

Statement of
The Honorable Richard J. Durbin

United States Senator
Illinois
March 11, 2009

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Hearing before the Senate Committee on the Judiciary,
Subcommittee on the Constitution and the
House Committee on the Judiciary,
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

"S.J. Res. 7 and H.J. Res. 21: A Constitutional Amendment Concerning Senate Vacancies"

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I commend Senator Feingold and Representative Conyers for chairing today's joint hearing, and I am pleased to be a co-sponsor of S.J. Res. 7, Senator Feingold's proposed constitutional amendment to require direct election of U.S. Senators and to prohibit gubernatorial appointments of U.S. Senators.

In today's U.S. Senate there are four states that will be represented for the next two years by someone the citizens of those states did not elect. Those four states - my home state of Illinois, along with New York, Colorado, and Delaware - comprise over 12% of the U.S. population. There are 45 states that permit gubernatorial appointment of U.S. Senators.

S. J. Res. 7 states the following: "No person shall be a Senator from a State unless such person has been elected by the people thereof. 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." By requiring that all Senators be directly elected by the people of their state, we would be putting Senators on the same constitutional footing as members of the U.S. House of Representatives, who are required by Article I, Section 2 of the U.S. Constitution to be directly elected by the people.

By requiring special elections when there are Senate vacancies, S. J. Res. 7 would modify the 17th Amendment of the Constitution, whose main purpose was to establish direct popular election of U.S. Senators but which contained a loophole stating that "the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct."

The main concern I have about special elections for Senators is the cost. In a large state like my own, such elections could cost millions of dollars. But many states have elections scheduled throughout the year, and the Feingold amendment would give states the flexibility to decide the timing of special elections in order to maximize coordination and minimize cost.

In any event, as Senator Feingold has noted: "weighing the costs associated with the most basic tenet of democracy - the election of the government by the governed - sets us on a dangerous path." Indeed, the Framers of our Constitution had this wisdom in mind when requiring that all members of the U.S. House of Representatives be subject to direct election by the people. One of today's witnesses, Stanford Law School Professor Pam Karlan, supports the Feingold constitutional amendment and observes in her written testimony that "the general principle that vacancies should be filled consistent with the democratic aspirations of our Constitution deserves greater weight than the current regime provides."

Recent events in Illinois provide further evidence of the need for a constitutional amendment that would prohibit gubernatorial appointments of Senators. A vacancy occurred in my home state in November upon the election of Barack Obama to be President of the United States. Few people had confidence in the ability of the former Governor of Illinois - who was arrested in early December during a federal criminal pay-to-play investigation but who remained in office until he was impeached, convicted, and removed in January - to appoint a Senator without there being a taint of corruption and impropriety. That is why I immediately urged the Illinois General Assembly to quickly enact a law to hold a special election to fill the Senate vacancy. But there were procedural complications - such as the ability of the Governor to wait 60 days and then issue a veto of such a law that could not be readily overridden - that undermined the ability to conduct a prompt special election. And despite universal pleas that he refrain from doing so, the Governor exercised his legal right to make a temporary Senate appointment.

Senator Feingold's proposed constitutional amendment would prevent such appointments from occurring in the future. It would remove the power of a governor to sell or attempt to sell a Senate seat, and it would help restore the faith of the American people in our elected officials.

Over a half century ago, Prime Minister Winston Churchill famously said: "No one pretends that democracy is perfect or all-wise. Indeed it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time." The same might be said of special elections to fill vacant U.S. Senate seats - they are the worst way to fill such seats, except for all the others.