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Disqualification, Death, or Ineligibility of the Winner of a Congressional Election

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Summary

On several occasions, including a Senate race in 2000, a congressional candidate on the ballot for the general election has died within such proximity to election day that there was not sufficient time under State election-administration procedures to change the ballot and substitute another candidate. Leaving the name of a deceased candidate on the ballot has raised questions and criticisms in some quarters concerning State authority to issue a "final" ballot and to decline to add or substitute other candidates at some point prior to an election; whether votes for the deceased candidate are "legal," or rather, should not be counted, since the deceased candidate is not "qualified" to serve in the office; and whether a "vacancy" in the office can be created, in effect, prospectively, when and if the ineligible candidate receives the most votes, or whether a new "special election" must proceed immediately.

Under the States' constitutional "Times, Places and Manner" authority over federal elections, the States may establish ballot procedures and administrative requirements. Courts have noted that States have a "compelling" interest in setting deadlines and in finalizing the ballot "so that general election ballots can be properly and timely prepared and distributed," and have thus found that there is no legal or constitutional problem with a State "finalizing" its ballot and refusing to withdraw, add or substitute names on the ballot within a reasonable time-frame prior to an election. Such State deadlines for finalizing the ballot are not only common, but are seen as absolute administrative necessities for orderly elections, and for the prevention of disenfranchisement of military and other absentee voters.

With ballot deadlines a common administrative requirement in the States, it is not unprecedented for a candidate to die in such proximity to an election that the ballots have been finalized, resulting in the deceased candidate's name remaining on the ballot for the election. Under the majority "American Rule," followed in most of the States for their non-federal offices, and expressly adopted by both the House and the Senate for judging the elections of their own Members to Congress, votes for the deceased candidate are not illegal, improper, or "thrown away" (such that the second-place vote-getter is elected), nor are the elections ignored and considered non-events; rather, a "win" by the deceased candidate creates, and is generally considered an indication of the voters' preference for, a temporary "vacancy" in the office.

Under the Constitution, vacancies in the House are filled by the issuance of "writs of election" by the Governor of the State for a special election. For vacancies in the Senate, however, the Seventeenth Amendment instructs the Governor of the State to issue writs of election but, in the alternative, the Governor, if authorized by State law, may make a "temporary appointment" until a later election to fill the remainder of the term, as directed by the State legislature. The Seventeenth Amendment, its history, and express judicial interpretation indicate that the States have discretionary authority to provide for a temporary appointment of a Senator by the Governor until a future election, such as a regularly scheduled state-wide election, and that the States are *not* required to hold a more immediate "special election" to fill a Senate vacancy, regardless of when the vacancy arises.

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Disqualification, Death, or Ineligibility of the Winner of a Congressional Election

This report addresses the issue of what happens when, in an election for the United States Senate or House of Representatives, the electorate of a State or of a congressional district gives the most votes to a candidate on the ballot who, because of constitutional disqualification, death, or other disability, is ineligible to serve in the Senate or in the House.

Introduction and Background

If a candidate who has been elected to the United States House of Representatives or the United States Senate subsequently dies (prior to taking the oath of office), or later acquires or has discovered a legal disability such that he or she is no longer eligible to serve or to be seated in the House or the Senate, then precedent and practice indicate that a "vacancy" in that office would be established. Such a vacancy would then be filled according to the United States Constitution.

However, if a candidate dies *prior* to a general election for the House or Senate, but because of the imminence of the election the candidate's name remains on the ballot under State election law procedures, and that deceased candidate then receives the most votes in the election, should this be treated as *other* than a "vacancy" in the office which will occur at the beginning of the congressional session?

As expressly provided in the United States Constitution, at Article I, Section 5, cl. 1, the House and the Senate each "shall be the Judge of the Elections, Returns and Qualifications of its own Members ...." In judging congressional elections, the overwhelming weight of precedent in both the House and the Senate has been to follow the so-called "American Rule," whereby an absolute disability or ineligibility of a candidate receiving the most votes in an election (the "majority candidate") creates a "vacancy" in the office, which is then filled according to the Constitution. The next highest qualified vote-getter in such an election is *not* deemed by the House or Senate to be entitled to the seat under this "American Rule" (unlike under the so-called "British Rule"), nor is the entire election considered a "nullity" (such that a new election or "do-over" must proceed immediately).[1] Under congressional precedent and practice, it has not mattered whether the majority candidate was actually ineligible or not qualified *before* or *after* the time of the election, or whether the voters knew of such ineligibility, death or disqualification before or at the time of the election – the

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[1]Riddick and Fruman, *Riddick's Senate Procedure, Precedents and Practice*, S. Doc. No. 101-28, 101st Cong., 2d Sess. 701 (1992); 2 *Deschler's Precedents of the U.S. House of Representatives*, Ch. 7, § 9, at 96; *see* discussion of "American Rule" versus "English Rule," in *Smith v. Brown* (40th Cong.), Rowell's Digest of Contested Election Cases, 220-221.

"vacancy" was deemed created, and filled in the manner prescribed in the United States Constitution.

As to vacancies in the United States Senate, the Seventeenth Amendment to the Constitution provides that when there are vacancies in the representation of any State in the Senate, the Governor of the State "shall issue writs of election to fill such vacancies"; however, in the alternative, if expressly authorized by that State's legislature, Governors may make "temporary appointments" to fill a Senate seat until an election is held to fill the remainder of the term, as directed by State law.[2] In the case of vacancies in the House of Representatives, the Constitution does not authorize the Governor of a State to fill a seat on an interim basis, but rather instructs only that "Writs of Election" for a special election shall be issued by the Governor.[3] The timing of the election to fill vacancies for Representative or Delegate, and thus how long the vacancy will continue, is generally within the discretion of the individual States as a matter of State law.[4]

On the several occasions of the death of a candidate for the United States House of Representatives so close to the election that a new candidate could not qualify in time to be printed on the general election ballot under applicable State election administration laws – and that deceased candidate subsequently received the most votes in the election (or when the majority candidate on the ballot was otherwise constitutionally ineligible for the office) – the so-called "American Rule" was applied. That is, the receipt of the most votes by the deceased or otherwise ineligible candidate on the ballot was deemed to have created a *vacancy* in the office of Representative, which was then filled as prescribed under the United States Constitution for vacancies in House seats, that is, through the issuance of "writs of election" for a special election. Representatives Hale Boggs (Louisiana) and Nick Begich (Alaska) were lost and presumed dead in an airplane crash in Alaska on October 16, 1972, less than a month before their general elections. Under State election procedures, their names remained on the ballot, and they received the most votes in their respective general elections, whereupon vacancies were declared, and special elections to fill the vacancies were held.[5] The living candidate with the next highest vote total, that is, the "runner-up" in the regular general election on the ballot, or from write-ins

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[2]*United States Constitution,* Amendment 17. "A vacancy in the Senate may be filled either by a writ of election or by state executive appointment under the Seventeenth Amendment." *Deschler's Precedents, supra* at Ch. 8, § 9, p. 250.

