Filling U.S. Senate Vacancies: Perspectives and Contemporary Developments

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Summary

The election of incumbent Senators as President and Vice President in 2008, combined with subsequent cabinet appointments, resulted in the highest number of Senate vacancies during a presidential transition period in over 60 years. Vacant seats were filled in Colorado, Delaware, Illinois, and New York, all states in which the governor appoints a temporary replacement. Controversies surrounding the replacement process in two of these states drew scrutiny and criticism of both the particular circumstances and the appointment process itself.

The use of temporary appointments to fill Senate vacancies is an original provision of the U.S. Constitution. The practice was revised by the 17th Amendment (effective in 1913), which substituted direct popular election of Senators for choice by state legislatures; it also changed the requirements for Senate vacancies, by specifically directing the state governors to "issue writs of election to fill such vacancies." The amendment simultaneously preserved the appointment option by authorizing state legislatures to "empower the [governor] to make temporary appointments until the people fill the vacancies by election."

Since 1913, the appointment of interim Senators has been predominant, with appointees usually serving until a special election is held. State scheduling provisions differ, but appointed Senators generally serve less than two years, and their terms usually expire immediately following the special election. Some states limit the governor's power: Arizona requires appointed Senators to be of the same political party as the prior incumbent, while Hawaii, Utah, and Wyoming require the governor to choose a temporary Senator from names submitted by the prior incumbent's state political party committee. In addition, Massachusetts, Oregon, and Wisconsin do not permit gubernatorial appointments; but require special elections to fill Senate vacancies. Oklahoma allows appointments only in limited circumstances. Alaska has passed both legislation and a ballot item providing for special elections, but its current status is unclear. Although several states considered legislation in 2009, only Connecticut enacted revised appointment procedures in 2009.

Two alternative federal reform approaches emerged in the 111th Congress: one legislative and the other constitutional. H.R. 899 would require special elections to fill all Senate vacancies, and would provide federal financial assistance to the affected state to cover up to 50% of the costs of the special election. S.J.Res. 7 and H.J.Res. 21 propose a constitutional amendment that would require all Senators to be elected, and would direct the governors of affected states to issue writs of election to fill Senate vacancies. The constitution subcommittees of the Senate and House Judiciary Committees held a joint hearing on the measures on March 11, 2009. On August 6, the Senate Judiciary Committee's Subcommittee on the Constitution voted to approve S.J.Res. 7 and report it to the full committee.

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Introduction

Throughout the nation's history, the governors of the several 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, when the 17th Amendment was ratified, the Constitution's original provisions empowered governors to "make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies."[1] The 17th Amendment, which provided for direct election of the Senate, also gave states the option of filling Senate vacancies 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 41 states possessing essentially unrestricted 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.

The presidential election of 2008 generated new interest in the Senate vacancy process. This election resulted, directly and indirectly, in the highest number of Senate vacancies associated with a presidential transition in more than 60 years.[3] The election of incumbent Senators as President and Vice President, combined with subsequent cabinet appointments, resulted in four Senate vacancies, in Colorado, Delaware, Illinois and New York, all states in which the governor is empowered to appoint a temporary replacement. Moreover, protracted controversies surrounding the replacement process in two of these states drew scrutiny and criticism of not only the particular circumstances, but the temporary appointment process itself, and led to proposals that would require all Senate vacancies to be filled by special elections.

This report reviews the constitutional origins of the appointments provision and its incorporation into the 17th Amendment. It also examines and analyzes contemporary proposals to eliminate the gubernatorial power to name temporary Senators.

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

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

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

[3] The most recent comparable event occurred following the presidential election of 1992, when Senator Al Gore, Jr., resigned after his election as Vice President, and Texas Senator Lloyd M. Bentsen, Jr., resigned to accept the position of Secretary of the Treasury.

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 supplied by the Executive until the next meeting of the Legislature* (emphasis added). Each member shall have one vote.[4]

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.[5]

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."[6] A motion to strike out executive appointment was voted down eight states to one, with one divided.[7] 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.[8]

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, incorporating it 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.[9]

[4] 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.

[5] Ibid., p. 363.

[6] Ibid., pp. 343-364.

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

[8] Ibid. In favor: GA, MD, NC, SC; opposed: CT, MA, NH, NJ, PA, VA.

[9] U.S. Constitution, Article I, Section 3, clause 2.

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.

