

Response of Kevin J. Kennedy

To

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 proposed amendment would require a procedure similar to the procedure for filling vacancies in the House of Representatives. A special election may take longer, but it reduces the role of cronyism and patronage in the selection process. There are significant benefits, particularly in a time of crisis, to letting the voters make a deliberative decision on the selection of their leaders. The primary benefit being increased public confidence in its elected representatives.

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 do not believe a special election puts candidates or voters at a disadvantage. In the case of a special election, all candidates start out from roughly the same point because they would be unable to plan in advance for an upcoming scheduled election. Candidates with access to personal wealth or a large campaign balance may have an advantage, but that may occur in any election scenario. A special election may reduce some of the natural advantages elected officials seeking higher office may have in a scheduled election. The shorter time frame presents a challenge for the candidates to adapt their campaigning. This enables them to demonstrate a different set of leadership skills.

I think voters will have abundant opportunity to obtain the requisite information to make an informed choice and may welcome a respite from a protracted contest that adds little new information over the course of the campaign. There are multiple channels of communication in this digital age for candidates to carry a campaign to voters in a cost effective manner.

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

A constitutional amendment is required to ensure a uniform approach to filling vacancies in the U.S. Senate by special election. States, such as Wisconsin has done, can choose to rely on special elections to fill vacancies without a constitutional amendment. However, without a constitutional amendment, states will continue with a hodge podge approach that is susceptible to improper influence, a lack of transparency and accountability as well as cronyism and patronage.

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?

Any vacancy or unresolved election, such as currently in neighboring Minnesota, leaves a state with one or possibly no Senators for a period of time. The focus of the proposed amendment is to provide the public with a clear means of filling the vacancy that is transparent and accountable. Equal representation of states in the Senate is based on the authorization that each state is to be represented by two Senators, not on a guarantee of the offices being filled. At a given point in time one of the offices may not be filled due to a vacancy created by death, resignation, disability or an unresolved election.

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

Current law leaves the cost of conducting federal elections with the states and local jurisdictions. States would certainly prefer to have the federal government fund or supplement the costs of a federal mandate.

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 view democracy as the opportunity for citizens to participate in the selection of their leaders. The appointment process removes this opportunity from citizens.

Any vacancy will leave citizens without one or more elected representatives until the vacancy is filled, either by election or appointment.

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 a proposed constitutional amendment would focus on the uniform requirement for a special election to fill a vacancy in the U.S. Senate while leaving the election process to the states. A campaign to cajole states into changing existing laws would lack the requirement that legislation be enacted. I think a campaign to change existing laws would have less chance for success because states would have no incentive other than the persuasiveness of the campaigners to change existing laws. The proposed constitutional amendment still leaves states with the choice of methods of implementation of the special election procedure.

Respectfully submitted,

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