

Responses by Professor Vikram Amar to Written Questions of Senator Tom Coburn, M.D.

Hearing: *“S.J. Res. 7 and H.J. Res. 21: A Constitutional Amendment Concerning
Senate Vacancies”*

Subcommittee on the Constitution
United States Senate Committee on the Judiciary
March 11, 2009
(Responses in **bold**)

1. In the aftermath of September 11th, debate in Congress was about how to preserve continuity of government in case of catastrophic vacancies. The special elections requirement in the House was generally viewed as an impediment to that challenge, while the virtues of temporary appointment in the Senate were extolled. Does this proposed constitutional amendment complicate the problems that may be faced in the event of a catastrophic vacancy? Please explain.

In its current form, undoubtedly the proposed amendment does. As I explained in my earlier written testimony, and as University of Texas Law Professor Sanford Levinson and others have elaborated, the possibility of an attack on Washington that could kill tens or dozens of Senators is all too real. And special elections to fill all those vacancies would take at least a few months to organize and hold. (Indeed, conducting special elections under "normal" circumstances is tough enough; administering them in times of national crisis might prove more difficult still.) So if this amendment were adopted, the nation would run the non-trivial risk that key decisions about how the federal government should respond to unprecedented crisis might be made by a miniature Senate in which some states or even regions of the country would lack full and equal, or perhaps any, representation and voice.

It is no solution to say, as some at the March 11 hearing suggested, that problems concerning continuity in government can be dealt with outside the contours of this amendment; if the amendment passes, it would block reasonable legislative efforts by states or Congress to provide a means to fill Senate seats quickly in the event of mass vacancy. It would take yet another constitutional amendment to address this important question. And it is extremely unlikely that two successful constitutional amendment drives could be mounted in the foreseeable future.

Campaigns for general elections often begin very early. Special elections, however, are often called unexpectedly, removing the possibility of any early campaigning. Does this put candidates and voters at a disadvantage? How else might candidates and voters be disadvantaged by a special, rather than general, election?

Special elections always place burdens on the states holding them, and on the voters who are asked to participate in them. As I noted in my earlier written testimony, promoting good voter turnout may be a particular problem in special elections, and might be a problem that is greater in some states than others. Moreover, as Representative Nadler pointed out at the hearing, short election campaign cycles may tend to favor rich and famous candidates in a big state, such as California or New York, where it usually takes time to raise the large amounts of money needed to run a state-wide campaign across many cities and hundreds of miles. It was mentioned in the hearing that in 2003 California was able to hold a statewide special election for Governor in a matter of about three months. But it is also perhaps worth noting that the winner of that election was a rich celebrity -- Arnold Schwarzenegger.

None of this is to say that special elections are poor means to fill Senate vacancies. To the contrary, elections are the *best* means to fill vacancies. But the practical problems of special elections (relating to time, expense and turnout) may mean that Senate vacancies would persist for intolerably long periods of time if gubernatorial appointments were foreclosed altogether. It also might mean that an unalterable one-size-fits-all timeframe for special elections might not adequately respect the demographic differences among the states.

Is a constitutional amendment necessary to ensure special elections to fill Senate vacancies, or are states already free to enact such requirements?

States are free to use special elections (and they do), but some states may not hold special elections promptly enough to satisfy many observers. And some proponents of the proposed constitutional amendment apparently think that having vacancies is preferable to having appointed Senators fill the seats until an election is held. I continue to believe that appointed Senators are better than absent Senators during the time it takes to hold reasonable, inclusive, fair elections.

Do you agree that this proposed constitutional amendment essentially guarantees that states facing Senate vacancies will have fewer than two senators for a period of time?

Yes, because even under the best of circumstances, elections take a matter of months.

Under this proposed amendment, is it also possible for states to have no Senate representation at all for periods of time? If so, how is this consistent with the Constitution's establishment of equal representation of the states in the Senate?

Yes, it is possible under the amendment for a state to have no Senate representation for a period of time, although this is statistically unlikely (except in the case of terrorism or other mass disaster). But even 50% representation of a state in the Senate for a matter of months is problematic. The Senate is somewhat anachronistic in its representational structure. From the point of view of a small state, being

denied two Senate votes for any significant period of time undermines the special concessions that small states won in 1787 in forming the Senate the way it is. And for a large state, underrepresentation is even more problematic; a populous state having half the voice of a small state in the Senate for any appreciable period of time seems to raise significant problems of democratic legitimacy. This is particularly true given that a great deal of important Senate business is often transacted in a matter of weeks, and that thin voting margins (both as to cloture and as to final votes on the merits of proposed actions) seem to have characterized many crucial recent public policy questions.

