Bill was covered when it was voted on favorably by the Senate Judiciary Subcommittee on the Constitution. *See* Edwin Mora, *Senate Panel Okays Ban on Gubernatorial Appointments to Vacant Senate Seats*, CNSNEWS (Aug. 20, 2009),

the entire Committee on the Judiciary in September, 2009, it was not supported by a majority and also seems to have lost momentum since then.<sup>137</sup>

### III. DISCUSSION

Under established Supreme Court and Seventh Circuit precedent, states have substantial discretion to conduct special elections and even to delay the election for twenty-nine months, provided only that the state has reasonable interests for doing so.<sup>138</sup> Temporary appointees can even finish a term where a state has determined that the impracticalities and costs of a special election outweigh voters' right to an elected representative.<sup>139</sup> The only exception is when a vacancy occurs in the House of Representatives; in that instance, a special election is required because a district would be unrepresented otherwise.<sup>140</sup> This remains the law despite recent attempts in Congress to otherwise limit the states' right to make appointments in the case of Senate vacancies.<sup>141</sup>

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<http://www.cnsnews.com/node/52837>. This Bill thus made it through the "mark-up" session and then proceeded to the entire Committee. *See Bill Summary and Status: S.J. Res. 7, LIBRARY OF CONGRESS*, <http://thomas.loc.gov/cgi-bin/bdquery/D?d111:7:./list/bss/d111SJ.lst:@@D&summ2=m&> (last visited Dec. 27, 2010); *see also* Josh Tauberer *What Does "Ordered to be Reported with an Amendment in the Nature of a Substitute Favorably" Mean?*, GOVTRACK BLOG, <http://www.govtrack.us/blog/2008/09/18/what-does-ordered-to-be-reported-with-an-amendment-in-the-nature-of-a-substitute-favorably-mean/> (Sept. 18, 2008) (discussing the various stages of a Bill).

137. This bill was met unfavorably by the entire Committee. *See Bill Summary and Status: S.J. Res. 7, LIBRARY OF CONGRESS*, <http://thomas.loc.gov/cgi-bin/bdquery/D?d111:7:./list/bss/d111SJ.lst:@@D&summ2=m&> (last visited Dec. 27, 2010); *see also* Josh Tauberer *What Does "Ordered to be Reported with an Amendment in the Nature of a Substitute Favorably" Mean?*, GOVTRACK BLOG, <http://www.govtrack.us/blog/2008/09/18/what-does-ordered-to-be-reported-with-an-amendment-in-the-nature-of-a-substitute-favorably-mean/> (Sept. 18, 2008) (stating that "favorably reported" means that a majority of the Committee supports it; conversely, if the majority of the committee was opposed to it, "they would report it out unfavorably to put their stamp on it but still not cross ways with leadership."); *see also Joint Hearing Report, supra* note 3, at 2-6 (citing costs to states, not allowing for quick refill in case of terrorist attack, and the rare large number of vacancies occurring in 2008 that will work themselves out in the next few senate cycles as reasons not warranting a constitutional amendment).

138. *See supra* Part II.E (providing synopsis of case law that assesses states' vacancy statutes under Seventeenth Amendment analysis).

139. *See supra* Part II.E (discussing how both *Rodriguez* and *Lynch* allowed permanent appointments).

140. *See supra* Part II.E (explaining how *Jackson* is the primary exception because it does not grant deference where a vacancy occurs in the House of Representatives).

141. *See supra* Part II.F (supplying the efforts by House of Representatives and Senate to limit states' discretion to appoint senators have lost momentum).

However, the Seventh Circuit's decision in *Judge* went against established Supreme Court and Seventh Circuit precedent when it held that a special election must always be held under the Seventeenth Amendment.<sup>142</sup> Part A first provides background information about the case.<sup>143</sup> Part B discusses the district court's opinion, which found that the Seventeenth Amendment did not require a special election in this instance.<sup>144</sup> Part C discusses the Seventh Circuit's decision that closely analyzed the language of the Seventeenth Amendment to find that a special election was required but affirmed the district court on other grounds.<sup>145</sup> Part D discusses the Seventh Circuit's amended opinion that explicitly required that Illinois conduct a special election.<sup>146</sup> Finally, Part E discusses the district court's injunctive order that established the procedures to be used in conducting the special election and the expedited verification schedule.<sup>147</sup>

#### A. BACKGROUND TO *JUDGE V. QUINN*

Illinois is one of thirty-six states that allow the governor to pick a temporary appointment until the next general election.<sup>148</sup> Section 5/25-8 of the Illinois' Election Code requires that a special election occur in conjunction with the next general election and that the winner take office once the election is verified.<sup>149</sup> Like most of the other "joint election only" states, Illinois

142. See *infra* Part III.C & III.D (discussing the Seventh Circuit's original decision in *Judge v. Quinn* which held that the language of the Seventeenth Amendment requires a special election and the subsequent amended opinion which explicitly required that Illinois conduct a special election in this instance).

143. See *infra* Part III.A (providing factual background as to how the senate vacancy was created in Illinois in 2008 as well as the Illinois statute that governs senate vacancies).

144. See *infra* Part III.B (discussing the district court's opinion in which the court utilized language in *Valenti, Rodriguez, and Lynch* to find that a special election was not always required).

145. See *infra* Part III.C (discussing the Seventh Circuit's original opinion which concluded that the language of the Seventeenth Amendment required that special elections be conducted to fill senate vacancies but nonetheless denying plaintiffs' relief on other grounds).

146. See *infra* Part III.D (discussing the Seventh Circuit's one-page amended opinion, which explicitly required Illinois conduct a special election to fill vacant senate seat).

147. See *infra* Part III.E (discussing district court's subsequent injunctive order which established an expedited election schedule for Illinois to allow the special election to occur in conjunction with next general election and to verify the results to allow the winner to take office before the end of the term).

148. See NATIONAL CONFERENCE OF STATE LEGISLATORS, *supra* note 12 (providing a breakdown of states' senate vacancy statutes).

149. 10 ILL. COMP. STAT. 5/25-8 (2010). Illinois' Election Code provides:

When a vacancy shall occur in the office of United States Senator from this state, the Governor shall make temporary appointment to fill such vacancy until the next election of representatives in Congress, at which time such vacancy shall be filled by election, and the senator so elected

also allows an appointee to finish the term when the vacancy occurs in the last one-third of the senate term.<sup>150</sup> This is precisely what happened when Barack Obama resigned from his Senate seat to become President on November 16, 2008,<sup>151</sup> leaving two years and forty-eight days left in the senate term.<sup>152</sup> The general election held the week of his resignation was in his fourth year in office.<sup>153</sup> The next general election would be at the end of Obama's term.<sup>154</sup> In accordance with its Election Code, Illinois had no plan of holding a special election, and the appointee, Roland Burris, was therefore allowed to serve out the remainder of the term.<sup>155</sup>

#### B. PROCEDURAL HISTORY

The Plaintiffs, Gerald Judge and David Kindler, were voters who sought an injunctive order requiring Illinois to hold an election to select the replacement senator.<sup>156</sup> They brought suit in the Northern District Court of Illinois contending that the Illinois Election Code violated the Seventeenth Amendment because there would be no special election to fill Obama's seat.<sup>157</sup> To determine if injunctive relief is appropriate, courts assess the harm that will occur if relief was denied and the likelihood of success on the merits.<sup>158</sup> The district court held that the plaintiffs had a low chance of

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shall take office as soon thereafter as he shall receive his certificate of election.

*Id.*

150. Attorney General Memorandum, *supra* note 9, at \*2.

151. Judge v. Quinn, 612 F.3d 537, 541 (7th Cir. 2010); Mason, *supra* note 4 (providing details of Obama's resignation).

152. Judge, 612 F.3d at 541; Mason, *supra* note 4 (providing details of Obama's resignation).

153. Barack Obama started his term in January, 2005, and therefore, his term would end in January, 2011.

154. The vacancy occurred after the November 2008 elections. See Lynn Sweet, *Obama Resigning Senate Seat As of Sunday*, CHI. SUN-TIMES (Nov. 13, 2008, 1:36 PM), [http://blogs.suntimes.com/sweet/2008/11/obama\\_resigning\\_senate\\_seat\\_as.html](http://blogs.suntimes.com/sweet/2008/11/obama_resigning_senate_seat_as.html). Therefore, under Illinois law, the special election would occur in conjunction with the next general election, which was in November 2010. See Kevin Lee, *Judge: Special Election Needed to Replace Burris*, ILL. STATEHOUSE NEWS (June 17, 2010), <http://illinois.statehousenewsonline.com/3303/judge-special-election-needed-to-replace-burris/>. However, this is also the election in which a new senator would be chosen for Obama's seat. *Id.*

155. Judge, 612 F.3d at 544 ("The State of Illinois appears to agree that this will be the practical effect of the state's system.").

156. Judge v. Quinn, 623 F. Supp. 2d 933, 933 (N.D. Ill. 2009), *aff'd*, 612 F.3d 537 (7th Cir. 2010).

157. *Id.* at 953.

158. Judge, 612 F.3d at 546. To a large extent, whether or not to grant preliminary injunction is a public inquiry because harm to the public can be a significant factor in determining if injunctive relief is proper. See *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S.

success on the merits because states had substantial discretion in regards to special elections in light of *Valenti* and *Rodriguez*.<sup>159</sup> Moreover, because the statute at issue in *Valenti* allowed for a delay of twenty-nine months, the district court held that a twenty-five months delay in this case was constitutional under Illinois' statute.<sup>160</sup> Therefore, the district court denied the plaintiffs' request for injunctive relief.<sup>161</sup> This case was then appealed to the Seventh Circuit.<sup>162</sup>

C. *JUDGE V. QUINN*

The Seventh Circuit held that states do not have the discretion to bypass a senate special election even if only two months would remain in the term after the election.<sup>163</sup> While the Seventh Circuit disagreed with the district court's analysis of the likelihood of success on the merits, it nonetheless denied injunctive relief because the plaintiffs could not show that they had been harmed yet because Illinois still had time to conduct a special election.<sup>164</sup>

In determining the likelihood of success on the merits, the Seventh Circuit first separated the vacancy clause of the Seventeenth Amendment into four parts—the first two parts being the principle clauses, and the last two being the proviso clauses.<sup>165</sup>

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7, 15 (2008) (involving environmental organizations' preliminary injunction that was denied in a case where although harm to marine mammals was possible if Navy used mid-frequency sonars in the sea, the public's interest in Navy research and providing realistic training to Navy sailors).

159. *Judge*, 623 F. Supp. 2d at 940 (“The analogy in *Rodriguez* to *Valenti* and the Seventeenth Amendment was not an ‘aside unrelated to the subject matter of the case’ . . . it played a meaningful role in the Court’s reasoning.” (citation omitted)).

160. *Id.* The district court did not even attempt to enumerate on the state's interests. Instead, it said the plaintiffs' claim was foreclosed under *Valenti* since it created a shorter delay than twenty-nine months, which was permitted in *Valenti*. *Id.*

161. *Id.*

162. *Judge*, 612 F.3d at 537.

163. *Id.* at 554-55.

164. *Id.* at 557. Here, the Seventh Circuit concluded that the plaintiffs had a strong likelihood of success on the merits. *Id.* However, the plaintiffs could not show harm. *Id.* The plaintiffs floundered on what relief they sought. *Id.* The plaintiffs abandoned their position that the election should be as soon as practical, and instead argued only that Governor Quinn issue a writ of election that fixes a particular date for the election to fill the vacancy. *Id.* Therefore, the Seventh Circuit noted that no harm had occurred yet. *Id.* There was still time for Governor Quinn to issue a writ of election setting the date of the general election as the date for the special election as well. *Id.*

165. *Id.* at 546. No previous court had ever attempted to break down the Seventeenth Amendment into its four components, and therefore, to some extent, this was a novel determination being undertaken by the Seventh Circuit. *See id.* However, other cases have discussed principal and proviso clauses, generally. *Alaska v. United States*, 545 U.S. 75, 108 (2005) (discussing that the purpose of a proviso is to state a “general, independent rule”);

[1] When vacancies happen in the representation of any State in the Senate, [2] the executive authority of such State shall issue writs of election to fill such vacancies: *Provided* [3] That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election [4] as the legislature may direct.<sup>166</sup>

The court then proceeded to determine the Seventeenth Amendment's vacancy requirements.<sup>167</sup> The first principal clause required that a vacancy occur.<sup>168</sup> Here, a vacancy occurred when Obama resigned.<sup>169</sup> The second principal clause<sup>170</sup> delegated responsibility as to who must do what when a vacancy occurs.<sup>171</sup> The Seventeenth Amendment required that the state executive address the vacancy provision by issuing a writ of election.<sup>172</sup> The word "shall" was interpreted as mandatory language; accordingly, the governor has to issue a writ of election when the vacancy occurs.<sup>173</sup> In reaching this interpretation, the court emphasized the words of Senator Bristow, the drafter of the Seventeenth Amendment.<sup>174</sup> Senator Bristow used similar language in the Seventeenth Amendment as in Article 1, § 2, clause 3 of the Constitution—the clause that governed vacancies for the

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United States v. Morrow, 266 U.S. 531, 534 (1925) (discussing the purpose of proviso clauses).

