

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.

A) The president is afforded broad, temporary, increased powers during national emergencies, so as to be able to maintain the functions of government. The catastrophic scenario most often discussed is an attack on a joint session of Congress; we note that under such a scenario, assuming comparable losses of membership in the House and Senate, given the status quo, the legislative branch would be rendered unable to function for a period of several weeks pending re-constitution of the House.

B) If need be, we could treat catastrophes differently than run-of-the-mill vacancies. We believe that if emergency appointment clauses are to be enacted, they should be taken up separately from the issue which the amendment in question seeks to address.

C) It is precisely during a time of crisis when we should be most wary of having unelected, unaccountable leadership -- it is during such times that we are most vulnerable to abusive governance, and the rise of despotism.

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?

A) Elections in the US, for all federal offices, are much longer than elections for national office in other countries. The length of our elections is by no means an unambiguously positive phenomenon: It means increased costs -- and therefore increases influence by moneyed interests; it can increase the likelihood of negative campaigning and voter cynicism. And it is a truism that a large portion of the electorate does not start paying attention until the final months of an election.

B) Potential disadvantages include lower turn-out, vote-splitting, favor to those with higher name recognition/wealth. Though "low" turn-out is obviously higher than turnout of just one -- a governor -- as results from allowing appointments; and vote-splitting and advantage for the

wealthy and well-known manifest are relatively likely to manifest in races for open seats, whether special elections or otherwise.

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

A) De jure, states can enact such requirements via local legislation. In practice, it's unlikely that the bulk of states will do so, per political dynamics that have been evinced by current deliberations on the matter, and which we discuss at length in our testimony. In that sense, a constitutional amendment is probably necessary to achieve broad adoption of 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?

A) Yes -- in the case of a senator's acute death or incapacitation, or sudden resignation, the state he or she represented would be without a full complement of senators for a period of time. It is possible, but unlikely, that both of a state's Senate seats might be vacant for a while. Though both such scenarios may manifest under current laws as well -- vacancies are not filled instantly upon their creation, even in those states which appoint senators in case of vacancy; and some states hold special elections. Society regularly accepts lengthy absences from the Senate, in case of illness. We believe that special elections could be held quickly, within a period of 60 days, facilitated by the use of instant runoff voting.

B) Some states allow for legislators to announce resignations ahead of time, triggering elections but keeping the given seat full until the new replacement legislator is elected. It seems reasonable to explore allowing for this for federal senators -- for instance, having allowed Barack Obama and Joe Biden to announce their resignations in November, effective in early January, with an election held during the intervening period.

C) Upon our nation's founding, U.S. House size was initially only 64 members, and one state (Delaware) had only one seat, but still the founders required all vacancies to be elected -- so from their logic, once you go to a representative democracy, you hold elections, even if on the House side that could leave a state without any representation and at the beginning each Member held a higher proportion of the House (1/64th) than any Senator holds of the Senate today (1/100th). (The House membership was obviously still greater than the Senate membership, but the ratio of House seats to Senate seats was much higher than today -- each House member of that era represented about twice as much of the nation's total legislative power than does a modern House member.)

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

A) We think that it would be reasonable for the Federal government, recognizing its obvious interest in the election of senators, and its greater access to monetary resources, to fund such elections. Vacancies in any given state occur on an essentially random basis, but as with most risks, the aggregation of such phenomena across all affected parties would smooth out variability. The Federal government could reasonably expect about two vacancies to occur per year, and budget accordingly. Failing full federal funding, a state-federal partnership seems reasonable, but none of these need be addressed via constitutional amendment.

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?

A) A randomly-selected warm body in a seat in the Senate chamber does not constitute meaningful representation: We would assert that an appointed senator, by definition, is un- or under-representative of the state whom he or she supposedly represents -- or worse, as an appointee can more readily act contrary to the will of his or her constituents. Having such an appointment in place for a period of months or years extends this period of un-, under-, or anti-representation far beyond the two-month time-frame that a special election would require.

