



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

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Summary

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

This report provides information on current vacancies in the Senate, the constitutional origins of the Senate vacancy clause, the appointment process by which most vacancies are filled, and related contemporary issues. It will be revised and updated to reflect current developments in vacancies, appointments, and special elections.

Since December 2012, four vacancies have occurred in the Senate. They are identified below in alphabetical order by state.

In Hawaii, Senator Daniel K. Inouye, who was also President pro tempore of the Senate, died on December 17, 2012. Hawaii Governor Neil Abercrombie appointed Lieutenant Governor Brian E. Schatz to serve in his place until the vacancy is filled by a special election in 2014. Senator Schatz was sworn in on December 27, 2012. The winner of the special election will serve until the term expires in 2017.

In Massachusetts, Senator John F. Kerry resigned from the Senate on February 1, 2013, to assume the office of U.S. Secretary of State. The vacancy was filled by expedited special election procedures enacted in connection with the 2009 death of Senator Edward M. Kennedy. On January 30, Massachusetts Governor Deval Patrick announced the appointment of William (Mo) Cowan, to serve until the special election, which was scheduled for June 25. Senator Cowan was sworn in on February 7 and served until the winner of the special election was sworn in. Representative Edward J. Markey won the special election; he was sworn in on July 16, and will serve for the balance of the term, which expires in 2015.

In New Jersey, Senator Frank R. Lautenberg died June 3, 2013. New Jersey Governor Chris Christie set a special primary election for August 13, and a special general election for October 16. On June 6, the governor announced his appointment of New Jersey Attorney General Jeffrey S. Chiesa to fill the vacancy and serve until the special general election is held. The winner of the special election will serve for the balance of the term, which expires in 2015.

In South Carolina, Senator Jim DeMint resigned from the Senate on January 1, 2013, to assume the presidency of The Heritage Foundation. South Carolina Governor Nikki Haley appointed Representative Tim Scott to serve in his place until the vacancy is filled by a special election in 2014. Senator Scott was sworn in on January 3. The winner of the special election will serve until the term expires in 2017.

The use of temporary appointments to fill Senate vacancies is an original provision of the U.S. Constitution, found in Article I, Section 3, clause 2. The practice was revised in 1913 by the 17th Amendment, which provided for direct popular election of Senators, replacing election by state legislatures; it specifically directed state governors to “issue writs of election to fill such vacancies.” The amendment also preserved the appointment option by authorizing state legislatures to empower governors to make temporary appointments pending a special election.”

Since 1913, most states have exercised this option, authorizing their governors to fill Senate vacancies by temporary appointments. Some, however, limit the governor's power: appointed Senators in Arizona must be of the same political party as the prior incumbent, while in Hawaii, Utah, and Wyoming, the governor must choose a replacement from names submitted by the prior incumbent's party. In Connecticut and Oklahoma, the governor may make a temporary appointment in limited circumstances, and Oregon, Rhode Island, and Wisconsin require vacancies to be filled only by special election.

As a result of controversies that arose concerning appointments to Senate vacancies following the 2008 presidential election, legislation and a constitutional amendment that would have required all Senate vacancies to be filled by special election were introduced in the 111th Congress. None of these measures reached the floor of either chamber, however, and no comparable measures have been introduced since that time.

Since 2009, three states have substantially modified their vacancy procedures. Connecticut significantly restricted the governor's appointment power in such instances; Rhode Island eliminated it entirely, requiring that all future Senate vacancies be filled by special election; and Massachusetts modified its election-only requirement to reinstate gubernatorial appointment within an expedited special election process.

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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, directly and indirectly, 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. An additional vacancy occurred in Massachusetts in 2009 and was followed by a highly publicized special election process. Controversies surrounding the replacement process, particularly in Illinois, drew scrutiny and criticism of both the particular circumstances, and the temporary appointment process itself, leading to unsuccessful proposals to require all Senate vacancies to be filled by special elections.

In contrast with 2008, although three Senate vacancies occurred within a few weeks in late 2012 and early 2013, they generated little controversy.

This report reviews the constitutional origins of the appointments provision and its incorporation in the 17th Amendment. It also examines and analyzes contemporary developments, including the disposition of recent vacancies and proposals to eliminate or restrict gubernatorial power to name temporary Senators.