[3]Article I, Section 2, cl. 4. For a general discussion on the process of filling House and Senate vacancies, see Neale, "House and Senate Vacancies: How Are They Filled?" CRS Report 97-1009.

[4]2 U.S.C. § 8. *See Jackson v. Ogilvie,* 426 F.2d 1333 (8th Cir. 1970), *cert. denied,* 400 U.S. 833 (1970), on mandatory duty of Governor to issue writ of election.

[5]Washington Post, November 9, 1972, at A25; Washington Star, December 7, 1972, at A16; Washington Post, December 8, 1972, at A7; New York Times, December 13, 1972, at 48; 2 *Deschler's Precedents,* Ch. 8, § 9.5; Congressional Quarterly, *Congress and the Nation,* Volume III, 1969-1972, at 24. A "vacancy" is generally announced by the executive of a State, as incident to the procedures for issuing writs of election for a special election, but may, where appropriate, be formally announced by the House with notification sent to the Governor. *Deschler's Precedents, supra* at Ch. 8, §9.

(Representative Boggs was unopposed), was *not* declared the winner. On October 7, 1962, Representative Clement Miller of California died also in a plane crash shortly before the 1962 general congressional election. As reported, "[u]nder California law, it was too late for the Democratic party to place a new nominee on the ballot for the November 6 election," and Representative Miller's name remained on the ballot.[6] When he received the most votes, a "vacancy" was declared in the seat, and filled according to the Constitution.

Similarly, in the one instance in the Senate when a candidate who had qualified for the ballot as a major party candidate for the Senate died *prior* to the time of the general election, but *after* the time established by State law for finalization of the ballot, and who then received the most votes in the election, a "vacancy" in the office of United States Senator was deemed to have occurred in that State, and such vacancy was filled as prescribed in the United States Constitution and State law, that is, by an interim appointment by the Governor. Former Governor Mel Carnahan of Missouri, the Democratic nominee for Senator, died in a plane crash on October 16, 2000, three weeks before the general election. Under Missouri election law, the names of deceased candidates remain on the ballot if they die so close to the election that the filing deadline, or the time for political parties to submit substitute candidates, has passed.[7] The Missouri statute then states expressly what is understood as the so-called "American Rule," that is, "if a sufficient number of votes are cast for the deceased candidate to entitle the candidate to ... election had the candidate not died, a vacancy shall exist ... in the office to be filled in the manner provided by law."[8] The acting Missouri Governor had indicated after the candidate's death that if the deceased candidate received the most votes, the Governor intended to appoint the candidate's wife, Jean Carnahan, to fill the vacancy such election result would create.[9] After the Missouri Board of Canvassers certified that the deceased candidate, Mr. Carnahan, had in fact received the most votes in the election, the Governor formally announced on December 4, 2000, that he was appointing, effective January 3, 2001, the deceased candidate's widow, Mrs. Jean Carnahan, to fill the vacant seat until the next general election for the remainder of the term.[10] The credentials of the Governor's appointee, Mrs. Carnahan, were accepted by the Senate, and she was given the oath of office and seated without objection in the Senate on January 3, 2001.[11]

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[6]1962 *Congressional Quarterly Almanac* 25-26.

[7]Annotated Missouri Statutes, §§ 115.379; 115.363, para. 3. A political party may submit a substitute party candidate for the deceased candidate if the original nominee dies "at or before 5:00 p.m. on the fourth Tuesday prior to the general election." §115.363, para. 3(1).

[8]Annotated Missouri Statutes, § 115.379, para. 1.

[9]*See* Washington Post, October 31, 2000, at A1.

[10]Washington Post, December 6, 2000, at A6. *See* Annotated Missouri Statutes, § 105.040.

[11]*Congressional Record*, January 3, 2001, at S 3 (daily edition), credentials accepted; *Id*. at S 5 (daily edition), oath of office given and Member-elect seated without objection.

Issues Raised Concerning Deceased Candidate on the Ballot, and Such Candidate Receiving the Most Votes

During the most recent case of the 2000 Senate race in Missouri, there were arguments raised in certain quarters that it was in some way unconstitutional for the State to allow the name of a deceased candidate to remain on the ballot for United States Senator, regardless of the timing of the candidate's demise in relation to the election; and that because the deceased candidate on the ballot could not actually *hold* the office of United States Senator (being deceased, he was not an "inhabitant" of the State as required by Article I, Section 3, cl. 3), that either the election in which the deceased candidate received the most votes should be ignored or set aside and a new election held immediately, or that the minority candidate, as being the qualified candidate who received the most votes, should win.[12]

These arguments, in the first instance, would appear to call into question the viability and constitutionality of a State's authority to set a specific deadline for finalizing the ballot, that is, a certain time or date prior to the day of an election, after which the ballot for that election could not be changed to add, remove or substitute the names of candidates. Secondly, these arguments would appear to press the so-called "British Rule" upon the Senate in judging the elections and qualifications of its Members, whereby the will of the plurality or majority of the voters of the State would be disregarded either by acting as if the election did not occur, or by not counting the votes cast for the deceased or otherwise ineligible candidate and seating the minority candidate.

Finally, certain arguments were forwarded that even if it had not been improper to allow the deceased candidate's name to remain on the ballot when the death of the candidate occurred in such proximity to the election, the State should not be allowed to treat as a "prospective vacancy" the death of the candidate who remains on the ballot. Under such argument, if the deceased candidate received the most votes, the Governor would not be able to make a temporary appointment to fill the "vacant" seat under the Seventeenth Amendment, even if expressly authorized under the laws of the State as specifically provided for in the Seventeenth Amendment, but rather could only issue writs of election for a special election to fill vacancies in the office of United States Senator which occur by virtue of the election of a disqualified candidate.[13]

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[12]Brooks Jackson/CNN, "Republicans Could Block Carnahan's Widow if She Wins Senate Seat," October 31, 2000 (CNN.Com); Robert Novack, Chicago Sun-Times, October 30, 2000, at 33: "[A] national GOP leader told me flatly: 'Jean Carnahan will never be seated in the U.S. Senate'"; Kevin Murphy, Kansas City Star, "GOP Denies Plan to Challenge a Carnahan Election," November 01, 2000; David Thibault, CNSNews.com, "Constitution Party Will Challenge Carnahan Election in Missouri," November 9, 2000.