166. *Judge*, 612 F.3d at 551 (quoting U.S. CONST. amend. XVII). The Seventh Circuit proceeded in its analysis with the understanding that the purpose is to give meaning to all words such that it will "carry into effect the whole purpose of the law." *Id.* (quoting *Am. Airlines, Inc. v. Civil Aeronautics Bd.*, 178 F.2d 903, 906-07 (7th Cir. 1949) (quoting *White v. United States*, 191 U.S. 545, 551 (1903))).

167. *Id.* Most notably, the Seventh Circuit does not place as much emphasis on *Valenti* as the district court did. *Id.* The Seventh Circuit stated that *Valenti* was only summarily affirmed by the Supreme Court. *Id.* at 549; *see also* *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 ("[T]he precedential effect of a summary affirmance extends no further than 'the precise issues presented and necessarily decided by those actions.'" (quoting, e.g., *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979))).

168. The first principal clause states: "When vacancies happen in the representation of any State in the Senate." *Judge*, 612 F.3d at 546 (quoting U.S. CONST. amend. XVII).

169. *Id.*

170. The second principal clause states: "[T]he executive authority of such State shall issue writs of election to fill such vacancies: *Provided*." *Id.* (quoting U.S. CONST. amend. XVII).

171. *Id.*

172. *Id.*

173. *Judge*, 612 F.3d at 546.

174. *Id.* ("The drafting history of the Seventeenth Amendment reveals that this was no accident. Senator Joseph Bristow, who proposed the language that was approved by the 62nd Congress . . . identified this similarity when he explained his proposed amendment to the Senate.").

House of Representatives.<sup>175</sup> The Seventh Circuit, therefore, read the second principal clause accordingly.<sup>176</sup>

The court then analyzed the proviso clauses to determine how they affected the principal clauses.<sup>177</sup> The purpose of the first proviso clause<sup>178</sup> was to maintain a state's representation in the Senate.<sup>179</sup> However, the appointment was only until the people could elect a permanent replacement.<sup>180</sup> The court then addressed the second proviso clause,<sup>181</sup> framing the issue as whether it modified the entire second paragraph of the Seventeenth Amendment or just the immediate antecedent of that final phrase—the word “election.”<sup>182</sup> The court decided that this proviso was best read as a modification of the directly preceding term “election.”<sup>183</sup> Accordingly, the legislature can prescribe the “Times, Places and Manner” of special elections, and also decide to bypass temporary appointments, opting instead to leave the seat vacant until the special election.<sup>184</sup> However, the state could not prevent a special election from occurring.<sup>185</sup> The court concluded that the command set out in the second principal clause—that the governor must issue a writ of election—could not be controlled by the legislature.<sup>186</sup> Therefore, the court held that a special election was always required to fill a

175. *Id.*; see also 47 CONG. REC. 1482-83 (May 23, 1911) (statement of Sen. Bristow) (opining that this vacancy clause utilized similar language to the House of Representatives vacancy clause and that a writ of election was necessary). See *supra* Part II.B for a full discussion of the congressional debate and ratification of the Seventeenth Amendment. When a vacancy occurs in the House of Representatives, the seat remains vacant until a special election is held. See U.S. CONST. art. I, § 2, cl. 1.

176. *Judge*, 612 F.3d at 546. (“Both [the clause governing vacancies in the House of Representatives] and . . . the Seventeenth Amendment . . . command the responsible state official to call an election in which the people can select a replacement.”).

177. *Id.* at 547-48.

178. The first proviso clause states: “That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election.” *Id.* at 546 (quoting U.S. CONST. amend. XVII).

179. *Id.* at 548.

180. *Id.*

181. The second proviso clause states: “as the legislature may direct.” *Judge*, 612 F.3d at 546 (quoting U.S. CONST. amend. XVII).

182. *Id.* at 549.

183. *Id.* at 550.

184. *Id.*

185. *Id.*

186. *Judge*, 612 F.3d at 553 (“The plaintiffs are correct that neither the proviso of the Seventeenth Amendment nor the Elections Clause overrides the duty of the state’s executive to issue a writ of election when a vacancy occurs.”). The Seventh Circuit also takes an extensive look at the purpose and usage of writs of election in history, dating back to King James II of France in the fifteenth century. *Id.* at 552.



senate vacancy, regardless of how much time would remain in the term after the special election.<sup>187</sup>

#### D. THE SEVENTH CIRCUIT'S AMENDED OPINION

Shortly after the Seventh Circuit handed down its decision, Governor Quinn filed a motion to amend opinion or for a rehearing *en banc*.<sup>188</sup> All of the judges on the original panel voted to deny rehearing and no judge in service requested a hearing.<sup>189</sup> However, the court did amend its opinion; it emphasized that the wording of the Seventeenth Amendment required that Illinois conduct a special election to elect a senator for the remainder of Obama's senate term.<sup>190</sup> Furthermore, the district court could strike down any state statute that otherwise prevented the special election from occurring.<sup>191</sup> Finally, the results from the special election should be certified as soon as possible so that the replacement senator could take office promptly to fill the remaining time in Obama's term.<sup>192</sup> The Senator elected to begin the six-year term would take office on January 3, 2011, when the 112th Congressional session begins.<sup>193</sup>

#### E. THE DISTRICT COURT'S INJUNCTIVE ORDER

Pursuant to the Seventh Circuit's amended opinion, the district court was charged with determining the appropriate injunctive relief.<sup>194</sup> This in-

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187. *Id.* at 555 ("So understood, the second paragraph of the Seventeenth Amendment establishes a rule for all circumstances: it imposes a duty on state executives to make sure that an election fills each vacancy; it obliges state legislatures to promulgate rules for vacancy elections; and it allows for temporary appointments until an election occurs.").

188. *Judge v. Quinn*, No. 09-229, 2010 WL 2853645 (7th Cir. 2010) (amended opinion).

189. *Id.*

190. *Id.*

191. *Id.* This amended opinion was very brief and provided no additional rationale as to why a special election was required under the Seventeenth Amendment. *Id.* It only clarified for the district court that it had to establish an expedited schedule for Illinois to conduct and verify the results of the special election. *Id.* It had not stated this explicitly in the original opinion but had denied the Plaintiffs' relief for failure to show harm. *Judge*, 612 F.3d 557. It is also worth noting that Illinois' statute was not struck down, but the Seventh Circuit held that the manner in which the State was interpreting the statute was unconstitutional since it bypassed the requirement for a special election. *Id.*

192. *Judge*, No. 09-229, 2010 WL 2853645 (amended opinion).

193. *Id.*

194. *Judge v. Quinn*, No. 09 C 1231, slip op. at 1 (N.D. Ill. Aug 2, 2010) (order granting permanent injunction). By this time, Governor Quinn had issued a writ of election to fill the vacancy at the next general election. *Id.* slip op. at 2. Since the Seventh Circuit's amended opinion, hearings were held on June 23, June 30, July 21, July 26, and July 29, 2010 to determine how the special election should occur. *Id.* slip op. at 3.

junctive order established the procedures to be used for the special election with an awareness of the time left before the election and knowledge that the results needed to be verified expeditiously to comply with the Seventeenth Amendment.<sup>195</sup> The district court first mandated that only the candidates running for the six-year term be eligible for the special election.<sup>196</sup> The court then provided an expedited schedule to determine the winner.<sup>197</sup> The state's election authorities had until Friday, Nov. 19, 2010 to count the votes.<sup>198</sup> It then had to transmit these results to the Illinois State Board of Elections ("ISBE"), which had five calendar days from the date of receipt of the tallies to verify the results and proclaim a winner.<sup>199</sup>

#### IV. ANALYSIS

*Judge* requires that a special election be held even where it would leave only two months in a senate term.<sup>200</sup> However, *Judge* goes against established Supreme Court and Seventh Circuit precedent as well as the

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195. *Id.* slip op. at 1.

196. *Id.* slip op. at 4. Governor Burris would then file an emergency motion to the Supreme Court to resolve this issue because he wanted to run for the two months and complete his term but was precluded by the district court's opinion. *See* Emergency Application for a Stay of Enforcement of the Judgment Below Pending the Filing and Disposition of a Petition for a Writ of Certiorari to the United States District Court for the Northern District of Illinois, *Judge*, 612 F.3d 537 [hereinafter Burris' Emergency Application for Stay of Enforcement] (arguing the district court was not authorized to conduct a closed election which precluded all prospective candidates who were not also running for the six-year term). Justice Breyer denied Burris' Request for a Stay of Enforcement but did provide case citations from which the reasons for denial can be inferred. *See* Lyle Denniston, *Burris Plea Denied*, SCOTUS BLOG (Sept. 19, 2010 5:23 PM), <http://www.scotusblog.com/2010/09/sen-burris-files-petition/> (providing case citations which stand for the proposition that it would be impractical to put Burris on the ballot now, that even if it were possible, that it would disrupt election proceedings, and because the Seventh Circuit should be given additional time to resolve the dispute). Justice Breyer's one-page opinion can also be accessed from this link to SCOTUS BLOG. *Id.*

197. *Judge v. Quinn*, No. 09 C 1231, slip op. at 4 (N.D. Ill. Aug. 2, 2010). There was no rationale provided as to why the district court structured it this way. *Id.* It seems to be as a result of the short amount of time before the election that the district court ordered it this way. *Id.*

198. *Id.*

199. *Id.* However, the court would allow an additional three days for the ISBE to verify the results if they did not receive the votes by November 19th or if errors or inconsistencies were apparent and could not be resolved within five days. *Id.* Burris was allowed to remain in office until the winner of the special election took the oath of office. *Id.* at slip op. at 5.

200. *Judge*, 612 F.3d at 554-55. *See supra* Part III.C (discussing Seventh Circuit's opinion in *Judge*).

legislative history of the Seventeenth Amendment.<sup>201</sup> Part A argues that *Judge* misinterprets the Seventeenth Amendment.<sup>202</sup> Part B argues that *Judge* does not place proper weight on the states' interest in not conducting a special election.<sup>203</sup> Part C argues that *Judge* fails to grant substantial deference to states' cut-off periods.<sup>204</sup> Part D argues that *Judge* is erroneous because it fails to distinguish between the effects of a vacancy in the House of Representatives and the Senate.<sup>205</sup> Finally, Part E argues that *Judge* is inconsistent with the legislative history of the Seventeenth Amendment and how permanent appointments by a governor were not the evil sought to be avoided by the Amendment.<sup>206</sup>

#### A. *JUDGE* MISINTERPRETS THE SEVENTEENTH AMENDMENT

The Seventh Circuit misinterprets the Seventeenth Amendment because it misconstrues the final proviso, "as the legislature may direct," as qualifying only the immediately preceding word "election" as opposed to the entire second paragraph of the Amendment.<sup>207</sup> The Supreme Court read

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201. See *infra* Parts IV.A-F (providing five ways in which *Judge* is inconsistent with established Supreme Court or Seventh Circuit precedent, as well as the legislative history of the Seventeenth Amendment).

202. See *infra* Part IV.A (arguing that the Supreme Court in *Valenti* and *Rodriguez* read the language "as the legislature may direct" as a modification on the entire second paragraph of the Seventeenth Amendment whereas the Seventh Circuit in *Judge* read it as a modification of only the immediately preceding word "election").

203. See *infra* Part IV.B (arguing that while *Valenti*, *Rodriguez*, and *Lynch* placed proper weight to the state's interests in not conducting a special election, the Seventh Circuit does not place any weight on Illinois' interests in *Judge*).

204. See *infra* Part IV.C (arguing that while *Jackson* gave deference to states' statutes in regards to how much time is required to conduct an election, the Seventh Circuit in *Judge* merely sets aside all Illinois statutes that otherwise stand in the way of a special election).