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) Foremost, it would remove governors from the process. Powerful actors rarely act to decrease their own authority, making governors a steep obstacle to the enactment of new laws relative to Senate vacancies -- but governors have no formal role in the ratification of a constitutional amendment. A constitutional amendment is essentially an interstate compact -- parties to it would need not fear that action would allow for any one state to gain an advantage relative to others. The formal proposal by Congress of a constitutional amendment would likely catalyze a national movement, depoliticize the matter, brand it as a 'good government' issue, and encourage local chapters of FairVote, Common Cause, and other groups to act vigorously towards its enactment.

3. I am familiar with Fair Vote's good work on voter turnout. According to your organization, "Voter Turnout is a fundamental quality of fair elections and is generally considered to be a necessary factor for a healthy democracy." Are you concerned about the possibility of low voter turnout for a special election?

A) Turn-out in a special election is likely to be lower than turn-out in a regular election -- but it would certainly be higher than the turn-out of precisely one voter (the governor) for the appointment of a senator. A broad electorate is preferable to a narrow one, but a narrow one better than none at all. We also believe that instant runoff voting, by compressing a primary and general election into a single election day, would keep turnout higher than it would be during a 'normal' special election.

Your organization has studied voter turnout in federal primary elections, including how it often drops in subsequent runoffs. Are you concerned that voter turnout would be even lower in primaries and runoffs for special elections to fill Senate vacancies?

A) This is a possibility, but an imperfect election is preferable to no election, and IRV could assuage such concerns, at least to a degree. Vote-by-mail, Saturday-Sunday elections, and other pro-turnout reforms could also be employed here.

Questions of Representative John Conyers, Jr.

1 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

1.1 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?

A) As far as we are concerned, a non-elected senator should not be considered a representative of the people of the state from which he or she hails. Such a senator has little accountability to his or her constituents, and could act contrary to their will more easily than could an accountable senator. We side squarely with elections of senators by the people.

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.

A) We believe that special elections could be held in a much quicker time-frame than that outlined above -- as little as 2 months. We believe that having a non-elected senator should not be considered tantamount to 'representation,' and can readily conceive of circumstances when it could be worse than having no senator at all. Special elections are the norm for House vacancies -- leaving districts, and sometimes whole states, with no representation in that body. We frequently accept the prolonged absence of senators, in the case of severe illness.

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?

A) We believe that instant runoff voting could raise turnout, by compressing two election days (primary and general) into just one. We also advocate election day holidays and no-fault

absentee voting, in the case of special elections and otherwise. We also note that turnout is necessarily higher in an election than in the case of appointment. (In the latter, turnout is just one voter -- the governor.)

B) Vote-by-mail, Saturday-Sunday elections, and other pro-turnout reforms could also be employed here.

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?

A) There is not a hard and fast rule, but in general, the electorate skews older, whiter, and wealthier -- but this dynamic is the same with our current primary system: Regularly scheduled primaries often have low, skewed turnout. To the extent to which we realize that the status quo can be imperfect, the answer is not to block elections -- the answer is to fix the problems.

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?

A) The president is afforded increased power during national emergencies, helping to maintain the functions of government. The catastrophic scenario most often discussed is an attack on a joint session of Congress -- we note that under such a scenario, assuming comparable losses of membership in the House and Senate, given the status quo, the legislative branch would be rendered unable to function for a period of several weeks pending re-constitution of the House.

B) It is precisely during a time of crisis when we should be most wary of having unelected, unaccountable leadership -- it is during such times that we are most vulnerable to abusive governance, and the rise of despotism.

C) If need be, we could treat catastrophes differently than run-of-the-mill vacancies.

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

A) FairVote does not fundamentally oppose this, but it need not interfere with improving the way in which the regular rhythm of run-of-the-mill vacancies are addressed.

