

Answers to Supplemental Questions
From Professor Pamela S. Karlan

Questions from Senator Tom Coburn, M.D.

(Note: The questions appear in *italic* type with my answers following in roman type.)

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.*

As I explained in my prepared testimony before the Committee, the proposed amendment does not deal with the problems that would arise from what I term “catastrophic” vacancies – that is, multiple vacancies caused by a single event. I urge Congress to consider a coherent, coordinated response to this problem.

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?

I am neither a political scientist nor someone with campaign experience, so my answers here are necessarily speculative. As I understand the evidence, most voters do not concentrate on elections until shortly before Election Day, so the length of the campaign season is not particularly relevant to them. (I leave aside citizens who are actively involved in the campaign process.) For candidates themselves, there are a variety of considerations that go into whether a short or a long election campaign is desirable. One way of thinking about this issue is to recognize that in many other Western democracies, the campaign season is far shorter than it is in the United States: for example, as I understand the Canada Elections Act, a campaign season (from when the election is called until when it is conducted) can last as little as six weeks.

In terms of special vs. general elections, it is also important, I think, to distinguish between regularly scheduled and specially scheduled elections. One significant problem with the latter arises if there is only one race or issue on the ballot. That can depress turnout since there are fewer candidates or groups interested in getting out the vote. If, however, a Senate vacancy election were on the ballot along with other important elective offices or ballot propositions, that difficulty would be significantly diminished.

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

Assuming no state constitutional provision to the contrary, states are free to enact legislation providing for special 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? 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?

I agree that the proposed amendment means that states facing vacancies will have fewer than two Senators for a period of time and that it is possible for a state to have no Senate representation at all for a period of time if both seats are vacant. (I do not believe the latter situation has ever occurred.) I note that it is also possible – indeed, it has happened – that states lack full representation in the Senate during periods of time while governors consider whom to appoint. With respect to its consistency with the constitutional principle of equal representation of the states in the Senate, I note as a practical matter that illness, absence from the country (or from the Senate chamber), and other factors quite often mean that, as a practical matter, a particular state does not have two Senators available to participate fully.

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

I do not have an informed opinion on this question.

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?

I think, for the reasons given in my prepared testimony, that each of these possibilities has undemocratic aspects: being “represented” by someone for whom one never had an opportunity to vote is “democratic” only in an attenuated sense.

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?

One argument in favor of a nationwide requirement for filling Senate vacancies that would be unavailable in a campaign to encourage states to change their current laws themselves is that no state would face a competitive disadvantage, relative to other states, if all states were required to use election rather than appointment.

3. *On average, how long do you believe it would take for states to organize a state-wide special election? What legal obligations must states fulfill to accommodate absentee voters, particularly those in the military? Should states with covered jurisdictions trigger the Voting Rights Act, how long does pre-clearance take? Are you aware of any state laws that restrict the timing of special elections?*

I am not an expert in election administrative, so I do not have an informed answer to the first question, but I would imagine that this varies by state. The federal legal obligations to

accommodate absentee voters, particularly those in the military, are set out in the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff et seq. and implementing regulations. In jurisdictions covered by section 5 of the Voting Rights Act preclearance for the setting of a special election date can be obtained expeditiously. See 28 C.F.R. § 51.34 (providing for expedited consideration of preclearance requests.)

In your opinion, what effect does low voter turnout have on an election? Is there evidence that turnout is lower in a special election than in a general election?

There is evidence that, all other things being equal, turnout is lower in special elections than in general elections. (Turnout is, however, often higher in elections for open seats than in elections involving incumbents.) Low turnout can skew election results in close cases, since decreases in turnout tend to be higher among groups that are generally less likely to participate in elections.

If voter turnout is lower for special elections, isn't it true that such an election could yield a senator elected by only a small handful of citizens? Yet, this amendment provides that special elections be held to fill the remainder of a senator's term. In theory, this could be as long as six years. Under many current state laws, however, appointed senators serve only until the next general election. Is it more "democratic" for a senator elected by a small minority of the people to represent the entire state, for as long as an entire six-year term, or for a senator to be elected in the normal course of a general election, held as soon as possible after a vacancy?

While turnout is likelier to be low in special elections than in general elections, it seems implausible to assume that a "small handful of citizens" will elect a Senator. Both political parties, for example, will likely have powerful incentives in any remotely competitive state to encourage their supporters to turn out.

Special elections are held for many local, state, and federal offices. States and localities are sometimes forced to hold many throughout the course of a relatively short period of time. What effect does this repetition have on voters? What about poll workers? Do special elections cause you concern about voter and poll worker fatigue?

