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U.S. Senate Vacancies: Contemporary Developments and Perspectives

Thomas H. Neale

Specialist in American National Government

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Summary

United States Senators serve a term of six years. Vacancies occur when an incumbent Senator leaves office prematurely for any reason; they may be caused by death or resignation of the incumbent, by expulsion or declination (refusal to serve), or by refusal of the Senate to seat a Senator-elect or -designate.

Aside from the death or resignation of individual Senators, Senate vacancies often occur in connection with a change in presidential administrations, if an incumbent Senator is elected to executive office, or if a newly elected or reelected President nominates an incumbent Senator or Senators to serve in some executive branch position. The election of 2008 was noteworthy in that it led to four Senate vacancies as two Senators, Barack H. Obama of Illinois and Joseph R. Biden of Delaware, were elected President and Vice President, and two additional Senators, Hillary R. Clinton of New York and Ken Salazar of Colorado, were appointed Secretaries of State and the Interior, respectively.

One Senate vacancy occurred in connection with the 2016 presidential election, when Senator Jeff Sessions of Alabama resigned from the Senate on February 8, 2017, to accept the position of Attorney General of the United States. On February 9, the governor of Alabama appointed state Attorney General Luther Strange III to fill the vacancy. Senator Strange, who was sworn in the same day, would hold office until a special election could be held to fill the seat for the balance of the current term, which expires in 2021. The special election was scheduled for December 12, 2017.

The use of temporary appointments to fill Senate vacancies is an original provision of the U.S. Constitution, found in Article I, Section 3, clause 2. The current constitutional authority for temporary appointments to fill Senate vacancies derives from the Seventeenth Amendment, which provides for direct popular election of Senators, replacing election by state legislatures. It specifically directs state governors to “issue writs of election to fill such vacancies: *Provided*, that the legislature of any state may empower the executive thereof to make temporary appointment until the people fill the vacancies by election as the legislature may direct.” Since ratification of the Seventeenth Amendment in 1913, the Senate records currently identify 195 appointments to fill vacancies in the office of U.S. Senator.

During this period, since ratification of the Seventeenth Amendment, most states have authorized their governors to fill Senate vacancies by temporary appointments. At present, in 35 states, these appointees serve until the next general election, when a permanent successor is elected to serve the balance of the term, or until the end of the term, whichever comes first. Ten states authorize gubernatorial appointment, but require an ad hoc special election to be called to fill the vacancy, which is usually conducted on an accelerated schedule, to minimize the length of time the seat is vacant. The remaining five states do not authorize their governors to fill a Senate vacancy by appointment. In these states, the vacancy must be filled by a special election, here again, usually conducted on an accelerated schedule. In one notable detail concerning the appointment process, four states require their governors to fill Senate vacancies with an appointee who is of the same political party as the prior incumbent.

Following the emergence of controversies in connection with the Senate vacancy created by the resignation of Senator Barack Obama in 2008, several states eliminated or restricted their governors’ authority to fill Senate vacancies by appointment, while both legislation and a constitutional amendment that would have required all Senate vacancies to be filled by special election were introduced in the 111th Congress. None of these measures reached the floor of either chamber, however, and no comparable measures have been introduced since that time.

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Introduction

Throughout the nation's history, the governors of the states have filled most Senate vacancies by the appointment of interim or temporary Senators whose terms continued until a special election could be held. Between 1789 and 1913, the Constitution's original provisions empowered governors to "make temporary Appointments until the next Meeting of the [state] Legislature, which shall then fill such Vacancies."¹ With the 1913 ratification of the Seventeenth Amendment, which provided for popular election of the Senate, the states acquired the option of filling Senate vacancies either by election or by temporary gubernatorial appointment:

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.²

Gubernatorial appointment to fill Senate vacancies has remained the prevailing practice from 1913 until the present day, with the executives of 45 states possessing some form of appointment authority, provided the candidate meets constitutional requirements. Of Senate appointments that have occurred since 1913, the vast majority have been filled by temporary appointments, and the practice appears to have aroused little controversy during that 96-year period.

Aside from the death or resignation of individual Senators, vacancies may also occur when a newly elected administration is inaugurated. During the presidential transition following an election, incumbent Senators may resign to accept appointments to executive branch positions or to assume the office of President or Vice President.

In 2008-2009, for instance, four vacancies were created following the presidential election: two in connection with the election of Senators Barack H. Obama and Joseph R. Biden as President and Vice President, and two more when Senator Hillary Rodham Clinton was nominated to be Secretary of State and Senator Kenneth L. Salazar of Colorado was nominated to be Secretary of the Interior. This report discusses the latest developments in vacancies in the Senate; identifies state provisions to appoint or elect Senators to fill vacancies; and reviews the constitutional origins of the appointments provision and its incorporation in the Seventeenth Amendment.

Latest Developments in Senate Vacancies

Alabama

One Senate vacancy has been generated to date in connection with the 2016 election of Donald J. Trump as President. On January 20, 2017, the President nominated Alabama Senator Jeff Sessions for the office of Attorney General of the United States.³ Senator Sessions was confirmed by the Senate on February 8, 2017; he resigned from the Senate the same day and was sworn in the following day, February 9.⁴ In accordance with Alabama law,⁵ Governor Robert Bentley

¹ U.S. Constitution, Article I, Section 3, clause 2.

² U.S. Constitution, Amendment 17, clause 2.

³ The White House, Office of the Press Secretary, "Nominations Sent to the Senate," January 20, 2017, at <https://www.whitehouse.gov/the-press-office/2017/01/20/nominations-sent-senate>.

⁴ "Jeff Sessions Sworn In as Attorney General, Trump Signs Executive Actions," CBS News, February 9, 2017, at <http://www.cbsnews.com/news/jeff-sessions-sworn-in-as-attorney-general-trump-signs-executive-actions/>.

announced his appointment of state Attorney General Luther Strange III to fill the vacancy on February 9.⁶ Senator Strange, who was sworn in the same day,⁷ would serve until a special election. On April 18, Governor Kay Ivey, who succeeded Governor Bentley on April 10, ordered special primary and general elections to fill the Senate seat for the balance of the current term, which expires in 2021. The special primary was held August 15 and the runoff on September 26; the special general election was scheduled for December 12, 2017.⁸

State Provisions Governing Senate Vacancies

At present, five states require that vacancies can be filled *only* by a special election. The remaining 45 states provide some form of appointment by their governors to fill U.S. Senate vacancies.