[13]Viet D.Dinh, "Dead Men Can't Win," The Wall Street Journal, November 9, 2000, at A26.

State Authority Over Election Procedures, Administration

As to a State's authority to establish a deadline where the ballot is "fixed" such that no new or substitute candidates could be added immediately prior to an election, it should be noted initially that a division of jurisdiction under our federal system occurs in the case of elections to federal office. In the first instance, the terms of federal offices and the qualifications of candidates eligible for federal offices are established and fixed by the agreement of the States within the instrument which created those federal offices, that is, the United States Constitution, and are unalterable by the Congress or by any State unilaterally.[14] The Constitution expressly provides, however, that the individual States generally have the authority to *administer* elections, even ones for federal congressional office,[15] while at the same time expressly providing that each House of Congress has the authority to be the final judge of the *results* of those elections.[16] Furthermore, the Constitution expressly provides that each House of Congress is to be the judge of the three constitutional *qualifications* for office of the Members-elect in those elections, that is, the age, citizenship and inhabitancy in the State of the Members-elect.

Under the States' "Times, Places and Manner" authority in the Constitution, the States may promulgate regulatory and administrative provisions over the mechanics and *procedures* even for federal elections within their States regarding such things as forms of the ballots, "ballot access" by candidates (including new party or independent candidates), voting procedures, and the nominating and electoral process generally, to prevent election fraud, voter confusion, ballot overcrowding, the proliferation of frivolous candidates, and to facilitate proper election administration.[17] Legitimate "ballot access" procedures, including filing requirements, filing deadlines, a show of qualifying support by new or minor party or independent candidates, "sore loser" laws and other restrictions on cross-filing, are generally within the State's purview to "regulate[ ] election *procedures*" to serve the State interest of "protecting

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[14]*Powell v. McCormack*,395 U.S. 486 (1969); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995); *Cook v. Gralike*, 531 U.S. 510 (2001).

[15]Article I, Section 4, cl. 1: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."

[16]Article I, Section 5, cl. 1:"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members ...."

[17]*Storer v. Brown*, 415 U.S. 724 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971); *Bullock v. Carter*, 405 U.S. 134, 145 (1972); *Williams v. Tucker*, 382 F. Supp. 381, 387-388 (M.D.Pa. 1974). Requirements for "ballot access," in addition to the requirement that they impose no substantive, new qualifications to federal office, must not violate equal protection provisions of the Constitution by impermissibly discriminating against new or independent candidates, nor impermissibly infringe upon First Amendment rights of voters to associate freely and express their political opinions through support of their chosen candidates.

the integrity and regularity of the election process....," and are not impermissible additional qualifications for federal office.[18]

As part of these administrative duties involving ballot access, preparation and printing of the ballots, a State must by necessity, because of the exigencies of time and duties, limit or establish a time-frame or deadline by which the ballot must be "set" or finalized, that is, a reasonable time before the general or primary election when no more candidates may be placed on the ballot or programmed into the voting machines. Courts have noted that States have a "compelling interest" in setting deadlines and in finalizing the ballot "so that general election ballots can be properly and timely prepared and distributed."[19] One of the consequences of *not* having a "set" ballot at some reasonable point prior to an election (and of allowing last-minute changes in the candidates on the printed ballot and on voting machines), would be the disenfranchisement of military and other absentee voters, since such last-minute changes would not allow sufficient time before election day to prepare, print, mail out and then to receive back by mail new absentee ballots with such changes.

As found by one federal court, with an election a "mere five weeks away" even if plaintiffs had prevailed on the merits of their arguments against their exclusion from the ballot, the court would have still refused to require the State to change its ballots by including petitioners' names, since the court recognized the overriding administrative necessities of deadlines to insure "time available for election officials to complete their election preparations" before the election.[20] The court noted the "risk [of] substantial disruption of the electoral process" that could ensue by changing a ballot after the State-established administrative deadline for finalization of those ballots, and noted the "tight schedule" of election officials, and the myriad duties and responsibilities that are valid administrative reasons for reasonable deadlines for finalizing ballots:

> Last minute voter registration, processing of many absentee ballot requests, supervising the printing of voting machine ballots, sample ballots, tally sheets, and instruction sheets, instruction classes for election judges and clerks [*footnote*: mailing of absentee ballots and classes for election judges and clerks have already begun], final preparation of voter lists and signature cards, and distribution of voting machines and supplies remain to be accomplished before [the] November [election].[21]

Courts have thus been loathe to require or allow parties to force changes to ballots close to an election, that is, at the "eleventh hour," with an election "close at hand," or with "the imminence of election," because of "the potential for seriously

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[18]*See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-835 (1995), comparing legitimate "ballot access" provisions as in *Storer v. Brown, supra*, with impermissible additional qualifications for federal office, such as individual State-imposed term limits.

[19]*Whig Party of Alabama v. Siegelman*, 500 F.Supp. 1195, 1205 (D.C. Ala. 1980). These deadlines may not be unreasonable and discriminate unfairly in favor of major party candidates over minor or new parties or independent candidates.

[20]*Maddox v. Wrightson*, 421 F. Supp. 1249, 1252 (D.C. Del. 1976).

[21]*Id.* at 1252.

disrupting the State's electoral process."[22] With an election "less than three weeks away," a federal court refused to require the changing of a ballot to add petitioners' names, even on a strong First Amendment showing by petitioners, since "much of the ballot and voting machine preparation" had already taken place, and there needed to be a balancing and a proper weight given to the State's needs and interests in an "orderly" election, including the prevention of the "possible disenfranchisement of absentee and military voters caused by eleventh hour changes to the ballot."[23] Justice Marshall, on circuit, turned down on October 1 a request to order names to be printed on a ballot for an upcoming November election citing, among other reasons, the State's concern for the potential "chaotic and disruptive effect upon the electoral process," since the "Presidential and overseas ballots have already been printed; some have been distributed. The general absentee ballots are currently being printed."[24]

The length of time before the election of a deadline which fixes the ballot, in relation to the administrative tasks that must be accomplished during that time, is generally relevant in judging the reasonableness and necessity of such deadline. The courts have noted that overly long deadlines for the filing of petitions by candidates, such as March or April deadlines for a November election, may not be of such a necessity as to overcome Fourteenth Amendment and First Amendment complaints of unfair treatment of supporters of those candidates who must file petitions to gain ballot access (as opposed to nominated party candidates who had much later deadlines).[25] In the context of a deceased candidate, it is conceivable or at least arguable, that an issue of this nature could arise, for example, if a deceased Senatorial candidate whose name remains on the ballot is of a *different* political party from that of the Governor of the State, and if there is an unusually long period of time before the general election when the ballot is "fixed" by State law. In such a situation voters affiliated with the deceased candidate's party might argue that they have no choice on the ballot to select someone of their own political persuasion for Senator, at least for the "temporary" period before the next election to fill the term. That is, just as a vote for the other candidate on the ballot is a vote for someone from the other party, a vote for the deceased candidate of their own party may also be choosing someone from the

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[22]*NAACP v. New York*, 413 U.S. 345, 369 (1973); *Valenti v. Mitchell*, 962 F.2d 288 (3rd Cir. 1992); *Smith v. Board of Elections*, 586 F. Supp. 309, 312 (N.D. Ill. 1984).

