



TESTIMONY

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SENATE COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON THE CONSTITUTION
HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS,
AND CIVIL LIBERTIES

Joint hearing on S. J. Res. 7 and H. J. Res. 2, proposing a constitutional amendment to require that states hold elections to fill Senate vacancies.

March 11, 2009

Chairmen Feingold, Chairman Nadler and members of the committees, thank you for the opportunity to testify today. I am Bob Edgar, President and CEO of Common Cause.

Common Cause is a nonpartisan, grassroots organization with 400,000 members and supporters and 36 state chapters dedicated to restoring the core values of American democracy, reinventing an open, honest, and accountable government that works for the public interest, and empowering ordinary people to make their voices heard.

Common Cause strongly supports S. J. Res. 7 and H. J. Res. 21, proposing a constitutional amendment to require that states hold elections to fill Senate vacancies. We urge Congress to pass this proposed constitutional amendment and send it to the states for ratification. This important modification of the 17th Amendment will fulfill the primary intent of that amendment – that U.S. Senators should be elected by the people.

We believe the Constitution should be amended rarely and with great care, but election of our representatives in Congress is one of those issues that crosses that threshold.

Over the course of its history, the United States has inexorably, though often over strenuous opposition, expanded the voting franchise and more fully embraced the democratic ideal that our representatives are elected by the people. We have left behind many of the outdated exclusionary policies that existed in the early days of our nation.

This proposed amendment is in keeping with those strides toward democracy. It is a small step, but an important one. The 17th Amendment and the campaign to enact it made clear that the American people wanted Senators to be elected, not appointed. Now, we must finish the work done in 1913 and no longer allow a single individual, a governor, to appoint a Senator for a term that can last as long as two years.

Indeed, as Chicago attorney Thomas Geoghegan observed in a January 6, 2009 *New York Times* op-ed, that the 17th Amendment's purpose was to require that Senators are elected, not appointed, "Yet the current practice in virtually every state flips the proviso [for temporary appointments] to override the main clause. Governors don't issue a writ or start the machinery for a special election as the amendment requires, but instead fill the post for up to two years, until the next general election. This frustrates the whole democratic thrust of the amendment." In fact, in some states the appointed Senator could be in office even longer than two years.

We all know this issue has arisen because of the unfortunate experiences in recent months as four Senate seats became vacant subsequent to President Obama's election. As an article in the December 10, 2008 *New York Times* noted, "Given the prestige of a Senate seat and its magnetic allure to politicians, it is perhaps not surprising that when these vacancies come up, the process of awarding the office has become fraught with malfeasance and political peril."

In New York, there was little transparency but many rumors and leaks amidst a media frenzy over the appointment process. In Delaware, the governor appointed a caretaker, whose task apparently is to keep the seat warm until the return of the intended candidate. And in recent

years, we have seen similar cases, including a governor's appointment of his daughter to the Senate. We cite these cases not to disparage the Senators who hold these seats, but to point out that the manner of their appointments inevitably leads to doubts about their qualifications by voters who were left out of the process.

We are all familiar with scandalous situation surrounding the appointment of President Barack Obama's successor in the Senate. Illinois Governor Rod Blagojevich verbalized the worst danger in the appointment process when he was caught by the FBI saying, "Unless I get something real good [for Senate candidate 1], s***, I'll just send myself, you know what I'm saying. ... [a Senate seat] "is a f***ing valuable thing, you just don't give it away for nothing."

That appointment continues to be a prime example of why we need to completely eliminate gubernatorial power to appoint Senators.

The circumstance surrounding the Blagojevich appointment of Senator Roland Burris (D-IL) may be considered an aberration by some, but in fact the most compelling reasons for the adoption of the 17th Amendment were startlingly similar to what transpired in Illinois. State legislatures, who had the sole authority to appoint Senators – at all times, not just when vacancies occurred – too often degenerated into scenes of blatant corruption as favors were traded and cash handed out for votes in favor of one candidate or the other. As Senator Feingold has pointed out, his colleague Senator Robert Byrd (W-VA), in his authoritative history of the Senate, detailed the numerous cases of "intimidation and bribery" in the selection of Senators.

In Illinois, in many state governments, and too often in Congress itself, there is a prevalent attitude that you must "pay-to-play." We heard it in the most blatant and egregious manner from the mouth of Governor Blagojevich, but even when done more subtly, this way of operating is a danger to democracy. As Illinois attorney and author Scott Turow observed, "One change that is obviously indispensable is overhauling the campaign contribution laws in Illinois, where there are literally no limits on political donations — neither how big they can be or who can give them."