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.

Latest Developments in Senate Vacancies

Two Senate vacancies occurred late in the 112th Congress, due to the death of Senator Daniel K. Inouye of Hawaii, and the resignation of Senator Jim DeMint of South Carolina. Two more have occurred to date 113th Congress, due to the resignation of Massachusetts Senator John F. Kerry and the death of New Jersey Senator Frank R. Lautenberg. Detailed information on these vacancies follows below in alphabetical order.

Hawaii

On December 17, Senator Daniel K. Inouye, of Hawaii, died.⁴ Senator Inouye, who had served since 1963, was also President pro tempore of the Senate at the time of his death. In accord with Hawaiian law,⁵ Governor Neil Abercrombie announced on December 26 that he would appoint Lieutenant Governor Brian E. Schatz to serve in his place until the vacancy is filled by a special election in 2014.⁶ Senator Schatz was sworn in on December 27, 2012.⁷ The winner of the special election will serve until the term expires in 2017.

Massachusetts

On December 21, 2012, President Barack H. Obama announced his nomination of Senator John F. Kerry, of Massachusetts, for the position of Secretary of State.⁸ Senator Kerry's nomination was confirmed by the Senate on January 29, 2013,⁹ after which he announced his resignation, effective at 4 PM, February 1.¹⁰ Secretary Kerry was sworn in on that day by Supreme Court Associate Justice Elena Kagan at a private ceremony held in the Capitol.¹¹

On January 30, Massachusetts Governor Deval Patrick announced the appointment of William (Mo) Cowan, and advisor and former chief counsel and chief of staff to the governor, as interim

⁴ Ken Dilanian, "Hawaii's Nine-term Senator, Daniel Inouye, Dies at 88," *Los Angeles Times*, December 17, 2012, at <http://www.latimes.com/news/politics/la-pn-hawaii-senator-daniel-inouye-dies-20121217,0,1960305.story>.

⁵ Hawaii Revised Statutes, §17-1, at http://www.capitol.hawaii.gov/hrscurrent/Vol01_Ch0001-0042F/HRS0017/HRS_0017-0001.htm. The statute provides: 1) that the governor shall choose from among three candidates proposed by the political party with which the prior incumbent was affiliated; and 2) that the person appointed to fill the vacancy shall have been a registered member of the political party with which the prior incumbent was affiliated for at least one year prior to the appointment.

⁶ Rosalind S. Helderman, "Hawaii's Lieutenant Governor is Named to U.S. Senate," *Washington Post*, December 26, 2012, at http://www.washingtonpost.com/politics/hawaii-names-its-lieutenant-governor-to-the-senate/2012/12/26/0c833730-4f9e-11e2-950a-7863a013264b_story.html?tid=pm_politics_pop.

⁷ Rosalind S. Helderman, "Brian Schatz Is Sworn in to Fill Inouye's Senate Seat," *Washington Post*, December 27, 2012, at <http://www.washingtonpost.com/blogs/post-politics/wp/2012/12/27/brian-schatz-sworn-in-to-fill-inouyes-senate-seat/>.

⁸ Paul Richter, "Obama Nominates John Kerry to Be Next Secretary of State," *Los Angeles Times*, December 21, 2012, at <http://www.latimes.com/news/politics/la-pn-john-kerry-state-20121221,0,3517149.story>.

⁹ Michael R. Gordon, "Kerry Sails Through the Senate as Secretary of State," *New York Times*, January 29, 2013, at <http://www.nytimes.com/2013/01/30/us/politics/senate-panel-approves-kerry-for-secretary-of-state.html>.

¹⁰ Letter from Senator John F. Kerry to Governor Deval L. Patrick, January 29, 2013, at <http://images.politico.com/global/2013/01/29/document.html>.

¹¹ "Kerry Sworn In As Secretary of State," CBS News, February 1, 2013, at http://www.cbsnews.com/8301-250_162-57567259/john-kerry-sworn-in-as-secretary-of-state/.