[23]*Valenti v. Mitchell*, *supra* at 301.

[24]*Fishman v. Schaffer*, 429 U.S. 1325, 1330 (1976). The State election procedure in question provided a filing deadline for petitions of nine weeks before an election.

[25]*Anderson v. Celebrezze*, 460 U.S. 780 (1983) (Ohio filing deadline in March for independent candidates not justified by State administrative need for so much time to verify petition signatures); *New Alliance Party of Alabama v. Hand*, 933 F.2d 1568, 1574 (11th Cir. 1991)(April deadline for new and minor party candidates not justified as "... evidence tends to show that the State would be able to place the name of a candidate on the ballot at a fairly late date without unduly impairing the administrative task of printing the ballot ...."); *McCarthy v. Kirkpatrick*, 420 F. Supp. 366, 374 (W.D.Mo. 1976), deadline of 188 days before election for independent candidates to file petitions was too long, as State of Missouri could conceivably add or take names off ballot as late as September for a November election; *McCarthy v. Austin*, 423 F. Supp. 990, 999 (W.D. Mich. 1976), ordering the placement of a name on the ballot on August 27 would not "seriously disrupt [State] preparations for the general election" in November.

other party, since the Governor would most likely appoint someone from his own political party to fill the "vacancy." There may in such cases be a need to balance the constitutional rights and interests of voters and supporters of the political party of the deceased candidate,[26] with the right of the State to finalize its ballot for administrative purposes and the reasonableness and necessity of those time deadlines to perform such administrative duties as printing and distribution of ballots, including absentee and overseas ballots, preparing and programing voting machines, preparing voter instructions and sample ballots, and training of poll workers and officials.[27]

In sum, there has been found no legal or constitutional problem with a State "finalizing" its ballot and refusing to add, substitute or withdraw names from the ballot within a "reasonable" time-frame in proximity to an election. Such ballot deadlines are not only common in the States, but are seen as absolute administrative necessities for fairness and orderly elections, and for the prevention of disenfranchisement of military and other absentee voters, all of which the courts have recognized as compelling State interests. Unfortunately, it is therefore not unprecedented nor uncommon for a candidate to die in such proximity to an election that the ballots have already been finalized, and to have that deceased candidate's name remain on the ballot for the election. Under the majority "American Rule," recognized and followed by both the House and the Senate for judging the elections of their Members, as well as most of the States for their own non-federal offices,[28] votes for the deceased candidate are not illegal, improper, "thrown away," or otherwise deemed to be nullities, nor is the election considered a non-event, but rather, if the deceased candidate receives the most votes, such expression is considered indicative that the majority or plurality of the voters favored the creation of a temporary "vacancy" in the office, to be filled according to the Constitution and the laws of the State.

The issue, in an imminent federal election, concerning the remaining on the ballot of the name of a deceased candidate is clearly *not* whether the candidate who has died is, or is not now, "qualified" to "be a Senator" under Article I, Section 3, clause 3, or a Representative under Article I, Section 2, clause 2 of the United States Constitution. Obviously, the deceased candidate could not and will not serve in or hold the office to which he or she had aspired while alive; nor has it ever been suggested that a State intended to issue "credentials" to the deceased candidate from the State to present the

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[26]*Note, e.g.*, arguments of supporters of minor party candidates left off ballot in *Williams v. Rhodes*, 393 U.S. 23 (1968).

[27]Such constitutional considerations were not present in the case of the 2000 Missouri Senate race, however, as the Governor was of the same political party as the deceased candidate and indicated that he would appoint a member of that party (the candidate's spouse) if the deceased candidate received the most votes.

[28]133 ALR 319, 321, "Deceased or disqualified person, result of election as affected by votes cast for"; *see, e.g., Evans v. State Election Board*, 804 P.2d 1125 (Okla. 1990), citing, among other supporting cases: *Petition of Keogh-Dwyer*, 256 A.2d 314, 318 (N.J. 1969); *Jackson v. County Court*, 166 S.E.2d 554 (W.Va. 1969); *Saunders v. Haynes*, 13 Ca. 145 (1859); *Derringe v. Donovan*, 162 A. 439, 441 (Pa. 1932); *Ingersoll v. Lamb*, 333 P.2d 982 (Nev. 1959); *Tellez v. Superior Court*, 450 P.2d 106 (Ariz. 1969); *Banks v. Zippert*, 470 So.2d 1147 (Ala. 1985).

issue of "qualifications" to the House or Senate in an effort to *seat* the deceased candidate. As far as the State's participation in the process is concerned, however, the candidate was qualified (as certified) when placed on the ballot, no timely contests were filed to challenge the candidate's qualifications and ballot access at that time, and the deadline established by State law for finalizing the ballots or for substituting candidates on the ballot by political parties had passed. In *this* context, the issue of "qualifications" for a candidate receiving the most votes in a congressional election would arise at the time a Member-elect, with credentials from the State (as a result of either a special election or an interim appointment in the case of a Senator-elect), presents himself or herself to the House or to the Senate for being sworn in and seated to fill the vacancy created by the death of the original majority candidate in the general election.[29]

Senate and House Decisions on "Qualifications"

As noted, while the States administer federal elections, including such administrative, housekeeping, and procedural matters as ballot access and placement on the ballot, the question of the *qualifications* of a candidate for the United States Congress is decided, in the first instance exclusively as provided for in the United States Constitution, and then, as to whether a person has met such constitutional qualifications, by each House of Congress judging the elections, returns and qualifications of its own Members.[30] Although there had been in the history of our country some debate over the nature of the authority of Congress to judge general "qualifications" and/or suitability of a Member-elect for office, the extent of the authority to exclude a Member-elect by majority vote based on the Member-elect's "qualifications," was expressly and narrowly delineated by the Supreme Court in 1969 in *Powell v. McCormack*.[31] The Supreme Court in that case clearly stated that "in judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution,"[32] that is, the Member-elect's age, citizenship, and inhabitancy in the State from where elected.[33] The Court noted that the House is "without authority to *exclude* any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution."[34]

Modern decisions in the House or Senate on determining "qualifications" are fairly rare, in part because of the clarification by the Supreme Court in *Powell v.*

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[29]"[E]lection does not, of itself, constitute membership ...." *Deschler's Precedents, supra* at Ch. 9, § 47, p. 481. "... Neither do election and return create membership .... [A] person may be selected by the people, destitute of certain qualifications, without which he cannot be admitted to a seat." *Deschler's Precedents, id.,* citing *Hammond v. Herrick,* 1 *Hinds' Precedents* § 499.

