

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

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.*

The passage of a constitutional amendment is a grave and serious undertaking which we firmly believe is necessary to preserve our democracy – namely that those who govern serve at the consent of the citizens who elect them. If a catastrophe such as 9/11 occurs and we lose a number of our elected Senators in the tragedy – it is all the more critical that we still honor the principles which make our nation great – and not jettison these principles for simplicity, peace of mind, or convenience. If this constitutional amendment passes, and we firmly believe that it should, we should no more abandon it than we should abandon the other processes we have in place to elect members of the House of Representatives, members of the state legislature, or our governors. In times of crisis, it will be adherence to the rule of law and to the principles of our democracy which will restore our nation. We as a nation are built on the idea that the complications of democracy and the ensuing rights and freedoms, far outweigh the difficulties inherent in the “complications.”

An event such as 9/11 may make adherence to the rule of law in all respects more difficult; nonetheless, it is at this time that it is even more vital that the difficulties be endured.

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?

Voters are well served when they have the opportunity to vote for those who represent them whether the campaign process is of normal duration or is truncated due to the need to elect a Senator within three or four months due to a vacancy. Although voters may benefit from a longer period of campaigning to get to know the candidates, they are far better served by having the opportunity to vote for their choice than not having that opportunity at all.

In addition, appointing replacements to fill Senate vacancies puts other candidates at a huge disadvantage when the next election rolls around – as the appointee by then enjoys the power of incumbency – and effectively limits voter choice.

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

Although states are free to choose whether Senators are elected or appointed, a constitutional amendment is necessary to ensure that all Senators serve at the will of the citizens in their states, not at the will of one person.

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? 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?

If a Senate seat becomes vacant in the middle of a six-year term for any reason, there will be a period of time, while special elections are being conducted, that there will not be a Senator from that state serving in the Senate. Indeed, at very infrequent times there may come a time when both Senators from a particular state are no longer serving in the Senate. However imperfect this may be, we believe that ensuring democratic representation is more important than ensuring 100% continuity of representation. It is worth the wait to have voters represented by someone they elect rather than someone appointed by a single person. Senators who are elected know that they are in the Senate to represent the people of a particular state and serve at their will, not at the will of the one person who appointed them.

The current protracted battle for the U.S. Senate seat in Minnesota illustrates this point. It is worth the wait, no matter how inconvenient, to have Minnesota represented by the majority's choice, and voters would not tolerate having the governor simply proclaim his choice in order to ensure continuous representation.

We also note that it is not infrequent that the entire body of 100 senators are not in place at one time; senators may be absent from the work of the senate due to illness, campaigning, fundraising, or personal crisis; yet this body has been able to continue with its important work.

2. *Who should bear the cost of the special elections that would be required by this proposed constitutional amendment?*

Currently states pay the bulk of the cost of special elections and this would continue to be the case.

In your opinion, which option is more “democratic”: for states to be un- or under-represented for a period of time in the U.S. Senate, or for states to have appointed representation during that period?

It is our contention that it is more democratic for citizens to be served by those they elect than those that are appointed for them. When vying for a Senate seat, which is appointed, a prospective senator need only win the approval of one person in that state – the governor. When vying for a Senate seat and having to face election, a prospective senator must gain approval of the voters. And, while having appointed representation may seem preferable to having none at all in the short term, having an appointed replacement means voters will be deprived of democratically chosen representation for a much longer period of time in most cases.

The process of a special election is also more transparent. As we stated in our testimony, “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.”

How would a campaign to ratify this proposed constitutional amendment requiring special elections to fill Senate vacancies differ from a campaign to encourage states to change their current laws, consistent with existing authority?

A campaign to ratify the proposed constitutional amendment would have the imprimatur of Congress and would be uniform across the states.

3. *In your written testimony, you said: “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.” States, however, are supposed to be laboratories of political experiment. How is your view consistent with basic principles of federalism, which respect state autonomy and decision-making?*

While it is true that the states are laboratories of democracy, many issues which impact the federal government are determined at the federal level. The number of United States senators, the number of members of the House of Representatives are all determined at the federal level. It is not inconsistent to have some rules and procedures governing federal office to be decided at the federal level.

Nonetheless, the impetus for this constitutional change is based on what the experiences in the states are telling us – that, increasingly, the system of having governors fill Senate vacancies is not meeting basic standards and democratic principles. The outcome of the proposed amendment will lie in the hands of the states, and the amendment process give them an opportunity to come to a consensus on what the rule for replacements should be, without any one state putting itself at a strategic disadvantage.

In your written testimony, you also said, “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.” Yet, the recent scandal in Illinois resulted in the impeachment of Governor Blagojevich. Doesn’t this demonstrate that states, which govern closest to the people, are well-suited to guard against similar abuse? Indeed, as Mr. Neale testified, the appointments process has generated relatively few controversies, prior to the present.