Senator.¹² Senator Cowan, who was sworn in on February 7, 2013, and served until the special election winner was certified and sworn in.¹³ In accordance with Massachusetts law, which requires a special election to fill the seat for the balance of the term between 145 and 160 days following the original vacancy, Secretary of the Commonwealth William F. Galvin scheduled a special primary election for April 30, followed by a special general election on June 25.¹⁴ In the primary, Democrats nominated Representative Edward J. Markey, while Republicans nominated Gabriel E. Gomez. In addition, Twelve Visions Party candidate Richard A. Heos won a place on the general election ballot.¹⁵ Representative Markey won the special election, and was sworn in on July 16.¹⁶ He will serve the balance of the term, which expires in 2015.

New Jersey

On June 3, 2013, Senator Frank R. Lautenberg, of New Jersey, died. Senator Lautenberg had previously announced his intention to retire at the end of his present term. The New Jersey Statutes Annotated vests the governor with authority to make temporary appointments to fill Senate vacancies, with the appointed incumbent serving until a general or special election.¹⁷ On June 4, Governor Chris Christie announced he would call a special primary election, to be held August 13, 2013, and a special general election, to be held October 16, 18 days before the regularly scheduled general election. On June 6, the governor announced his appointment of New Jersey Attorney General Jeffrey S. Chiesa to fill the vacancy and serve until the special election. The winner of the special election will serve the balance of the term, which expires in 2015.¹⁸

South Carolina

On December 6, 2012, Senator Jim DeMint, of South Carolina, announced he would resign from the Senate to assume the position of President of The Heritage Foundation.¹⁹ In accord with South Carolina law,²⁰ Governor Nikki Haley announced on December 17 that she would appoint

¹² Katharine Q. Seelye, "Governor Appoints Ex-Aide to Fill Kerry's Seat," *New York Times*, January 30, 2013, at <http://www.nytimes.com/2013/01/31/us/politics/boston-lawyer-chosen-for-kerrys-senate-seat.html>.

¹³ Humberto Sanchez, "Cowan Joins Senate for Temporary Stint," *CQ Roll Call*, February 7, 2013, at http://www.rollcall.com/news/cowan_joins_senate_for_temporary_stint-222238-1.html?ET=rollcall:e15128:22496a:&st=email&pos=epol.

¹⁴ Frank Phillips, "Secretary of State to Set Senate Special Election Date of June 25," *Boston Globe*, Boston.com, January 28, 2013, at <http://www.boston.com/politicalintelligence/2013/01/28/secretary-state-set-senate-special-election-date-june/cIHHl6NFLnwQ609piAw7gI/story.html>.

¹⁵ Secretary of the Commonwealth of Massachusetts web site, "Special State Election Candidates, Senator in Congress, June 25, 2013," at http://www.sec.state.ma.us/ele/elespeif/senatorincongressma_elecan13.htm

¹⁶ "Date Set for Markey's Swearing-in As Senator," *Boston.com*, July 9, 2013, at <http://www.boston.com/news/local/massachusetts/2013/07/09/date-set-for-markey-swearing-mass-senator/eul13UI925JY a5tiWQeQ3L/story.html>.

¹⁷ New Jersey Permanent Statutes Data Base, §19:3-26, at http://lis.njleg.state.nj.us/cgi-bin/om_isapi.dll?clientID=27991379&Depth=2&depth=2&expandheadings=on&headingswithhits=on&hitsperheading=on&infobase=statutes.info&record={92DC}&softpage=Doc_Frame_PG42.

¹⁸ Mark Santora and Kate Zernicke, "Attorney General of New Jersey is Names Interim Senator," *New York Times*, June 6, 2013, at <http://www.nytimes.com/2013/06/07/nyregion/in-new-jersey-scrambling-to-vie-for-a-senate-seat.html?ref=frankrlautenberg>.

¹⁹ Paul Kane and David Farenthold, "Jim DeMint Resigning from Senate to Head Conservative Think Tank," *Washington Post*, December 6, 2012, at http://articles.washingtonpost.com/2012-12-06/politics/35649614_1_de-mint-senate-conservatives-fund-republican-senate-candidates.

²⁰ South Carolina Code of Laws, §7-19-20.