Filling Vacancies by Special Election

Five states currently provide that Senate vacancies be filled *only* by special elections; their governors are not empowered to fill a vacancy by appointment.⁹ Typically, these states provide for an expedited election process in order to reduce the period during which the seat is vacant:

- North Dakota¹⁰
- Oklahoma¹¹
- Oregon¹²
- Rhode Island¹³

(...continued)

⁵ *Code of Alabama*, §36-9-8, “Proceedings upon occurrence of vacancy in office of United States Senator - Ordering of election for selection of United States Senator - Authorization and procedure generally,” at <http://alisondb.legislature.state.al.us/alison/codeofalabama/1975/36-9-8.htm>.

⁶ Office of the Alabama Governor, press release, February 9, 2017, “Governor Bentley Appoints U.S. Senator,” at <http://governor.alabama.gov/newsroom/2017/02/governor-bentley-appoints-alabama-u-s-senator/>.

⁷ “Luther Strange Sworn In as Alabama Senator, Replacing Attorney General Jeff Sessions,” *Washington Post*, February 9, 2017, at https://www.washingtonpost.com/politics/congress/luther-strange-sworn-in-as-alabama-senator-replacing-attorney-general-jeff-sessions/2017/02/09/46b0c944-ee6b-11e6-a100-fdaaf400369a_story.html?utm_term=.057b15ae61e1.

⁸ Office of the Alabama Governor, press release, April 18, 2017, “Governor Ivey Moves U.S. Senate Election to Adhere with State Law,” at <http://governor.alabama.gov/news/press-releases/governor-ivey-moves-us-senate-special-election-to-adhere-with-state-law>.

⁹ National Conference of State Legislatures, “Filling Vacancies in the Office of United States Senator,” Updated May 17, 2017, at <http://www.ncsl.org/research/elections-and-campaigns/vacancies-in-the-united-states-senate.aspx>.

¹⁰ *Ibid.*, North Dakota: Governor calls special election to be held within 95 days after the vacancy, but if the vacancy occurs within 95 days of the expiration, the seat remains vacant for the balance of the term.

¹¹ *Ibid.*, Oklahoma: Governor calls special primary election to be held within 53 days after the vacancy, a runoff primary 20 days later, and a general election 20 days after the runoff, but if the vacancy occurs after March 1 of an even-numbered year, the vacancy is filled at regular primary and general elections.

¹² *Oregon Revised Statutes*, §188.120, Filling Vacancy in Election or Office of U.S. Representative or Senator,” at <https://www.oregonlaws.org/ors/188.120>. Governor schedules a special election “as soon as practicable.”

¹³ National Conference of State Legislatures, “Filling Vacancies in the Office of United States Senator,” Rhode Island: Governor schedules a special election at “as early a date as is in compliance with the provisions of law.” If a vacancy occurs between July 1 and October 1 of an even-numbered year, the special election is held concurrently with the regularly scheduled general election held that year.

- Wisconsin¹⁴

Filling Vacancies by Gubernatorial Appointment

As noted previously, 45 states authorize their governors to fill Senate vacancies by appointment. The most widespread practice is for governors to appoint temporary Senators who hold the seat until the next statewide general election, at which time a special election is held to fill the seat for the balance of the term. The National Conference of State Legislatures identifies two variations within this larger category:

- 36 states that provide for gubernatorial appointments to fill Senate vacancies, with the appointed Senator serving the balance of the term or until the next statewide general election; and
- 9 states that provide for gubernatorial appointments, but also require a special election on an accelerated schedule, often within a relatively short period after the vacancy occurs.

In addition, within the first sub-category, four states also identified below require that the Senator appointed by the governor be a member of the same political party as the prior incumbent.

Filling Vacancies by Appointment Through the Next General Election

The 36 states listed below authorize their governors to fill Senate vacancies by appointment, with the temporary Senator serving the balance of the term or until a special election is held concurrently with the next statewide general election. General elections are scheduled with relative frequency throughout the states. They are held in every state at least once in every even-numbered year, for Representatives in Congress, Senators, if applicable, and, quadrennially, for the President and Vice President, as well as for a broad range of state officials, including governors, legislators, and other state and local elected officials. In addition, a number of states schedule statewide elections for local elected officials for odd-numbered years. In several states—Hawaii, Minnesota, New Jersey, New York, and Virginia—if a Senate vacancy occurs in close proximity to a regularly scheduled statewide primary or general election, the appointed Senator serves until the *following* statewide election.¹⁵

Arizona	Illinois	Missouri	Ohio
Arkansas	Indiana	Montana	Pennsylvania
California	Iowa	Nebraska	South Carolina
Colorado	Kansas	Nevada	South Dakota
Delaware	Kentucky	New Hampshire	Tennessee
Florida	Maine	New Jersey	Utah
Georgia	Maryland	New Mexico	Virginia
Hawaii	Michigan	New York	West Virginia
Idaho	Minnesota	North Carolina	Wyoming

¹⁴ Wisconsin: the Governor orders a special election to be held between 62 and 77 days following the order. A vacancy that occurs between the second Tuesday in April and the second Tuesday in May in the year of the general election is filled at the regular primary and general election. *Wisconsin Statutes*, ch. 8, §50, at <http://docs.legis.wisconsin.gov/statutes/statutes/8/50>.

¹⁵ National Conference of State Legislatures, “Filling Vacancies in the Office of United States Senator,” Updated May 17, 2017.

“Same Party” Requirements

Four of the states listed above that authorize their governors to fill vacancies by appointment also place political party-related restrictions on that power. These provisions are intended to ensure that the appointing governors respect the results of the previous election by selecting a temporary replacement who will either be of the same political party as the prior incumbent, or who has been endorsed or “nominated” by the prior incumbent’s party apparatus.