[30]Constitution, Article I, Section 5, cl. 1

[31] 395 U.S. 486 (1969).

[32] *Id.* at 550.

[33]Article I, Section 2, clause 2 (Representatives); Article I, Section 3, clause 3 (Senators).

[34]*Powell v. McCormack, supra* at 522.

McCormack delineating Congress' authority in judging qualifications to judge only the three express constitutional "qualifications" for office,[35] and because modern communications and media coverage make it more likely that an actual disqualifying condition (such as a candidate's age or lack of citizenship) would be revealed before nominations by a major political party are made. It should be noted that an appointment by the Governor of California under the Seventeenth Amendment and the laws of California was challenged in 1964 on the basis of "qualifications" of the appointee, Pierre Salinger. Under the laws of the State of California one needed to be a "qualified elector" to be a candidate for United States Senate, which would have required one to have resided in the State for a particular amount of time. Some Senators argued that Salinger was not qualified to be chosen to fill the unexpired term of a Senator from California because, under the laws of the State of California, he had not resided in California long enough to meet the State's qualifications of being an "elector," as required by State law for candidacy.[36] The Senate found, in accordance with the findings of the Privileges and Elections Subcommittee of the Committee on Rules, however, that such a State law would have force and effect only as to State and local offices, and could not disqualify one from being chosen as a United States Senator. State provisions cannot bind the Senate in determining the constitutional qualifications for office of those presenting credentials for seating, nor can State law add a "durational" residency requirement to the inhabitancy qualification for Senator set out in the United States Constitution — that is, to be an "inhabitant" of the State "when elected."[37]

In the Senate, there has since the adoption of the Seventeenth Amendment been one other case (in addition to the 2000 Missouri election) in which an ineligible candidate was on the ballot, and then received the most votes in the election. In that instance, the Senate candidate receiving the most votes was not *yet* eligible to serve in the Senate at the time he was on the ballot for the general election, nor at the time of the beginning of the new congressional session, because he was only 29 years of age. The Senate found that since the issue of "qualifications" arises when the candidate or Member-elect presents his credentials to the Senate for seating, the Senate could and did allow the candidate/Member-elect to delay presenting his credentials until the time he was 30 years old, and thus qualified.[38] The precedents in the House similarly indicate that the issue of qualifications would arise at the time a Member-elect presents his or her credentials for seating, generally at the commencement of the session, and that the Member-elect would have to meet the "age" and "citizenship" requirements at that time (but must meet the "inhabitancy" requirement at the time of the election, that is, "when elected"). The House has in the

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[35]The precedents of both the House and Senate pre-dating 1969, where a Member-elect's "character" or pre-election "conduct" was examined in judging "qualifications" to office, are thus of limited relevance to modern congressional practice and constitutional interpretation. *Deschler's Precedents, supra* at Ch. 7, § 9, at 98.

[36]*See* discussion in election case of Pierre E.G. Salinger, Case 134, *United States Senate Election, Expulsion, and Censure Cases, 1793-1990*, Senate Doc. 103-33, at 413 (1995); S. Rpt. 1381, 88th Cong., 2d Sess. (1964).

[37]S. Rpt. 1381, *supra* at 4-6.

[38]*Hatfield v. Holt*, Case No. 119, *Election, Expulsion and Censure Cases, supra* at 360.

past also allowed a Member-elect to defer taking the oath of office until the beginning of the second session of the Congress (even though Congress was called into session earlier by a Presidential proclamation), at which time the Member-elect had met the seven-year citizenship requirement, notwithstanding the fact that he was "ineligible," that is, he was not a citizen for seven years at the time he was on the ballot and elected in the November congressional election, nor at the beginning of the first session of the new Congress.[39] The House earlier, in 1859, had apparently also allowed a Member-elect, Mr. John Y. Brown of Kentucky, to defer taking the oath of office beyond the opening of the Congress, until the beginning of the next session in December of 1860, at which time Mr. Brown met the constitutional age requirement.[40]

Judging Elections In Congress and the "American Rule"

As expressly provided in the Constitution, the House or the Senate as an institution, in addition to judging "qualifications" of its Members, is empowered to examine the "elections" and "returns" of its own Members beyond a limited examination of a Member-elect's three constitutional "qualifications." That is, as stated by the Supreme Court, each House may inquire and judge as to whether a member-elect was "duly elected by his constituents."[41] The Supreme Court in *Roudebush v. Hartke*, affirmed the Senate's authority to be the final judge of the elections and returns of its own Members, and expressly recognized the constitutional authority for "an independent evaluation by the Senate" of an election and the election returns for the United States Senate: "The Senate is free to accept or reject the apparent winner in either count [original or recount], and, if it chooses, to conduct its own recount."[42]

Given the express textual commitment within the Constitution to each House of Congress to be the judge of its own Members' elections, the *congressional* precedent and practice in this area, although not technically binding on a future Congress, is of primary importance.[43] Furthermore, given this express textual commitment within the Constitution, it is not surprising that there is no apparent judicial authority on the question of whether Congress should seat the next-highest vote-getter when the majority candidate is ineligible, dead, or otherwise disqualified, or declare the election a "non-event" and require an immediate "do-over," since it is not at all clear that the federal courts, absent any apparent violation of another express constitutional

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[39] *In re Ellenbogen* (1934), *Deschler's Precedents, supra* at Ch. 9, § 47, pp. 479 - 482.

[40] 1 *Hinds' Precedents of the House of Representatives* § 418, pp. 389-390.

[41] *Powell v. McCormack, supra* at 522.

[42] 405 U.S. 15, 25-26 (1972). *See* also *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 614, (1929), concerning the "jurisdiction of the Senate to determine the rightfulness of the claim [to a Senate seat] ... and its power to adjudicate such right ...."