Representative Tim Scott to serve in his place until the vacancy is filled by a special election in 2014.²¹ The winner of the special election will serve until the term expires in 2017. Senator DeMint resigned effective January 1, 2013,²² and Senator Scott was sworn in on January 3.²³

Constitutional Origins of the Vacancies Clause

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

Article 5, Section 1. The Senate of the United States shall be chosen by the Legislatures of the several States. Each Legislature shall choose two members. *Vacancies may be supplied by the Executive until the next meeting of the Legislature* (emphasis added). Each member shall have one vote.²⁴

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.²⁵

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.”²⁶ A motion to strike out executive appointment was voted down eight states to one, with one divided.²⁷ Hugh Williamson of North Carolina then offered an amendment to change the language to read “vacancies shall be

²¹ Aaron Blake and Chris Cilizza, “Nikki Haley Appoints Rep. Tim Scott to Senate,” *Washington Post*, December 17, 2012, at <http://www.washingtonpost.com/blogs/the-fix/wp/2012/12/17/nikki-haley-to-appoint-rep-tim-scott-to-senate/>.

²² *Congressional Record*, daily edition, vol. 158 (January 2, 2013), p. S8666.

²³ Senator Scott also has the distinction of being the first African American from South Carolina to serve in the U.S. Senate, and the first African American Republican Senator since Senator Edward M. Brooke, of Massachusetts, who served from 1967-1979.

²⁴ 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.

²⁵ *Ibid.*, p. 363.

²⁶ *Ibid.*, pp. 343-364.

²⁷ *Ibid.*, p. 364. In favor: PA; opposed: CT, GA, MA, NC, NH, NJ, SC, VA; divided: MD.

supplied by the Executive unless other provision shall be made by the legislature,” which was also rejected.²⁸

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

... and if vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.²⁹

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.³⁰ The primary grounds for these contested appointments appear to have centered on whether vacancies happened during the recess of the legislature.³¹ 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.”³² 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.³³

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

²⁸ Ibid. In favor: GA, MD, NC, SC; opposed: CT, MA, NH, NJ, PA, VA.

²⁹ U.S. Constitution, Article I, Section 3, clause 2.

³⁰ 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 (name redacted).

³¹ Ibid.

³² George H. Haynes, *The Election of Senators* (New York: Henry Holt, 1906), p. 60.

³³ Statistics compiled by CRS from *Congressional Quarterly’s Guide to U.S. Elections*, 4th ed. (Washington, DC: CQ Press, 2001).

followed, and by 1860, only nine such proposals had been offered, all but one in the House.³⁴ 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 resulted in unfilled Senate vacancies for sometimes lengthy periods.³⁵ 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.”³⁶ 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.”³⁷ 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.”³⁸ 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.³⁹ For nearly the next decade, Congress took no action, as the House declined to spend limited session time debating proposals that were very

³⁴ Haynes, *The Election of Senators*, pp. 101-102.

³⁵ Wendy Schiller and Charles Stewart III, *U. S. Senate Elections Before 1914*, paper prepared for presentation at the Annual Meeting of the Midwest Political Science Association, Chicago, April 15-18, 2004, pp. 5-6, at http://web.mit.edu/cstewart/www/papers/senate_elections1.pdf. The authors define protracted elections as cases in which the two chambers of a state legislature were unable to elect a Senator by concurrent action, and required a joint session to resolve the stalemate.

³⁶ 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.

³⁷ 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.

³⁸ 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.

³⁹ Haynes, *The Senate of the United States*, vol. 1, p. 96.

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.⁴⁰

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.⁴¹ Deadlocked elections in several states continued to draw publicity, while in 1906, a sensational but influential series of articles titled “The Treason of the Senate” ran in William Randolph Hearst’s *Cosmopolitan*.⁴² 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.⁴³

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.”⁴⁴ Supporters of the clause asserted it guaranteed state sovereignty and

⁴⁰ Kyvig, “Redesigning Congress,” p. 359.

⁴¹ The Constitution, in Article V, requires Congress to “call a Convention for proposing Amendments ...” on the application of the legislatures of two thirds of the states.

⁴² During this period *Cosmopolitan* was a general interest publication, which also specialized in investigative articles.

⁴³ H.J.Res. 39, 61st Congress.

⁴⁴ 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.