- **Arizona** requires the governor to appoint a replacement Senator from the same party as the previous incumbent.¹⁶
- **Hawaii** requires the governor to select a candidate from a list of three prospective appointees submitted by the political party of the previous incumbent.¹⁷
- **Utah** requires the governor to appoint a replacement Senator from the same party as the previous incumbent.¹⁸
- **Wyoming** requires the governor to appoint a replacement Senator from the same party as the previous incumbent.¹⁹

Some commentators have questioned these “same party” requirements on the grounds that they attempt to add extra qualifications to Senate membership, beyond the constitutional requirements of age, citizenship, and residence.²⁰

Filling Vacancies by Appointment Followed by a Proximate Special Election

Another category of states includes nine that authorize their governors to fill Senate vacancies by appointment until a special election, but require that the special election be held in relatively close proximity to the date the vacancy occurred. If the vacancy does occur close to a regularly scheduled general election, the special election may be held concurrently, but if not, the special election may be scheduled within a few months of the vacancy. This provision is intended to reduce the length of time an appointed Senator holds office before being replaced by an elected successor. In these states, the appointed Senator generally serves only until the election results for a successor are certified. The following state requirements do not include information on nomination procedures.

- **Alabama** authorizes the governor to fill a Senate vacancy by appointment. The Code of Alabama also requires the governor to order a special election if the vacancy occurs more than four months before a general election. If it occurs between 2 and 4 months before the general election, it is filled at that election, but if it occurs within 60 days of a general election, the governor shall schedule a

¹⁶ *Arizona Revised Statutes*, Article 16-222, 5C, at <http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/16/00222.htm&Title=16&DocType=ARS>.

¹⁷ *Hawaii Revised Statutes*, ss. 17-1, at http://www.capitol.hawaii.gov/hrscurrent/Vol01_Ch0001-0042F/HRS0017/HRS_0017-0001.htm.

¹⁸ *Utah Code Annotated*, Title 20-A-1-502, at http://le.utah.gov/~code/TITLE20A/hm/20A01_050200.htm.

¹⁹ *Wyoming Statutes*, Title 22-18-111, at <http://legisweb.state.wy.us/statutes/statutes.aspx?file=titles/Title22/Title22.htm>.

²⁰ Vikram David Amar, “Are Statutes Constraining Gubernatorial Power to Make Senate Appointments Constitutional Under the Seventeenth Amendment?” *Hastings Law Quarterly*, vol. 35, number 4, summer 2008, pp. 727-760.

special election to be held “on the first Tuesday after the lapse of 60 days from and after the day on which the vacancy is known to the governor.”²¹

- **Alaska** authorizes the governor to fill a Senate vacancy by appointment. Alaska statutes also require the governor to order a special election not less than 60 or more than 90 days after the vacancy. If, however, the vacancy occurs less than 60 days before the primary election in the general election year in which the term expires, no special election is held.²²
- **Connecticut** authorizes the governor to fill a Senate vacancy by appointment under limited circumstances. Within 10 days of a vacancy, the governor orders a special election to be held 150 days later, unless the vacancy occurs in close proximity of regular statewide state or municipal elections, in which case the special election is held concurrently with the regular elections. If it occurs after municipal elections during the year the term expires, the governor nominates an appointee to fill the vacancy for the balance of the term, subject to approval by two-thirds of the members of both houses of the legislature. If, however, the vacancy occurs in close proximity of the elections at which the seat would be filled, the seat remains vacant for the balance of the term.²³
- **Louisiana** authorizes the governor to fill a Senate vacancy by appointment for the balance of the term if it expires in one year or less. Otherwise, the governor orders a special election to be held in conformity with a range of dates provided in state law, but not less than 11 weeks after the election proclamation.²⁴
- **Massachusetts** authorizes the governor fill a Senate vacancy by appointment to serve only until a special election has been held. The governor calls a special election to fill a Senate vacancy between 145 and 160 days after the vacancy occurs, unless the vacancy occurs after April 10 of an even-numbered year, in which case the special election is held concurrently with the regularly scheduled statewide election.²⁵
- **Mississippi** authorizes the governor to fill a Senate vacancy by appointment until a special election has been held; if less than one year remains on the prior incumbent’s term, the appointee serves the balance of the term. If more than 1 year remains on the term, the special election is held within 90 days of the date on which the governor ordered the election, unless the vacancy occurs during a

²¹ *Code of Alabama*, §36-9-7, “Proceedings upon occurrence of vacancy in office of United States Senator—Temporary Appointment of Senator,” at <http://alisondb.legislature.state.al.us/alison/codeofalabama/1975/coatoc.htm>; and §36-9-8, “Ordering of election for selection of United States Senator—Authorization and procedure generally,” at <http://alisondb.legislature.state.al.us/alison/codeofalabama/1975/36-9-8.htm>.

²² *Alaska Statutes*, AS 15.40.140, “Condition and Time of Calling a Special Election,” at <http://touchngo.com/lglcntr/akstats/Statutes/Title15/Chapter40/Section140.htm>.

²³ *General Statutes of Connecticut*, ch. 146, Elections, §9-211, “United States Senator: Vacancy,” at https://www.cga.ct.gov/current/pub/chap_146.htm#sec_9-211.

²⁴ Louisiana Secretary of State, *Excerpts from the Louisiana Code*, “Title 18 of the Louisiana Revised Statutes,” RS 18:1278, at <http://www.sos.la.gov/ElectionsAndVoting/PublishedDocuments/PresidentExcerptsFromTheElectionCodeRegardingPresident2016.pdf>.

²⁵ 190th General Court of the Commonwealth of Massachusetts, *Massachusetts General Laws*, Title VIII, ch. 54, §140, “Senators and Representatives in Congress: Vacancies,” at <https://malegislature.gov/Laws/GeneralLaws/Part/TitleVIII/Chapter54/Section140>.