205. See *infra* Part IV.D (arguing that while *Valenti* and *Jackson* read the two vacancy clauses differently in light of the different harms that occur when a vacancy occurs in the Senate as compared to the House of Representatives, *Judge* reads the two clauses analogously).

206. See *infra* Part IV.F (arguing that permanent appointments by a governor were not foreclosed by the legislative history nor the evil sought to be avoided by the Framers of the Seventeenth Amendment).

207. Compare *Valenti v. Rockefeller*, 292 F. Supp. 85, 867-68 (W.D. N.Y. 1969) and *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 14 (1892) and *Lynch v. Ill. State Bd. of Elections*, 682 F.2d 93, 94 (7th Cir. 1982), with *Judge*, 612 F.3d at 554-55. Constitutional Law scholars have also disagreed as to whether the proviso "as the legislature directs" should modify the language in the principal clauses or only the immediately preceding word "election." This debate pertained to Wyoming's statute that required the governor to appoint one of three recommended candidates provided to them by the political party which the fallen incumbent represented. See WYO. STAT. ANN. § 22-18-111 (requiring governor to appoint one of three candidates provided by the fallen incumbent's political party). If the

this language as a modification on the entire second paragraph of the Seventeenth Amendment.<sup>208</sup> Accordingly, under *Valenti*, a state legislature could allow an appointee to serve for an extended period of time, or even conclude that a special election would not be needed if the state's interests outweighed the harm to voters, provided only that those interests were reasonable.<sup>209</sup> New York was allowed to keep their temporary appointee for a period of twenty-nine months because the state had substantial interests at stake.<sup>210</sup> The court clarified that a statute would be problematic only if it allowed for an appointee to serve out the remainder of a senate term "regardless of its length."<sup>211</sup> But states with statutes like Illinois do not always allow an appointee to serve out the remainder of a term.<sup>212</sup> For example, if a vacancy occurs in the first two-thirds of a senate term, Illinois will not allow a permanent appointment.<sup>213</sup> A permanent appointment is only possible when the vacancy occurs in the final one-third of the senate term.<sup>214</sup> *Valenti* therefore envisioned scenarios where appointments would be permanent.<sup>215</sup>

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proviso "as the legislature directs" applied to the entire second paragraph of the Seventeenth Amendment, then states would be allowed to require a governor to appoint from a list of candidates; alternatively, if the proviso only applied to the immediately preceding word "election," then a legislature could not limit the governor's choice but could only control the "Times, Places and Manner" of the special election. Vikram Amar argued that the legislature could only empower the state executive to make an appointment; it could not constrain the governor's power by requiring the governor to pick from a list of candidates. See 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, 729-33 (2008). Sanford Levinson disagreed, arguing that such an interpretation was reasonable and not a frivolous reading of the Seventeenth Amendment. See Sanford Levinson, *Political Party and Senatorial Succession: A Response to Vikram Amar on how Best to Interpret the Seventeenth Amendment*, 35 HASTINGS L.Q. 713, 721 (2008) ("One's ultimate answer might well depend on the degree to which one believes that constitutional drafters are like poets or novelists like Ernest Hemingway in their concern for the placement and grammatical implications of every single word . . . The Constitution is rife with badly or confusingly drafted language.").

208. *Valenti*, 292 F. Supp. at 864.

209. *Id.*

210. *Id.* at 867-68.

211. *Id.* at 856.

212. *Id.* Where the vacancy occurs in the first four years (with ample time allowing a state to conduct a special election with the fourth year general election), the special election is held with the next general election. See, e.g., 10 ILL. COMP. STAT. 5/25-8 (2010) (requiring the special election occur with the next general election). It is only after the fourth year general election passes that the statute's practical effect is to allow for permanent appointments. *Id.*

213. *Id.* Illinois statutes, like other states' statutes, require that the special election occur in conjunction with the next general election. *Id.* So, for example, if a vacancy occurs in the first year, a special election would be held with the general election in the second year of the term.

214. *Id.* This is likely a legislative decision by the states that there would not be any significant period of time left in the term to justify holding the special election. See Eric

That the Supreme Court envisioned permanent appointments in certain scenarios is clear from the aftermath of *Valenti* and the subsequent affirmation of *Valenti* in *Rodriguez*.<sup>216</sup> In *Valenti*, while a special election was initially scheduled, it was never actually conducted and the appointee, Charles Goodell, was allowed to finish the term.<sup>217</sup> *Rodriguez* then held that a permanent appointment lasting fifteen months in the state legislature was constitutional under a Seventeenth Amendment analysis.<sup>218</sup> When the *Rodriguez* Court revisited *Valenti* thirteen years later, it is reasonable to assume

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Zorn, *A Special Election to Pick a Lame Duck? The Idea Just Might Fly*, CHI. TRIB. (July 2, 2010), [http://blogs.chicagotribune.com/news\\_columnists\\_ezorn/2010/07/election.html](http://blogs.chicagotribune.com/news_columnists_ezorn/2010/07/election.html). This is clear from Illinois' example since Mark Kirk, the winner of the special election, took office in early December, leaving less than one month in the term. See Brian O'Connor, *Illinois Republican Senator Mark Kirk to be Sworn In Monday*, RED DOG REPORT (Nov. 27, 2010, 9:13 AM), <http://reddogreport.com/2010/11/illinois-republican-senator-mark-kirk-to-be-sworn-in-monday/>. Allowing permanent appointments if a vacancy occurs in the final one-third of a senate term is the interpretation most states have given to their statutes. For example, in the 193 vacancies that have occurred between the ratification of the Seventeenth Amendment and the election of President Obama, twenty-seven of those vacancies were filled by appointees who served the remainder of the senate term in question. *Judge v. Quinn*, 612 F.3d 537, 556 (7th Cir. 2010) (noting that this was the practical effect of these states' statutes when the vacancy occurs and the next general election would be in the year immediately preceding the term's end). States' statutes would be problematic under *Valenti*, if for example, a vacancy occurred in the first one-third of the term, and nonetheless, the states allowed an appointee to serve out the remainder of the term. *Valenti*, 292 F. Supp. at 856. But none of the states have enacted statutes to this effect. Such an interpretation of the Seventeenth Amendment would be unreasonable, as the court opined in *Valenti*. *Id.* ("We would have difficulty, for example, squaring the word 'temporary' with a statute providing that the Governor's appointee is to serve out the remainder of a term regardless of its length.").

215. *Valenti*, 292 F. Supp. at 856.

216. See *supra* text accompanying note 109. In the aftermath of *Valenti*, the appointee, Charles Goodell was allowed to serve out the remainder of the term. *Id.*

217. *Judge*, 612 F.3d at 556 ("Notably, there was never an election to fill the vacancy that was the subject of *Valenti v. Rockefeller*"; see *Biography of Charles Ellsworth Goodell*, BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=G000282> (last visited Dec. 23, 2010) (noting that Goodell "served from September 10, 1968, to January 3, 1971 . . ."). It seems that the state at least intended to conduct the special election with the next general election. *Valenti*, 292 F. Supp 885 (Frankel, J., dissenting) (arguing that the creation of the vacancy to November, 30, 1969, which would be the end of the appointee's term as announced by the Governor of New York, was too long). The dissent, therefore, understood the appointment to still be temporary. *Id.* However, it is not clear that the majority limited its opinion to only a term lasting until November 30, 1969, but instead used much broader language. See discussion *supra* Part II.E (discussing *Valenti*).

218. *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 11 (1992) ("[T]he fact that the Seventeenth Amendment permits a state, if it chooses, to forgo a special election in favor of a temporary appointment to the United States Senate suggests that a state is not constitutionally prohibited from exercising similar latitude with regard to vacancies in its own legislature.").

the Supreme Court knew no special election was ever held after the Court's decision in *Valenti*.<sup>219</sup> It nonetheless affirmed *Valenti* and allowed for the permanent appointment in *Rodriguez*.<sup>220</sup>

In contrast, the Seventh Circuit interpreted the second proviso to modify only the preceding term "election."<sup>221</sup> Accordingly, the legislature could not stop a governor from filing a writ of election nor could the legislature conclude that a special election was not needed under certain circumstances.<sup>222</sup> The outcomes of these three cases display this difference in interpretation: no special election was held after *Valenti* and *Rodriguez* and the temporary appointees finished the remainder of the term.<sup>223</sup> However, after *Judge*, a special election was required to fill the remaining time period in Obama's term.<sup>224</sup> Therefore, the Seventh Circuit's interpretation of the language "as the legislature may direct" is erroneous.<sup>225</sup>

B. *JUDGE DOES NOT PLACE PROPER WEIGHT ON ILLINOIS' INTERESTS IN NOT CONDUCTING A SPECIAL ELECTION*

Moreover, the Seventh Circuit in *Judge* did not place any weight on the states' interests.<sup>226</sup> This runs apposite to what the Supreme Court had done in *Valenti* and *Rodriguez*.<sup>227</sup> The Supreme Court in *Valenti* and *Rodriguez* concluded that states had the option of bypassing special elections if they felt their interests outweighed the voters' right to elected representation.<sup>228</sup> In *Valenti*, the Court accepted the state's arguments that waiting until the next general election was reasonable because it maximized voter

219. *Id.* at 10-12. Had the Court in *Rodriguez* not agreed with the eventual outcome in *Valenti*—namely, New York's decision not to conduct a special election, it likely would have expressed disapproval in *Rodriguez*. Instead, it expressly affirmed *Valenti* and discussed it at length. *Id.*

220. *Id.* at 11 (discussing the importance of the holding in *Valenti*).

221. *Judge*, 612 F.3d at 550.

222. *Id.* at 552.

223. *Valenti v. Rockefeller*, 292 F. Supp. 851, 856 (W.D.N.Y. 1968) (Charles Goodell served the remainder of the term in *Valenti*); *Judge*, 612 F.3d at 556. In addition, the appointee in *Rodriguez* served for approximately fifteen months lasting the duration of the term. *Rodriguez*, 457 U.S. at 11.

224. See Pearson, *supra* note 17; Davey, *supra* note 17 (illustrating newspaper articles that confirm two senate races will be on the November 2 ballot).

225. Compare *Valenti*, 292 F. Supp. at 867-68, *Rodriguez*, 457 U.S. at 14, with *Judge*, 612 F.3d at 554-55.

226. *Judge*, 612 F.3d at 554-55 (not discussing the substantial odds of voter confusion or inconvenience that would result to conduct a special election in approximately three months).

227. Compare *Valenti*, 292 F. Supp. at 868, *Rodriguez*, 457 U.S. at 13, with *Judge*, 612 F.3d at 554-55.

228. *Valenti* 292 F. Supp. at 855-62; *Rodriguez*, 457 U.S. at 12.

turnout and ensured that the special election was not conducted in haste.<sup>229</sup> Similarly, in *Rodriguez*, the Court opined that a permanent appointee furthered the state's legitimate interest in ensuring vacancies are filled promptly without the expense and inconvenience of a special election.<sup>230</sup> But Illinois argued that the state had an interest in preventing the voter confusion that would inevitably result from expeditiously conducting a joint election.<sup>231</sup> Furthermore, this interest outweighed the voters' right to have an elected representative for the final one month of the term.<sup>232</sup> However, the Seventh Circuit did not assign proper weight to Illinois' interest in preventing voter confusion.<sup>233</sup> Illinois, like the state of New York in *Valenti*, had a history of voter confusion that substantiated their claim.<sup>234</sup> When Illinois held a special election in conjunction with a general election for the House of Representative vacancy at issue in *Jackson*, more people voted on the first ballot but left the second ballot blank.<sup>235</sup> Illinois, therefore, did not want to conduct a special election in haste because it would have jeopardized the integrity of both the special election as well as the general election.<sup>236</sup> Under the reasoning of *Valenti* and *Lynch*, these state interests, such as preventing voter confusion, and the states' interest in not conducting an election in haste, should have outweighed the voters' right to elected representation for the final one or two months of a senate term.<sup>237</sup> Judge nonetheless held that permanent appointments were unconstitutional and a special election was required.<sup>238</sup>

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229. *Valenti*, 292 F. Supp. 855-62.

230. *Rodriguez*, 457 U.S. at 12.

231. Motion to Amend Opinion or, in the Alternative, Petition for Rehearing *en banc*, of Defendant-Appellee Patrick J. Quinn, Governor of the State of Illinois, at 9-10, 612 F.3d 537 (7th Cir. 2010) (No. 09-CV-1231) [hereinafter State's Motion to Amend Opinion].