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.⁴⁵ 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.⁴⁶

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.⁴⁷ The Senate then overwhelmingly approved the constitutional amendment itself by a vote of 64 to 24.⁴⁸

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.⁴⁹

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.⁵⁰ Almost a year passed before the House receded from its version and accepted the amendment as passed by the Senate.⁵¹ 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, 1913.⁵²

⁴⁵ *Ibid.*, p. 80.

⁴⁶ *Congressional Record*, vol. 47, part 1 (April 13, 1911), pp. 241-243.

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

⁴⁸ *Ibid.*, p. 1924.

⁴⁹ *Congressional Record*, vol. 47, part 2, May 23, 1911, p. 1483.

⁵⁰ Kyvig, "Redesigning Congress," p. 361.

⁵¹ *Congressional Record*, vol. 48, part 7, May 13, 1912, p. 6367.

⁵² *The Constitution of the United States, Analysis and Interpretation*, 108th Cong., 2nd sess., Senate Document 108-17 (Washington, DC: GPO, 2004), p. 34.

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.⁵³ In the second case, the governor of Alabama sought to appoint an interim Senator to fill a vacancy created in 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.⁵⁴

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. At the time of this writing, the Senate's records currently identify 193 appointments to the office of U.S. Senator since that time, including the recent appointments of Senators Schatz, Scott, Cowan, and Chiesa; this includes 190 individuals, since three persons were appointed to fill Senate vacancies twice. 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 death of their fathers.⁵⁵ Of the 193 appointments, 118, or 61.1%, sought election, while the remainder served only until the special election. Sixty two, or 52.5%, of those who pursued election were successful, while 56 were defeated, often in the primary election.⁵⁶

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.⁵⁷

⁵³ Haynes, *The Senate of the United States*, vol. 1, pp. 164-165.

⁵⁴ *Ibid.*

⁵⁵ Statistics compiled from data provided by the U.S. Senate Historical Office, at http://www.senate.gov/artandhistory/history/common/briefing/senators_appointed.htm, and the *Biographical Directory of the United States Congress, 1774-Present*, at <http://bioguide.congress.gov/biosearch/biosearch.asp>.

⁵⁶ *Ibid.*

⁵⁷ Source: Donald Ritchie, *Senate Historian*, January 16, 2013. See also Irwin B. Arief, "Republicans Reap Victory Harvest: Senate Parties Meet, Choose Leadership, Committee Posts," *CQ Weekly Report*, vol. 38, December 6, 1980, p. 3481.

Although complete data are not available, a study of Senators appointed to fill vacancies between 1945 and 1979 found an even lower success rate in primary elections. According to William D. Morris and Roger H. Marz, writing in the political science journal *Publius*, 41.7% of appointed Senators who sought election in their own right during this period were defeated in the subsequent special primary election.⁵⁸

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.⁵⁹ 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.⁶⁰

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 a fifth requires gubernatorial appointments to be approved by the legislature.

Filling Vacancies by Special Election

Oregon, Rhode Island, and Wisconsin currently provide that Senate vacancies be filled only by special elections. Wisconsin revoked the governor’s power to fill temporary Senate vacancies by appointment in 1985,⁶¹ followed by Oregon in 1986, when that state’s voters adopted the special election provision in legislation referred by the legislature.⁶² Rhode Island in 2009 required that any Senate vacancy be filled by special election only.⁶³ Oklahoma falls into a related subcategory, empowering the governor to appoint only the winner of a special election to fill the Senate seat for the balance of the term.⁶⁴ Also in 2009, Connecticut restricted the governor’s appointment

⁵⁸ William D. Morris and Roger M Marz, “Treadmill to Oblivion: The Fate of Appointed Senators,” *Publius*, vol. 11, no. 1, winter 1981, p. 68.

⁵⁹ Morris and Marz, “Treadmill to Oblivion,” p. 68; Walter S. G. Kohn, “Filling Vacancies in the U.S. Senate: An Undemocratic Relic,” *Policy Studies Journal*, vol. 2, issue 4, summer 1974, p. 296; Alan L. Clem, “Popular Representation and Senate Vacancies,” *Midwest Journal of Political Science*, vol. 10, number 1, February 1966, pp.68-69.

⁶⁰ Morris and Marz, “Treadmill to Oblivion,” pp. 68-69.