- year in which a regular statewide election is scheduled, in which case the vacancy is filled concurrently with the regularly scheduled election.²⁶
- **Texas** authorizes the governor to fill a Senate vacancy temporarily by appointment if the vacancy exists or will exist when Congress is in session. If the vacancy occurs in an even-numbered year and 62 or more days before the primary, the vacancy is filled at that year's general election. If the vacancy occurs in an odd-numbered year, or fewer than 62 days before the primary, the governor calls a special election which is scheduled for the first uniform election date falling 36 or more days after it has been ordered.²⁷
 - **Vermont** authorizes the governor to fill a Senate vacancy by appointment until a successor has been elected. The governor calls a special election, which is held within three months of the vacancy, except if the vacancy occurs within six months of a general election, in which case the special election is held concurrently with the regularly scheduled general election.²⁸
 - **Washington** authorizes the governor to fill a Senate vacancy by appointment until a successor has been elected. Not more than 10 days after the vacancy occurs, the governor calls a special election to be held not less than 140 days later. If the vacancy occurs less than eight months before a general election, the special election is held concurrently with the regularly scheduled election. If the vacancy occurs after the close of the filing period, a special election is held not more than 90 days following the regularly scheduled general election.²⁹

Senate Vacancies and Elections: Perspectives

Constitutional Origins of the Vacancies Clause

The Constitutional Convention of 1787 addressed the question of Senate vacancies not long after it had approved the Great, or Connecticut, Compromise, which settled on equality of state representation in the Senate, and representation according to population in the House of Representatives. On July 24, the delegates appointed five members to serve as the Committee of Detail; the committee was charged with assembling all the points decided by that stage of the deliberations, arranging them, and presenting them to the convention for further refinement and discussion. The committee's report, presented on August 6, proposed that governors would fill Senate vacancies if they occurred when the state legislature was not in session:

Article 5, Section 1. The Senate of the United States shall be chosen by the Legislatures of the several States. Each Legislature shall choose two members. *Vacancies may be*

²⁶ Mississippi Secretary of State, *Mississippi Code*, Title 23 Elections, Chapter 15, Election Code Revised, Article 25, Vacancies in Office, §223-25-855. "Elections to Fill Vacancies in Office of U.S. Senator; Interim Appointments by Governor," at <https://www.sos.ms.gov/links/elections/home/tab5/ElectionCodeRev020209.pdf>.

²⁷ *Texas Election Code*, Title 12, chapter 204, subchapter A, "Vacancy in Senate," §204.001-005, at <http://www.statutes.legis.state.tx.us/Docs/EL/htm/EL.204.htm#A>.

²⁸ *Vermont Election Laws*, Chapter 53, "Vacancies," §2621-2622, at <https://www.sec.state.vt.us/media/809598/title-17-2017.pdf>.

²⁹ *Revised Code of Washington*, Title 29A, "Elections," §29A.038-041, at <http://app.leg.wa.gov/RCW/default.aspx?cite=29A.28.041>.

supplied by the Executive until the next meeting of the Legislature (emphasis added). Each member shall have one vote.³⁰

On August 9, the delegates turned to Article 5; Edmund Randolph of Virginia, a member of the Committee of Detail, explained that the provision was thought

necessary to prevent inconvenient chasms in the Senate. In some states the legislatures meet but once a year. As the Senate will have more power and consist of a smaller number than the other house, vacancies there will be of more consequence. The executives might be safely entrusted, he thought, with the appointment for so short a time.³¹

James Wilson of Pennsylvania countered by asserting that the state legislatures met frequently enough to deal with vacancies, that the measure removed appointment of the Senators another step from popular election, and that it violated separation of powers by giving the executive power to appoint a legislator, no matter how brief the period. Oliver Ellsworth of Connecticut noted that “may” as used in the provision was not necessarily prescriptive, and that “[w]hen the legislative meeting happens to be near, the power will not be exerted.”³² A motion to strike out executive appointment was voted down eight states to one, with one divided.³³ Hugh Williamson of North Carolina then offered an amendment to change the language to read “vacancies shall be supplied by the Executive unless other provision shall be made by the legislature,” which was also rejected.³⁴

The Committee on Style and Arrangement made minor alterations, and inserted the provision in Article I, Section 3, paragraph (clause) 2 in its September 12 report. The full convention made final changes and approved the provision on September 17, and it was incorporated without debate into the Constitution in the following form:

and if vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.³⁵

The appointments provision does not appear to have aroused much interest during the debate on ratification. A review of available sources, including *The Federalist* and proceedings of the state conventions that ratified the Constitution, reveals almost no debate on the question.

Prevailing Practice in Filling Senate Vacancies, 1789-1913

For the next 124 years, governors appointed temporary Senators according to the constitutional requirement with only minor controversy. During this long period, 189 Senators were appointed by state governors; 20 of these appointments were contested, but only 8 were “excluded” by the Senate.³⁶ The primary grounds for these contested appointments appear to have centered on

³⁰ U.S. Constitutional Convention, *The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America*, reported by James Madison (Westport, CT: Greenwood Press, 1970 [originally published in 1920 by Oxford University Press, New York]), p. 339.

³¹ *Ibid.*, p. 363.

³² *Ibid.*, pp. 343-364.

³³ *Ibid.*, p. 364. In favor: PA; opposed: CT, GA, MA, NC, NH, NJ, SC, VA; divided: MD.

³⁴ *Ibid.* In favor: GA, MD, NC, and SC; opposed: CT, MA, NH, NJ, PA, and VA.

³⁵ U.S. Constitution, Article I, Section 3, clause 2.