232. *Id.*

233. Had the Seventh Circuit actually balanced the interests, it is likely Illinois' interest in preventing voter confusion would outweigh the plaintiffs' interest in having an elected representative for the final two months of the term. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364-65 (1997) (holding that states can prevent candidates from appearing as representatives from more than one party on a ballot because the state has an important interest in preventing voter confusion); *American Party of Texas v. Hainsworth*, 415 U.S. 767, 783 (1974) (preventing voter confusion is a "compelling" state interest).

234. State's Motion to Amend Opinion, *supra* note 231, at 9-10.

235. *Id.* It is not clear why voters left the second ballot left, it may have been because they thought it was a misprint. In the aftermath of *Jackson*, a special election was held in conjunction with the general election for the House of Representatives' seat. Substantial voter confusion was present. *Id.*

236. See *id.*

237. *Valenti v. Rockefeller*, 292 F. Supp. 85, 861-64 (W.D. N.Y. 1969); *Lynch v. Ill. State Bd. of Elections*, 682 F.2d 93, 94-95 (7th Cir. 1982),

238. *Judge v. Quinn*, 387 F. App'x 629 (7th Cir. 2010) (amended opinion).

C. *JUDGE DOES NOT GRANT DEFERENCE TO THE STATE'S DECISION NOT TO CONDUCT A SPECIAL ELECTION IN THE FINAL ONE-THIRD OF THE SENATE TERM*

Finally, *Judge* does not grant deference to Illinois' decision not to conduct a special election when the senate vacancy occurred in the last one-third of the term.<sup>239</sup> The Seventh Circuit in *Lynch* concluded that the Seventeenth Amendment allowed an appointee to remain in office for a period of twenty-five months running through the duration of the term.<sup>240</sup> However, the Seventh Circuit in *Judge* held that an appointment for approximately twenty-five months running through the duration of the term was unconstitutional.<sup>241</sup> In addition, *Lynch* found cut-offs to be reasonable because the government had an interest in ensuring governmental processes were not disrupted by vacancies.<sup>242</sup> Similarly, in *Judge*, an argument was made that Illinois had an interest in ensuring consistency through the end of now-President Obama's Senate term.<sup>243</sup> The appointee, Roland Burris, had already served for approximately two years but would not have the opportunity to finish the term.<sup>244</sup> Instead, the elected representative will serve for the final one month of the term.<sup>245</sup> Finally, *Lynch* found a twenty-eight month cut-off to be reasonable because Illinois had specifically adopted the twenty-eight month cut-off for vacancies in other public offices as well.<sup>246</sup> This cut-off was a "considered legislative judgment" as to the amount of time remaining in a term that would justify holding a special election.<sup>247</sup> Similarly, in *Judge*, the court held that Illinois' decision not to conduct a special election in the final one-third of the senate term was a calculated decision because Illinois felt the inconvenience and probability of confusion did not outweigh voters' right to a represented Senator for the final

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239. *Judge*, 612 F. 3d at 550-51.

240. *Lynch*, 682 F.2d at 97.

241. *Judge*, 612 F. 3d at 550-51.

242. *Lynch*, 682 F.2d at 97.

243. Burris argued that voters may have different preferences for the two elections and allow him to finish the remainder of the term. Moreover, the Democratic Party in Illinois could choose a different candidate for the special and regular elections. "After all, important legislation is set for the concluding session, and the Democratic Party of Illinois might wish to have the Senator who is already in Washington and well steeped in the pending issues to advocate for the people of Illinois." Burris' Emergency Application for Stay of Enforcement, *supra* note 196, at 17.

244. The district court decided that only the candidates running for the six-year term would be allowed to run for the special election. *Judge v. Quinn*, No 09 C 1231, slip op. at 1 (order granting injunctive relief). This precluded Burris because he did not run for the six-year term. See *Burris Won't Be on Either Senate Ballot*, ABC7 NEWS CHI. (Aug. 4, 2010), <http://abclocal.go.com/wls/story?section=news/politics&id=7589638>.

245. *Id.*

246. *Lynch*, 682 F.2d at 97.

247. *Id.*



month of the term that would remain after verification of the results.<sup>248</sup> However, *Judge* did not grant the “wide latitude” opined of in *Lynch*, and therefore, did not allow a permanent appointment in *Judge*.<sup>249</sup> Instead, the Seventh Circuit’s amended opinion stated that any state statute standing in the way of a special election would be struck down.<sup>250</sup>

D. *JUDGE* FAILS TO DISTINGUISH THE HARMS THAT OCCUR WHEN A VACANCY IS CREATED IN THE HOUSE OF REPRESENTATIVES AS COMPARED TO THE SENATE

*Judge* does not adequately address the differences between vacancies in the Senate and the House of Representatives.<sup>251</sup> In *Judge*, the Seventh Circuit opined that the vacancy clause should be read analogous to the vacancy clause that governs the House of Representatives because the wording in the two clauses was identical.<sup>252</sup> However, in *Valenti*, the Supreme Court rejected the plaintiffs’ argument that the vacancy provision of the Seventeenth Amendment should be read analogous to the vacancy provision that applies to the House of Representatives.<sup>253</sup> The reason for treating the two vacancy provisions differently is because temporary appointments are not allowed in the House of Representatives; consequently, vacancies persist until a special election is held to fill the seat.<sup>254</sup> Utilizing *Valenti*, the Seventh Circuit in *Jackson* stated that an election had to be held to fill a U.S. House of Representative seat even though only two months would remain in the term after the election.<sup>255</sup> This period was not *de minimis* because without the special election, a particular district would go completely unrepresented for that time period.<sup>256</sup> However, the Seventh Circuit’s reliance on *Jackson* in *Judge* was misplaced because those same harms were

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248. The State argued that the time period between the verification of the election results to January 3rd was *de minimis* because the Senate is rarely in session, and this was outweighed by the probability of voter confusion, and the fact that by requiring an expedited challenge, it would not grant parties a right to challenge the results. State’s Motion to Amend Opinion at 6-12, *Judge v. Quinn*, 612 F.3d 537 (7th Cir. 2010) (No. 09-CV-1231).

249. *Lynch*, 682 F.2d at 97.

250. *Judge v. Quinn*, 387 F. App’x 629 (7th Cir. 2010) (amended opinion).

251. See *Judge*, 612 F.3d at 545-47.

252. *Id.* at 547. The Seventh Circuit reached this decision primarily because Senator Bristow utilized similar language in the Seventeenth Amendment as was already present in Article I of the Constitution governing House of Representative vacancies. *Id.* The Seventh Circuit then opined that it could not find a reason to read the two clauses differently. *Id.*

253. *Valenti v. Rockefeller*, 292 F. Supp. 851, 862-63 (W.D.N.Y. 1968).

254. *Id.* at 863.

255. *Jackson v. Ogilvie*, 426 F.2d 1333, 1337 (7th Cir. 1970).

256. In *Judge*, the Seventh Circuit disagreed with the district court’s holding that the short time of not being represented was *de minimis* and therefore, no special election was needed. *Judge*, 612 F.3d at 545-47. The Seventh Circuit stated that this period was not *de minimis*. *Id.* at 1337.

not present when the Senate vacancy occurred in Illinois.<sup>257</sup> The people of Illinois were already represented by Richard Durbin, the other elected senator from Illinois.<sup>258</sup> Illinois was also being represented by the temporary appointee—Roland Burris.<sup>259</sup> Illinois was not unrepresented in the case of a Senate vacancy, as it was in *Jackson*, when a vacancy occurred in the House of Representatives.<sup>260</sup> The harm discussed in *Valenti* and *Jackson* would not have come to pass in *Judge*.<sup>261</sup> Had the Seventh Circuit recognized this, a special election likely would not have been required in the Seventh Circuit’s amended opinion.<sup>262</sup>

E. *JUDGE* ERRONEOUSLY REQUIRES ILLINOIS TO CONDUCT A SPECIAL ELECTION BY SETTING ASIDE ITS ELECTION CODE

*Judge* is erroneous because it requires that Illinois conduct a special election by setting aside its Election Code.<sup>263</sup> The *Jackson* court stated that if a vacancy occurred within the time period required to conduct an election, a special election need not be held because that time period could “truly be deemed *de minimis*.”<sup>264</sup> In that case, an Illinois statute required 162 days to lapse from when the writ of election is filed to when the election can take place.<sup>265</sup> However, a similar argument fell on deaf ears when it was brought up by Illinois in *Judge*.<sup>266</sup> Under Illinois’ Election Code, at least four-and-a-half months are required to conduct even an abridged spe-

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257. Compare *Jackson*, 426 F.2d at 1336-37, with *Judge*, 612 F.3d at 545-47, 555.

258. Durbin has been serving on the Senate since 1996. UNITED STATES SENATE BIOGRAPHIES 111TH CONGRESS, [http://senate.gov/pagelayout/reference/three\\_column\\_table/Senators.htm](http://senate.gov/pagelayout/reference/three_column_table/Senators.htm) (last visited Dec. 28, 2010) (click on particular class to access Senators’ Biographies). Durbin was also recently rated as one of the top 10 Senators by Time Magazine. See Massimo Calabresi & Perry Bacon Jr., *America’s 10 Best Senators*, TIME (Apr. 16, 2006), available at <http://www.time.com/time/magazine/article/0,9171,1184028,00.html>.

259. *Judge*, 612 F.3d at 537. See Deanna Bellandi, *Roland Burris: Blagojevich Appoints Former Attorney General to Obama’s Seat*, HUFFINGTON POST (Dec. 30, 2008), [http://www.huffingtonpost.com/2008/12/30/blagojevich-to-appoint-ro\\_n\\_154240.html](http://www.huffingtonpost.com/2008/12/30/blagojevich-to-appoint-ro_n_154240.html).

260. *Jackson*, 426 F.2d at 1336-37.

261. Compare *Valenti*, 292 F. Supp. at 857-59, with *Jackson*, 426 F.2d at 1336-37 with *Judge*, 612 F.3d at 545-47, 555.

262. Indeed, the Seventh Circuit draws a lot of support for its holding from *Jackson* but makes no attempt to distinguish between the two. See *Judge*, 612 F.3d 545-47, 555.

263. *Judge v. Quinn*, 387 F. App’x 629 (7th Cir. 2010) (amended opinion) (requiring that all Illinois statute that prevent the special election be set aside).

264. *Jackson*, 426 F.2d at 1336.

265. *Id.* at 1334.

266. State’s Motion to Amend Opinion at 9-10, 612 F.3d 537 (7th Cir. 2010) (citing voter confusion, among other things, as reason why special election should not be required).

cial election.<sup>267</sup> But Illinois only conclusively learned of this special election requirement when the July 22, 2010 amended opinion explicitly stated that a special election would be required—three-and-a-half months before the general election in November.<sup>268</sup> Under *Jackson*, therefore, Illinois should not have had to schedule the elections together because the statutes required additional time to conduct a proper election.<sup>269</sup> Thus, while the Seventh Circuit in *Jackson* respected state statutes that set out how many days were required before a special election could be held, the Seventh Circuit in *Judge* ordered that all state statutes that conflicted with the special election be set aside by the district court.<sup>270</sup> Therefore, *Judge* is inconsistent with a combined reading of *Valenti* and *Jackson*.<sup>271</sup>

F. *JUDGE'S REQUIREMENT FOR A SPECIAL ELECTION IS INCONSISTENT WITH THE LEGISLATIVE HISTORY OF THE SEVENTEENTH AMENDMENT NOR WAS IT THE EVIL SOUGHT TO BE PREVENTED BY ITS FRAMERS*

A careful look into the pre-amendment Constitution, the congressional debate on the Seventeenth Amendment and the underlying purposes of ratification of the Seventeenth Amendment show that *Judge* imposes nothing more than an empty formality and a substantial burden upon the states.<sup>272</sup>

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267. A proper election actually required seven-and-one-half months but an expedited schedule could be conducted in four-and-one-half months. *Id.* at 13-14 (citing various Illinois statutes in the Election Code and the timeline). Even for a House seat, which requires an election in only one district, Illinois requires 115 days. *Id.* at 14.

268. The district court could have granted the injunctive relief after the Seventh Circuit's initial decision. However, the district court decided to wait until a rehearing as filed by the State to clarify certain issues before any type of relief was entered by the district court. Transcript of Proceedings Before the District Court at 21, *Judge v. Quinn*, 612 F.3d 537 (2010) (No. 09-C-1231) ("What I am doing now is shifting gears a little bit and myself asking for some clarification . . . The briefs should go to the Court of Appeals because that's where we are going to get the answer on this . . .").