Governor Blagojevich himself, trying to explain his recorded pay-to-play demands, said, "Those are conversations relating to the things all of us in politics do in order to run campaigns and try to win elections. ... You guys are in politics. You know what we have to do to go out and run elections."

Governor Blagojevich is the poster child for what is wrong with our system. He may have been unusually brash, but the way he conducted business is not that different from what happens all across America in our self-destructive, pay-to-play political culture. His statements provide a clear indictment of the current political system, in which our elected officials raise millions of dollars in campaign cash from special interests at the same time they are supposed to be making decisions in the public interest.

Common Cause is working in Congress and in states to confront this problem directly by reforming the campaign finance system, establishing a comprehensive reform package to address

the pervasive pay-to-play political environment that threatens to further undermine public confidence in government.

A key reason we support this proposed amendment is that it will take even the occasional appointment to fill a vacancy in the Senate out of the arena where pay-to-play reigns.

The Blagojevich controversy also raises in a stark way another problem with the gubernatorial appointment authority. Democracy is at its best when it's open and transparent. But as we have seen recently, this is not the case when one person makes his or her own decision, behind closed doors, to appoint someone to become a U.S. Senator. In Illinois, but for the ongoing federal investigation of the Illinois governor, we may never have known about Governor Blagojevich's effort to sell the seat to the highest bidder.

In New York, although there were no criminal allegations, the process was marked by selective leaking of information and overall opaqueness in the governor's decision-making. While in some other cases governors have been more open about their decision-making process, too often that is not so. In any event, there are few effective legal requirements for openness. We will support efforts in states to ensure that the appointment process is open and transparent to the public.

We know there are concerns that calling a special election to fill a Senate vacancy will take months, leaving citizens of the state without representation and disrupting the continuity of the federal government. But the states that now require special elections to fill Senate vacancies generally also require a special election be held within a set period of time. We believe that setting a special election within three or four months is reasonable. We do not believe the state or federal government will suffer unduly from the lack of a Senator for that period of time.

We are also acutely aware that some issues come before the Senate that are decided by one or two votes and that a vacant seat could have some bearing on the outcome of critical issues. But we know that Senators are often absent for votes for reasons varying from illness to fundraising. An occasional temporary vacancy will be no more of a problem.

Ironically, lengthy delays in the selection of a Senator was part of the impetus behind the 17th Amendment. According to the Senate's own history, some state legislatures became bogged down in partisan conflict sometimes took years to select a Senator. The authors of the Amendment addressed that problem, but in the provision dealing with appointments with vacancies, did not anticipate that temporary appointments by Governors would be for periods as long as 1 to 2 years, the period until the next regularly scheduled election. The proposed amendment simply fixes an ambiguity in the 17th Amendment that undercuts the clear purpose of the 17th Amendment.

Common Cause is active in state legislatures across the country, so we have considered whether it would be a better strategy to change Senate vacancy laws on a state-by-state basis. The constitutional amendment process can be lengthy and there are many points along the way where it can fail. However, we believe that the constitutional amendment process, while always difficult, is the better choice in this matter.

A constitutional amendment, by providing a uniform way of filling Senate vacancies, would eliminate any resistance to change based on a potential disadvantage to states who choose to hold a special election rather than the generally more timely appointment process.

The obvious political obstacle in the state-by-state strategy would be the governors, some of whom would likely resist this encroachment on their authority and could wield their veto power to stop this reform. On the other hand, state legislators have no role in the process and are more likely to view favorably a constitutional amendment that has strong support with the public.

Requiring elections to fill vacant Senate seats will, in most cases, require a special election, which will impose a cost on the state to hold the election. We realize that the funding for administering any election is already limited and that in this harsh financial environment for states, it is an especially daunting task to find the necessary funds for an unscheduled special election. But we believe that this is a cost a democracy must bear in order to end the undemocratic practice of appointing Senators.

Now is the time to address this issue, while the problems of the status quo are so apparent. We cannot simply wait for the next Senate vacancy and hope that the governor making the appointment will act with honor and transparency in naming someone to represent that state in the U.S. Senate. This proposed constitutional amendment will help ensure that a fundamental tenet of our democracy – that the will of the people is most effectively made known through elections of their representatives – is adhered to in the selection of the members of the U.S. Senate.