³⁶ George H. Haynes, *The Senate of the United States, Its History and Practice* (Boston: Houghton Mifflin, 1938), vol. 1, p. 161. For further information on the Senate’s authority, please consult CRS Report R40105, *Authority of the Senate Over Seating Its Own Members: Exclusion of a Senator-Elect or Senator-Designate*, by Jack Maskell.

whether vacancies happened during the recess of the legislature.³⁷ According to historian George Haynes, throughout much of this time, “the Senate refused to admit to its membership men who had been appointed by the governors of their several States when the legislature had had the opportunity to fill the vacancies, but had failed to do so by reason of deadlocks.”³⁸ Aside from this recurring controversy, the appointment of temporary Senators seems to have been otherwise unremarkable. A random survey of various states during the period from 1789 through 1913 identifies an average of 3.3 senatorial appointments per state for the period, with individual totals dependent largely on the length of time the state had been in the Union. For instance, New Hampshire, one of the original states, is recorded as having had eight appointed temporary Senators during this period, while Montana, admitted in 1889, never had an appointment under the original constitutional provision.³⁹

Direct Election of Senators: The Seventeenth Amendment

For more than 70 years following ratification of the Constitution, there was little interest in changing the original constitutional provisions governing Senate elections and vacancies. Although an amendment providing for direct election was introduced as early as 1826, few others followed, and by 1860, only nine such proposals had been offered, all but one of which was introduced in the House.⁴⁰ Satisfaction with the status quo began to erode, however, after the Civil War, and support grew for a constitutional amendment that would provide direct popular election of the Senate.

Support Grows for Direct Election of U.S. Senators—1886-1910

During the last third of the 19th century, indirect election of Senators by state legislatures came under growing criticism, while proposals for an amendment to establish direct election began to gain support. The decades following the Civil War witnessed increasing instances of both protracted elections, in which senatorial contests were drawn out over lengthy periods, and deadlocked elections, in which state legislatures were unable to settle on a candidate by the time their sessions ended. In the most extreme instances, protracted and deadlocked elections resulted in unfilled Senate vacancies for sometimes lengthy periods.⁴¹ According to Haynes, 14 seats were left unfilled in the Senate for protracted periods, and while “[t]he duration of these vacancies varied somewhat ... in most cases, it amounted to the loss of a Senator for the entire term of a Congress.”⁴²

During the same period, the Senate election process was increasingly regarded as seriously compromised by corruption. Corporations, trusts, and wealthy individuals were often perceived as

³⁷ Ibid.

³⁸ George H. Haynes, *The Election of Senators* (New York: Henry Holt, 1906), p. 60.

³⁹ Statistics compiled by CRS from *Congressional Quarterly's Guide to U.S. Elections*, 4th ed. (Washington, DC: CQ Press, 2001).

⁴⁰ Haynes, *The Election of Senators*, pp. 101-102.

⁴¹ Wendy Schiller and Charles Stewart III, *U. S. Senate Elections Before 1914*, paper prepared for presentation at the Annual Meeting of the Midwest Political Science Association, Chicago, April 15-18, 2004, pp. 5-6, at http://web.mit.edu/cstewart/www/papers/senate_elections1.pdf. The authors define protracted elections as cases in which the two chambers of a state legislature were unable to elect a Senator by concurrent action, and required a joint session to resolve the stalemate.

⁴² Haynes, *The Election of Senators*, pp. 59-60. The situation was compounded by the Senate's customary refusal to seat gubernatorial appointees from states in which the legislature had been in session after a vacancy occurred, but had failed to elect.

having bribed state legislators in order to secure the election of favored candidates. Once in office, the Senators so elected were said to “keep their positions by heeding the wishes of party leaders and corporate sponsors rather than constituents.”⁴³

A third factor contributing to the rise of support for direct election of Senators was what one historian characterized as “a long-term American inclination to strengthen representative democracy.”⁴⁴ As such, the campaign for popular election might be considered part of the series of state and federal laws and constitutional amendments intended to expand the right to vote and guarantee the integrity of election procedures. As the movement for reform gained strength, “progressive” elements in both major parties, and rising political movements, such as the Populist and Socialist parties, all supported direct election of the Senate.

Action for popular election of Senators proceeded on two levels. First, beginning as early as the 1870s, the House of Representatives considered popular election amendment proposals. As support for this idea gained strength, the House approved a popular election amendment for the first time in 1893. Moreover, the House continued to approve popular election amendments by increasing vote margins a total of five times between 1893 and 1902; in each case, however, the Senate took no action.⁴⁵ Faced with the Senate’s refusal to consider a direct election amendment, the House put the question aside, and the question of popular election of Senators remained quiescent for nearly a decade, at least in Congress.

Efforts to secure direct election of Senators met with greater success in the states during this period. After years of experimentation with different plans by the states, Oregon voters used the newly enacted initiative process in 1904 to pass legislation that had the effect of requiring state legislators to pledge to elect the Senate candidate who received the most votes in the popular primary election.⁴⁶ The winner of the primary, who would then be elected Senator by the state legislature, would reflect the people’s choice by one degree of removal. The “Oregon Plan” spread quickly, so that by 1911, over half the states had adopted some version of indirect popular election of Senators.⁴⁷

Congress Proposes the Seventeenth Amendment, the States Ratify – 1911-1913

Pressure continued to build on the Senate in the first decade of the 20th century. In addition to enacting versions of the Oregon Plan, a number of states petitioned Congress, asking it to propose a direct election amendment, while others submitted petitions for an Article V convention to consider an amendment.⁴⁸ Deadlocked elections in several states continued to draw publicity, while in 1906, a sensational but influential series of articles titled “The Treason of the Senate” ran

⁴³ David Kyvig, “Redesigning Congress: The Seventeenth and Twentieth Amendments to the Constitution,” in Julian E. Zelizer, ed., *The American Congress: The Building of a Democracy* (Boston: Houghton Mifflin, 2004), p. 358.

⁴⁴ John D. Buenker, “Seventeenth Amendment,” in Donald C. Bacon, Roger H. Davidson, and Morton Keller, eds., *The Encyclopedia of the United States Congress* (New York: Simon and Schuster, 1995), vol. 4. p. 1810.

⁴⁵ Haynes, *The Senate of the United States*, vol. 1, p. 96.

⁴⁶ Candidates for the legislature were required by the law to declare whether they would pledge to vote for the Senate candidate who received the most popular votes in the primary. Alan P. Grimes, *Democracy and the Amendments to the Constitution* (Lexington, MA: DC Heath, Lexington Books, 1978) pp. 75-76.