2. In your opinion, should S.J. Res. 7 and H.J. Res. 21 be passed by Congress and sent to the states for ratification?

No, not in its current form, for a handful of reasons: (1) the absence of a "mass vacancy exception" is deeply problematic; (2) the underrepresentation of states (especially large states) during the months required to hold special elections is worrisome; and (3) I think a statutory fix that that requires states to hold vacancy-filling elections promptly -- but that preserves short-term appointments -- is constitutionally permissible and susceptible of alteration in light of additional data and experience, and is thus superior to the constitutional amendment route.

I hope this is helpful. Thank you for seeking my input.

**Responses by Professor Vikram Amar to Written
Questions of Representative John Conyers, Jr.
U.S. Senate Committee on the Judiciary
Subcommittee on the Constitution
&
U.S. 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. 21:
A Constitutional Amendment Concerning Senate Vacancies**

(Responses in **bold**).

1. In your written testimony, you express the concern that without immediate appointments, States may not be represented at times of great significance. Former Representative Rahm Emmanuel's seat was only filled at the beginning of March, having been vacated in November. Do you think House vacancies should be filled by Governors for the same reason?

One could argue that House vacancies *should* be fillable by appointment as well, especially in moments of mass vacancy, but the House and Senate are not remotely situated similarly in this regard, for a number of reasons.

For starters, a single vacancy in the House does not usually deprive persons of an entire state their representational due. It is a much bigger problem when tens of millions of residents (in a large state) are underrepresented in the Senate than when several hundred thousands of persons (in a Congressional district) temporarily lack a voice in the House.

Moreover, while the needs of citizens of Rep. Emmanuel's (or any) district may differ from the needs of citizens in neighboring districts in Illinois, all these citizens share much in common such that their House members can often be counted on to virtually represent the interests of the region. Consider, for example, the recently-enacted stimulus package and the aid to states it contained. All Illinois residents benefit from the stimulus money dedicated to Illinois; if Illinois were missing one House member, that would be far less troubling than if Illinois lacked one of two Senators.

Even as to so-called "earmarks" destined for particular Congressional districts, there is far more spillover effect into other districts within a state than there is spillover across state lines. Because states remain important political and regulatory units in the United States, lines between states are much more important than lines between Congressional districts.

Also, the law of large numbers makes the House much less likely than the Senate to suffer a disturbingly high percentage (say, 10%) of vacancy at any time.

Finally, special supermajority rules of operation in the Senate, like the filibuster, may tend to make the margins of victory on key votes smaller there, which in turn makes the presence of any vacancies more significant and troubling.

For these and other reasons, the House and Senate cannot be equated for these purposes.

- 2a. If the delays created by special elections hurt a State's interests in Congress, shouldn't we have this same concern in the House where there are no gubernatorial appointments?

See above.

- 2b. Have you seen evidence of this?

See above.

- 2c. Shouldn't we be more concerned with House vacancies considering every person is represented by two Senators but only one Representative?

No, see above. See also my response to Senator Coburn's questions, in which I reiterate the special problems of temporarily unequal representation in the Senate, both from the perspective of small states and (especially, to me) of large states.

3. Sixty-seven appointed Senators, or more than a third of all appointed Senators, did not seek reelection. Without a special election, how can the people make sure that these Senators who do not want reelection are representing their interests?

Of course, many elected officials (Senators, Presidents, etc.) either choose not to run, or are ineligible to run, for reelection, and thus are less accountable in some sense than persons who stand for another term. And yet these non-returning incumbents are not deemed "illegitimate" in their lame-duck terms. Moreover, Governors who appoint Senators are in almost all circumstances themselves elected, and elected by the same statewide electorates that elect Senators. Governors are accountable, and indeed are removable (by recall) in many states. As I have already noted, I don't quarrel with the notion that elections are superior to appointments as a general matter. What I argue, however, is that appointments are superior to vacancies during the significant periods of time that special elections invariably require. And

if we, regrettably, need appointments to fill vacancies, then Governors are the best (albeit imperfect) ones to make such temporary appointment, for reasons I laid out in my earlier written testimony -- reasons that motivated the drafters of the Seventeenth Amendment.