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.[10] The primary grounds for these contested appointments appear to have centered on whether vacancies happened during the recess of the legislature.[11] 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."[12] 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.[13]

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 in the House.[14] 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

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 the state legislature proved unable to settle on a candidate by the time its session ended. In the most extreme instances, protracted and deadlocked elections

[10] 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.

[11] Ibid.

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

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

[14] Haynes, *The Election of Senators*, pp. 101-102.

resulted in unfilled Senate vacancies for sometimes lengthy periods.[15] 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."[16] 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 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."[17] 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."[18] 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 the proposal gained strength, the House first approved a proposed amendment in 1893, and did so with increasing vote margins a total of five times between 1893 and 1902; in each case, however, the Senate took no action.[19] For nearly the next decade, Congress took no action, as the House declined to spend limited session time debating proposals that were very unlikely to receive consideration in the Senate. Direct election met with greater success in the states. After years of experimentation with different plans by the states, in 1904, Oregon voters used the newly enacted initiative process 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 primary elections. By 1911, over half the states had adopted some version of the Oregon system.[20]

Congress Acts—The Seventeenth Amendment

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.[21] Deadlocked elections in several states continued to draw publicity,

[15] 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. Available 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.

[16] 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.

[17] 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.

[18] 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.

[19] Haynes, *The Senate of the United States*, vol. 1, p. 96.

[20] Kyvig, "Redesigning Congress," p. 359.

[21] The Constitution, in Article V, requires Congress to "call a Convention for proposing Amendments ..." on the (continued...)

while in 1906, a sensational but influential series of articles titled "The Treason of the Senate" ran in William Randolph Hearst's *Cosmopolitan*.[22] 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.[23]

The language is identical to the 17th 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."[24] 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 15th Amendment, at least with respect to the Senate.[25] On April 13, 1911, the House rejected an effort to strip Clause 2 from H.J.Res. 39, and moved immediately to approve the resolution with it intact.[26]

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.[27] The Senate then overwhelmingly approved the constitutional amendment itself by a vote of 64 to 24.[28]

(...continued)

application of the legislatures of two thirds of the states.

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

[23] H.J.Res. 39, 61st Congress.

[24] Alan P. Grimes, *Democracy and the Amendments to the Constitution* (Lexington, MA, DC Heath, Lexington Books, 1978) pp. 75-76. See also Kyvig, "Redesigning Congress," pp. 360-362.

[25] Ibid., p. 80.

[26] *Congressional Record*, vol. 47, April 13, 1911, pp. 241-243.

[27] *Congressional Record*, vol. 47, June 12, 1911, p. 1923.

[28] Ibid., p. 1924.

What is perhaps most remarkable about deliberations over the 17th 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

> 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.[29]

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.[30] Almost a year passed before the House receded from its version and accepted the amendment as passed by the Senate.[31] 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 17th Amendment to have been duly ratified on May 31, 1913.[32]

Appointments to Fill Senate Vacancies Since 1913

Within a year of the 17th 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 17th 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 17th Amendment. The Senate debated the issue, rejected this argument, and seated the elected Senator.[33] In the second case, the Governor of Alabama sought to appoint an interim Senator to fill a vacancy created in

[29] *Congressional Record*, vol. 47, May 23, 1911, p. 1483.

[30] Kyvig, "Redesigning Congress," p. 361.

[31] *Congressional Record*, vol. 48, May 13, 1912, p. 6367.

[32] *The Constitution of the United States, Analysis and Interpretation*, 108th Cong., 2nd sess., Senate Document 108-17 (Washington, GPO: 2004), p. 34. Available at http://www.gpoaccess.gov/constitution/browse2002.html#2002.

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

1913, after the 17th 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.[34]

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 17th Amendment, which was declared to be ratified on May 31. The Senate's records currently identify 184 appointments to the office of U.S. Senator since that time; this includes 181 individuals, since three persons were appointed to fill Senate vacancies twice. It also includes the four Members appointed to fill vacancies caused by the presidential election of 2008 and subsequent Cabinet appointments. Of this figure, 14 appointees have been women: seven of these were the widows of incumbent Senators who agreed to serve until a successor could be elected; two were spouses of the governor who appointed them; and one was the daughter of the governor who appointed her. Three men were appointed to fill vacancies created by the deaths of their fathers.[35]

The Senate data exclude so-called "technical" resignations. Generally considered a separate class, these resignations 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, and accrue the benefits of two months extra seniority. This practice was ended in 1980 when the major parties agreed that Senators-elect would no longer be able to derive seniority benefits through appointment as a result of technical resignations.[36]

A Congressional Research Service study noted that 64 of 184[37] Senate appointments since 1913, or 36% of the total, did not seek subsequent election. Of the 116 who have done so to date, 60, or 52%, were successful, while 56, or 48%, were defeated.[38] The remaining Senators of the 184 total are the four who were appointed following the 2008 presidential election, and have not yet had the opportunity to seek election. 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 *Publius*, 41.7% of appointed Senators who sought election in their own right during this period were defeated in the subsequent special primary election.[39]

[34] Ibid.