The process of having governors appoint senators to serve out a one- or two-year term is inherently opaque and devoid of democratic process. Fortunately for the people of Illinois Governor Blagojevich was under an FBI probe – the probe of a federal agency. Without a wiretap in place, the people would never have known what machinations were at play to anoint their next senator. Additionally, despite the fate of the Blagojevich, the people of Illinois are still being represented by a sitting senator they did not elect, around whom there is a cloud of controversy, including a possible Senate ethics investigation and increasing calls for his resignation.

The fact that voters have not, until recently, had a window into the appointment process does not mean that process generally works well, or that it should not be revisited and restored to a process more compatible with the vision of the 17th amendment. As we stated in our testimony, the purpose of the 17th Amendment was to require Senators be elected, not appointed.

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

1. *There are two competing concerns here: (1) the interest of States having immediate representation in the Senate with (2) the ability of the people to elect Senators who represent their interests. How should we weigh these factors?*

We support this constitutional amendment because we firmly believe that a special election to fill a Senate vacancy is the best way for the people of that state to receive fair representation in the Senate. Although it might appear that an immediate appointment to fill a Senate vacancy would offer citizens of a particular state immediate representation, that may not be the case depending on the choice of the governor. The fact that a governor appoints a senator to serve in the event of a vacancy does not necessarily mean that the people in the state will be fairly represented. Governors and senators from the same state may be from different parties. And although some state statutes specify that the appointed senator must be from the same party, not all states have this restriction, and in some cases the governor may choose a member of their own party to fill a senate vacancy. In other words, a Democratic governor may choose to appoint a senator who is a Democrat, even if the senate seat in question was vacated by a Republican. If that is the case, can the representation really be considered true and fair? We don't believe this to be the case. And that is why we believe a special election is the best alternative.

2. *John Fortier from the American Enterprise Institute wrote in Politico that if this amendment is ratified, "the death or resignation of a Senator would lead to a State effectively losing representation for a prolonged period, likely five or six months, before the special election is held."¹ In his written testimony, Professor Vikram Amar argued that under-representation results from the delays of special elections. Please respond to this argument.*

We support this constitutional amendment because we firmly believe that representation of the people of a particular state is best achieved when the citizens in that state can choose their representative. Currently 37 states allow the governor to appoint a senator to a vacant senate seat and also allow that person to serve the duration of the term – however long that term may be. The situation is therefore not expedient or temporary. A

¹John Fortier, *No Good Alternative to Appointments*, POLITICO, March 2, 2009.

situation in which an appointed, not elected Senator may serve for a period of two years or more flies in the face of the 17th amendment.

Vacancies for the U.S. House and state legislatures across the country are filled by special elections, without any dire consequences and with more democratic (and less manipulable) outcomes. There is no compelling reason why the U.S. Senate – a co-equal chamber of the legislative branch – should be treated any differently.

3a. Special elections have been criticized for low voter turnout, a concern raised by Professor Vikram Amar. What Steps can states take to improve turnout?

Low voter turnout is a critical concern in a democracy, but is the result of a combination of variables and factors each of which can be addressed by a variety of solutions. To the extent that there are barriers to voter participation resulting from cumbersome election administration practices, Congress can do a great deal to remove these barriers. For example, low voter turnout can be the result of overly stringent and cumbersome registration requirements – which can be overcome by allowing voters to register and vote on the same day.

Low voter turnout can in part be the result of the election occurring only on one day. There are many citizens who cannot leave their workplace on one Election Day because public safety would be in jeopardy (for example hospital emergency room staff, police workers, fire and rescue squad workers). Early voting and no-excuse absentee voting would allow these voters to cast ballots. Congress can certainly pass legislation which would mandate that during federal elections, citizens be allowed to vote one or two weeks prior to Election Day and that citizens be allowed to cast ballots by mail.

Low voter turnout also may be the result of deliberate misinformation campaigns. During this past election cycle, voters received deceptive automatic phone calls stating that polling places had changed, when in fact they had not. Voters also received flyers saying that, “Due to the anticipated heavy turnout, Democrats would be voting on Wednesday and Republicans would be voting on Tuesday.” Congress should pass legislation to penalize these types of practices.

3b. When there is low voter turnout, is the turnout reflective of the State’s demographics or do certain groups disproportionately vote compared to regular elections?

The academic literature on low voter turnout has tended to show that the poor, minorities, and young voters lag behind the rest of the population in voter participation. However, according to recent research conducted and published by the Pew Research Center in their recent report (“Dissecting the 2008 Electorate: Most Diverse in U.S. History”), many shifts were recorded in this past election cycle. According to the study:

The electorate in last year's presidential election was the most racially and ethnically diverse in U.S. history, with nearly one-in-four votes cast by non-whites. The nation's three biggest minority groups -- blacks, Hispanics and Asians -- each accounted for unprecedented shares of the presidential vote in

2008. Overall, whites made up 76.3% of the record 131 million people who voted in November's presidential election, while blacks made up 12.1%, Hispanics 7.4% and Asians 2.5%. The white share is the lowest ever, yet is still higher than the 65.8% white share of the total U.S. population.