[43] Brown, *House Practice*, "Rules and Precedents of the House," § 2, at p. 809: "On the theory that a government of laws is preferable to a government of men, the House has repeatedly recognized the importance of following its precedents and obeying its well-established procedural rules."

provision, would have entertained challenges to review congressional determinations on the elections of their own Members.[44]

The practice and experience in both the House and the Senate on elections of "ineligible" candidates is clear, and is remarkably consistent given the great potential for partisan division on this issue when it arises with respect to a particular Member-elect. The overwhelming weight of authority in both the Senate and the House, as well as the express statements of official Senate and House procedural and parliamentary guides, clearly indicate that the ineligibility of the majority candidate in a congressional election, whether because of death, disability or other incapacity before or after the election, gives no title or right to the office to the runner-up candidate, but rather merely creates a "vacancy" in the office from that State.[45] This has been the case whether or not the law of the particular State in which the election was held would have, under express State law or practice, given the election to the runner-up. In the Indiana election case of *Lowery v. White* in the Fiftieth Congress, notwithstanding the fact that Indiana law at that time followed the minority "English Rule" and would have awarded the election to the runner-up if the majority candidate was ineligible, the majority of the Committee on Elections found that the clear and long line of congressional precedent follows the so-called "American Rule," and that despite the State law the runner-up is not entitled to a congressional seat upon the disqualification of the majority candidate.[46]

As early as 1868 the House had under its consideration a challenge to a "vacancy" where the contesting candidate claimed a seat by virtue of the fact that the winning candidate on the ballot in the original election had been constitutionally disqualified because he was not an "inhabitant" of the State. The House explained that the constitutional disqualification of the candidate on the ballot because of a lack

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[44]"The Senate [has the] *sole authority* under the Constitution to judge of the elections, returns and qualifications of its members ..." and "to render a judgment which is beyond the authority of any other tribunal to review." *Barry v. Cunningham*, 279 U.S. 587, 613, 619 (1929); *Reed v. County Commissioners*, 277 U.S. 376, 388 (1928); *Keogh v. Horner*, 8 F. Supp. 933, 935 (S.D. Ill. 1934). *See* also, generally, *Baker v. Carr*, 369 U.S. 186, 210 (1962), as to "nonjusticiability" of a political question under the separation of powers doctrine where there is "found a textually demonstrable constitutional commitment of the issue to a coordinate political department ...."

[45]*Riddick's Senate Procedure, Precedents and Practices, supra* at 701; *Deschler's Precedents, supra* at Ch. 7, § 9, p. 96. For the opposite and minority conclusion in the House of Representatives, *see Lawson v. Owen*, H.R. Rpt. No. 968, 71st Cong., 2d Sess. (1930), *Deschlers' Precedents, supra* at Ch. 9, App., pp. 862-863. The recognition of the so-called "British Rule" by the majority of the Committee on Elections was not, however, dispositive nor relevant to the final decision of the Committee, nor expressly approved by the House in this case, as the majority candidate was found to possess the requisite citizenship qualifications and was seated.

[46]*Rowell's Digest, supra* at 426-427; 1 *Hinds' Precedents, supra* at § 424, p. 403: "The universal weight of authority in the United States in both branches of the Congress thereof render an extended discussion of this point quite unnecessary." The House did not need to rule on or confirm the majority opinion of the Committee, as the House found that the majority candidate was qualified, seating the Member-elect and dismissing the contest.

of "inhabitancy" in the State was immaterial to the challenger's claim to the seat, since the disqualification of the majority candidate on the ballot for lack of inhabitancy would merely create a "vacancy" in the office, and would not elect the minority or second place vote-getter:

> Contestant further contended that Mr. Mann was not at the time of his election an inhabitant of the State, and was therefore ineligible. ... [T]he committee held that it was immaterial whether he was ineligible or not, as under the principles already settled by the decisions of other cases the ineligibility of the majority candidate would give no title to the minority candidate. The committee were therefore unanimous in the opinion that Mr. Jones was not elected, and that the death of Mr. Mann had caused a vacancy.[47]

In the Senate, it is plainly noted in the Senate's procedural treatise that: "In election cases the ineligibility of a majority candidate, for a seat in the Congress gives no title to the candidate receiving the next highest number of votes."[48] Senate precedents, citing similar rulings in the House of Representatives, have stated the "well-established Senate rule that the ineligibility of the winning candidate gives no title to the candidate receiving the next highest number of votes."[49] In the Senate election case of *Henry D. Hatfield v. Rush D. Holt*, where the candidate on the ballot who had been elected by the people was only twenty-nine years old, "the Senate ... reaffirmed that even if a winning candidate was ruled ineligible, the runner-up in the election would not be declared elected."[50] The Committee on Privileges and Elections in the 74th Congress explained as follows:

> Also, that the said Henry D. Hatfield, by virtue of his having received the next highest number of eligible votes for United States Senator in the general election held in and for the State of West Virginia in November 1934, is not the duly elected Senator from the State of West Virginia. The rule is well settled that in election cases the ineligibility of a majority candidate for a seat in the Congress gives no title to the minority candidate or to the candidate receiving the next highest numbers of votes. See *Jones v. Mann* (40th Cong.); Rowell's Digest 220, 2 Bartlett 475; *Cannon v. Campbell* (47th Cong.), Rowell's Digest 391.[51]

It should be noted that one early authority on parliaments and legislative assemblies, Luther Stearns Cushing, had suggested that, although it would be a "harsh" result, votes cast for a candidate whom the electors knew to be disqualified

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[47] *Jones v. Mann*, Rowell's Digest, *supra* at 226, 1 *Hinds' Precedents, supra* at § 326.

[48] *Riddick's Senate Procedure, Precedents and Practices, supra* at 701.

[49] *Senate Election, Expulsion and Censure Cases, supra* at 360, Case No. 119.

[50] *Id.* at 361.