⁶¹ 1985 Wisconsin Act 304, at <http://www.legis.state.wi.us/acts89-93/85Act304.pdf>.

⁶² *Oregon Blue Book*, “Elections: Initiative, Referendum and Recall,” at <http://bluebook.state.or.us/state/elections/elections20.htm>.

⁶³ General Laws of Rhode Island, §17-4-9, at <http://webserver.rilin.state.ri.us/Statutes/TITLE17/17-4/17-4-9.HTM>.

⁶⁴ Oklahoma Statutes, title 26, SS.12-101, at <http://www.lsb.state.ok.us/>.

authority, requiring that executive's nomination to fill a Senate vacancy be approved by a two-thirds majority in both houses of the legislature.⁶⁵

Filling Vacancies by Temporary Appointment and Special Election

A 2009 study by staff of the Subcommittee on the Constitution of the Senate Judiciary Committee classified the remaining states according to their scheduling requirements for special elections. These included 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.⁶⁶

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.

The remaining 37 states⁶⁷ 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.⁶⁸

According to the staff survey, appointed Senators from these states "could theoretically serve as long as 30 months."⁶⁹

⁶⁵ Connecticut General Statutes, Ch. 146, §9-211, at <http://www.cga.ct.gov/2011/pub/chap146.htm#Sec9-211.htm>.

⁶⁶ *How States Fill U.S. Senate Vacancies: A Survey of State Laws*, Internal study, compiled by the Senate Judiciary Committee, Subcommittee on the Constitution, February 2009. Available from the author of this report.

⁶⁷ 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.

⁶⁸ *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.

⁶⁹ *Ibid.*

“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.⁷⁰ 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.⁷¹ 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.⁷²

State Legislation Since 2009

Following controversies that arose in connection with appointments to fill Senate vacancies in 2008 and 2009, particularly with respect to the Illinois Senate vacancy,⁷³ proposals to eliminate or curtail gubernatorial power to fill Senate vacancies by appointment were introduced in a number of state legislatures. According to the National Council of State Legislatures (NCSL), bills affecting the governor’s appointment authority as provided under the 17th Amendment were introduced in 12 states during 2009, and 12 more since then.⁷⁴ Only Connecticut, Massachusetts, and Rhode Island passed legislation revising Senate vacancy procedures in their 2009 sessions, however.

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

⁷⁰ *Arizona Revised Statutes*, Article 16-222, 5C, at <http://www.azleg.state.az.us/FormatDocument.asp?inDoc=/ars/16/00222.htm&Title=16&DocType=ARS>.

⁷¹ *Hawaii Revised Statutes*, ss. 17-1, at http://www.capitol.hawaii.gov/hrscurrent/Vol01_Ch0001-0042F/HRS0017/HRS_0017-0001.htm; *Utah Code Annotated*, Title 20-A-1-502, at http://le.utah.gov/~code/TITLE20A/htm/20A01_050200.htm; *Wyoming Statutes*, Title 22-18-111, at <http://legisweb.state.wy.us/statutes/statutes.aspx?file=titles/Title22/Title22.htm>.

⁷² Vikram David Amar, “Are Statutes Constraining Gubernatorial Power to Make Senate Appointments Constitutional Under the Seventeenth Amendment?” *Hastings Law Quarterly*, vol. 35, number 4, summer 2008, pp. 727-760.

⁷³ “No Magic Number, but More Muscle,” *CQ 2008 Almanac*, 110th Congress, 2nd Session, volume LXIV (64) (Washington, DC, Congressional Quarterly, Inc.: 2009), p. 10-18; “Rangel, Burriss Top Ethics Concerns,” *CQ 2009 Almanac*, 111th Congress, 1st Session, volume LXV (Washington, DC, CQ-Roll Call Group: 2010), pp. 5-8-5-9.

⁷⁴ NCSL (National Conference of State Legislatures), “Filling Vacancies in the Office of United States Senator,” last updated January 10, 2013, at <http://www.ncsl.org/legislatures-elections/elections/vacancies-in-the-united-states-senate.aspx#Recent>.