⁴⁷ Kyvig, “Redesigning Congress,” p. 359.

⁴⁸ The Constitution, in Article V, requires Congress to “call a Convention for proposing Amendments ...” on the application of the legislatures of two-thirds of the states.

in William Randolph Hearst's *Cosmopolitan*.⁴⁹ All these influences helped promote the cause of direct election.

After a false start in the 61st Congress, when the Senate failed to approve a direct amendment proposal, both chambers revisited the issue early in 1911 as the first session of the 62nd Congress convened. H.J.Res. 39, excerpted below, was the House vehicle for the proposed amendment.

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors of each state shall have the qualifications requisite for electors for the most numerous branch of the State legislature.

The times, places, and manner of holding elections for Senator shall be as prescribed in each State by the legislature thereof.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election, as the legislature may direct.⁵⁰

The language is identical to the Seventeenth Amendment as eventually ratified, except for clause 2, "The times, places, and manner of holding elections for Senator shall be as prescribed in each State by the legislature thereof." Controversy over this provision delayed congressional proposal of the amendment for a full year. This clause would have removed reference to the Senate from Article I, Section 4, clause 1, of the Constitution, and would have had the effect of eliminating federal authority over the Senate elections process. It has been described by historians as "a 'race rider' which would deny to the federal government the authority to regulate the manner in which elections were conducted."⁵¹ Supporters of the clause asserted it guaranteed state sovereignty and restrained the power of the federal government, while opponents characterized it as an attack on the right of black Americans to vote as conferred by the Fifteenth Amendment, at least with respect to the Senate.⁵² On April 13, 1911, the House rejected an effort to strip clause 2 from H.J.Res. 39, and then moved immediately to approve the resolution with it intact.⁵³

When the Senate took up the measure on May 15, Senator Joseph Bristow offered an amended version which did not include the elections control clause. The Senate debated Bristow's amendment for almost two months. The vote, when finally taken on June 12, resulted in a tie, which Vice President James Sherman broke by voting in favor of the Bristow amendment.⁵⁴ The Senate then overwhelmingly approved the constitutional amendment itself by a vote of 64 to 24.⁵⁵

What is perhaps most remarkable about deliberations over the Seventeenth Amendment in both chambers is how little was said of the vacancies clause. Senator Bristow's explanation of his purpose evinced little comment from other Members; he characterized his vacancy clause as

⁴⁹ During this period *Cosmopolitan* was a general interest publication, which also specialized in investigative articles.

⁵⁰ H.J.Res. 39, 61st Congress.

⁵¹ Grimes, *Democracy and the Amendments to the Constitution*, p.76. See also Kyvig, "Redesigning Congress," pp. 360-362.

⁵² *Ibid.*, p. 80.

⁵³ *Congressional Record*, vol. 47, part 1 (April 13, 1911), pp. 241-243.

⁵⁴ *Congressional Record*, vol. 47, part 2, June 12, 1911, p. 1923.

⁵⁵ *Ibid.*, p. 1924.

exactly the language used in providing for the filling of vacancies which occur in the House of Representatives, with the exception that the word “of” is used in the first line for the word “from,” which however, makes no material difference.

Then my substitute provides that—[“]The legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.[”]

That is practically the same provision which now exists in the case of such a vacancy. The governor of the State may appoint a Senator until the legislature elects. My amendment provides that the legislature may empower the governor of the State to appoint a Senator to fill a vacancy until the election occurs, and he is directed by this amendment to “issue writs of election to fill such vacancies.”

That is, I use exactly the same language in directing the governor to call special elections for the election of Senator to fill vacancies that is used in the Constitution in directing him to issue writs of election to fill vacancies in the House of Representatives.⁵⁶

A conference committee was appointed to resolve differences between the competing House and Senate versions; it met 16 times without reaching approval, while the Senate continued to insist on its version.⁵⁷ Almost a year passed before the House receded from its version and accepted the amendment as passed by the Senate.⁵⁸ The “clean” amendment was sent to the states, where it was ratified in record time: Connecticut became the 36th state to approve, on April 8, 1913, and Secretary of State William Jennings Bryan declared the Seventeenth Amendment to have been duly ratified on May 31, 1913.⁵⁹

Appointments to Fill Senate Vacancies Since 1913

Within a year of the Seventeenth Amendment’s ratification, two precedents concerning Senate special elections and the power of governors to fill vacant seats by appointment were decided. In 1913, the governor of Maryland issued a writ of special election to fill a Senate vacancy. The election was held, and a Senator elected, but the governor had previously appointed a temporary replacement in 1912, six months before the Seventeenth Amendment was ratified. The right of the elected Senator to supplant the appointed one was challenged on the grounds that the governor had no legal right to issue the writ of election, because neither Congress nor the Maryland legislature had enacted legislation authorizing the special elections contemplated by the Seventeenth Amendment. The Senate debated the issue, rejected this argument, and seated the elected Senator.⁶⁰ In the second case, the governor of Alabama sought to appoint an interim Senator to fill a vacancy created in 1913, after the Seventeenth Amendment had been ratified. The Alabama legislature had not yet passed legislation providing for gubernatorial appointments, as provided in clause 2 of the Amendment, and the Senate declined to seat the appointee on the grounds that the governor could not exercise the appointment power unless so authorized by state law.⁶¹

⁵⁶ *Congressional Record*, vol. 47, part 2, May 23, 1911, p. 1483.

⁵⁷ Kyvig, “Redesigning Congress,” p. 361.

⁵⁸ *Congressional Record*, vol. 48, part 7, May 13, 1912, p. 6367.

⁵⁹ *The Constitution of the United States, Analysis and Interpretation*, 108th Cong., 2nd sess., Senate Document 108-17 (Washington, DC: GPO, 2004), p. 34.

⁶⁰ Haynes, *The Senate of the United States*, vol. 1, pp. 164-165.

