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Voting and Democracy

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Testimony before joint hearing of the Senate Judiciary Committee,
Subcommittee on the Constitution and the House Judiciary Committee,
Subcommittee on the Constitution, Civil Rights, and Civil Liberties,
On March, 11, 2009, relative to
"S.J. Res. 7 and H.J. Res. 21: A Constitutional Amendment Concerning Senate Vacancies"

Introduction:

My name is David Segal. I am a member of the Rhode Island House of Representatives and an analyst for FairVote. FairVote is honored to have the opportunity to testify before your Subcommittees on the important matter of how states fill vacancies in their representation in the United States Senate, and in support of "S.J. Res. 7 and H.J. Res. 21: A Constitutional Amendment Concerning Senate Vacancies." A non-profit, non-partisan organization, FairVote was founded in 1992 and operated for several years as the Center for Voting and Democracy. FairVote's mission is to achieve universal access to participation in elections, a full spectrum of meaningful ballot choices, and majority rule with fair representation for all. As a catalyst for change, we work towards a constitutionally protected right to vote, universal voter registration, a national popular vote for president, instant runoff voting and proportional representation.

FairVote's testimony today will focus primarily on why a constitutional amendment, as opposed to state-by-state reforms, is so important to achieve the goal of the legislation before you: a U.S. Senate composed of Senators elected by the people whom they represent.

As the Senators and Members are aware, the issue of Senate vacancy appointments has recently risen to the fore of public consciousness, following several controversial such appointments, especially the high-profile appointment to fill the Illinois seat vacated by now-President Barack Obama. While the issue has achieved new prominence of late, the appointment of senators has been a regularity, even after the ratification of the 17th Amendment. For any of a number of reasons – appointments to cabinet posts, runs for other offices, scandal, poor health, or death – the U.S. Senate yields a regular rhythm of vacancies; in fact, nearly one-quarter of all U.S. Senators who

have first taken office after the ratification of the 17th Amendment (182/788) have achieved office via gubernatorial appointment.

Three states – Massachusetts, Oregon, and Wisconsin – today do not allow for gubernatorial appointments of Senators. Oklahoma only allows appointment of a Senator who has won a regularly scheduled election that takes place after a vacancy was created close to the end of a Senator's term. In Alaska, voters approved a referendum prohibiting gubernatorial appointments, but the measure's legality is untested. Eight additional states call for relatively quick special elections, but allow for temporary gubernatorial appointments, until the resolution of said elections. The remaining states allow governors to make appointments, though sometimes with restrictions such as requiring that the appointee be of the same party as the Senator who held the seat that became vacant.

Such appointments are frequently characterized by back-room wheeling and dealing, influenced by any of a variety of motives: consolidation of a power base, political favors, horse-trading, kinship – blood or otherwise, and, as evinced by the Illinois debacle, a desire for personal enrichment. Even when not explicitly corrupt or otherwise nefariously motivated, the selection of Senators by governors is necessarily problematic: The appointment of our nation's most powerful legislators is anathema to the democratic values that are held in common by most Americans, that underpin our government, and that imbue it with its very legitimacy. Quite simply, representative democracy is founded on voters electing their representatives.

Constitutional Amendment Necessary:

FairVote is active at the local level in several states, and has a broad network of state-level partner organizations and allies; we have followed state legislative attempts to end senatorial vacancy appointments – some efforts new, others longer-standing – and will focus our testimony on rebutting the notion that the vacancy appointment issue, and any problems arising therefrom, are better resolved via state legislation than via constitutional amendment. State legislation is important and, for the moment, necessary, but it is far from sufficient: Such legislation seems unlikely to yield broad-based Senate vacancy reform, which is why we so strongly support the constitutional amendment track.