269. *Jackson*, 426 F.2d at 1335 ("Such provisions would render it useless for the Governor to issue a writ of election where the vacancy occurred 162 days or less before the end of a term."). Also, the Supreme Court in *Valenti* had opined that it did not want to force the city of New York to conduct an expedited or abridged special election because State Legislatures were afraid of "boss dominated" elections where primaries were not held. *Valenti*, 292 F. Supp. 858.

270. *Judge v. Quinn*, 387 F. App'x 629 (7th Cir. 2010) (amended opinion) (opining that a district court order could disregard provisions of state law that otherwise might ordinarily apply to cause delay or prevent the election from occurring).

271. Compare *Valenti*, 292 F. Supp. at 857-59, and *Jackson*, 426 F.2d at 1336-37, with *Judge*, 612 F.3d at 545-47, 555.

272. See discussion *supra* Part II.A & II.B for background information on the original Constitution and the ratification of the Seventeenth Amendment. It can hardly be said that the framers would allow a twenty-nine month delay in circumstances such as *Valenti*, but not allow a twenty-five month vacancy in *Judge* simply because of the fact that the latter vacancy would be until the end of the term.

*Judge* requires that States conduct elections with almost no regard to how much time would remain in the term after the special election.<sup>273</sup> A close reading of *Judge* indicates that a special election is always required to fill a senate vacancy.<sup>274</sup> Presumably, even if a special election cannot be held with the general election in the year preceding the term's end, *Judge* would nonetheless require that a special election occur at the end of November or maybe even in December.<sup>275</sup> That is because the Seventh Circuit emphasized the Seventeenth Amendment's "requirement" that a state governor issue the writ of election.<sup>276</sup> In reaching this conclusion, the court placed substantial weight on the words of Senator Bristow, the drafter of the Seventeenth Amendment, who had intentionally used identical language in the Seventeenth Amendment as that found in the House of Representatives' vacancy clause.<sup>277</sup> The court found no reason to treat the Senate and House of Representative clauses differently.<sup>278</sup>

However, the Seventh Circuit's reading of Senator Bristow's statements is only a partial reading because it does not account for Senator Bristow's intentional use of the appointment powers language of the pre-Seventeenth Amendment Constitution.<sup>279</sup> Senator Bristow clarified that he did not want to change the existing framework of the pre-amendment Constitution in regards to the appointment powers.<sup>280</sup> Under the pre-

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273. *Judge*, 612 F.3d at 541 (noting that the language of the Seventeenth Amendment "commands" the state's executive to issue the writ of election).

274. The Seventh Circuit did not limit its holding to say that Illinois had to conduct a special election only because there was already a general election scheduled. Instead, the second principal clause commands the governor to issue a writ of election to fill a vacancy. *See supra* notes 170-176 and accompanying text. In addition, the final proviso, "as the legislature may direct," only applies to the immediately preceding word "election." Accordingly, the legislature did not have the discretion to determine that no special election would be required. *See supra* notes 181-187 and accompanying text.

275. *See supra* notes 170-187 and accompanying text. The Seventh Circuit does not actually discuss when a *de minimis* period would be, but presumably, the Seventh Circuit knew only a month would remain in the term after verification of the results. In addition, the State also had argued that this final month is characterized by infrequent sessions since it was the holiday season. *See State's Motion to Amend Opinion* at 8, 612 F.3d 537 (7th Cir. 2010) ("[T]he Senate is frequently out of session, convening only for a few days when it convenes at all."). The State also provided information that on average, the Senate meets for eleven days in the month of December. *Id.*

276. *Judge*, 612 F.3d at 548 (opining that Sen. Bristow intended to adopt the precise language of the vacancy clause that governs the House of Representatives).

277. *Id.*

278. *Id.*

279. 47 CONG. REC. 1483 (1911) (statement of Sen. Joseph Bristow) ("That is practically the same provision which now exists in the case of such a vacancy. The governor of the State may appoint a Senator until the legislature elects.").

280. *Id.*; 155 CONG. REC. S2068 (daily ed. Jan. 29, 2009) (statement of Sen. Russ Feingold), available at <http://feingold.senate.gov/record.cfm?id=307525> ("These cases have

Seventeenth Amendment Constitution, an appointment would last until the “next meeting of the Legislature,” at which point, a new Senator would be chosen.<sup>281</sup> The state legislatures met only once a year.<sup>282</sup> Consequently, where the legislature’s next meeting was not before the end of the term, an appointee would finish out the term because the legislature was not required to conduct a special session to pick the next Senator.<sup>283</sup>

There is only one reading of the Seventeenth Amendment that reconciles both Senator Bristow’s use of the House of Representatives’ vacancy clause and the pre-Seventeenth Amendment appointment powers.<sup>284</sup> If the vacancy occurs with ample time before the next general election in the year

simply confirmed my longstanding view that Senate appointments by state governors are an unfortunate relic of the pre-17th Amendment era.”).

281. “[I]f 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.” U.S. CONST. art I, § 3, cl. 2, *amended by* U.S. CONST. amend. XVII.

282. Edmund Randolph of the Detail Committee opined that temporary appointments were necessary because the Legislature met only once a year and such appointments prevented chasms in the Senate. CREATION OF THE SENATE: FROM THE PROCEEDINGS OF THE FEDERAL CONVENTION PHILADELPHIA, S. DOC. NO. 100-7, at 43 (1937), *available at* <http://www.senate.gov/artandhistory/history/resources/pdf/SchulzCreationSenate.pdf> (last visited Dec. 29, 2010). This same argument would be applicable here insofar as requiring an election for the final month of a term would lead to “inconvenient chasms” insofar as the representation would be inconsistent. *Id.* The possibility of permanent appointments in the Senate was understood as a possibility. *See* 1 THOMAS HART BENTON, THIRTY YEARS’ VIEW 56 (London, Appleton & Co. 1856) (“The election was the regular mode of the [C]onstitution, and was not to be superseded by an appointment in any case in which the legislature *could* act.”) (emphasis added). Because state legislatures typically met only once a year, and no special session was required when a vacancy occurred, it was possible for an appointee to serve out the remainder of a senate term.

283. CREATION OF THE SENATE: FROM THE PROCEEDINGS OF THE FEDERAL CONVENTION PHILADELPHIA, S. DOC. NO. 100-7, at 43 (1937), *available at* <http://www.senate.gov/artandhistory/history/resources/pdf/SchulzCreationSenate.pdf> (last visited Dec. 29, 2010) However, once the legislature had convened for its normal session, an appointee could no longer finish its term. *See* BENTON, *supra* note 282, at 56 (citing multiple cases where the Senate no longer accepted appointments because the legislatures in those states had convened). This decision not to require a special session by the legislature to pick a replacement may reflect the belief that because a year or less remained in the Senate term, the legislature’s interest in not convening for a special session outweighed the state’s interest in a properly appointed senator, although, as mentioned in Part II, debate on the clause is scarce.

284. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37 (Princeton Univ. Press 1997) (reasoning that words and phrases of the Constitution should be given “an expansive rather than narrow interpretation—though not an interpretation that the language will not bear”). Here, while Senator Bristow’s adoption of language contained in both the pre-Seventeenth Amendment Constitution as well as the vacancy clause that governs the House of Representatives seems contradictory at first glance, they can be reconciled in a reasonable manner.

preceding the term's end, then states must, at the latest, hold a special election in conjunction with the general election.<sup>285</sup> However, an appointment should be permanent where the final election immediately preceding the term's end has passed, or where the vacancy occurs so close to the general election that it would be impractical for the state to conduct the special election.<sup>286</sup> The burdens at issue are analogous; legislatures were not burdened by a requirement that they convene for a special session under the pre-Seventeenth Amendment Constitution.<sup>287</sup> Similarly, states should not be burdened by having to conduct a special election where adequate time is not available to do so.<sup>288</sup> Therefore, because permanent appointments were allowed under the pre-Seventeenth Amendment Constitution in limited circumstances, Senator Bristow's explicit adoption of the pre-amendment appointment powers suggests that he approved of permanent appointments under the proposed Seventeenth Amendment as well.<sup>289</sup> Accordingly, in circumstances like *Judge*, where Illinois can no longer conduct a special election without substantial burden or by setting aside much of its election procedures, the Seventh Circuit should have allowed the appointment to be permanent.<sup>290</sup>

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285. This conclusion is drawn from Senator Bristow's words in the congressional session that it was required for a governor to issue the writ of election and order that an election take place. 47 CONG. REC. 1483 (1911) (Statement of Sen. Joseph Bristow) ("That is, I use exactly the same language in directing the governor to call special elections for the election of Senators to fill vacancies that is used in the Constitution in directing him to issue writs of election to fill vacancies in the House of Representatives.").

286. This conclusion is drawn from Senator Bristow's words in the Congressional Session that the appointment powers from the pre-Seventeenth Amendment Constitution carried over. *Id.* ("That is practically the same provision which now exists in the case of such a vacancy. The governor of the state may appoint a Senator until the legislature elects.").

287. See U.S. CONST. art I, § 3, cl. 2, amended by U.S. CONST. amend. XVII.

288. For example, in the aftermath of *Judge*, Illinois had to set aside many of its election statutes and determine how to conduct an expedited election. *Judge v. Quinn*, No. 09-229, 387 Fed. App'x 629 (7th Cir. 2010), 2010 WL 2853645 (amended opinion) (opining Illinois must set aside its election law statutes to comport with the Seventeenth Amendment); *Judge v. Quinn*, No 09 C 1231, slip op. at 1-4 (N.D. Ill. Aug 2, 2010) (establishing new guidelines for upcoming expedited special election). This burden to determine a replacement is akin to requiring the legislature to convene in a special session just because the next regular meeting of the legislature would be after the particular Senate term would have ended. There is nothing in the legislative records to suggest Senator Bristow intended such inconvenience; but rather, he wanted to keep the appointment system of the pre-Seventeenth Amendment Constitution intact. This presumably included the possibility of permanent appointments in certain circumstances.

289. Thus, Senator Bristow's adoption of the pre-Seventeenth Amendment appointment powers along with the requirement that a writ of election be filed when a vacancy occurs can be reconciled with this interpretation.

290. Illinois only had three-and-one-half months to arrange the election because it only found out about this requirement in the amended opinion. Illinois likely would not have had an excuse if they had effectively known from the time the vacancy occurred that a spe-

Moreover, curtailing a governor's appointment powers was not the evil sought to be prevented by the Seventeenth Amendment.<sup>291</sup> The evils that led to the ratification of the Seventeenth Amendment were associated with the legislature picking Senators, such as corruption, bribery, and political deadlocks that prevented the state legislatures from handling other pertinent state matters.<sup>292</sup> Nothing in the legislative history of the Seventeenth Amendment implies that the Framers sought to curtail the Executive's appointment powers, but only those of the State Legislature.<sup>293</sup> Therefore, the Seventh Circuit's determination that the Seventeenth Amendment precluded a governor from making a permanent appointment in extenuating circumstances is also not supported by the legislative history of the Seventeenth Amendment.<sup>294</sup>

## V. IMPACT

Most recently, The Supreme Court recently denied the writ of certiorari; this means that the ruling in *Judge v. Quinn* stands.<sup>295</sup> Also, *Judge*

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cial election would be required. Instead, Illinois read its statute just like multiple states had done before it, without any constitutional challenges.

291. See *supra* Part I.B (nothing in the legislative history of the Seventeenth Amendment would imply that governors' right to pick a senator was problematic). A governor's power is curtailed because when the results of a special election are certified, the temporary appointee is no longer authorized by the Seventeenth Amendment to serve the office. U.S. CONST. amend. XVII § 2 (“[A]ny State may empower the executive thereof to make temporary appointments *until* the people fill the vacancies by election as the legislature may direct.”) (emphasis added)). In addition, the Seventeenth Amendment was not necessarily passed because voters hoped to make the system more efficient; it was only to prevent the problems associated with state legislators picking senators. See Haynes, *Changing Senate*, *supra* note 52, at 231 (“[T]he Seventeenth Amendment arose far more from observation of the influence of the legislative election of Senators . . . than from optimistic assurance that the personnel or efficiency of the Senate would be notably improved by popular election.”).

292. See *supra* Part II.B.

293. See *supra* note 56 and accompanying text (noting that statements of various senators preceding the Seventeenth Amendment showed state legislatures had gotten corrupt and could not be trusted with picking senators). Nothing in these records suggests governors could not be trusted to make appointments either.

294. Had the Seventh Circuit interpreted the legislative history correctly, it likely would not have had an issue with Burris serving the remainder of the term because there was no evil to be prevented by allowing an appointee to serve out the remainder of the term. See discussion *supra* Part II.B (providing purposes of the Seventeenth Amendment).