⁶¹ *Ibid.*

The Senate Historical Office maintains records for Senators appointed since 1913, beginning with Rienzi M. Johnson of Texas, although Senator Johnson's appointment on January 14, 1913, technically antedated the Seventeenth Amendment, which was declared to be ratified on May 31. At the time of this writing (November 29, 2017), the Senate's records currently identify 195 appointments to the office of U.S. Senator since that time, including, most recently, Senator Strange, as cited previously in this report.⁶² This total includes 192 individuals, since 3 persons were appointed to fill Senate vacancies twice. Of this figure, 14 appointees have been women: 7 of these were the widows of incumbent Senators who agreed to serve until a successor could be elected; 2 were spouses of the governor who appointed them; and 1 was the daughter of the governor who appointed her. Three men were appointed to fill vacancies created by the death of their fathers.⁶³

These Senate data exclude so-called "technical" resignations, a practice which ended in 1980. Prior to that year, technical resignations, which were generally considered a separate class, occurred when a retiring Senator resigned after the election of his or her successor, but before the expiration of the term. The Senator-elect would then be appointed to serve out the balance of the term by the state governor. The purpose here was to provide the Senator-elect with the benefits of two months of extra seniority. As noted above, this practice ended in 1980 when the major parties agreed that Senators-elect would no longer accrue seniority benefits through appointment as a result of technical resignations.⁶⁴

Of the 194 Senators appointed prior to 2017, 118, or 60.8%, sought election, while the remainder served only until the special election. Sixty-two, or 52.5%, of those who pursued election were successful, while 56 were defeated, often in the primary election.⁶⁵

Although complete data are not available, a study of Senators appointed to fill vacancies between 1945 and 1979 found an even lower success rate in primary elections. According to William D. Morris and Roger H. Marz, writing in the political science journal *Publius*, 41.7% of appointed Senators who sought election in their own right during this period were defeated in the subsequent special primary election.⁶⁶

The electoral fate of appointed Senators has long been the subject of investigation and speculation. Scholars have noted that appointed Senators who have run for election in their own right have mixed electoral success, at best.⁶⁷ Morris and Marz concluded that

appointed senators are a special class, at least insofar as their reception by the voters is concerned.... [They] are only half as likely to be successful in the election process, and

⁶² U.S. Senate website, Art and History, Senate History, "Appointed Senators," at https://www.senate.gov/artandhistory/history/common/briefing/senators_appointed.htm.

⁶³ Statistics compiled from data provided by the U.S. Senate website, Art and History, Senate History, "Appointed Senators, and *Biographical Directory of the United States Congress, 1774-Present*, at <http://bioguide.congress.gov/biosearch/biosearch.asp>.

⁶⁴ Source: Donald Ritchie, Senate Historian, January 16, 2013. See also Irwin B. Arief, "Republicans Reap Victory Harvest: Senate Parties Meet, Choose Leadership, Committee Posts," *CQ Weekly Report*, vol. 38, December 6, 1980, p. 3481.

⁶⁵ *Ibid.*

⁶⁶ William D. Morris and Roger H. Marz, "Treadmill to Oblivion: The Fate of Appointed Senators," *Publius*, vol. 11, no. 1, winter 1981, p. 68.

⁶⁷ Morris and Marz, "Treadmill to Oblivion," p. 68; Walter S. G. Kohn, "Filling Vacancies in the U.S. Senate: An Undemocratic Relic," *Policy Studies Journal*, vol. 2, issue 4, summer 1974, p. 296; Alan L. Clem, "Popular Representation and Senate Vacancies," *Midwest Journal of Political Science*, vol. 10, number 1, February 1966, pp. 68-69.

more than one-fifth of them do not even win the nomination of their own party.... [T]hough they are constitutionally and statutorially full members of the Senate in every formal sense of the body, their low survival rate in their first election suggests the mantle of office protecting “normal” incumbents does not fully cover the appointee.⁶⁸

Proposals to Require that Senate Vacancies Be Filled by Election Only—2009-2011

Following controversies that arose in connection with appointments to fill Senate vacancies in 2008 and 2009, particularly with respect to the Illinois Senate vacancy created by the election of Senator Barack H. Obama as President,⁶⁹ proposals to eliminate or curtail gubernatorial power to fill Senate vacancies by appointment were introduced in the 111th Congress and in a number of state legislatures.

111th Congress Proposals

These proposals fell into two categories, legislative and constitutional. No bills or resolutions proposing similar legislation or constitutional amendments have been introduced to date in succeeding Congresses.

Proposed Legislation: H.R. 899

H.R. 899, the Ethical and Legal Elections for Congressional Transitions Act, was introduced by Representative Aaron Schock on February 4, 2009.⁷⁰ This bill sought to provide for expedited special elections to fill Senate vacancies, and to assist states in meeting the expenses of special elections. It sought to avoid potential conflicts with the Seventeenth Amendment by authorizing the states to continue to provide for gubernatorial appointments, but it sought considerably shorter tenures for most appointed Senators. As a secondary issue, it addressed concerns of state and local governments related to the costs of planning and administration of special elections through a program of reimbursements. H.R. 899 would have provided that

- when the President of the U.S. Senate issued a certification that a vacancy existed in the Senate, a special election to fill the vacancy would be held not later than 90 days after the certification was issued;
- the election would be conducted in accordance with existing state laws; and
- a special election would not be held if the vacancy were certified within 90 days of the regularly scheduled election for the Senate seat in question, or during the

⁶⁸ Morris and Marz, “Treadmill to Oblivion,” pp. 68-69.

⁶⁹ It was reported at the time that the Illinois Governor had attempted to trade the seat for personal gain. For additional information, see Carl Hulse, “Burris Is Sworn In,” *New York Times*, January 15, 2009, at https://thecaucus.blogs.nytimes.com/2009/01/15/burris-is-sworn-in/?_r=0; “No Magic Number, but More Muscle,” *CQ 2008 Almanac*, 110th Congress, 2nd Session, volume LXIV (64) (Washington, DC, Congressional Quarterly, Inc.: 2009), p. 10-18; “Rangel, Burris Top Ethics Concerns,” *CQ 2009 Almanac*, 111th Congress, 1st Session, volume LXV (Washington, DC, CQ-Roll Call Group: 2010), pp. 5-8-5-9. “Feds: Governor Tried to Auction Obama Seat,” *Politics on NBC News.com*, December 9, 2008, at <http://www.nbcnews.com/id/28139155/ns/politics/t/feds-governor-tried-auction-obamas-seat/#.WJ4GuW8rJdg>.