[51] S. Rpt. No. 904, 74th Cong., 1st Sess. 3 (1935). *See* also *Bayley v. Barbour*, 1 *Hinds' Precedents, supra* at § 435, p. 422: "The Elections Committee held that a contestant could have no claim to a seat declared vacant because of the constitutional disqualifications of the sitting Member."

should be considered "thrown away" and "the opposing candidate elected."[52] In the early election case of *Smith v. Brown* (1861) in the House, however, Cushing's opinion, based on English parliamentary practice and called the "English Rule," was criticized and expressly rejected in favor of the "American Rule" of representative democracy. As explained in Rowell's Digest, the committee in that case found:

> But the English rule had never been applied in this country and was hostile to the genius of our institutions. Mr. Cushing, in stating the English parliamentary rule, states that in his opinion the same rule applies in this country, but he gives no case to sustain his statement, which is the best of evidence that there are none. There had been numerous cases in the House and Senate where members were deprived of their seats because of ineligibility, but in no case had it ever been claimed that any title was thereby given to the minority candidate.[53]

The so-called "American Rule" is based on principles of representative democracy, that in such a system the overriding issue in an election contest in the House or Senate is to attempt to effectuate the will of the majority (or plurality) of the voters of that State or district, usually in determining who was "actually elected" or "duly elected" by the people to represent them, that is, who has received the most votes.[54] Under these principles, one who has, in fact, lost an election, that is, has received fewer votes than someone else on the ballot, is therefore not seated by the legislature in contravention of the choice of the people of the State or district upon a finding by the legislature of an ineligibility and disqualification of the actual winner of the election. When, under the American Rule, a majority or plurality of voters vote for a candidate widely *known* to be ineligible (such as in the case of a candidate who dies shortly before the election but whose name remains on the ballot), it is assumed that the will of the majority or plurality of voters was to choose a "vacancy." In the case of Senate races, if the Governor has already indicated the person whom he will appoint to fill the vacancy should the deceased candidate receive the most votes, then the will of the electorate, in giving the most votes to the deceased candidate, would arguably have been expressed in favor of that proposed appointee over the other candidates on the ballot. In one case in the Senate concerning an "anticipatory appointment," where there arose an issue as to which Governor (the outgoing or incoming) had the authority to appoint an interim Senator to the vacancy created by the in-coming Governor who was giving up his Senate seat to be Governor, the Senate precedent indicates that the decision was made, in part, on a recognition that "the voters had known when they elected Matthew Neely governor that he intended to name his Senate successor, since he made his plan clear during the campaign."[55]

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[52]Cushing, *Elements of the Law and Practice of Legislative Assemblies*, at 67 (Boston 1856).

[53]*Smith v. Brown*, Rowell's Digest, *supra* 220-221.

[54] Justice Joseph Story, *Commentaries on the Constitution of the United States,* Volume I, § 833, p. 585 (1873); Tucker and Tucker, *The Constitution of the United States, A Critical Discussion of Its Genesis, Development and Interpretation,* Vol. I, at pp. 426-427 (1899): "The power of election is vested ... in the constituency,"and it is left to each House finally to determine who the constituency has "duly elected." *See* also *Powell v. McCormack, supra* at 522; *Roudebush v. Hartke,* 405 U.S. 15 (1972).

[55]*Martin v. Rosier, Senate Election, Expulsion and Censure Cases, supra* at 373, Case 124.

Seventeenth Amendment

It was argued during the 2000 Senate race in Missouri that the Seventeenth Amendment, adopted principally to provide for popular election of United States Senators, should limit a Governor's authority (and the authority of the State legislatures in empowering the Governor) to require a Governor to issue only "writs of election" for a special election when there is a vacancy which has been created by the election of a candidate known to be disqualified or ineligible at the time of the election, rather than making a "temporary appointment" to fill such vacancy until a later scheduled election.[56] Although there are some interesting *policy* arguments concerning such proposed limitations on State Governors' authority to make "temporary appointments" in these circumstances, particularly where the Governor is of the same major political party as the surviving candidate,[57] there is nothing on the face of the language of the Seventeenth Amendment, its enactment history, nor any judicial interpretations or congressional precedents which support such a restrictive construction of State authority under the Amendment.

The language of the vacancy clause of the Seventeenth Amendment clearly provides *no* distinctions as to when or how the "vacancy" in the office has been created:

> 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.

The text and the actual language of the Amendment clearly show, therefore, that there is no express restriction on a State legislature's or Governor's authority which is dependant or based upon any distinctions in the nature or the timing of how or when the Senate vacancy occurs. Rather, the language of the Amendment appears to provide on its face two alternate ways for a State to fill any vacancy in the State's representation in the Senate: either the executive of the State shall issue writs of election for a special election to fill the vacancy, or, if expressly authorized by the legislature of the State, the Governor may make a "temporary appointment" to fill the vacancy until the people select a replacement for the remainder of the term in a future election as the State "legislature may direct." As noted in *dicta* by the Supreme Court, "the Seventeenth Amendment permits a state, if it chooses, to forgo a special election in favor of a temporary appointment to the United States Senate ...."[58] In practice, most of the States provide for a temporary appointment by the Governor until the next regularly scheduled biennial congressional election, but a State might

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[56]Viet D.Dinh, "Dead Men Can't Win," The Wall Street Journal, November 9, 2000, at A26.

[57]Some States require the Governor to select someone from the same political party as the deceased Member to fill a vacancy, but such additional requirement might prove difficult to enforce in court, as it may be seen as a qualification for the Senate additional to those established in the Constitution.

[58]*Rodriquez v. Popular Democratic Party*, 457 U.S. 1, 11 (1982).

also provide for a more immediate "special election" and authorize an appointment by the Governor until the time of such election.[59]

Generally speaking, in provisions such as the Seventeenth Amendment, the "plain meaning" of the text and the words of the provision should be employed in discerning its import and intent, unless there is some clear and express countervailing enactment history.[60] Furthermore, under long-established principles of constitutional interpretation, meaning must be given to all the words in a provision, and thus phrases and words in the text of the Constitution may not be ignored.[61] Thus, while the principal purpose of the Seventeenth Amendment was certainly to provide for the popular election of Senators, the express discretion and authority delegated to the State legislatures to allow the Governor of the State to make temporary appointments to fill Senate vacancies can not be disregarded.[62]

In the enactment history of the Seventeenth Amendment there is no express indication that a State is *required* to hold a more immediate "special election" to fill a vacancy created by the death or other ineligibility of the majority candidate in a general election, as opposed to using the alternative method of allowing a temporary appointment by the Governor until a later election is held, as directed by the State legislature. In fact, in the earliest formulations of the vacancy language used in what became the Seventeenth Amendment, the drafter was cognizant of the expense of State-wide elections, and expressly intended to allow the State to be spared the expense of having to hold another State-wide "special election" soon after or before a regular State-wide election.[63]

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[59]For a general discussion of experiences of States in filling Senate vacancies, *see* Alan L. Clem, "Popular Representation and Senate Vacancies," 10 *Midwest Journal of Political Science* 52 - 77 (Feb. 1966); for recent compilation of State provisions, *see* S. Doc. 106-14, 106th Cong., 2d Sess., *Senate Election Law Guidebook 2000* (1999).

[60]*United States v. Sprague*, 282 U.S.716, 731-732 (1931)(in providing two alternative methods of ratification, there is nothing in the text of the Constitution which requires the legislature [Congress] to select one method over the other); *McPherson v. Blacker*, 146 U.S. 1, 27 (1892); *see* generally, Justice Joseph Story, *Commentaries on the Constitution* , § 451.