[35] Statistics compiled by CRS from data provided by the U.S. Senate Historical Office, available at http://www.senate.gov/artandhistory/history/common/briefing/senators_appointed.htm, and the *Biographical Directory of the United States Congress, 1774-Present*, available at http://bioguide.congress.gov/biosearch/biosearch.asp.

[36] Phone conversation with Mary Baumann, Office of Secretary of the Senate, March 3, 2009.

[37] The three persons appointed twice to the Senate are considered separate appointments here.

[38] *Statistical Survey of Gubernatorial Senate Appointments Since 1913*, by Cara Warner. Internal CRS memorandum, available from the author of this report.

[39] William D. Morris and Roger M Marz, "Treadmill to Oblivion: The Fate of Appointed Senators," *Publius*, vol. 11, winter 1981, p. 68.

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.[40] 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 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.[41]

Current State Provisions Governing Senate Vacancies

At present, 45 states continue to provide for temporary appointments by their governors to fill Senate vacancies. Four states require a special election to fill Senate vacancies, while the status of a fifth is unclear.

Filling Vacancies by Special Election

Massachusetts, Oregon, and Wisconsin currently provide only for special elections to fill Senate vacancies. Wisconsin revoked the governor's power to fill temporary Senate vacancies by appointment in 1985,[42] followed by Oregon in 1986, when that state's voters adopted the special election provision in legislation referred by the legislature.[43] Also in 2004, the Massachusetts legislature passed a special election requirement.[44] Oklahoma falls into a related subcategory, empowering the governor only to appoint the winner of a special election to fill the Senate seat for the balance of the term.[45] In Alaska, a statute adopted by the legislature in 2004 authorizes the governor to make a temporary appointment of a person to be United States Senator until a special election is held 60-90 days after the vacancy. However, in a referendum passed by the voters of Alaska, a law was adopted that took effect the same day as the legislative enactment, calling for a special election between 60 and 90 days after a United States Senate vacancy but without expressly authorizing the governor to make a temporary appointment. As noted in the official revisor's notes in the Alaska Statutes, at § 15.40.145, the referendum "casts doubt upon the continued effectiveness" of the legislature's authorization of the governor to make a temporary

[40] 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*, vo. 2, summer 1974, p. 296; Alan L. Clem, "Popular Representation and Senate Vacancies," *Midwest Journal of Political Science*, vol. 10, 1966, pp.68-69.

[41] Morris and Marz, "Treadmill to Oblivion," pp. 68-69.

[42] 1985 Wisconsin Act 304, available at http://www.legis.state.wi.us/acts89-93/85Act304.pdf.

[43] *Oregon Blue Book*, "Elections: Initiative, Referendum and Recall," available at http://bluebook.state.or.us/state/elections/elections20.htm.

[44] Massachusetts General Court, Chapter 236 of the Acts of 2004, available at http://www.mass.gov/legis/laws/seslaw04/sl040236.htm.

[45] Oklahoma Statutes, title 26, SS.12-101, available at http://www.lsb.state.ok.us/.

appointment."[46] Considering these potentially conflicting enactments, the current status of vacancy procedures in that state is unclear.

