

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.

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?

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

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?

In light of the events of September 11, 2001, the potential of a catastrophic vacancy in the Senate is unfortunately a prudent consideration. As your initial question suggests, the amendment under consideration would —if accepted—compromise the integrity of the Senate between the time of the catastrophe and the eventual election of new senators. Elections take time, and in the interim, the Senate would have to function with many states underrepresented or unrepresented. This is particularly significant for the Senate because the Senate is directly responsible under the Constitution for the ratification of treaties and the formation of alliances. In the case of a terrorist attack, a fully-functioning Senate would be essential for combating the aggressors, a responsibility that may be difficult to fulfill under the proposed amendment.

It is true, the House faces a similar difficulty under current law, but there are two factors that distinguish between a special election in the House versus the Senate. First, as a practical matter, the probability that a terrorist attack (or some similar event) would

incapacitate a large proportion of the House is lower than this potential for the Senate just as a matter of numerical probability—the Senate is a much smaller body than the House. Secondly and more substantively, temporary appointment for representatives is not a viable possibility. As you know, representatives act on the behalf of a specific district, which is almost always drawn up without regard for county or municipal lines. Finding someone to appoint a representative is not feasible—simply put, no one is elected by the same group of constituents as a given representative. Senators, on the other hand, represent their entire state; as such, the 17th Amendment allows for the potential of gubernatorial appointment because a governor, like a senator, is elected by his or her entire state (i.e., by the same constituency). Thus, to the extent that it is possible, I would suggest that we exclude comparisons between the House and the Senate in the current discussion. The risk of vacancies in the House is certainly significant (though not as acute as in the Senate), but this is not a problem that can be ameliorated through temporary appointment.

A shortened special election cycle carries with it distinct disadvantages—voters have less time to study candidates, there is less time for campaigning, candidates are given less warning to prepare for the election, the price of a special election is significant, etc. However, I should note that there are some advantages to a shortened election cycle as well—a shorter election season may discourage petty argument and trivialities, because, under a shortened time frame, substantive debate is given greater priority.

These are considerations that states should account for when deciding their own particular policy apropos senate vacancies. Of course, these considerations will vary from state to state, depending on variables like the state's population, population density, urban/rural population distribution, the efficiency of the state's election process, the technological abilities of the election offices, the funding available for special elections, etc. That is why, when drawing up the 17th Amendment, the framers left these decisions to the individual states. States have a much better grasp of the challenges posed by a quick special election than the federal government. In some cases, states will decide that a special election for each vacancy is realistic and desirable, and that extending the temporary vacancy long enough to hold a special election is acceptable (indeed, this is the case in your home state of Oklahoma); in other cases, a state may decide that a temporary appointment by a governor is more realistic and more efficiently provides for senatorial representation in the Senate. Either way, the principle of federalism would dictate that the states continue to decide for themselves.

As mentioned, the potential of a state going without senatorial representation for a period of time is very real. In fact, according to Oklahoma law, this is exactly what would happen if both of Oklahoma's senators were unable to continue serving—the state would remain unrepresented until a special election took place. As a matter of principle, this is fine, because Oklahomans themselves, through their elected state officials, have chosen this mechanism for filling senate vacancies. What is unacceptable is for the federal government to prescribe mandatory periods of time without representation for every state.

The right to equal representation is a guarantee that each state be given the same access to representation as every other state, and permits the states to work out for themselves how best to fill this position. (The 17th Amendment further specified that regularly scheduled elections be held statewide and democratically.)

The recommendations of the proposed amendment can (and perhaps should!) be taken up by the states individually. But by totally removing the potential of gubernatorial appointment, the federal government would infringe on the right of states to be represented continuously in the Senate (if they so choose). Insofar as the mandate for special election disallows representation for a period of time—irrespective of the state's wishes—the principle of equal representation is violated. The fundamental question is not whether the Senate is always 100 percent full (although this is certainly a question worth asking); more accurately, we should ask: who should decide the mechanism for filling a vacated seat—the states, or the federal government? This is the heart of the matter at hand.