It has been suggested that passage of S.J. Res. 7 and H.J. Res. 21 would be an affront to pluralism or federalism. FairVote contends that it is not pluralism or federalism as such that would make it difficult for states to reform Senate vacancy laws: Rather, the major obstacle is the natural tendency of powerful, self-interested actors to strive to maintain their authority. We believe that the proposal before your committee respects federalism, insofar as it provides states with wide latitude in determining how best to implement vacancy elections. We also note that states, per those mechanisms set forth by our nation's founders, will play a critical role in the ratification of any constitutional amendment relative to this matter. Amendment of the Constitution is not an affront to federalism – it is an exercise therein.

FairVote has identified nine states in which legislation requiring U.S. Senate vacancies be filled by special election has been introduced this year; we believe this to be an exhaustive, or nearly-exhaustive, account of such states at this time, though additional legislation may be introduced in coming weeks and months. (Note: Not all such state legislation precisely captures the intent of the resolutions before the Subcommittees. For instance, some bills would allow for very brief temporary appointments, until the special election is held.)

It is worth noting our surprise at the relative lack of formal consideration of this issue by state legislatures, despite the prominence in the national discourse of Senate vacancies, and what appears to be broad popular support, editorial support from prominent newspapers like the *Washington Post* and *New York Times* and support by many government reform groups like FairVote and state branches of Common Cause. Even at this relatively early moment in most legislative sessions, it is evident that few of the aforementioned bills stand a chance of passage this year. We attribute this state of affairs largely to the awkward, frequently tense, intra- and inter-party political dynamics endemic to most state governments. The predicament in Illinois is the most loaded, and remains fluid and unpredictable, but let us consider the various other scenarios.

First, states in which the legislature is dominated by the same party as the governor – especially those with political dynamics that are relatively stable – are unlikely to perceive an urgency to act on the Senate vacancy issue without all states moving in concert. The party that rules the legislature is hesitant to strip authority from a Governor of the same party; individual members might fear

being ostracized or other retribution for participating in such efforts. Consider:

- In Colorado, where Democrats control the legislature and the governor's seat, special election legislation was introduced by Republican State Senator Michael Kopp; the legislation died in committee on a 3-2 party-line vote. Democrats openly acknowledged that passage of the legislation was politically unpalatable because it would appear to be a demonstration of disapproval of Governor Bill Ritter's recent appointment of Senator Michael Bennet to fill the vacancy created Ken Salazar's appointment as Secretary of the interior.
- In Maryland, Democratic Delegate Saqib Ali introduced legislation to require special elections -- but only beginning after 2015, when Democratic Governor Martin O'Malley will certainly have vacated his office. This has reduced any sense of urgency to pass the legislation, and it appears unlikely to move forward this session.
- In New York, Republicans have lined up behind legislation to require special elections. Democrats control both houses of the Assembly, and passage of the legislation would no doubt be seen as a referendum on Governor David Patterson's appointment of Kirsten Gillibrand to fill the seat that had been held by Hillary Clinton.

Second, in the remaining states in which power is shared by Democrats and Republicans, the parties typically have competing interests that tend to complicate the case for holding vacancy elections, hurting chances of passage. Legislative chambers might be controlled by different parties, or a single party might control both chambers, but not have enough votes to override a likely gubernatorial veto.

- In Vermont, Democratic State Representative Jason Lorber has proposed legislation that would require special elections whenever a Senate vacancy occurs, replacing Vermont's so-called "hybrid" system, which requires a special election within three months (unless the vacancy occurs within six months of a general election) but allows for interim appointments by the Governor. The Vermont House and Senate are firmly controlled by Democrats, but Republican Governor Jim Douglas has said that he thinks the status quo "is a pretty good

system" and sees no reason to change it. It is unclear whether Republicans in the legislature will support Rep. Lorber's proposal.

