

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

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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, as introduced, would prohibit gubernatorial appointments to fill Senate vacancies. As such, it may be argued that an absolute ban on alternative arrangements would complicate the task of reconstituting the upper house following an attack on the Senate that caused wide-scale death or disability of its Members. An alternative might be changes to the amendment, such as a disaster exemption, that would provide for cases in which a certain number of seats became vacant simultaneously. A disability exemption would be more complex, since it would need to define what a disability is, when it may be declared, when it has been resolved, not to mention procedures for disputed cases. Another option might be to consider the concept of alternate or contingent Members who would assume office in the event the position became vacant. While this practice is little known in the American political context, several European parliaments routinely provide for standby members who are chosen at every regular election.

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?

There can be no question that special elections impose a burden on all participants because of the abbreviated timeline under which they are held. These burdens fall not only on individual candidates who seek the office to be filled, but also on the party organizations in the affected state or district, as well as elections administration officials on both the state and local levels. It is unclear, however, that these obstacles are insurmountable. Vacancies in the House of Representatives generally occur several times during the course of every Congress, yet the states have established efficient procedures to fill them by special election.

Senate elections would be different because of their statewide scope. Arranging to fill a Senate seat by special election would require an exponentially greater effort in the more populous states, but recent experience suggests it can be done. California, the Nation’s most populous state, conducted a *de facto* special election in 2003 when its voters recalled Gray Davis and replaced him in the governor’s office with Arnold Schwarzenegger. Although the recall campaign began

in February, 2003, only on July 24 did the Secretary of State order the two-step recall election to be held on October 7, a date 75 days into the 80-day window prescribed in the state constitution. Nine million voters, comprising 61.2% of those registered, participated in the recall election. This figure falls below the 79.4% who cast votes in the 2008 presidential election, but it demonstrates that a successful special election can be scheduled and conducted on an expedited basis in even the Nation's most populous state.

With respect to the second part of your question, there are certain other considerations that might affect a special election. With very few exceptions, special elections scheduled for any time other than a regular general election will draw a lower voter turnout. The potential disadvantage here is that well-organized advocacy groups might be able to exercise disproportionate influence in a special election. This leverage could take the form of contributions, provision of campaign volunteers in both primary and general elections, and mobilization of large numbers of committed supporters on election day. It would be inappropriate to characterize this influence as overwhelmingly positive or negative, but it is a real possibility, and arguably should be a factor in considering proposals to fill Senate vacancies exclusively through special election.

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

If the goal is to ensure that Senate vacancies may be filled *only* by special election, then a constitutional amendment would be necessary, because the states are guaranteed the appointment option in the 17th Amendment. It is worth noting, however, that the amendment cites special elections first in clause 2. This arrangement of the constitutional language arguably suggests special elections are the primary procedure to meet such contingencies, and that the gubernatorial appointment option, ("the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election....") was established as a secondary expedient to avoid lengthy Senate vacancies at such times when Congress is in session.

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?

Equality of the states in the Senate, known as the "Great" or "Connecticut" Compromise was one of the cornerstone decisions that made possible the Constitution, and thus, the government of the United States as we know it today, possible. It remains one of the foundations of federalism in the American republic, and is a principle that should not be taken lightly. Opponents of the amendment before the subcommittees will argue that, if it is ratified, it will do violence to this principle, not just by tolerating, but by establishing procedures that will ultimately tolerate longer interruptions in equal state representation in the Senate than at present. Further, it is conceivable that, in extraordinary circumstances, a state could be totally deprived of Senate representation for a certain period. To opponents of the proposal, these contingencies are sufficient to eliminate it

from consideration. Supporters of the amendment might argue that the amendment would tolerate interruptions in state representation in the Senate, but that in this instance, the “best” may be enemy of the good. Vacancies will occur if the amendment is approved and ratified in the states, but is it not better, they might suggest, that these gaps in state representation be filled by persons who have been elected by, and therefore enjoy the unquestioned support of, the state’s voters?

Questions of Representative John Conyers, Jr.

U.S. Senate Committee on the Judiciary Subcommittee on the Constitution

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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. You have written about Electoral College reform. The issue before us today is somewhat similar in that arguments have been made that the Electoral College and Senate appointments are not truly democratic processes. What is the danger to representative democracy if Governors fill temporary appointments?

The answer to this question depends on a person's point of view. The arguments for and against the proposed amendment are drawn from the same competing interpretations of democratic principle that animate the two-century old discourse concerning the electoral college method of electing the President and Vice President.

Both interpretations are democratic, but one argues that direct popular election is best under nearly all circumstances. Call it the "Jeffersonian" persuasion, if you will, at least for the purposes of answering your immediate question. Jeffersonians passionately hold the belief that more democracy, and more direct democracy, are always to be preferred, unless the converse can be definitively proved. Under this interpretation, while there may not be an immediate danger to representative democracy if Governors have the power to fill Senate vacancies, election by the people is to be preferred on principle in all but the most extraordinary circumstances. Proceeding from the same philosophical foundation, "Jeffersonians" will generally support direct popular election of the President and Vice President over the electoral college system for the same reasons: their conviction that direct election is more inherently democratic, and therefore, preferable.