3. In your written testimony, you called the ELECT Act the "wisest course to pursue." Mr. Matthew Spalding is concerned about the Act's constitutionality. Other experts say the legislation would likely be ruled unconstitutional, because it would infringe on the 17th Amendment's grant of authority to the States to direct how Senate vacancies are filled. How do you address these Constitutional concerns?

Dr. Spalding did not express concern about the constitutionality of the ELECT Act (nor would I expect him to weigh in on technical legal doctrine, given that he is not a constitutional lawyer.) What his written testimony said was that it would be unconstitutional to foreclose by statute temporary gubernatorial appointments altogether, since the Seventeenth Amendment provides for them. See Spalding Testimony, at p. 12 ("Let me say something about *removing* the temporary appointment option by legislation. . . .") (emphasis added). I might agree with Dr. Spalding that *eliminating* temporary appointments by statute would be unconstitutional. But the ELECT Act would do no such thing; it would simply prevent any gubernatorial appointments from lasting more than 90 days by requiring elections to be held within that time. For the reasons I explained in my earlier testimony, Congress enjoys the power to set the *time* of vacancy-filling elections under Article I, Section 4; Dr. Spalding said nothing to undermine the arguments I advanced.

I have heard no constitutional expert say s/he thinks the ELECT Act would be struck down. The most I have heard is that a challenge might be raised about its validity, and that litigation outcomes cannot be guaranteed. (Laurence Tribe of Harvard was reported in a *Washington Post* editorial as "disagree[ing]" with my position that the ELECT Act is constitutionally permissible, but my discussions with Professor Tribe lead me to believe that he has questions more than answers, and that he has not yet had a chance to look at all the arguments that I -- and others, including Congressional legal expert Michael Stern -- have advanced in support of the bill's validity.)

In short, I am at present unaware of any sustained and sophisticated analysis of the text, structure, history and practicalities of the Constitution suggesting that Congress lacks power to pass a measure like the ELECT Act. The essential question concerns the Constitution's Article I, Section 4, which expressly gives state legislatures the power, in the first instance, to set the time and manner of federal legislative elections but then also gives to Congress the power to override those state legislative decisions. The precise issue is whether this provision applies to vacancy-filling elections under the Seventeenth Amendment. Congress had (and exercised) power to regulate vacancy-filling devices in the Senate before the Seventeenth Amendment was enacted. And there is nothing in the Seventeenth Amendment that

should be read to eliminate this power. Certainly Article I, Section 4 applies to regular (six-year) elections under the Seventeenth Amendment: state legislatures are allowed to regulate, in the first instance, the time and manner of regular six-year elections, and Congress possesses the power (which it has invoked) to step in to prescribe the time of those elections. There is no plausible reason why Article I, Section 4 should not *also* apply to vacancy-filling elections.

As noted in my earlier remarks, Southern Senators attempted, during the latter-stage debates over what became the Seventeenth Amendment, to insert language that would have freed popular elections of Senators in the several states from Article I, Section 4 Congressional control. The Southerners' proposal for the wording of the Seventeenth Amendment would have explicitly given state legislatures power over the time, place, and manner of Senate elections, replicating the first part of Article I, Section 4, but pointedly would *not* have repeated the second part of Article I, Section 4, which speaks to Congressional override power. Proponents of this language were overt about their intentions; they trumpeted their goal of trying to eliminate Article I, Section 4 power in Senate elections, even going so far as to highlight that objective in the preamble to their proposal. These attempts were discussed extensively during the deliberations in Congress, and, of course, the Southerners' efforts ultimately failed; proponents of the (what became the) Seventeenth Amendment successfully argued for the continued need for federal oversight over the time and manner of picking Senators. It would be hard to imagine that the Southerners lost their battle to remove federal oversight power with respect to regular Senate elections, but won this battle with respect to vacancy-filling elections, *without anyone in the debate (so far as I can tell at this point) having even intimated that the two kinds of elections (regular and vacancy-filling) should be treated differently in this regard.*

Indeed, a number of noteworthy features of the battle over the unsuccessful Southern effort to eliminate Congressional oversight power over Senate elections corroborate Congress' power to pass a law such as the ELECT Act. First, there seemed to be general agreement -- on both sides of the debate -- that if the Southerners' wording proposal were rejected (as it ultimately was), and none of Article I, Section 4's words were repeated in the Seventeenth Amendment, the broad powers and language of Article I, Section 4 would apply to popular Senate elections of their own force; the debate focused on the Southerners' efforts to "remove" or "eliminate" federal oversight power, whereas opponents of the Southerners' proposal were characterized by both sides during the debate as attempting to "preserve" or "retain" or "keep intact" federal power.