⁷⁰ Representatives Jason Chaffetz, Henry A. “Hank” Johnson, Jr., Donald A. Manzullo, Howard P. “Buck” McKeon, Thomas E. Petri, John Shimkus, and Frank R. Wolf joined as cosponsors.

period between the regularly scheduled election and the first day of the first session of the next Congress.

H.R. 899 also provided a rule of construction (legally clarifying language) stating that nothing in the act would impair the constitutional authority of the several states to provide for temporary appointments to fill Senate vacancies, or the authority of appointed Senators between the time of their appointment and the special election. Further, it would have authorized the Election Assistance Commission to reimburse states for up to 50% of the costs incurred in connection with holding the special election. H.R. 899 was introduced on February 4, 2009, and was referred to the House Committee on House Administration on the same day, but no further action was taken on the bill.

Proposed Constitutional Amendments: S.J.Res. 7 and H.J.Res. 21

These two identical proposals sought to amend the Constitution to eliminate the states' authority to provide for temporary appointments to fill Senate vacancies. S.J.Res. 7 was introduced by Senator Russell D. Feingold on January 29, 2009, and was referred to the Senate Judiciary Committee, and subsequently to the Subcommittee on the Constitution.⁷¹ A companion measure, H.J.Res. 21, was introduced by Representative David Dreier on February 11, 2009.⁷² The resolution was referred to the House Judiciary Committee and subsequently to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties.

The proposed amendments would have required that “no person shall be a Senator from a State unless such person has been elected by the people thereof” and further directed state governors to issue writs of election to fill Senate vacancies.

S.J.Res. 7 and H.J.Res. 21 proposed a fundamental change in the constitutional procedures governing Senate vacancies by completely eliminating the state option to provide for temporary appointments incorporated in the Seventeenth Amendment. As one of the sponsors of the Senate version asserted, the proposed amendment reflected the view that “those who want to be a U.S. Senator should have to make their case to the people.... And the voters should choose them in the time-honored way that they choose the rest of the Congress of the United States.”⁷³ Conversely, opponents might have argued that the proposed amendments were introduced as a too-hasty response to specific events that were unlikely to be repeated, and that the appointment clause of the Seventeenth Amendment had functioned without incident for a century.

On March 11, 2009, the two constitutional subcommittees, in the House, the Subcommittee on the Constitution, Civil Rights, and Civil Liberties and in the Senate, the Subcommittee on the Constitution, held a joint hearing on the measures, and on August 6, the Senate Subcommittee on the Constitution voted to approve S.J.Res. 7 and to report it to the full Committee on the Judiciary, but no further action was taken on either measure.

⁷¹ Senators Mark Begich, Richard Durbin, and John McCain joined as cosponsors.

⁷² Representative John Conyers, Jr., Chairman of the House Committee on the Judiciary, and Representatives Bob Filner, Virginia Foxx, Elton Gallegly, Donald A. Manzullo, Pedro R Pierluisi, James F. Sensenbrenner, Jr., and Lamar Smith joined as cosponsors.

⁷³ Sen. Russell Feingold, Remarks in the Senate, *Congressional Record*, daily edition, vol. 155 (January 29, 2009), p. S 1068.

Proposals in the State Legislatures

According to the National Council of State Legislatures (NCSL), bills affecting the governor's appointment authority as provided under the Seventeenth Amendment were introduced in 12 states during 2009, and in 17 more since then.⁷⁴ As a result of these initiatives, Connecticut, Rhode Island, and North Dakota eliminated or limited the governor's authority to fill U.S. Senate vacancies by appointment. These states' current provisions for filling Senate vacancies are examined earlier in this report. In addition, Massachusetts changed its requirement from filling vacancies by election only to providing for temporary appointment by the governor followed by a special election. Following the death of Senator Edward M. Kennedy on August 25, 2009, Governor Deval Patrick urged the legislature to pass expedited legislation that changed the state's previous requirement that U.S. Senate vacancies be filled only through a special election to provide instead for a gubernatorial appointment to fill the vacancy until a special election could be held.⁷⁵ By September 22, both chambers had passed the bill; on September 24, Governor Patrick approved the legislation as an emergency law, to take effect immediately.⁷⁶

Concluding Observations

Since ratification of the Seventeenth Amendment in 1913, most of the states, with few exceptions and little evident controversy, have empowered their governors to fill Senate vacancies by appointment until a permanent replacement can be elected. The controversies surrounding appointments to fill Senate vacancies that occurred in the context of the 2008 presidential election generated a considerable level of interest, including media analyses and commentaries, and legislative and constitutional proposals, for change on both the federal and state levels. On the federal level, interest in the question of revising Senate vacancy procedures appears to have been a short-lived phenomenon. While three states did change their procedures to limit or eliminate their governors' role in filling Senate vacancies between 2009 and 2012, 10 vacancies in U.S. Senate seats have been filled by temporary appointments since 2009 with little discussion as to the appointment process.

Author Contact Information

Thomas H. Neale
Specialist in American National Government
tneale@crs.loc.gov, 7-7883

⁷⁴ National Conference of State Legislatures, "Filling Vacancies in the Office of United States Senator," Updated May 17, 2017.

⁷⁵ Frank Phillips, Andrew Viser, and Matt Ryan, "Governor Sets Date for Special Election, Presses for Interim Appointment," *Boston Globe* on Boston.com, August 31, 2009, at http://www.boston.com/news/local/breaking_news/2009/08/patrick_to_make.html.

⁷⁶ 90.9 WBUR, "Text of Gov. Patrick's Letter Declaring Emergency Law," September 24, 2009, at <http://www.wbur.org/2009/09/24/patrick-emergency>.