Repeal of a Special Election Requirement? Recent Developments in Massachusetts

On August 20, 2009, both the *Boston Globe* and *Boston Herald* reported that Senator Edward Kennedy had written Governor Deval Patrick proposing that Massachusetts change its current law, which requires that all Senate vacancies be filled by special election, to provide instead for a temporary appointment to fill such vacancies until a special election can be held. The proposal further indicated that the appointment should be purely temporary, and that the appointee should explicitly disavow any plans to run for the seat in the special election. The argument advanced was that the schedule provided by the existing law could leave the state without full Senate representation until the election is held, a period between 145 and 160 days.[47]

Filling Vacancies by Temporary Appointment and Special Election

A recent study by staff of the Subcommittee on the Constitution of the Senate Judiciary Committee classified the remaining 45 states according to their scheduling requirements for special elections. These include eight states that provide for "quick special elections with interim gubernatorial appointments," and the remaining 37 that permit gubernatorial appointments who serve until the next general election.[48]

The study further divides states included in the quick elections category into three subcategories. The governors of three states, Alabama, Vermont and Washington, are authorized to fill vacancies by appointment, but they are also required to call special elections, within 90 days for Vermont and Washington, and "forthwith" for Alabama, with exceptions if the vacancy occurs shortly before a general election. All three states require that the special election be held concurrently with a general election if the vacancy falls within a specific period prior to the next regularly scheduled general election. Three more states, Arkansas, Louisiana, and Mississippi, provide what the report refers to as "hybrid" systems. In each case, the governor is empowered to fill vacancies by temporary appointment, but if the current term has one year or longer to run, the governor must schedule a special election. Finally, California and New Jersey empower the governor to call a discretionary "quick special election," depending on the amount of time remaining in the unexpired senatorial term, while also empowering both officers to make interim appointments.

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[46] Alaska Statutes SS. 15.40.145, available at http://www.legis.state.ak.us/basis/folio.asp; 140 Alaska 2004 General Election Results, available at http://www.elections.alaska.gov/04genr/data/results.htm.

[47] "Kennedy, Looking Ahead, Urges That Senate Seat Be Filled Quickly," *Boston Globe* on Boston.com, August 20, 2009, available at: http://www.boston.com/news/local/massachusetts/articles/2009/08/20/kennedy_looking_ahead_urges_a_quick_filling_of_senate_seat/?page=1; Laura Crimaldi, "Ailing Ted Kennedy Asks for Speedy Replacement Process," *Boston Herald* on Bostonherald.com, August 20, 2009, available at: http://www.bostonherald.com/news/us_politics/view/20090820ailing_ted_kennedy_asks_for_speedy_replacement_process/srvc=home&position=2

[48] *How States Fill U.S. Senate Vacancies: A Survey of State Laws*, compiled by the Senate Judiciary Committee, Subcommittee on the Constitution, February, 2009. Available from the author of this report.

The remaining 37 states[49] empower their governors to provide temporary appointments to fill Senate vacancies, with the appointees customarily serving until the next general election. The survey notes:

> The phrase 'until the next general election' may be misleading in some cases. If a vacancy occurs within close proximity (as defined by varying numbers of days in different state statutes) to a general election or primary, eighteen of these states require the appointee [to] serve as Senator until the *following* general election.[50]

According to the staff survey, appointed Senators from these states "could theoretically serve as long as 30 months."[51]

"Same Party" Requirements

Four of the states that authorize their governors to appoint temporary replacements pending special elections 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 that the appointed Senator be of the same party as the previous incumbent.[52] In a variation on this practice, Hawaii, Utah, and Wyoming require the governor to appoint a temporary Senator from among a list of three prospective candidates submitted by the same political party (Utah and Wyoming specify the State Central Committee of the party) as the previous incumbent.[53] It should be noted that 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.[54]

Current State Proposals to Require Special Elections to Fill Senate Vacancies

As the controversies surrounding appointments to fill Senate vacancies that occurred following the 2008 presidential elections continued, proposals to eliminate gubernatorial appointment as a means of filling Senate vacancies were offered in the 2009 sessions of several state legislatures.

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[49] The 37 states include AZ, CO, CT, DE, FL, GA, HI, ID, IL, IN, IA, KS, KY, ME, MD, MI, MN, MO, MT, NE, NV, NH, NM, NY, NC, ND, OH, PA, RI, SC, SD, TN, TX, UT, VA, WV, and WY.

[50] Ibid., p. 3. These 18 states include CT, GA, HI, ID, IN, ME, MI, NB, NJ, NM, NY, NC, ND, OH, PA, RI, SC, and VA.

[51] Ibid.

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

[53] *Hawaii Revised Statutes*, ss. 17-1, available at http://www.capitol.hawaii.gov/hrscurrent/Vol01_Ch0001-0042F/HRS0017/HRS_0017-0001.htm; *Utah Code Annotated* , Title 20-A-1-502, available at http://le.utah.gov/~code/TITLE20A/htm/20A01_050200.htm; *Wyoming Statutes*, Title 22-18-111, available at http://legisweb.state.wy.us/statutes/statutes.aspx?file=titles/Title22/Title22.htm.