Second, proponents of federal oversight power argued that Congress needed to retain the power to do what it did in the 1866 Act, an Act which (as noted in my earlier testimony) regulated the manner and timing of *all* state legislative elections (not just elections every six years) of U.S. Senators. The Act said that whenever there was a Senate vacancy of any kind, both houses of a state legislature, on the second Tuesday they were in session, must vote to fill the vacancy, and if no person

was elected, both houses must continue to vote at least once each and every day thereafter of the legislative session.

Third, the arguments in favor of retaining Article I, Section 4 power often rested on the wisdom of having Congressional power over Senate elections coextensive with its power over House elections, and there does not seem to be a question about Congress' power to impose time limits for vacancy-filling House elections (as Congress did a few years back to provide for the case of mass vacancy.)

Fourth, and importantly, the arguments in favor of retaining federal oversight power -- the desire to promote widespread suffrage to blacks and other disenfranchised groups, to reduce election fraud and abuse, to prevent the timing of elections from being used to manipulate outcomes -- all apply to vacancy-filling elections just as to regular elections. (That is likely why no one suggested Congressional power ought to be treated any differently in the context of vacancy-filling elections.) Indeed, at least some of the arguments supporting federal power -- the need to prevent states from setting the time of special elections to manipulate turnout and skew outcomes -- apply with *added force* to vacancy-filling elections.

If, for example, Congress passed a law to prevent vacancy-filling Senate elections from taking place *too soon* -- in order to allow a few weeks of campaigning so that voter awareness and voter turnout could be increased, such a law would have fit *perfectly* into the Article I, Section 4 power rationale that successful opponents of the Southern proposal articulated. And if Article I, Section 4 applies to vacancy-filling elections, the ELECT Act is within Congress' authority.

That leaves us with the question, then, of why the vacancy-filling provision of the Seventeenth Amendment closes with the phrase "as the legislature may direct." Here are two of many plausible reasons: First, the language simply reflects that state legislatures do, by virtue of Article I, Section 4's general applicability, have the power to regulate the procedure of all congressional elections, *in the first instance*. Second, the wording makes clear that state legislatures, rather than state Governors, are the ones who set the procedures for elections. Much of the Seventeenth Amendment focused on limiting the power of (untrusted) state legislatures, but the amendment's drafters wanted to make clear that although they had more faith in Governors than in state legislatures to pick Senators, they recognized and affirmed that enacting general and prospective rules -- to govern elections and other things -- is quintessentially a legislative rather than executive task.

No mention of Congress' override power right after the mention of state legislative power was necessary, because such federal power was, as noted above, well understood to exist by participants in the drafting debate. After all, the text of Article I, Section 4 by its own terms already applied. And newly-created state powers may generally be subject to preexisting federal preemption power (as in the Twenty-First Amendment) unless the constitutional text otherwise makes clear.

Thus, while I remain open to seeing new arguments and new historical evidence, I believe the ELECT or something like it falls within Congress' Article I, Section 4 power.

Finally, with respect to the ELECT Act, I should note, as I did in my earlier written testimony, that spending power could likely be used as a backup to Article I, Section 4, to get all states to agree to prompt vacancy-filling elections.

4. In your written testimony, you support gubernatorial appointments because Governors are directly accountable to the same electorate as Senators. But as Professor Pamela Karlan notes in her written testimony, Governors can appoint individuals who may not be the people's choice – e.g., if the Governor is of a different political party. How do you respond to Professor Karlan's point?

Sometimes an appointee of a party other than that of the departed Senator would be the people's choice; the departed Senator might have been elected because of his/her personality, not his/her party. Or perhaps the departed Senator's party might have been repudiated in the meantime because of incompetence or scandal. So it is hard to know whether a Governor is, or is not, appointing a person the people would have elected. But the Governor is accountable to (and in some states removable by) the people, so the Governor's appointment is not inherently illegitimate, as some at the hearing suggested.

Everyone agrees that fair elections are the best ways to fill vacancies. But because good elections take time, and because allowing vacancies to persist in the meantime is, to my mind, not a good idea, I strongly believe that gubernatorial appointments are the best alternative we have in a world that is imperfect because we can't have instantaneous credible elections.

I hope this is helpful. Thank you for seeking my input.