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.⁷⁵ Rhode Island in 2009 eliminated the governor's appointment authority, and provided expedited procedures for special elections.⁷⁶

Massachusetts Legislation in 2009: From "Election Only" to Temporary Appointment and Special Election

Also in 2009, Massachusetts repealed an "election-only" requirement it had established in 2004 and reinstated the governor's authority to fill vacancies by appointment.⁷⁷ At that time, Senator Edward Kennedy, who was mortally ill, wrote Governor Deval Patrick proposing that Massachusetts change its then-current law, which required all Senate vacancies to be filled by special election, to provide instead for a temporary appointment. The argument advanced was that the schedule provided by the existing law could leave the state without full Senate representation during a period of intense legislative activity until the election were held, a period between 145 and 160 days.⁷⁸

Senator Kennedy died on August 25, 2009. A week later, on August 31, Governor Patrick set January 19, 2010, as the date on which a special election would be held to fill the vacancy. Citing the reasoning noted above, Governor Patrick urged the legislature to pass expedited legislation to provide for a gubernatorial appointment to fill the vacancy until the special election was held.⁷⁹ By September 22, both chambers had passed the bill; on September 24, Governor Patrick approved the legislation as an emergency law, to take effect immediately.⁸⁰ Paul G. Kirk, former Chairman of the Democratic National Committee, was chosen to fill the vacancy. The special election was ultimately held on January 19, 2010, and state Senator Scott Brown was chosen to serve for the balance of the term, which expired on January 3, 2013.⁸¹

⁷⁵ Connecticut General Assembly website, at <http://www.cga.ct.gov/2009/ACT/PA/2009PA-00170-R00SB-00913-PA.htm>.

⁷⁶ Rhode Island General Laws §17-4-9, at <http://webserver.rilin.state.ri.us/Statutes/TITLE17/17-4/17-4-9.HTM>.

⁷⁷ Frank Phillips and Michael Levenson, "Democrats Face Dilemma in Holding Kerry Senate Seat," *Boston Globe*, December 15, 2012, at <http://www.bostonglobe.com/metro/2012/12/15/democrats-face-dilemma-how-hold-onto-kerry-senate-seat/khjBeJqYL4rlfsUs5N3A2L/story.html>.

⁷⁸ "Kennedy, Looking Ahead, Urges That Senate Seat Be Filled Quickly," *Boston Globe* on Boston.com, August 20, 2009, 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, at http://www.bostonherald.com/news/us_politics/view/20090820ailing_ted_kennedy_asks_for_speedy_replacement_process/srvc=home&position=2.

⁷⁹ Frank Phillips, Andrew Viser, and Matt Ryan, "Governor Sets Date for Special Election, Presses for Interim Appointment," *Boston Globe* on Boston.com, August 31, 2009, at http://www.boston.com/news/local/breaking_news/2009/08/patrick_to_make.html.

⁸⁰ 90.9wbur, "Text of Gov. Patrick's Letter Declaring Emergency Law," September 24, 2009, at <http://www.wbur.org/2009/09/24/patrick-emergency>.

⁸¹ "Administration of Oath of Office," *Congressional Record*, daily edition, vol. 156 (February 4, 2010), p. S473.

111th Congress Proposals

Controversies surrounding Senate vacancies created directly or indirectly by the 2008 presidential elections⁸² led to proposals in the 111th Congress to alter the current arrangements provided by the 17th Amendment. These proposals fell into two categories, legislative and constitutional. Similar legislative activity did not, however occur in the 112th Congress.

Legislative Proposal: H.R. 899, The Ethical and Legal Elections for Congressional Transitions Act

H.R. 899, the Ethical and Legal Elections for Congressional Transitions Act, was introduced by Representative Aaron Schock on February 4, 2009.⁸³

Section 1 of the bill stated the title. Section 2(a) required 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) provided 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) provided 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 have authorized the Election Assistance Commission to reimburse states for up to 50% of the costs incurred in connection with holding the special election.

This bill sought to provide for expedited special elections to fill Senate vacancies, and to assist states in meeting the expenses of special elections. It sought to avoid potential conflicts with the 17th Amendment by authorizing the states to continue to provide for gubernatorial appointments, but would generally have led to considerably shorter tenures for most appointed Senators. As a secondary issue, it addressed concerns of state and local governments related to the costs of planning and administration of special elections through a program of reimbursements. It may be noted that this provision would have eliminated or reduced the likelihood that the act would be subject to points of order on the floor of either chamber on the grounds that it imposed “unfunded mandates” on state and local governments.⁸⁴

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

⁸² See above at footnote 72.