295. The petition for review was denied on June 6, 2011. *Judge v. Quinn*, 612 F.3d 537 (7th Cir. 2010), *cert. denied*, *Quinn v. Judge*, 121 S. Ct. 2958 (2011), available at <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/10-821.htm>. A thorough analysis of whether or not the Supreme Court should have accepted this case is beyond the scope of this Article. However, it is generally known that less than one percent of cases are actually accepted by the Supreme Court. See THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* 4 (West 1994). Moreover, in recent

cannot be circumvented by the states.<sup>296</sup> While circuit court decisions are not binding on other circuits, it is possible courts will follow *Judge* because

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years, the Supreme Court has been taking even less cases, thereby leaving days when the Court is not even in session. Linda Greenhouse, *Dwindling Docket Mystifies Supreme Court*, N.Y. TIMES (Dec. 7, 2006), <http://www.nytimes.com/2006/12/07/washington/07scotus.html> (“The number of cases the court decided with signed opinions [in 2006], 69, was the lowest since 1953.”). The Supreme Court cites a lack of cases that meet its criteria as the primary reason for the increasingly small number of cases being accepted in recent years. *Id.* It may seem at the outset that because the election has occurred already, the issue had become moot and that is why the Supreme Court denied review. However, *Judge* could have been reviewed because there is an exception to the mootness principle “where ‘(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.’” Fed. Election Comm’n v. Wisc. Right to Life, Inc., 551 U.S. 449, 462 (2007) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). The Supreme Court has also determined that election issues fall squarely within this exception. *Id.* at 462-64 (making it illegal to broadcast, shortly before an election, a communication that names a federal candidate for office and is aimed at the electorate could be challenged under the above criteria). *See also* *Davis v. FEC* 128 554 U.S. 724, 730-32 (2008) (allowing a candidate to challenge federal financing law even after an election had occurred); *Moore v. Ogilvie*, 394 U.S. 814-16 (1969) (discussing an Illinois Election Law requiring at least 25,000 signatures including 200 from each district could be challenged after election); EUGENE GRESSMAN, ET AL., SUPREME COURT PRACTICE 928-29 (6th ed., 2007) (1986) (discussing that election issues are not moot even after the election occurs). The Seventh Circuit’s amended opinion was in late July which made it very difficult to seek review before the election without further compromising the integrity of the elections. Moreover, many states give similar practical effect to their statutes, and so, this is an issue that will recur whenever a vacancy occurs in the final one-third of a Senate term. *See supra* note 12 and accompanying text.

296. Although not in response to *Judge*, at least two states—Minnesota and Oklahoma—have tried to prevent this sixth-year special election requirement by statute. Minnesota has adopted a statute that allows the winner of the general election for a term that currently houses a temporary appointee to take over the term for the remaining time and subsequently serving the entire the six year term as well, thereby allowing a term of six years and two months. *See* MINN. STAT. ANN. § 204D.28 (West 2010). Under this statute, Minnesota allows Senators to serve for a period longer than six years by winning only a single election. *Id.* This statute allows one election to serve “two separate and distinct purposes”: (1) filling the final two months of the unexpired term; and (2) determining the winner of the next six year term. WILLIAM F. HILDENBRAND AND ROBERT DOVE, THE TERM OF A SENATOR: WHEN DOES IT BEGIN AND END?, S. Doc. No. 98-29, at 14 (1984). The Minnesota statute violates the Constitution because it allows the election of a Senator to serve more than six years. *See* U.S. CONST. art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof for six Years.”) S. Doc. No. 98-29, at 13-14 (“The people of Minnesota may not be empowered by their legislature to elect United States Senators for terms greater than that authorized by the Constitution.”). It is moreover unlikely the Senate would allow such a Senator to be sworn in on such an election. Even if such a statute was not found unconstitutional, it is likely that the Senate will not allow a Senator to begin their term immediately after the verification of the results. *See* JACK MASKELL, CONG. RESEARCH SERV., R 41031, BEGINNING AND END OF THE TERMS OF UNITED STATES SENATORS CHOSEN TO FILL SENATE VACANCIES 5 (2010) (“[in reference to Minnesota’s statute,] [t]he precedents of the Senate show that the Senate has refused to allow any



it is the first case to explicitly analyze the language of the Seventeenth Amendment and conclude that a special election is required.<sup>297</sup> In addition, *Judge* is one of the rare cases that carve an outer limit of constitutionality under the Seventeenth Amendment.<sup>298</sup> If states do not take *Judge* into consideration, they risk the possibility of their statutes being challenged under the Seventeenth Amendment and then subsequently having to conduct a special election in haste, as was the case in Illinois.<sup>299</sup>

To comply with *Judge*, almost all states will need to update their statutes.<sup>300</sup> Part A first discusses which states will need to update their statutes.<sup>301</sup> Part B discusses the need for states to establish realistic *de minimis* periods—the period after which permanent appointments will be allowed.<sup>302</sup> Part C argues that “*joint election only*” states, like Illinois, should update their statutes to clarify what should happen in the state if a vacancy occurs in the final one-third of the senate term.<sup>303</sup>

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State by statute, executive order, or otherwise to vary the procedure for the election of Senators or to set the time or date for their service to begin.”). Similarly, Oklahoma’s statute provides that when a vacancy occurs after March 1 of any year preceding the term’s end, no special election is required and the governor must appoint the winner of the general election for the remainder of the term. See OKLA. STAT. ANN. tit. 26, § 12-101(B) (West 1994). Oklahoma therefore bypasses a special election and allows an appointment to be permanent for the final two months of a term plus another six years on the basis of having won one general election.

297. See *supra* Part II.F (highlighting that congressional efforts to limit states’ ability to appoint senators have lost momentum), and *supra* Part III.C (*Judge* is the only precedent on the issue and holds that a special election is always required under the Seventeenth Amendment).

298. See *Gietzen v. McMillan*, 857 F. Supp. 777, 782 (D. Kan. 1994) (“Since the Supreme Court’s decision in *Rodriguez* challenges to statutes prescribing the means of filling vacancies in elected positions have generally been unsuccessful.”); *supra* Part III.A.2. *Judge* is one of the rare cases that go against this trend.

299. Illinois was only told of the requirement of a special election in the Seventh Circuit’s amended opinion. This was handed down on July 22, 2010, thereby leaving approximately three months in which Illinois had to make the necessary arrangements. See discussion *supra* Part III.D.

300. *Judge* will require states to determine true *de minimis* periods and also, for those states with statutes similar to Illinois, to clarify their statutes to determine what happens when a Senate vacancy occurs in the final one-third of a Senate term. See discussion *supra* Part III.C (discussing that the Seventh Circuit held that Illinois’ statute did not comply with the Seventeenth Amendment largely because it allowed for permanent appointments).

301. See *infra* Part V.A (providing breakdown of states’ statutes in determining which states’ statutes will need to be updated or clarified).

302. See *infra* Part V.B (arguing that currently, states’ *de minimis* periods are arbitrarily set and do not reflect the period of time actually needed by the state to conduct a special election).

303. See *infra* Part V.C (noting that thirty-eight states, in total, will need to clarify their statutes to account for *Judge*).

A. STATES WITH STATUTES RENDERED UNCONSTITUTIONAL UNDER *JUDGE*

A majority of states have statutes that violate the Seventeenth Amendment as interpreted by *Judge*.<sup>304</sup> Of the fifty states, the five “*special election only*” states<sup>305</sup>—Alaska, Oklahoma, Oregon, Rhode Island and Wisconsin—and the seven “*short-term appointment*” states<sup>306</sup>—Alabama, Arkansas, Connecticut, Massachusetts, Texas, Vermont and Washington—do not need to update their statutes, except for determining a *de minimis* period.<sup>307</sup> However, a large majority of states: the two “*hybrid*” states<sup>308</sup>—Louisiana and Mississippi—and the thirty-six remaining “*joint election only*” states are all at risk of having their statutes struck down or set aside under *Judge*.<sup>309</sup> The two “*hybrid*” states violate the Seventeenth Amendment on its face because they explicitly allow states to bypass a special election under certain circumstances, and consequently, these would be struck down by a court following *Judge*.<sup>310</sup> The thirty-six “*joint election only*” states’ statutes violate the Seventeenth Amendment in their application because their practical effect is to allow a permanent appointment in

304. See *supra* text accompanying notes 85-96 (providing a breakdown of the states’ statutes, which is also provided again in this section).

305. The “special election only” states are those states that have chosen not to permit a temporary appointee. Instead, the Senate seat remains vacant until a special election is conducted. See NATIONAL CONFERENCE OF STATE LEGISLATORS, *supra* note 12. This compilation states that only four states (OK, OR, RI and WI) are “special election only” states. However, a recent referendum in Alaska amended this statute but leaves out the provision which granted temporary appointment powers to the governor. See NEALE, *supra* note 2, at 8.

306. The “short term appointment” states are ones that allow temporary appointees but conduct a special election as soon as possible and do not wait until the next general election. Vermont and Washington require a special election within 90 days, Alabama requires a special election “forthwith,” Alaska requires a special election between 60 and 90 days, and Massachusetts requires a special election within 145-160 days. See NATIONAL CONFERENCE OF STATE LEGISLATORS, *supra* note 12.

307. All states need to determine *de minimis* periods—the point from which permanent appointments will be allowed. As will be discussed *infra* Part V.B.2, states’ *de minimis* periods are arbitrary and do not reflect the actual amount of time the state needs to conduct the special election. However, because these twelve states hold a special election shortly after the vacancy occurs, they do not need to update their statutes, like Illinois and the other thirty-seven states do.

308. These two states are Louisiana and Mississippi. NATIONAL CONFERENCE OF STATE LEGISLATORS, *supra* note 12.

309. The “joint election only” states are states that require the special election occur in conjunction with the next general election. These thirty-five other states are: AZ, CO, DE, FL, GA, HI, ID, IN, IA, KS, KY, ME, MD, MI, MN, MO, MT, NE, NV, NH, NM, NY, NC, ND, OH, PA, SC, SD, TN, TX, UT, VA, WV, and WY. See *id.*

310. See LA. REV. STAT. ANN. §18:1278 (2010); MISS. CODE ANN. § 23-15-855 (2010). Thus, both states violate the Seventeenth Amendment on its face by allowing an appointment to be permanent if less than one year remains in the term.

the final one-third of a Senate term; therefore, these would be set aside by a court following *Judge*.<sup>311</sup>

While Seventh Circuit decisions are not binding on courts outside of the circuit, it is still possible that other courts will follow *Judge* if confronted with a similar scenario.<sup>312</sup> Therefore, states should update their statutes to prevent the hassle of conducting a special election with only a couple of months forewarning and the expense of litigation.<sup>313</sup>

#### B. ESTABLISHING REALISTIC DE MINIMIS PERIODS

States will first need to establish a realistic *de minimis* period; if the vacancy occurs in this carefully calculated time period, no election would be needed and a temporary appointee could finish the remaining of the term.<sup>314</sup> *Jackson* allows for states to determine how many days are required to conduct a special election, and if the vacancy occurs within that time frame, then a special election is not needed.<sup>315</sup> However, *Judge* qualifies this by rejecting the time frame established by Illinois statute.<sup>316</sup> It can be

311. In *Judge*, the Seventh Circuit did not actually strike down the relevant election code statute because the plaintiffs did not make the requisite showing of irreparable injury required for a court to grant preliminary injunctive relief. *Judge v. Quinn*, 612 F.3d 537, 557 (7th Cir. 2010). By its language, that statute complies with the Seventeenth Amendment because it requires that the special election be held with the general election even in the sixth year. See *Judge*, 612 F.3d at 540 (quoting 10 ILL. COMP. STAT. 5/25-8 (2010)). However, these states just interpret their statutes to not require the special election in the sixth year of the term. Therefore, such statutes would only be set aside after it becomes clear that the particular state will not be holding a special election. See *Judge*, 612 F.3d at 557 (“[Plaintiffs have not suffered any harm yet because] [t]here is still time for a writ of election to be issued setting the date of the general election as the date for the special election as well”).

312. States may follow the Seventh Circuit because *Judge* is the first decision to explicitly read the Seventeenth Amendment to require an election. See *id.*

313. See 42 U.S.C. § 1988(b) (2000) (“[T]he court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee as part of the costs.”). Illinois also had to organize and conduct the special election in about three months.