[54] Discussion with Jack Maskell, CRS legislative attorney, March 8, 2009.

Bills affecting the governor's appointment authority as provided under the 17th Amendment were introduced in eight states, as listed below. Only Connecticut passed legislation revising its Senate vacancy procedures in the 2009 session, however. This law reinforced the special election requirement, while retaining gubernatorial appointment power under certain conditions. Future gubernatorial nominees to fill Senate vacancies will, however, require confirmation by a two-thirds vote of both houses of the Connecticut Legislature.

Colorado

One bill was introduced in the Colorado General Assembly in 2009. Senate Bill SB 09-152 sought to amend state law to eliminate gubernatorial authority to appoint temporary Senators and require a special election to fill Senate vacancies conducted under provisions identical to those governing special elections for vacancies in the office of U.S. Representative. The bill was referred to committee but no further action was taken.[55]

Connecticut

Two relevant bills were introduced in the Connecticut General Assembly in 2009. House bill HB 5829 was referred to committee and saw no further action, but Senate bill SB 913 formed the basis for Public Law 09-170, approved by Governor M. Jodi Rell on June 25, 2009. The act amended state law to eliminate gubernatorial authority to appoint temporary Senators in most circumstances and to require a special election to fill Senate vacancies. If, however, the vacancy occurs after the municipal election in the year preceding the last year in the term of a Senator, or after the municipal election in the last year of the term of a Senator, then the governor nominates a candidate to fill the vacancy for the balance of the term. The governor's nomination is subject to approval by a two-thirds vote of both chambers of the legislature.[56]

Illinois

Four relevant bills were introduced in the Illinois General Assembly in the 2009 session, but none proceeded beyond consideration in committee. House Bill HB 0365 sought to provide an expedited special election process to fill Senate vacancies unless the vacancy occurred within 90 days of the primary election for the regularly scheduled election for the office itself. In this case, the governor would retain authority to appoint a temporary replacement who would serve the unexpired term. House Bills HB 2503 and HB 2543 sought to preserve the governor's Senate vacancy appointment authority, but would have required a special election unless the vacancy occurred within 180 days of the election at which the office would be filled; in such cases the appointee would have served the balance of the term. Senate Bill SB 0285 would have required vacancies in the office of U.S. Senator to be filled by special election when the vacancy occurred more than one year before the next general election.[57]

[55] Colorado General Assembly website, available at http://www.leg.state.co.us/Clics/CLICS2009A/csl.nsf/MainBills?openFrameset

[56] Connecticut General Assembly website, available at: http://www.cga.ct.gov/2009/ACT/PA/2009PA-00170-R00SB-00913-PA.htm .

[57] Illinois General Assembly website, available at http://www.ilga.gov/legislation/default.asp .

Iowa

One relevant bill was introduced in the Iowa General Assembly in the 2009 session. House Bill HF 200 sought to eliminate the governor's authority to nominate a temporary replacement to fill U.S. Senate vacancies. The bill provided for expedited special primary and general elections to fill Senate vacancies. If Congress were in session, or about to enter session, the schedule would have been further compressed. No action was taken beyond committee assignment.[58]

Maryland

Two relevant identical bills were introduced in the Maryland General Assembly in the 2009 session. House of Delegates bills HB 278 and HB 369 would have required the governor to order an expedited special election process to fill Senate vacancies. The governor would retain authority to make temporary appointments to serve until the special election. Both bills were reported unfavorably in committee, and no further action was taken. In the Senate, bill SB 326 proposed retention of the governor's authority to make temporary appointments to fill U.S. Senate vacancies, as well as other more modest changes to scheduling procedures for special Senate elections. Hearings were held on the bill in committee, but no further action was taken.[59]

Minnesota

Three relevant bills were introduced in the Minnesota State Legislature in the 2009 session. House Bill HF 39 and Senate Bill SF 64 took the form of constitutional amendments, which, had they passed the legislature, would then have been subject to approval by the state's voters in the next general election. Although primarily focused on gubernatorial succession and disability, they would also have provided for an expedited special election process, while retaining the governor's authority to appoint a temporary replacement to fill Senate vacancies. Companion bills HF 531 in the House and SF 278 in the Senate proposed a legislative revision to U.S. Senate vacancy procedures. They proposed a special election to fill all U.S. Senate vacancies, unless they occurred after July 1 of the year in which the term expired, in which case the seat would remain vacant and the candidate elected at the regularly scheduled election would fill the vacancy immediately. Both bills were referred to committee, but no further action was taken on either.[60]