[61]*Marbury v. Madison*, 5 U.S. 137, 174 (1803); *Holmes v. Jennison*, 39 U.S. 540, 571 (1840).

[62]One existing problem expressly recognized in the enactment history of the Seventeenth Amendment was that of extended vacancies in State delegations to the Senate caused by inaction and political stalemate and intrigue in the State legislatures. S. Rpt. No. 961, 61st Cong., 3rd Sess. 13-14 (1911); David E. Kyvig, *Explicit and Authentic Acts, Amending the U.S. Constitution, 1776-1995*, at 209, noting that "Delaware was represented by only one senator in three Congresses and none at all from 1901 until 1908." The provision of a mechanism for the temporary appointment by the *Governor* of a State in cases of Senate vacancies until an election is held, providing a quick and efficient method to fill a Senate vacancy, may have been intended in part as an effort to address this problem.

[63]Representative Tucker of Virginia originally drafted and offered in 1892 the vacancy provision eventually adopted in 1912. As reported in the House, one reason discretion was given to the State legislatures to allow a "temporary appointment" until a later election, such as a regularly scheduled state-wide election, was that mandatory special elections might be

(continued...)

There is also no express indication in the enactment history that the Amendment, contrary to its express language, was intended to limit or restrict the authority or power of a State legislature over the details of the procedures of elections in their respective States to fill vacancies. The enactment history of the Seventeenth Amendment in the United States Congress shows a serious debate and division concerning "States' rights," with one of the major contentions in the debate being over a provision, adopted in one House, which went so far as 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.[64] The author of the substitute amendment eventually adopted by Congress, Senator Bristow, 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.[65] The constitutional provision adopted expressly provides as to vacancies, in fact, 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,[66] limited only by the requirement that the Governor's appointment be "temporary," and there is no indication of a silent or implicit agenda to limit that authority or discretion when vacancies arise from the death of a candidate, or otherwise, at the beginning of the term.

Federal courts looking at the issue of whether the Seventeenth Amendment requires a State to hold a "special election" to fill a Senate vacancy have concluded that the Constitution delegated to the State legislatures significant discretion and authority as to the mechanics and procedures of how and when vacancies in the Senate from their respective States are to be filled. In *Valenti v. Rockefeller*, a federal court, in a case expressly affirmed by the United States Supreme Court, found that there is nothing in the Seventeenth Amendment, nor its history, that requires the State to hold a *special election* to fill a vacancy, rather than to have a temporary gubernatorial appointment, even if such appointment extends, because of the State's statutory nominating procedures, more than two years and thus *beyond* the next immediate State-wide election.[67] The court noted there that the pre-Seventeenth Amendment history, as well as the Amendment's enactment history, "provides no support for plaintiff's contention that special elections are required to fill vacancies

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[63](...continued)
a "hardship" on the State which recently had or soon will have a state election, since "to add another State election would be imposing an unnecessary expense on the people." H.R. Rep. No. 368, 52d Cong., 1st Sess. 5 (1892).

[64]This provision was reported out of committee in the Senate, and had passed the House. S. Doc. No. 666, 62d Cong., 2d Sess. 6-9, "Resolution for the Direct Election of Senators," by Senator Joseph L. Bristow (1912); Kyvig, *Explicit and Authentic Acts*, *supra* at 210-213.

[65]S. Doc. No. 666, 62d Cong., *supra* at 9. *Trinsey v. Commonwealth of Pennsylvania*, 941 F.2d 224, 234 (3rd Cir. 1982), cert. denied, 502 U.S. 1014 (1991).

[66]*See McPherson v. Blacker*, 146 U.S. 1 (1892), as to express constitutional delegation to the State legislatures of role in electoral scheme for choosing presidential electors.

[67] *Valenti v. Rockefeller*, 292 F. Supp. 851 (D.C.N.Y. 1968), *aff'd*, 393 U.S. 404, 405, 406 (1969), *rehearing denied*, 393 U.S. 1124 (1969).

under the Seventeenth Amendment."[68] Noting the discretion expressly given in the text of the Constitution to the State legislatures over this issue, the court found:

> The Seventeenth Amendment's vacancy provision explicitly confers upon the state legislatures discretion concerning the timing of vacancy elections. If the legislature authorizes the governor to make a temporary appointment, the appointee may hold office "until the people fill the vacanc[y] by election *as the legislature may direct.*"... [W]e believe that we must give effect to the natural reading of the Seventeenth Amendment as adopted since there is no indication that the Congress which proposed the Amendment, or the state legislatures which ratified it, intended a different meaning. This natural reading grants to the states some reasonable discretion concerning both the timing of vacancy elections and the procedures to be used in selecting candidates for such elections. This interpretation gains support from Art. I, § 4 of the Constitution which gives to the state legislatures the initial power to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives ...." If the drafters of the Seventeenth Amendment had intended to bring about a radical departure from this normal rule of state discretion in the instance of the timing and manner of holding vacancy elections, such as by requiring special elections, it is likely that they would have employed clear language to that effect. ...[69]

The court found that the Seventeenth Amendment did place "some limit on the discretion of the states" by requiring that the Governor's appointment be "temporary" until an election is held.[70] The majority of the court did not, however, attempt to set an outer limit to that time. In the case of the New York statutory provisions in effect and reviewed in *Valenti v. Rockefeller*, the "temporary appointment" by Governor Rockefeller after the death of Senator Robert Kennedy worked out to 29 months.[71]

In a similar manner, in *Trinsey v. Commonwealth of Pennsylvania*,[72] the United States Court of Appeals found that the discretion granted to the State legislatures in the Seventeenth Amendment to establish the details of the procedures and timing of *vacancy* elections for the Senate was so broad and significant that, even though the Seventeenth Amendment itself required popular *general* elections for the Senate, the Commonwealth of Pennsylvania was within its authority under the vacancy clause to provide by statute that nominations for a special election to fill a Senate vacancy may be made without a popular primary election. The court noted that the legislative history of the Seventeenth Amendment indicated that the Congress "was resistant to any change that would decrease the power and authority of the states and enlarge that of the federal government," and that the "explicit provision in the vacancy paragraph

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[68] *Id.* at 865.

[69] *Id.*at 855-856.

[70] *Id.* at 856.

[71] 292 F. Supp. at 868.

[72] 941 F.2d 224 (3rd Cir. 1991), *cert. denied*, 502 U.S. 1014 (1991).

of the Seventeenth Amendment vesting discretion in the state legislatures ... itself could be deemed dispositive of the issue."[73]

[73] *Id.* at 234.