

Statement of
The Honorable Russ Feingold

United States Senator
Wisconsin
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On S.J. Res. 7: A Constitutional Amendment Concerning Senate Vacancies
Subcommittee on the Constitution Executive Business Meeting

As Prepared for Delivery

We last came together to consider this proposed constitutional amendment in March, when we held a joint House and Senate Constitution Subcommittee hearing to discuss S.J. Res. 7 and H.J. Res. 21, which are identical proposed constitutional amendments. I have had discussions with many of my colleagues since then, and I thank them for their patience and willingness to address this topic.

As we are all aware, the nation weathered a number of controversial gubernatorial appointments to Senate seats at the beginning of the year. There are now a total of four individuals serving in the Senate who were not elected by their constituents. These Senators--from Colorado, Delaware, Illinois, and New York--were each appointed by a single person--their state governor. Yet these Senators represent states that encompass a total of 12% of the U.S. population, and they will serve until the next general election, which is still sixteen months away.

And now, yet another vacancy and gubernatorial appointment drama lies ahead. Sen. Kay Bailey Hutchison announced just yesterday that she will leave the Senate in October or November to run against the incumbent Governor, Rick Perry, in the Republican gubernatorial primary next year. Governor Perry has the power under Texas law to appoint her temporary successor, who will serve until a special election is held. The exact date of that special election is not yet clear, but for whatever time the temporary Senator serves, over 20% of the U.S. population will be represented in the Senate by someone they did not elect.

Now I want to be clear, and I have said this many times before, but it bears repeating: I do not have anything against these new Senators. I hope and expect that they will serve with great distinction, as many appointed Senators have done in the past. Gubernatorial appointments are often unremarkable events, and governors often make thoughtful decisions about who is best qualified and able to serve the interests of the state in the Senate. But it greatly troubles me that such a large percentage of our citizens are represented by someone in the Senate whom they did not elect. Indeed, two of these appointed Senators have announced that they will not stand for election in 2010. That means they have never and will never face the voters they now represent.

In 1913, the citizens of this country, acting through their elected state legislatures, ratified the 17th Amendment to the Constitution, providing for the direct election of Senators. The

amendment was the culmination of a nearly century long struggle to eliminate the cronyism and corruption that resulted from the original constitutional provision that gave state legislatures the power to choose United States Senators.

The 17th Amendment allowed state legislatures to empower their Governors to make temporary appointments in the case of a vacancy, and over the past 96 years, 184 people have been appointed to the Senate. That is not a small number--and it indicates that this is not an infrequent or uncommon problem. In fact, gubernatorial appointments represent almost one quarter of the total number of Senators that have taken office since the passage of the 17th Amendment.

It is very difficult to imagine that the Congress that passed the 17th Amendment, and the populace that demanded it, would have been comfortable with a system that has resulted in such a large carve-out for gubernatorial appointments. The current system of appointments to fill Senate vacancies is fundamentally undemocratic, and it too often leads to political shenanigans, at best, and serious allegations of corruption, bribery, and nepotism, at worst.

Although some states have adopted legislation to require a special election following a mid-term vacancy, this is still very rare. Only Wisconsin, Oklahoma, Oregon, Massachusetts, Alaska, and most recently, Connecticut, have made this change. Changing this system state by state would be a long, arduous process, particularly since Governors have the power to veto state statutes that attempt to take this power away from them. But, more importantly, the burden should not fall on Americans to initiate state-by-state legislation to protect their fundamental voting rights. The right to elect one's representatives is a bedrock principle of our democracy, and it is time to unambiguously reaffirm it in the Constitution.

The constitutional amendment before us today simply provides:

"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."

The amendment also makes clear that the term of any Senator chosen before the amendment is ratified shall be unaffected by the amendment.

The founding fathers did a remarkable job in drafting the United States Constitution and the Bill of Rights, but every so often, a situation arises that so clearly exposes a flaw in the constitutional structure that it requires a constitutional remedy. Direct election of Senators was such a remedy. It was championed by the great progressive Bob La Follette, who served as Wisconsin's Governor and a U.S. Senator. I believe we now need to finish the job started by La Follette and other reformers nearly a century ago. No one can represent the people in the House of Representatives without the approval of the voters. The same should be true for the Senate. So I urge my colleagues to vote "aye" on this constitutional amendment. I thank you all again for your attendance here today and your cooperation.

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