New York

Three relevant bills were introduced in the New York State Legislature in the 2009 session. Assembly Bill A 1829 proposed repeal of the governor's authority to appoint temporary replacements to fill Senate vacancies and provided an expedited special election process to fill such vacancies. Assembly bill A 2001 was similar, but authorized the governor to make a temporary appointment extending until the special election was held. No action beyond

[58] Iowa General Assembly website, available at http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=BillInfo&Service=DspHistory&var=HF&key=0216C&GA=83 .

[59] Maryland General Assembly website, available at http://mlis.state.md.us/.

[60] Minnesota State Legislature website, "Minnesota Legislation and Status," available at http://www.leg.state.mn.us/leg/legis.asp .

committee referral was taken on either bill.[61] Senate Bill S 1801 was similar, but would also have required special elections to fill vacancies in the state offices of Comptroller and Attorney General. No action beyond committee referral was taken on this bill.[62]

Vermont

One relevant bill was introduced in the Vermont Legislature in the 2009 session. House Bill H 298 retained the governor's authority to make an interim appointment to fill a Senate vacancy, but would have provided an expedited special election process which also incorporated an "instant runoff" provision by which to determine results in the event no candidate won a majority of votes.[63]

111th Congress Proposals

Controversies surrounding Senate vacancies created directly or indirectly by the 2008 presidential elections have led to proposals in the 111th Congress that would significantly alter the current arrangements provided by the 17th Amendment. These proposals fall into two categories: legislative and constitutional.

Legislative Proposal: 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. Representatives Donald A. Manzullo, Howard P. "Buck" McKeon, Thomas E. Petri, John Shimkus, and Frank R. Wolf have joined as cosponsors.

Section 1 of the bill states the title. Section 2(a) would require that, if the President of the Senate issues a certification that a vacancy exists 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. Section 2(b) would provide that a special election 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 period between the regularly scheduled election and the first day of the first session of the next Congress. Finally, Section 2(c) would provide a rule of construction 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.

Section 3 would authorize the Election Assistance Commission to reimburse states for up to 50% of the costs incurred in connection with holding the special election.

[61] New York State Assembly website, available at http://assembly.state.ny.us/leg/ .

[62] New York State Legislature website, bill number "S01801"available at http://public.leginfo.state.ny.us/menuf.cgi .

[63] Vermont Legislative Bill Tracking System, available at http://www.leg.state.vt.us/docs/2010/bills/Intro/H-298.pdf .

Discussion

The purposes of this bill are to provide for expedited special elections to fill Senate vacancies, and to assist states in meeting the expenses of special elections. The bill seeks to avoid potential conflicts with the 17th Amendment concerning the state option to provide for gubernatorial appointments, but would generally lead to considerably shorter tenures for most appointed Senators. As a secondary issue, it seeks to address the concerns of state and local governments related to the costs of planning and administration of special elections through a program of reimbursements. It may be noted that this provision would eliminate or reduce the likelihood that the act's requirements would be subject to points of order on the floor of either chamber on the grounds that they impose "unfunded mandates" on state and local governments.[64]

H.R. 899 derives its authority from the Constitution, which provides that

> 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.[65]

In this connection, it could be argued, however, that, notwithstanding the rule of construction contained in Section 2(c), the bill infringes on the 17th Amendment's grant of authority to the states to "fill the vacancies by election as the legislature may direct."

In proposing legislation, rather than a constitutional amendment, as the vehicle for their proposal, the sponsors of H.R. 899 may be subject to a constitutional challenge, but the choice may also have been influenced by the many obstacles to passage and ratification faced by constitutional amendments. The bill addresses many of the concerns surrounding the Senate vacancy appointment process, but is arguably more likely than a constitutional amendment to be successful. The reason for this is that the hurdles faced by bills are much lower than those faced by proposed constitutional amendments: there is no supermajority requirement for passage in the House and Senate with their proposal, nor is the approval of three-fourths of the states required, as is the case with amendments. On the other hand, as a bill, H.R. 899 would be subject to veto, whereas the President exercises no constitutional authority at any stage of the amendment process.

Action

H.R. 899 was introduced on February 4, 2009, and was referred to the House Committee on House Administration on the same day. No further action has been taken to date.