The alternative theory is also democratic, but it argues for what has been described as "balanced," or "filtered" democracy, or "ordered liberty." Again, for the purposes of responding to your query, this may be styled the "Hamiltonian" school of thought. Hamiltonians arguably place a high value on precedent, separation of powers, checks and balances, and the role of states as partners in the federal system. Given these fundamentals, they might suggest that gubernatorial appointments to fill Senate vacancies do no harm in the short run, and in fact, by tempering the passions of the moment, they may be more fully consonant with the vision of the founders. Proceeding from the same point of view, Hamiltonians would also seem to be more likely than their Jeffersonian counterparts to support the values represented of the electoral college system, rather than direct popular election.

2. The 17th Amendment's ratification was driven by a movement to restore the people's voice. Yet, it allows Governors to temporarily appoint Senators. Why was this exception created?

The historical record seems clear on this point: Senator Joseph Bristow of Kansas, author of the resolution that became the legislative vehicle for the 17th Amendment, noted that, while his proposal employed “exactly the same language used in providing for the filling of vacancies which occur in the House of Representatives,” the clause empowering the states to provide for gubernatorial appointment to fill temporarily Senate vacancies “is practically the same provision which now exists in the case of such a vacancy.” It seems clear that he was seeking to assure his colleagues that while the proposed amendment embraced the increasing demand for popular election of the Senate, some of the more familiar elements in the election process, such as gubernatorial appointments, would be preserved, at least at the discretion of the states.

- 3a. Did the authors of the 17th Amendment imagine temporary appointments lasting two or more years?

It's unlikely that the authors of the 17th Amendment contemplated temporary appointments of such length. The language of the amendment specifies that governors could be empowered to make temporary appointments “until the people fill the vacancies by election as the legislature may direct[,]” and only when so authorized by the legislatures. Although the amendment nowhere suggests how long this period might last, it may be inferred that its authors envisioned prompt special elections, in part because public concern over lengthy vacancies prior to the amendment's ratification had been an important factor in its successful consideration by Congress.

Another element here was the fact that in 1913, congressional sessions were still fairly short: the first session of a new Congress did not assemble until 13 months after it was elected, and generally adjourned by the end of the following June. The second, or lame duck, session, generally convened the following December, after the general election, and adjourned sine die in March of the following year. Prior to ratification of the 20th Amendment, an average Congress would generally spend 10 months of its two-year term in actual session time, a comparatively short period by comparison with contemporary standards. Of course, there were some notable exceptions, such as during World War I and the New Deal.

- 3b. Do you believe they envisioned something like *Valenti v. Rockefeller* where the court upheld a temporary appointment that lasted twenty-nine months, which is more than a two-year House term?

It is difficult to discern and speculate on any unified intent or understanding of the drafters of the 17th Amendment in Congress respecting the length of a “temporary” appointment of United States Senators prior to an election by the people. Both the historical record and contemporary accounts identify several different political and sectional factions and ideologies in competition in Congress in the drafting of the language that became the 17th Amendment. One of these was a determination to preserve to the states as much authority as possible over the selection, election,

and choosing of United States Senators. The enactment history of the amendment in the United States Congress shows a serious debate and division concerning “states’ rights,” with one of the major contentions in the debate centering on a provision, adopted in the House version, that sought to remove entirely Congress’ residual authority over the “Times, Places and Manners” of federal elections in the states under Article I, Section 4, clause 1 of the Constitution.

In light of the strong states’ rights sentiment, the author of the substitute amendment eventually adopted by Congress, Senator Joseph Bristow of Kansas, noted explicitly that the direct election provisions were not intended to “add new powers of control to the Federal Government” at the expense of the authority of the state legislatures over such elections. The constitutional provision adopted thus expressly provided, as to vacancies, that after a temporary appointment, the people of the state will fill the vacancy by election “as the legislature may direct.” This is a direct grant in the United States Constitution of authority and discretion to the state legislatures, limited only by the requirement that the Governor’s appointment be “temporary,” and there is no indication of a uniform or agreed-upon understanding of a federally-mandated time limit on such appointments, as authorized by the various state legislatures, other than that such appointments be “temporary.”

An early concern of the Congress with regard to mandating “special” elections, as opposed to appointments, it may be noted, had been the expense of such elections to the states. Thus, in the earliest formulations of the vacancy language used in what became the 17th Amendment, the drafter recognized the issue of the expense of statewide elections, and expressly intended to allow the state to be spared the expense of having to hold an extraordinary statewide “special election” soon after or before a regular statewide election.

4. In your opinion, why have the majority of States allowed gubernatorial appointments?

It seems likely that the state legislatures had at least three motives in providing their governors with power to make temporary appointments to fill Senate vacancies. The first was to guarantee that their states would have full representation in the Senate at all times. The spectacle of lengthy, sometimes multiple, Senate vacancies was one of the prime factors contributing to the passage in Congress of the 17th Amendment and its speedy ratification in the states. Second, temporary gubernatorial appointment was familiar to state legislators. Governors had exercised this constitutional mandate for more than a century at the time the 17th Amendment was ratified, and they may have regarded the arrangement as ensuring a degree of continuity. Finally, the states generally accord a high priority to the costs of election administration costs in our own era, so it seems logical to suggest that it may have been of similar concern to state legislators in the early 20th century. With temporary appointments, special elections could be scheduled concurrently with regular statewide elections at substantial savings that may well have attracted cost-conscious state legislatures.