- Connecticut Democrats, who handily control both legislative chambers, have proposed to strip Republican Governor Jodi Rell of the ability to appoint senators. Such legislation has been filed for four consecutive years. Rell's office has called the move a "political maneuver" and a "political ploy, and the Connecticut Republican Party has called it "nothing more than a power grab by Democrats." Likelihood of passage remains unclear at this stage in the session.
- In Mississippi, Democrats control the House and the Senate by a narrow margin, while Republican Haley Barbour is Governor. Special elections legislation there, as introduced by a Democratic senator, has already died in committee – this despite controversies over vacancy elections in the state in 2007-2008, after Trent Lott resigned his U.S. Senate seat.
- Minnesota is another state in which consideration of Senate elections and vacancies is especially contentious. Democrats control the legislature, but not by a veto-proof margin. Independent Dean Barkley was appointed by then-Governor Jesse Ventura to fill the final few months of Paul Wellstone's term upon Wellstone's death in 2002. Norm Coleman won election to the seat that November and last year ran for re-election against Barkley and Democrat Al Franken. The state remains embroiled in a contentious recount, with questions having been raised about Republican Governor Tim Pawlenty's possible authority to appoint a temporary senator, to serve until the 2008 election is resolved. (The current consensus is that he does not have such authority.) Legislation has been introduced to require special elections to fill future vacancies, but in the midst of a contentious multi-party scrum and expensive recount, it appears that this legislation will not advance.

Such dynamics at the state level appear to confirm the hypothesis that a constitutional amendment is more likely to achieve widespread adoption of this reform than would individualized, state-by-state bills. One state serves as the proverbial "exception that proves the rule." For reasons that are intuitive, it appears that the greatest likelihood of passage is in a state with an unusual political dynamic: a legislature controlled by a super-majority of one political party, but a governor of the opposite political affiliation.

My state of Rhode Island is the most extremely imbalanced state in this regard. Approximately 90% of seats in the General Assembly are held by Democrats, and the Governor is a relatively unpopular second-term Republican. It should be unsurprising that Rhode Island has acted on the Senate vacancies issue more swiftly than has any other state. A measure to require special elections has passed the House Judiciary Committee, and vote by the full House is scheduled for Tuesday, March 10 – just after our testimony was due to be submitted to the Subcommittees. Should the measure pass, a likely gubernatorial veto would stand a reasonable chance of being overridden.

Congress's formal proposal to the states of the constitutional amendment under consideration today would surely catalyze a national effort to achieve its ratification and serve to depoliticize the state-by-state dynamics. As governors have no role in the ratification of constitutional amendments, the threat of vetoes would be removed. A national movement, and national branding of the push as a "good government" effort, would lessen the appearance (or reality) that action or inaction by a given legislature would serve as a referendum on any particular governor, or on any particular appointee to the Senate. Passage by only 38 states would, once and for all, put an end to this vestige of the oligarchical politics of a century-gone-by.

Addressing Likely Counter-Arguments:

We expect that a number of other arguments will be suggested by those who oppose the proposal and adoption of this amendment, which we address below:

1) *Argument:* "Elections will require that seats be left vacant for an unduly long period of time"

   Response:

a. First and foremost, under no circumstances should a drive for speediness allow for a Senate seat to be held by an appointee for two years or more, as is often the case under the current procedures for filling Senate vacancies.

b. Special elections have governed U.S. House vacancies since the establishment of Congress. A handful of states have made regular use of special elections for U.S. Senate vacancies, yielding no major problems of which we are aware – and the burden of proof should be placed on those who make the extraordinary assertion that Americans should not elect our leaders, rather than on those who assert that we should.

c. Our society has regularly accepted senators' missing large periods of time when ill.

d. As practiced in some state legislative vacancy elections, states could explore allowing a Senator to announce his or her resignation prospectively, and hold special elections prior to the effective date of said resignation. While this obviously would not be feasible in case of death, it would, for instance, have allowed Vice President Jose Biden to announce his resignation ahead of time – effective on a given date in January – and to start the process of electing their replacements during the interim. Certainly will are all familiar with a "lame duck" Senator or House Member not running for re-election, but continuing to serve in office

e. Those who are concerned that states not be left without effective representation in the Senate need only observe the current dynamic – relative to Illinois in particular – to recognize that quick appointments are no assurance of due representation. Even under circumstances less severe than those now facing the people of Illinois, there is reason to believe that appointed Senators typically serve with less clout than do their elected colleagues. Their constituents haven't gotten to know them as they would through an election and they don't take office with any particular mandate from the voters. These facts help explain the relatively poor record of appointed Senators running for re-election.