The unprecedented diversity of the electorate last year was driven by increases both in the number and in the turnout rates of minority eligible voters.

The levels of participation by black, Hispanic and Asian eligible voters all increased from 2004 to 2008, reducing the voter participation gap between themselves and white eligible voters. This was particularly true for black eligible voters. Their voter turnout rate increased 4.9 percentage points, from 60.3% in 2004 to 65.3% in 2008, nearly matching the voter turnout rate of white eligible voters (66.1%). For Hispanics, participation levels also increased, with the voter turnout rate rising 2.7 percentage points, from 47.2% in 2004 to 49.9% in 2008. Among Asians, voter participation rates increased from 44.6% in 2004 to 47.0% in 2008. Meanwhile, among white eligible voters, the voter turnout rate fell slightly, from 67.2% in 2004 to 66.1% in 2008.

It is therefore somewhat difficult to predict how voter participation will shift and which demographics will be reflected in a special election to fill a vacant senate seat. Certainly, the demographics of the state in question and laws governing election administration, as well as the candidates and campaigns, will impact which voters participate.

However, it is clear that voter participation is not possible when there is no election and senators are simply appointed.

4. *Another concern has been that in a national emergency, the nation may have to replace a number of Senators at the same time. How do you respond to the argument that the gubernatorial appointment power be retained in times of national emergency?*

At the time of a national emergency, we believe the rule of law should prevail. The number of senators that must face special election should not deter the operation of democracy. During each election cycle, one third of the Senate faces election at the same time, and this has not threatened our democracy.

The passage of a constitutional amendment is a grave and serious undertaking that we firmly believe is necessary to preserve our democracy – namely that those who govern serve with the consent of the citizens who elect them. If a catastrophe such as 9/11 occurs and we lose a number of our elected Senators in the tragedy, it is all the more critical that we still honor the principles which make our nation great. If this constitutional amendment passes, and we firmly believe that it should, we should no more abandon it than we should abandon the other processes we have in place to elect members of the House of Representatives, members of the state legislatures, or our governors. In times of crisis, it will be adherence to the rule of law and to the principles of our democracy which will restore our nation. We as a nation are built on the idea that the complications of democracy and the ensuing rights and freedoms, far outweigh the difficulties presented by special elections.

An event such as 9/11 may make adherence to the rule of law in all respects more difficult; nonetheless, it is at this time that it is even more vital that the difficulties be endured.

- 5a. *Should there be a national emergency clause to address the possibility of a large number of vacancies at one time?*

The principles of democracy should not be compromised even in a national state of emergency. It is our contention that those that govern should be elected by the people they govern and that this democratic principle should be followed even during very difficult times.

- 5b. *If so, when would the clause be triggered; what should the numerical or other threshold be?*

See above.

6. *According to your written testimony, Common Cause works with State legislatures across the country. In your view, how will the States receive this constitutional amendment?*

Each state will have to ratify this amendment if it passes the Congress by a two-thirds majority. It is unclear how the state legislatures of each state will react and how the citizens of each state will react. However, Common Cause is committed to seeing this legislation pass and will be working with our membership in all of the states towards ratification.

7. *In your written testimony, you say, “[w]e do not believe the State or Federal government will suffer unduly from the lack of a Senator for that period of time,” the period of time being three or four months. How do you respond to Professor Vikram Amar’s concerns about this period of under-representation?*

Certainly it is not desirable for the citizens of a particular state to be served by less than two senators. However, this must be weighed against what we mean by “represented.” As we have stated in our comments above, we believe that citizens are more fully represented by those that they have the opportunity to elect than those that are chosen for them.

8. *In your written testimony, you note that this Constitutional amendment builds upon the efforts throughout history to expand the voting franchise. Do you believe the 17th Amendment as written disenfranchises voters; can you please explain why or why not?*

The 17th amendment has had the tremendous impact of giving citizens a greater voice in the process of selecting Senators; it does not disenfranchise voters. The provision to allow for temporary appointments however has been interpreted in an overly broad fashion. This constitutional amendment would restore the original intent of the amendment which was to give citizens the right to choose those who represent them in the Senate.

- 9a. *In your written testimony, you say that the “obvious political obstacle” preventing States from adopting reforms is Governors. Can you expound on this?*

Currently governors in most states enjoy the rare privilege of acting as a “king maker” when there is a senate vacancy. Behind closed doors, without debate or public discussion, a governor can decide who can be senator. The senator then enjoys the benefits of incumbency if he or she wishes to remain in office, and has not had to conduct the difficult but vital work of campaigning to be in this office. Some governors may not wish to give up this power.

- 9b. *Why is it impractical to continue the effort to have each State change their election law?*

Each state will have to consider this constitutional amendment and ratify it; it is not impractical for each state to have this discussion – in fact states are critical and vital part of this process. However, we believe it is appropriate for the Congress, which does have the authority to decide the procedures for election to federal office, to begin the process of amending the constitution to restore the intent behind the 17th amendment.