

Response of Kevin J. Kennedy

To

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?*

I believe more weight should be given to 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. The appointment process does not necessarily fill the vacancy immediately, as states try to add transparency to the appointment process.

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.*

Wisconsin has demonstrated it is able to conduct a special election in 9 to 11 weeks from the call of the election. A State may be without full representation in Congress for a number of reasons including death, resignation, disability or an unresolved election. The length of the period depends on the State’s ability to fill the vacancy. However, voters also have a stake in representation. By being shut of the process for filling a vacancy, voters may perceive they are unrepresented when the choice was made for the voters, rather than by the voters.

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

- 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 is primarily a factor of the electorate's perception the election is important. This is why presidential elections generate a larger turnout than statehouse races, where turnout is larger than local election contests. However, certain referendum or ballot initiatives may generate turnout close to a statehouse race because of the high level of personal impact perceived by voters. States have no control over the quality of the candidates or the nature of the issues in an election campaign.

There are other factors that impact turnout such as administrative barriers to voter registration and absentee voting. Wisconsin has Election Day registration, no excuse absentee voting and an election schedule that permits calling a special election to coincide with a regularly scheduled election for local and judicial offices. States could emulate these practices to improve voter turnout.

- 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?*

Demographics is one factor. Motivated voters participate. This means older voters and voters closely aligned with a particular interest, partisan or issue oriented, are more likely to participate whether it is a special election or a lower profile election.

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?*

Congress has already enacted continuity of representation provisions when it passed the 2006 Legislative Branch Appropriations Act. Those provisions can be adapted for election of U.S. Senators as well as Members of the House of Representatives. 2 USC 8. 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.

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

I believe this can be addressed by modifying existing law related to the continuity of representation adopted in 2005. 2 USC 8.

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

I suggest including a provision the presiding officer of the Senate may declare extraordinary circumstances triggering the special elections when the number of vacancies in the Senate exceeds 25.

- 6a. *Wisconsin is one of four States that requires special elections in the event of Senate vacancies. In your written testimony, you said that the expected cost of a special election is approximately \$3 million. What steps has the State taken to reduce the costs of holding a special election?*

The primary means of reducing costs is to hold the election in concert with a regularly scheduled election. The chief cost components are the time of administrative officials and costs for poll workers. The state could consider consolidating polling places or conducting an election by mail to reduce operating costs.

- 6b. *Do you think Congress should offset some of these costs, as proposed by the ELECT Act?*

Yes. I think the ELECT Act provides a framework for the federal government sharing part of the costs of a special election for U.S. Senator.

7. *What advice can Wisconsin offer to other States about holding special elections?*

Wisconsin's special election timetable is compact and provides an excellent prototype for other states. Wisconsin has Election Day registration, no excuse absentee voting and an election schedule that permits calling a special election to coincide with a regularly scheduled election for local and judicial offices.

- 8a. *Professor Vikram Amar found that voters don't turn out for special elections. What steps has Wisconsin taken to increase turnout?*

Wisconsin has adopted a number of administrative procedures to facilitate voter participation which has resulted in a turnout ranked second in the country, behind Minnesota, the last two presidential elections. These include Election Day registration, no excuse absentee voting, uniform poll hours and an election schedule that permits calling a special election to coincide with a regularly scheduled election for local and judicial offices.

- 8b. *How would you describe the turnout when Wisconsin held its seven special elections?*

The turnout was consistent with turnout for regularly scheduled elections for local and judicial offices. The special election for U.S. Senator in 1957 produced a 35% turnout which is higher than a regularly scheduled Spring election for local or judicial office or the partisan nominating primary for the November general election.

- 8c. *Were there complaints that the candidates elected were not reflective of the State's interests or eligible voters?*

No. The last two special elections to fill vacancies in the U. S. Senate selected two very popular Senators: Robert M. La Follette, Jr. and William Proxmire. Three of the four special elections for Representative in Congress led to the election of individuals who were re-elected several times: Gerald Kleczka, David Obey and Thomas Petri. The other Congressman elected in a special election came from the same political party as his predecessor, but redistricting has changed the demographics of the district.

9. *Why did the Wisconsin legislature remove the Governor's temporary appointment power in 1986?*

The change was a floor amendment to a comprehensive piece of legislation introduced at the request of my office to make a series of administrative and technical changes to the election code to improve the efficiency of conducting elections. 1985 Wisconsin Act 304.

According to former State Representative Steven Brist, who authored the amendment, he wanted to return to the practice of filling vacancies in the office of U.S. Senator by special election. This was the procedure in place at the time of the last U.S. Senate vacancy. All other state and federal legislative offices are filled by special election without temporary appointment and former Representative Brist believed this was an important change. Our legislation provided a convenient vehicle for making the change since it is difficult for a second term legislator to secure passage of his own bills even if he is in the majority, as was the case in 1986.

Another factor according to former Representative Brist was the case in Minnesota following the election of Walter Mondale as Vice-President in 1976. Governor Wendell Anderson resigned from office and the acting Governor appointed Mr. Anderson to the Senate vacancy. He was defeated at the next general election.

10a. *Both Professor Vikram Amar and Mr. Matthew Spalding are concerned about the length of time a special election takes to organize. How soon after a Senate vacancy can a special election be held?*

Wisconsin has demonstrated it is able to conduct a special election in 9 to 11 weeks from the call of the election.

10b. *In comparison to a House special election, is there a different timetable for a Senate special election because it is state-wide?*

No. Wisconsin's timetable is the same for a statewide special election.

10c. *If there is certainty that a Senator is leaving office, can States prepare in advance so that the special election can be held shortly after the Senator leaves?*

I believe so. Wisconsin provides for this with respect to legislative vacancies. Whenever a member of the state legislature is elected to another office and the term of the new office begins before the end of the term for the legislative office, the Governor may call a special election before the vacancy occurs. §8.50 (4)(e), Wis. Stats.

Respectfully submitted,

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