f. Innovative voting methods, such as instant runoff voting (IRV), could be employed to address this concern. As actively backed by both Sen. John McCain and then Illinois state senator Barack Obama in 2002 advocacy efforts, IRV allows for primary and general elections (or for general and runoff elections) to be compressed into a single act of voting, by letting voters rank their choices in order of preference and using said rankings to simulate successive rounds of runoffs. IRV is used by countless civics organizations, by several governmental jurisdictions abroad and by overseas voters during state runoff elections in Arkansas, Louisiana and South Carolina. It has been adopted by many municipalities across the United States, most recently by 71% of voters in Memphis, Tennessee, and has been incorporated into special elections legislation pending before the Vermont Legislature.

2) *Argument*: "Special elections can be costly"

Response:

a. Democracy does indeed cost money: There is always a trade-off between efficiency – of time and money – and democratic governance. The abstract costs to our democracy of allowing for unaccountable governance – and the potential real-world costs of governance run amok – are far greater than the few dollars-per-voter that it would cost to run a special election.
b. There is a qualitative cost – in terms of increased cynicism and decreased likelihood of future participation in democracy – to allowing for appointed, unaccountable governance. It would be speculative, but not unreasonable, to contend that such decreased faith in the legitimacy of government has other, more quantifiable, ramifications – such as decreased propensities to pay taxes, obey laws and volunteer for military service.
c. Voting methods such as instant runoff voting would allow states to reduce the cost of running special elections – for instance, by doing away with the need for lopsided general elections, as likely in the current campaign to fill the Illinois District-5 U.S. House seat left vacant by Rahm Emanuel's resignation.

3) *Argument*: "Quick special elections will mean candidates with better name recognition and money will have an advantage"

Response:

a. For better or worse, candidates with broad name-recognition and/or high fundraising capacity already have an advantage in electoral politics. The history of U.S. House vacancy elections would suggest that such candidates have no special advantage in vacancy elections as compared to regularly scheduled elections.
b. The election of a candidate with such advantages is preferable to a choice made out of political expedience, with little or no public input.

4) *Argument*: "A special elections requirement would make presidents less likely to appoint senators to cabinet posts"

Response:

a. Perhaps this is true under certain circumstances, but there are more than three hundred million people in the United States, and the notion that those who have served in the U.S. Senate are so disproportionately qualified for cabinet posts is untrue, elitist, and oligarchical.
b. The reverse might in fact be the case, as U.S. Senators whose governors are of another party are probably unduly discouraged from leaving the Senate to serve in appointed posts.

5) *Argument*: "Crowded fields can yield vote-splitting and plurality winners, as was the case in last week's Illinois District-5 election primaries"

Response:

a. It is true that there is a propensity for many candidates to file to run in special elections, but this is also true of open seats, more generally.
b. While vote-splitting is a concern, a plurality victor is still preferable to a Senator chosen largely for political expedience, via back-room dealing, with little or no popular support.
c. The ratification of the constitutional amendment in question would allow states that are particularly concerned about vote-splitting to implement runoffs or instant runoff voting.

Conclusion:

FairVote reiterates its gratitude at being afforded the opportunity to testify today; we are happy to serve as a resource for the Subcommittees in the future. We wish the best to the sponsors and cosponsors of "S.J. Res. 7 and H.J. Res. 21: A Constitutional Amendment Concerning Senate Vacancies" in their advocacy efforts, and hope that in their wisdom, the Subcommittees, Committees, House, and Senate see fit to advance this important democratic reform.

More information about our organization may be accessed online at www.FairVote.org. Rob Richie, executive director, may be reached at (301) 270-4616 / rr@fairvote.org. David Segal, analyst, may be reached at (401) 499-5991.