Constitutional Proposals: S.J.Res. 7 and H.J.Res. 21

These two identical proposals would 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

[64] For additional information, please consult CRS Report RS20058, *Unfunded Mandates Reform Act Summarized*, by Keith Bea and Richard S. Beth.

[65] U.S. Constitution, Article I, Section 4, clause 1.

Committee, and subsequently to the Subcommittee on the Constitution. Senators Mark Begich, Richard Durbin and John McCain have joined as cosponsors. H.J.Res. 21 was introduced by Representative David Dreier on February 11, 2009. Representative John Conyers, Jr., Chairman of the House Committee on the Judiciary, and Representatives Bob Filner, Virginia Foxx, Elton Gallegly, Pedro R. Pierluisi, James F. Sensenbrenner, Jr., and Lamar Smith have joined as cosponsors. The resolution was referred to the House Judiciary Committee and subsequently to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties.

Section 1 of S.J.Res. 7 and H.J.Res. 21 would require that "no person shall be a Senator from a State unless such person has been elected by the people thereof." The section further directs state governors to issue writs of election to fill Senate vacancies. Section 2 would guarantee that "the election or term of any Senator chosen before" the amendment takes effect would not be affected.

Discussion

S.J.Res. 7 and H.J.Res. 21 propose a fundamental change in the constitutional procedures governing Senate vacancies by completely eliminating the state option to provide for temporary appointments incorporated in the 17th Amendment.

Proponents of the amendment may argue that the proposal is a further step in the long march toward more inclusively democratic government in the United States. By extending the voters' right to choose their Senators to special elections when vacancies occur, it can be described by supporters as falling not only within the tradition of the 17th Amendment, but in the same progression as the 15th, 19th, 23rd, 24th and 26th Amendments, all of which extended the people's right to vote. As one of the sponsors noted, the amendment does not question the integrity or ability of any appointed Senators, but rather, it is a recognition of the fact 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."[66]

Opponents might raise the argument that when it is not necessary to change, it is necessary not to change, particularly in the case of the Constitution. The 17th Amendment provision for temporary Senate appointments, they could note, has, with few exceptions, served the nation well for nearly a century. In this connection, they might further characterize the proposed amendment as an overreaction to a situation that is almost without precedent, is unlikely to be repeated any time soon, and will resolve itself in 20 months or less. They might also raise the issue of costs imposed on the states by special Senate elections. In even the least populous ones, they would be significant, but in states such as California, they would place a substantial financial strain on overburdened state and local governments. Further concern might be raised over the question of continuity in government. Critics of the amendment might question the effect it would have on the ability of the Senate to reconstitute itself in the event of a terrorist attack or some other catastrophe that resulted in the death or disability of a large number of Senators. Current arrangements under the 17th Amendment allow for multiple appointments under these circumstances. If the proposed amendment were ratified, critics might assert that it could prolong the amount of time necessary to fill a large number of Senate vacancies.

[66] Sen. Russell Feingold, Remarks in the Senate, *Congressional Record*, daily edition, vol. 155, January 29, 2009, p. S 1068.

Action

Both resolutions were referred to the constitutional subcommittees of their respective full judiciary committees: in the House, the Subcommittee on the Constitution, Civil Rights, and Civil Liberties and in the Senate, the Subcommittee on the Constitution. On March 11, 2009, the two subcommittees 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 report it to the full Committee on the Judiciary. According to a CQ Tracker report, the full Senate Judiciary Committee may consider the proposal in September 2009.[67]

Concluding Observations

The controversies surrounding appointments to fill Senate vacancies that occurred in the context of the 2008 presidential election have generated a considerable level of interest, including media analyses and commentaries, and legislative proposals in the states. In the 111th Congress, proposals have been introduced that would provide for expedited special elections to fill Senate vacancies or would require that all Senate vacancies be filled by special election. The ultimate disposition of these latter measures, in particular, arguably depends on the extent to which they generate a degree of momentum and support for constitutional change that is both sufficient and sustained.

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[67] Leah Nylen, "Subcommittee Endorses Amendment to Require Election of Senators," *CQ.com*, August 6, 2009, available to subscribers at:

http://www.cq.com/display.do?dockey=/cqonline/prod/data/docs/html/committees/111/committees111-2009080600263321.html@committees&metapub=CQ-COMMITTEEMARKUPS&searchIndex=0&seqNum=1 .