314. *Judge* did not overrule *Jackson*, but rather, used explicit wording from *Jackson*. *Jackson* allowed for such a *de minimis* period. *Judge*, 612 F.3d at 556 (“We are not prepared to say that this is such a short period of time that it should be dismissed as *de minimis*”) (quoting *Jackson v. Ogilvie*, 426 F.2d 1333, 1337 (7th Cir. 1970)). See *supra* Part II.E, for a discussion of the Seventh Circuit’s decision in *Jackson*.

315. *Jackson*, 426 F.2d at 1336 (“Such provisions [i.e., Illinois’ statute requiring 162 days lapse before a special election could be held] would render it useless for the Governor to issue a writ of election . . . and might well excuse issuance . . . [because] the period of possible service could truly be deemed *de minimis*.” (emphasis added)).

316. See *supra* note 267 and accompanying text (Illinois statute required seven-and-one-half months for a full-scale election or four-and-one-half months for even an abridged election). States should determine the absolute shortest time that is needed. Courts have already determined that states can take shortcuts with special elections, such as not requiring

inferred from *Judge* that three months is sufficient notice to combine a special election with a general election.<sup>317</sup> A special election is required to fill a vacancy provided only that there is ample time to conduct an expedited special election, notwithstanding the likelihood for voter confusion.<sup>318</sup> The Seventh Circuit in *Judge* has already held that a state is not allowed to determine that a special election will not be held for arbitrary reasons.<sup>319</sup> Accordingly, the *de minimis* period must be the period of time, wherein, if the vacancy occurs, it would be impossible to conduct the special election.<sup>320</sup>

Many states have already established *de minimis* periods in the year immediately preceding the expiration of the term from which point permanent appointments will be allowed.<sup>321</sup> However, such discretionary cut-offs are not reflective of the actual amount of time the state would need to conduct an abridged special election.<sup>322</sup> Moreover, the two “hybrid” states—

primaries. See *Trinsey v. Pennsylvania*, 941 F.2d 224, 234 (3d Cir. 1991) (holding that Pennsylvania is not required to hold a primary for a special election).

317. Here, the amended opinion was handed down on July 22, 2010. The injunction order was entered on August 2, 2010. Illinois therefore had approximately three months before the general election.

318. This is inferred from the Seventh Circuit’s interpretation of the proviso clause. The court held that it modifies only the preceding word “election.” Accordingly, states could not prevent an election from occurring, but could only control aspects of the election, such as the “Times, Places and Manner.” *Judge v. Quinn*, 612 F.3d 537, 550-52 (7th Cir. 2010).

319. *Judge*, 612 F.3d at 555. The court stated:

[T]he second paragraph of the Seventeenth Amendment establishes a rule for all circumstances: it imposes a duty on state executives to make sure that an election fills each vacancy; it obliges state legislatures to promulgate rules for vacancy elections; and it allows for temporary appointments until an election occurs.

*Id.*

320. Under *Judge*, a period can still be *de minimis*, but that timing wasn’t the time that remained in Illinois. Presumably, if it would have been impossible for Illinois to conduct an election and verify the results with little to no time remaining in the term, it would excuse the state from conducting the election. See *Judge*, 612 F.3d at 556 (holding that the period from verification of November results to January 3rd, when the term would end, is not *de minimis*). It seems that even if the special election cannot somehow be combined with the general election immediately preceding the year in which the term ends, that a special election must still be held in late-November or maybe even early-December. Presumably, if there would be no time left in the term after an abridged election was conducted and the election results were expeditiously verified, then it may excuse the state from conducting the special election. In all other circumstances, it seems the Seventh Circuit would require the election. See *supra* notes 170-187 and accompanying text (discussing that the governor is commanded to issue the writ, and the state may only control aspects of the election; it cannot conclude that a special election is not required under some circumstances).

321. These *de minimis* periods are built into the statutes because many states say no election will be held if a vacancy occurs after a certain date. See *infra* note 322 and accompanying text.

322. For the most part, these *de minimis* periods are arbitrary. For example, Alaska allows permanent appointments where the vacancy occurs within sixty days of the primary.

Louisiana, and Mississippi—require the governor to schedule a special election unless there is less than one year remaining in the term, in which case, the appointment can be permanent.<sup>323</sup> In contrast, other states have been much more realistic in determining their *de minimis* periods in the year preceding the expiration of the term.<sup>324</sup> These *de minimis* periods seem more realistic insofar as it would be nearly impossible to conduct an election when these vacancies occur since so little time remains.<sup>325</sup>

### C. CLARIFYING “JOINT ELECTION ONLY” STATES’ STATUTES

In addition, the thirty-six “joint election only” states that permit a special election to occur only in conjunction with a general election will need to clarify their statutes to account for scenarios where the vacancy occurs in the final one-third of the senate term.<sup>326</sup> If the vacancy arises in the first two-thirds of the term, these states can maintain their current system under *Valenti*.<sup>327</sup> However, if the vacancy occurs in the final one-third of the term,

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ALASKA STAT. ANN. § 15.40.140 (West 2010). Alaska conducts its primaries in late-August, so late-June would be the last date the vacancy could occur and still result in a special election. See *2010 Congressional Primary Dates and Candidate Filing Deadlines for Ballot Access*, FED. ELECTION COMM., <http://www.fec.gov/pubrec/fe2010/2010pdates.pdf> (last visited Dec. 29, 2010) [hereinafter *FEC Congressional Primary Dates*]. This would likely be too soon under *Judge*, because Illinois had even less time to conduct the special election. North Dakota allows permanent appointments if the vacancy occurs within ninety days of the primary. N.D. CENT. CODE ANN. § 16.1-13-08 (West 1992). North Dakota conducts its primaries in early June, so even a vacancy in March could lead to a permanent appointment. See *FEC Congressional Primary Dates*, *supra* note 322. This, too, would be too soon. Oklahoma allows permanent appointments where the vacancy occurs after March 1. OKLA. STAT. ANN. tit. 26, § 12-101(B) (West 1994). This is also too soon under *Judge*. Ohio allows a permanent appointment where the vacancy occurs in the final year of the term. OHIO REV. CODE ANN. § 3521.02 (West 1990). Although Ohio is similar to the hybrid system, the primary distinction is that Ohio generally requires that the special election occur with the next general election. In contrast, the hybrid system states require that the election occur soon thereafter *except* for the final year, where the appointment can be permanent. But these states raise the same concerns for a court following *Judge*.

323. See LA. REV. STAT. ANN. §18:1278 (2010); MISS. CODE ANN. § 23-15-855 (2010).

324. For example, Nebraska allows permanent appointments if the vacancy occurs sixty days prior to the general election. NEB. REV. STAT. ANN. § 32-565 (West 1995). Idaho allows permanent appointments if the vacancy occurs thirty days before the general election. IDAHO CODE ANN. § 59-910 (West 2010).

325. The statutes of Nebraska and Idaho are in stark contrast to the other state statutes in that respect. See *supra* notes 322-323 and accompanying text.

326. The practical effect of Illinois’ statute is constitutional if the vacancy occurs in the first two-thirds of a senate term. However, it is only when the vacancy occurs in the final one-third that the practical effect of the statute is to not conduct a special election. Thus, it is only vacancies in the final one-third of a term that were the issue of concern in *Judge*.

327. *Valenti* stands for the proposition that states have reasonable discretion to determine the timing of the election, and can do so with the next general election, even if that

states will need to establish whether they will follow the Illinois route, or whether they will adopt the “short term appointment” system.<sup>328</sup>

The Illinois route—the route taken by Illinois in the aftermath of *Judge*—entails holding the special election in conjunction with the general election even in the sixth year of the term, followed by an expedited election verification process.<sup>329</sup> If this system is adopted, there are some concerns states will need to be aware of: first, the quality of representation may be inconsistent or substantially lowered.<sup>330</sup> For example, in Illinois, although Burriss had filled Obama’s seat for nearly two years, he could not finish the term;<sup>331</sup> instead, Mark Kirk finished the final one month of Obama’s term and began a new six year term on January 3, 2011.<sup>332</sup> But there is no guarantee under this system that the person who wins the six year term will also win the special election; of the candidates running for both terms, a substantial number of people decided to vote for a small-party candidate in the special election as opposed to a big-party candidate.<sup>333</sup> Although it is unlikely a small-party candidate would win the seat, the resulting shift in voters could be substantial if the two big-party candidates were only separated by a small margin.<sup>334</sup> In such an instance, the winners of the two elections could be different, and the candidate who wins only the unex-

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general election is twenty-nine months away. *Valenti v. Rockefeller*, 292 F. Supp. 851, 867-68 (W.D.N.Y. 1968). See *supra* Part III.E for a discussion of *Valenti*.

328. See *infra* notes 329-350 for the Illinois route and *infra* notes 351-358 for the “short term appointment” route.

329. See *Judge v. Quinn*, No 09 C 1231, slip op. at 1 (N.D. Ill. Aug 2, 2010) (order granting permanent injunction).

330. The quality of representation may be a factor because depending on which system is adopted, it could determine how much time the elected senator will be in office.

331. Due to the lack of time, the district court conducted a “closed election” in which only those candidates who were already running for the six-year term could run for the special election. *Id.* slip op. at 5. However, where there is additional time, states may allow additional candidates to run, or allow a closed system which includes only those running for the six-year term plus the appointee. It seems unlikely anyone else would really be interested in running for a two month senate term. *Id.*

332. Lynn Sweet, *Mark Kirk Sworn In as Illinois Senator to Fill Obama’s Unexpired Term*, POLITICS DAILY, <http://www.politicsdaily.com/2010/11/29/mark-kirk-sworn-in-as-illinois-senator-to-fill-obamas-unexpired> (last visited Dec. 27, 2010).

333. For the regular six year term, Republican Mark Kirk received 48.2% of the votes while runner-up, Alexi Giannoulis received 46.3 percent of the vote. However, for the unexpired term, Kirk received 47.5% of the votes while runner-up Giannoulis received 46.2 percent of the votes. See CHI. TRIB. ELECTION CENTER, <http://elections.chicagotribune.com/results/> (last visited Dec. 28, 2010).

334. Here 0.7 percent of the voters who voted for Kirk for the six year term did not vote for him for the unexpired term. In contrast, only 0.1% of voters who voted for Giannoulis did not also vote for him for the unexpired term. Had these two candidate been separated by 0.8% (a margin which would not be uncommon), it could have led to different candidate winning the terms. See *id.*

pired term would have little incentive to adjust to any learning curve in the Senate.<sup>335</sup>

A second concern states should be aware of is the possibility that a special election conducted with the general election could lead to a vacancy in the House of Representatives.<sup>336</sup> In the 111th Congress, almost half of the current Senators came from the House of Representatives.<sup>337</sup> With such a large number of Representatives later seeking office in the Senate, it is probable that these senate hopefuls will also run for the special election immediately preceding the six year term as well.<sup>338</sup> If that candidate wins

335. For example, if Alexi Giannoulas—the Democratic nominee—had won only the special election, he would only have been in office for the time period of verification of the results to January 3rd, a period of about a month. This can hardly be labeled “quality time” in the senate.

336. This was precisely what happened in Illinois when Mark Kirk won the special election. He had to resign from the House of Representatives to accept the position. *See infra* notes 340-342 and accompanying text.

337. Altogether, forty-eight of the Senators in the 111th Congress came from the House of Representatives. In Class I (2007-2013 term), there are thirteen Senators: Sherrod Brown (D-OH), Maria Cantwell (D-WA), Benjamin Cardin (D-MD), Thomas Carper (D-DE), Kirsten Gillibrand (D-NY), Robert Menendez (D-NJ), Bill Nelson (D-FL), Debbie Stabenow (D-MI), John Inhofe (R-OK), Jon Kyl (R-AZ), Olympia Snowe (R-ME), Roger Wicker (R-MS) and Bernard Sanders (I-VT). In Class II (2009-2015), there are twelve Senators: Max Baucus (D-MI), Dick Durbin (D-IL), Tom Harkin (D-IA), Tim Johnson (D-SD), Jack Reed (D-RI), Mark Udall (D-CO), Thomas Udall (D-NM), Saxby Chambliss (R-GA), Thad Cochran (R-MS), Lindsey Graham (R-SC), James Inhofe (R-OK) and Pat Roberts (R-KS). Finally, in Class III (2011-2017), there are twenty-three Senators: Barbara Boxer (D-CA), Christopher Dodd (D-CT), Byron Dorgan (D-ND), Daniel Inouye (D-HI), Blanche Lincoln (D-AR), Barbara Mikulski (D-MD), Harry Reid (D-NV), Chuck Schumer (D-NY), Ronald Wyden (D-OR), Sam Brownback (R-KS), Jim Bunning (D-KY), Richard Burr (R-NC), Thomas Coburn (R-OK), Michael Crapo (R-ID), James DeMint (R-SC), Charles Grassley (R-IA), Judd Gregg (R-NH), Johnny Isakson (R-GA), Mark Kirk (R-IL), John McCain (R-AZ), Richard Shelby (R-AL), John Thune (R-SD) and David Vitter (R-LA). *See UNITED STATES SENATE BIOGRAPHIES 111TH CONGRESS*, [http://senate.gov/pagelayout/reference/three\\_column\\_table/Senators.htm](http://senate.gov/pagelayout/reference/three_column_table/Senators.htm) (last visited Dec. 28, 2010) (click on particular Class to access Senators’ Biographies).