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**

- 1a. In your written testimony, you found that there was “no discussion of the vacancy clause” during the debate of the 17th Amendment. When people hear the word “temporary,” most do not think of something lasting two or more years. What do you think the drafters meant by the term temporary appointments?
- 1b. Is there any Constitutional limit on how long an appointment can last before it stops being temporary?

The drafters meant by temporary that the appointment cannot exceed the next election cycle. The appointment would last until the state filled the vacancy through an election. The length of the temporary appointment would be determined by state legislatures. Elections serve as the mechanism by which an appointment stops being temporary.

- 2a. You describe the Senate as a “stable” and “deliberative” body. Although there are examples of Governor appointed Senators who have served long distinguished careers, of the 184 appointed Senators, only 60 were eventually elected and served another term.¹ Professor Karlan gives the example of a 24-hour Senator in her written testimony. Doesn’t that hurt the Senate’s stability?
- 2b. What weight should we give to this concern?

Stability, due to the longer term limits, is less susceptible to immediate political passions. A key aspect of the Senate’s role in the Federal government is its continuity on behalf of the states. This key role is not undermined by gubernatorial appointments. There is no weight to the concern of stability. To the extent that a vacancy causes instability, a

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

gubernatorial appointment stabilizes it. There is no contradiction between the principle of stability and gubernatorial appointments.

3. In your written testimony, you said that the question here is how to balance “the risk associated with . . . a bad appointment . . . and the people of a State not being fully represented in Congress for a period of time.” Assuming that a special election could be held within weeks or a month of a vacancy, does that shift the scale in favor of special elections?

No, the proper balancing of these concerns should be left to the states. Each state has particulars which demand different answers. There is no need to impose special elections on a state that has specific circumstances that demand gubernatorial elections. Each state should decide for itself whether it is better to have a gubernatorial appointment or a special election.

4. If the ELECT Act took the form of a Constitutional amendment, would you support it as that would give States immediate representation while capping the length of temporary appointments?

No, the current mechanism allows states to make various decisions regarding their particular circumstances. There is no need to amend the Constitution and make one nationwide standard. This would be imposing on the states options that they already have. There is no controversy that requires a Constitutional amendment; the states can already choose what is best for their particular circumstances.

5. In your written testimony, you express the concern that without immediate appointments, States may not be represented at times of great significance. Former Representative Rahm Emmanuel’s seat was only filled at the beginning of March, having been vacated in November. Do you think House vacancies should be filled by Governors for the same reason?

There are several important differences between Senatorial vacancies and House vacancies. First, because the Senate is a much smaller body, the absence of one Senator will be far more keenly felt. Moreover, the Senate has a unique responsibility in the sphere of treaties and foreign policy. In the case of a national emergency, continuity of government in the Senate is a particularly pressing concern. Second, Senators are elected to represent their State, while Representatives are elected to represent the constituents of their district. In most states, there is no executive authority elected by that same constituency, and so there is no one who might legitimately select a replacement. In

states with only one Representative, however, it might be prudent to allow for gubernatorial appointment in the event of a House vacancy.

- 6a. If the delays created by special elections hurt a State's interests in Congress, shouldn't we have this same concern in the House where there are no gubernatorial appointments?
- 6b. Have you seen evidence of this?
- 6c. Shouldn't we be more concerned with House vacancies considering every person is represented by two Senators but only one Representative?

The premise of your question suggests that representation in the House and Senate differ only in the relative size of their constituencies. This is incorrect. As I stated in my written testimony, Senators represent States as unique, semi-sovereign entities, while Representatives are elected to represent the constituents of their district. As such, a Senatorial vacancy clearly hurts a State's interests, and a vacancy in the House hurts the interests of that district. However, when no other official is elected by the exact constituency that elects a Representative, no one is in a position to appoint a replacement.

- 7. Sixty-seven appointed Senators, or more than a third of all appointed Senators, did not seek reelection. Without a special election, how can the people make sure that these Senators who do not want reelection are representing their interests?

When Senators are appointed to fill vacancies, they are appointed by the democratically elected Governor of the State, representing the interests of the same exact constituency as the Senator. If the citizens of any State are concerned that their Governor may appoint Senators who do not represent their interests, their State legislatures may mandate special elections for Senatorial seats, as several states have already done.