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

A) We believe that if emergency appointment clauses are to be enacted, they should be taken up separately from the issue which the amendment in question seeks to address. Any such emergency appointments should obviously be considered very seriously, with a high threshold for implementation: to be triggered upon death or incapacitation of a number of members such that it is essentially impossible for government to function otherwise -- and ideally with affirmation of such by the legislatures and executives of the states whose representatives are said

to be unable to function. Any such emergency appointments should be short, and writs of election should be filed simultaneous to such appointments.

6a. Professor Vikram Amar is concerned that special elections cause delays. In the New York Times, you suggested compressing runoffs into general elections as one solution.¹ Can you expound on this?

A) Instant runoff voting (IRV) allows for primary and general elections (or general and runoff elections) to be compressed into a single election. Voters rank their choices in order of preference, and a runoff is simulated, nearly instantly. IRV is used in a variety of communities -- including for certain voters in state-wide elections in Arkansas and South Carolina, and in municipalities throughout the nation. We believe that IRV has many benefits -- in the case of special elections, doing away with the lag between a primary and general, allowing for cost savings, and increasing turnout. Legislation pending in Vermont includes IRV, after private party nominations; New York does not hold primaries in the case of US House vacancies.

6b. What other steps should states take so special elections run quickly?

Please see above answer.

7. You were the only hearing witness who is serving as a State representative. You also sponsored legislation in Rhode Island to require special elections. In your view, how will the States receive this constitutional amendment?

A) The reception will likely be mixed, though substantial action on this issue is far more likely in the form of constitutional amendment than as state-level legislation. An amendment would remove self-interest governors -- who are unlikely to assent to the stripping of their authority -- from the process: Governors have been the most significant obstacle to state reform efforts to date. A constitutional amendment is essentially an interstate compact -- parties to it would need not fear that action would allow for a one state to gain an advantage relative to others. A proposal by Congress of a constitutional amendment would likely catalyze a national movement, depoliticize the matter, brand it as a 'good government' issue, and encourage local chapters of FairVote, Common Cause, and other groups to act vigorously towards its enactment.

8. Why did Rhode Island allow its Governor the exclusive power to fill Senate seat vacancies and what has changed since that time?

A) It's important to note that governors filled Senate vacancies prior to the passage of the 17th Amendment. Allowing them to continue to do so, even after 1913, was essentially maintenance of the status quo. Over the course of the last century, the notion that senators should be elected by the populous has, thankfully, become a basic tenet of our democracy -- what seemed normal a century ago now seems like a gross, unjustifiable misappropriation of power. I introduced legislation to change this process last year, primarily as an abstract assertion of values I believe are important, but it did not pass out of committee. It is the broad public disgust at the shenanigans in Illinois and elsewhere that has led to the higher likelihood of passage this session.

9. Mr. Matthew Spalding said in his written testimony that “the proposed amendment, by preventing States from supplying immediate appointed representation to the national legislature if they so choose, would be detrimental to the States.” Please respond to this argument.

A) This requires a brief meditation on the relevant meaning of the term "State." States deserve representation inasmuch as we understand "State" to be synonymous with the totality of the people who reside within the borders of the given geographical unit: States have no interest apart from the aggregated will of the people who reside within them. Such aggregated will can only be determined by election. A senator who has been appointed by a governor does not represent a state in a meaningful sense -- foremost, he or she represents the interests of said governor, which may or may not coincide with the will of the people of the relevant state.

10. In your written testimony, you found that nine States introduced legislation requiring special elections. Why do you think more States have not acted?

A) As outlined in our testimony, the political realities of most states make such action highly unlikely -- inter- and intra- party tension and conflict within and between branches of government make such action unlikely. In particular, governors are unlikely to accede to the diminishment of their own authority. Legislatures controlled by the same party as the governor are unlikely to act to strip the governor of such powers. Legislatures controlled by a different party than the governor are more likely to act, but their efforts will be negated by gubernatorial vetoes -- except in states like Rhode Island, wherein the legislature is controlled by a super-majority of a different party than the governor, and will therefor be able to override such vetoes. A constitutional amendment would make action much more likely in most states.