338. Mark Kirk ran in this special election and even made a campaign video to solicit votes for this special session. Marc A. Thiessen, *Mark Kirk, the Lame-duck Killer*, WASH. POST (Aug. 17, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/16/AR2010081602818.html>; SAVE US FROM THE LAME DUCK HOME PAGE, <http://saveusfromthelameduck.com/> (last visited Dec. 29, 2010) (click on “Hear Mark Kirk’s Words on the Lame Duck”). One incentive for running for this special session may be because it would allow a candidate to gain seniority in the Senate. Because these candidates would take office in late November or early December, they would have seniority over all of the senators who took office on January 3rd in the following year. Seniority is important because it determines committee assignments. *See Seniority*, SENATE.GOV, <http://www.senate.gov/reference/Sessions/Traditions/Seniority.htm> (last visited Dec. 29, 2010). Seniority is also vital for states because it could heavily influence what federal contracts a state gets. Rachel D’Oro, *Murkowski Upset Erases Alaska Seniority in the Senate*, HUFFINGTON POST (Sept. 2, 2010), <http://www.huffingtonpost.com/2010/09/02/murkowski>

the special election, the district represented by that candidate would go unrepresented for the remainder of the term because the winner of the special election would take office in December, as opposed to January 3rd, when their terms in the House of Representatives would end.<sup>339</sup> This is precisely what happened in Illinois; Mark Kirk's special election victory created a vacancy in the Tenth District of Illinois.<sup>340</sup> Consequently, while Kirk was serving the remainder of Obama's term,<sup>341</sup> the Tenth District went unrepresented for that period.<sup>342</sup>

Finally, states will need to create an expedited special election certification statute.<sup>343</sup> An expedited verification schedule is needed because the practical effect of these statutes is to allow the winner of a special election to take office on January 3rd, by following its typical election verification schedule.<sup>344</sup> However, in order for the winner of the special election to take office before the term ends, an expedited verification process will be neces-

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upset-erases-al\_n\_703602.html (Murkowski's loss in the GOP primary for the 2010 general election could be devastating for Alaska); Alan Blinder, *Senate's Seniority System Leaves Most big States out of Power*, CHRON (July 25, 2010), [http://blogs.chron.com/txpotomac/2010/07/senates\\_seniority\\_system\\_leave.html](http://blogs.chron.com/txpotomac/2010/07/senates_seniority_system_leave.html) (providing example that North Dakota receives more federal funds than Oklahoma despite having only one-sixth the population because North Dakota has a committee chairman).

339. See Gill, *supra* note 3 (noting that the House of Representatives' term ends on January 3rd).

340. Kirk was the Representative for the Tenth District of Illinois. See *About Mark Kirk*, KIRK FOR SENATE, [http://www.kirkforsenate.com/?page\\_id=2](http://www.kirkforsenate.com/?page_id=2) (last visited Dec. 27, 2010).

341. Kirk was not allowed to take office until after the first week of the lame duck session. Danny Yardon, *Kirk Can't Join Senate at Start of Lame Duck Session*, WALL ST. J. (Nov. 8, 2010), <http://blogs.wsj.com/washwire/2010/11/08/kirk-cant-join-senate-at-start-of-lame-duck/>.

342. Lynne Stiefel, *10th Congressional District: Seat to be Empty for Part of Lame-Duck Session*, SUN TIMES MEDIA (Nov. 5, 2010), <http://www.pioneerlocal.com/glenview/news/2869540,glenview-10thseat-111110-s1.article>. There were also several important bills pending in the House of Representatives, including: the Bush-era tax cuts, President Obama's Making Work Pay tax credit, and a stopgap spending bill. *Id.* The Tenth District was the only district not represented during this time frame. *Id.*

343. Typically, state statutes are designed to verify the results by January 3rd of the year after the election. This allows ample time for challenges against the results and to otherwise ensure that no mistakes were made in the counting of the ballots, among other things. See, e.g., 10 ILL. COMP. STAT. 5/18A (2008) (The Illinois State Board of Elections has until December 3, 2010 to certify and proclaim the results of the election); 10 ILL. COMP. STAT. 5/22-9.1 (2008) (allowing parties to petition for a recount after the election has been proclaimed).

344. All statutes break down the process and allow ample time for re-verification and time to challenge the results. Illinois' statute is one example. See statutes cited *supra* note 343 for Illinois verification schedule.



sary.<sup>345</sup> The district court in Illinois provided an expedited schedule, which would have verified the special election results by November 23, 2010, at the latest.<sup>346</sup> Currently, Ohio is the only state that explicitly allows for expedited verification of their special election results.<sup>347</sup>

The primary benefit to adopting the Illinois route is that it is much cheaper for states to conduct a special election in conjunction with the general election.<sup>348</sup> In addition, the advantages enumerated in *Valenti* would also apply.<sup>349</sup> For example, holding the special election in conjunction with the general election would: (1) maximize voter turnout; (2) allow candidates to finance their campaigns more easily since financing in an off-year is more difficult; and (3) prevent inconvenience to the state in having to conduct a special election.<sup>350</sup> Therefore, this is one route the “joint election only” states could take when a vacancy occurs in the final one-third of the term.

Alternatively, states can adopt the “short term appointment” system when the vacancy occurs in the final one-third of the senate term.<sup>351</sup> Under this system, the state would allow for a short term temporary appointment followed by a quick special election.<sup>352</sup> For example, if Illinois had adopted this system, a special election could have been called promptly after Obama resigned from the senate seat on November 16, 2008.<sup>353</sup> This would have

345. For example, in *Judge*, the practical effect of Illinois’ statute in question was to allow permanent appointments because the results are not verified until January 3rd. *Judge*, 612 F.3d at 538.

346. *Judge v. Quinn*, No 09 C 1231, slip op. at 4 (N.D. Ill. Aug 2, 2010) (order granting permanent injunction).

347. OHIO REV. CODE ANN. § 3521.02 (2010) (“[T]he appointee shall hold office until the fifteenth day of December.”). None of the other states allow for expedited verification of the special election results, meaning the winner would take office by January 3rd. All of the other “joint election only” states do not explicitly create an expedited verification schedule.

348. Pat Gauen, *Illinois Voters Face Confusing, Simultaneous Senate Elections*, STLTODAY.COM (July 29, 2010), [http://www.stltoday.com/news/local/columns/pat-gauen/article\\_0d862265-337e-51a1-9691-c6bcaa6d5a01.html](http://www.stltoday.com/news/local/columns/pat-gauen/article_0d862265-337e-51a1-9691-c6bcaa6d5a01.html) (observing that the special election in Illinois will cost nothing more than the ink to print the ballots).

349. See *supra* note 103 and accompanying text.

350. See *Valenti v. Rockefeller*, 292 F. Supp. 851, 859 (W.D.N.Y. 1968) (providing reasons why New York was justified in waiting until the next general election to conduct its special election).

351. Some states are permanently categorized as “short term appointment” states. These seven states are: AL, AR, CT, MA, TX, VT and WA. NATIONAL CONFERENCE OF STATE LEGISLATORS, *supra* note 12.

352. See NATIONAL CONFERENCE OF STATE LEGISLATORS, *supra* note 12 for the exact requirements in these seven states. Typically, these states require a special election within 90 days of the vacancy occurring. See *id.*

353. Obama resigned on November 16, 2008. Gill, *supra* note 3; Mason, *supra* note 4.

ensured quality representation because the winner would still have approximately a year and a half in the term to serve.<sup>354</sup>

However, the primary disadvantage to this system is the cost of conducting a special election.<sup>355</sup> It would have cost Illinois between \$30 million to \$50 million dollars, by some estimates.<sup>356</sup> However, certain circumstances may warrant a special election; for example, Burris' appointment had been tainted by the Blagojevich scandal.<sup>357</sup> These circumstances almost led Illinois to become a "short term appointment" state and conduct a special election in early 2009, although the Illinois Legislature eventually decided against it.<sup>358</sup> These are the two routes states can choose in clarifying their statutes.<sup>359</sup>

## VI. CONCLUSION

The Seventh Circuit's decision in *Judge v. Quinn* is an important decision because it is one of the few cases that carves an outer limit within

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354. Even if Illinois' statute requires 162 days lapse before an election was held, this would mean if the vacancy occurred on November 16, 2008, an election could have still occurred by late April-early May, still leaving more than one-and-a-half years.

355. Most recently a special election was conducted in Massachusetts, costing the state about \$6.3 million dollars. See *Mass. Reimbursing Communities for Special Election to Fill the Late Sen. Edward Kennedy's Seat*, MASSLIVE.COM (May 10, 2010), [http://www.masslive.com/news/index.ssf/2010/05/mass\\_reimbursing\\_communities\\_f.html](http://www.masslive.com/news/index.ssf/2010/05/mass_reimbursing_communities_f.html).

356. Caryn Rousseau, *Illinois Can't Afford Special Election: State Officials*, HUFFINGTON POST (Dec. 15, 2008), [http://www.huffingtonpost.com/2008/12/15/illinois-cant-afford-spec\\_n\\_151173.html](http://www.huffingtonpost.com/2008/12/15/illinois-cant-afford-spec_n_151173.html).

357. Blagojevich was accused of attempting to sell the Senate seat. Kathy Chaney, *Senate Appointment Tainted by Blagojevich*, DEFENDER (Dec. 10, 2008), <http://www.chicagodefender.com/article-2666-senate-appointment-tainted-by-bлагоjevich.html>. After a summer-long trial, Blagojevich was ultimately convicted of one count for lying to the FBI, but the jury was deadlocked on the remaining twenty-three counts, including the allegation of attempting to sell Obama's Senate seat. See *Blagojevich Trial: Only Slim Majority wants Blagojevich Retried*, CHI. TRIB. MOBILE (Sept. 8, 2010), <http://mobile.chicagotribune.com/wap/news/text.jsp?sid=289&nid=21219811&cid=17689&scid=-1&ith=4&title=Blagojevich+Trial>.

358. The Illinois General Assembly was considering proposal to amend their statute to allow for short term appointment and sought advice from the Illinois Attorney General as to whether such an action would be constitutional. See Attorney General Memorandum, *supra* note 9, at \*1. This memorandum was written in February, 2009, and may have resulted in a special election sometime in mid-2009. *Id.* However, the Illinois Legislature ultimately decided not to conduct the special election. See *supra* note 10 and accompanying text (noting that the Illinois Legislature had requested that the Illinois Attorney General's Office write a brief to determine if it was possible to move the election to an earlier date). See discussion *supra* note 10 (discussing potential reasons why the Legislature ultimately decided against it).

359. See *supra* notes 329-350 (noting the Illinois route); see also *supra* notes 351-358 (discussing the "short term appointment" route).

which states can operate in regards to their senate vacancies. The Seventh Circuit held that a governor was commanded to issue a writ of election in the case of a senate vacancy and a state could not prevent a special election from occurring. This holding runs counter to Supreme Court precedent in *Valenti* and *Rodriguez*, as well as the Seventh Circuit's own precedent in *Jackson* and *Lynch*. In addition, this holding is inconsistent with the legislative history of the vacancy provision. Nonetheless, *Judge* is valid precedent and therefore, states will need to update their senate vacancy statutes to comply with the decision or risk litigation and substantial inconvenience in the final months before an election. Under *Judge*, states will need to determine their *de minimis* periods. Moreover, the two "discretionary" states will need to adopt a new system because neither governors nor states have the discretion to forgo a special election. Finally, the thirty-six "joint election only" states, including Illinois, will need to clarify their statutes to determine what happens when the senate vacancy occurs in the final one-third of the term.

Illinois' special election experience has been a memorable one, albeit for the wrong reasons. States should learn from Illinois and update their senate vacancy statutes accordingly. As is true with preventing any type of litigation or hassle, the course of action is always proactive and preventative in nature.