All things being equal, having fewer elections throughout a given year is likely to increase turnout in any particular election. I worry less about poll worker fatigue than about voters not turning out in any particular election. That being said, a U.S. Senate election is far likelier to excite voters to participate than a low-salience local nonpartisan election.

In your testimony, you urged Congress to consider what to do in the event of "catastrophic" vacancies, adding that they were only a "remote possibility." In the aftermath of September 11th, however, Congress recognized the very real possibilities of such an event. The bipartisan Continuity of Government Commission made recommendations to address such a threat and testified before Congress numerous times to demonstrate the importance of addressing this possibility. Throughout that debate, the virtues of temporary appointments in the Senate were extolled. How does eliminating the

possibility of a temporary appointment get us closer to a solution on the continuity of government problem?

I don't think the proposed amendment does anything to solve the continuity of government problem, which is a separate issue. I urge Congress to consider that issue more fully.

Questions from Representative John Conyers, Jr.

(Note: The questions appear in *italic* type with my answers following in roman type.)

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?*

My view is that the risks attendant on having unelected Senators serve for significant periods of time – as some states now do – are every bit as troubling as the short-term lack of full representation for a state during the period between when a vacancy occurs and when the vacancy is filled by special election. I identified those risks in my prepared testimony.

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.” In his written testimony, Professor Vikram Amar argued that under-representation results from the delays of special elections. Please respond to this argument.*

As I mentioned in my answer to Sen. Coburn's question, other nations regularly manage to hold what we would think of as “special elections” -- in the sense that they do not occur on a previously long-established date – within six to eight weeks of a decision to hold an election (e.g., Canada, the United Kingdom). Thus, I am not sure that there needs to be a “prolonged period” of vacancy. And in the future, as electoral technology changes, that period could be made even shorter.

- 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?*

Turnout could be increased, in special elections as in general ones, by permitting day of election registration, early voting, and lenient absentee voting.

- 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?*

In my experience, which occurred during the 1980's and may not be as true today, special elections tend to disproportionately affect less well-educated and less affluent voters who find it more difficult to turn out without the normal kinds of get-out-the-vote efforts that accompany

general elections. I would expect, though, that an election for the U.S. Senate would attract the kind of GOTV funding and attention that normally does not occur in special elections.

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?*

Given that such a national emergency is likely to affect the House of Representatives as well as the Senate, I'm skeptical that gubernatorial appointment of Senators provides much of the flexibility the Nation might need.

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

As I mentioned in my answer to Sen. Coburn's questions, I think Congress should address this issue comprehensively, rather than piecemeal.

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

I don't have an opinion on this question.

6. *Professor Vikram Amar says Governors are well suited to fill vacancies because they are "directly accountable to the exact same statewide electorate that elects Senators." Even though Governors are voted in by the same electorate, why do gubernatorial appointments "distort the representational process," as your written testimony says?*

There are a number of states in which voters have elected Governors and Senators affiliated with different political parties, either because of the qualities of the individual candidates or because their preferences with regard to party control of Congress differ from their views about which state-level party best represents their interests. (For example, in my state – California – the current governor is a Republican while both Senators are Democrats, and the Governor's policies can fairly be described, on many issues, as closer to the positions of the national Democratic Party than the national Republican Party.) Permitting a Governor to appoint a Senator may risk swinging party control over the Senate in a direction that the Governor's constituents would not prefer.

7. *In your written testimony, you found that incumbent Senators enjoy "significant electoral advantages" over challengers, giving appointed Senators an "unwarranted boost." However, even with this advantage, only about a half of appointed Senators who seek reelection win. How do you reconcile this "unwarranted boost" theory with the fact that only half of our appointed Senators get reelected?*

It may be a sign that the people who are being appointed are particularly unattractive to the constituents they are ostensibly representing, especially given the general boost political scientists have found incumbency to provide.

8. *Professor Vikram Amar and Mr. Matthew Spalding are concerned about States not having full representation when there is a Senate vacancy. When a State has a Senate vacancy and is awaiting the outcome of a special election, please explain how one Senator representing the State can protect the State's interests and constituents.*

To be sure, one Senator has less voting power than two. And a State with only one Senator for some period of time will have a diminished presence on committees and the like. That's one reason why most states are likely to conduct special elections rather than leave seats vacant for substantial periods of time. But to the extent that your question is asking about constituent service, Senators from different states already handle constituent service for vastly different sized constituencies. For example, even during a period when Delaware would have only Senator, that Senator would represent fewer constituents than each of the Senators from most of the other states, even if they split the workload.