⁸³ Representatives Jason Chafetz, Henry A. “Hank” Johnson, Jr., Donald A. Manzullo, Howard P. “Buck” McKeon, Thomas E. Petri, John Shimkus, and Frank R. Wolf joined as cosponsors.

⁸⁴ For additional information, please consult CRS Report RS20058, *Unfunded Mandates Reform Act Summarized*, by (name redacted) and (name redacted).

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.⁸⁵

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

By choosing legislation, rather than a constitutional amendment, as the vehicle for their proposal, the sponsors of H.R. 899 may have been subject to a constitutional challenge, but they may also have been influenced by the many obstacles faced by proposed constitutional amendments. The bill addressed many concerns surrounding the Senate vacancy appointment process, but had arguably a better chance of passage than a constitutional amendment. The hurdles faced by bills are much lower than those faced by proposed constitutional amendments: unlike constitutional amendments, there is no supermajority requirement for passage in the House and Senate, nor is the approval of three fourths of the states required. On the other hand, as a bill, H.R. 899 would have been subject to veto, whereas the President exercises no constitutional authority at any stage of the amendment process.

H.R. 899 was introduced on February 4, 2009, and was referred to the House Committee on House Administration on the same day, but no further action was taken on the bill.

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

These two identical proposals sought to amend the Constitution to eliminate the states' authority to provide for temporary appointments to fill Senate vacancies. S.J.Res. 7 was introduced by Senator Russell D. Feingold on January 29, 2009, and was referred to the Senate Judiciary Committee, and subsequently to the Subcommittee on the Constitution.⁸⁶ H.J.Res. 21 was introduced by Representative David Dreier on February 11, 2009.⁸⁷ 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 required that "no person shall be a Senator from a State unless such person has been elected by the people thereof." The section further directed state governors to issue writs of election to fill Senate vacancies. Section 2 stipulated that "the election or term of any Senator chosen before" the amendment took effect would not be affected.

S.J.Res. 7 and H.J.Res. 21 proposed a fundamental change in the constitutional procedures governing Senate vacancies by completely eliminating the state option to provide for temporary appointments incorporated in the 17th Amendment. Proponents of the amendment may have argued that it was 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 could have been described by supporters as falling not only

⁸⁵ U.S. Constitution, Article I, Section 4, clause 1.

⁸⁶ Senators Mark Begich, Richard Durbin and John McCain joined as cosponsors.

⁸⁷ Representative John Conyers, Jr., Chairman of the House Committee on the Judiciary, and Representatives Bob Filner, Virginia Foxx, Elton Gallegly, Donald A. Manzullo, Pedro R Pierluisi, James F. Sensenbrenner, Jr., and Lamar Smith joined as cosponsors.

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 did not question the integrity or ability of any appointed Senators, but rather, recognized 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."⁸⁸

Opponents might have responded with the argument attributed to Viscount Falkland, that "where it is not necessary to change, it is necessary not to change,"⁸⁹ particularly in the case of the Constitution. The 17th Amendment provision for temporary Senate appointments, they might have noted, has, with few exceptions, served the nation well for nearly a century. In this connection, they might further have characterized the proposed amendment as an overreaction to a situation that was almost without precedent, was unlikely to be repeated any time soon, and could resolve itself in 20 months or less, which it ultimately did. They might also have raised 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 have been raised over the question of continuity in government. Critics of the amendment might question the effect it would have had 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 had been ratified, it might arguably have prolonged the amount of time necessary to fill a large number of Senate vacancies.

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, but no further action was taken on either measure.

Concluding Observations

The controversies surrounding appointments to fill Senate vacancies that occurred in the context of the 2008 presidential election generated a considerable level of interest, including media analyses and commentaries, and legislative proposals for change on both the federal and state levels. The death of Senator Kennedy, the Massachusetts legislature's subsequent repeal of the state's "election-only" Senate vacancy law, and the vigorously contested special election to succeed the Senator, generated even greater public interest, given its prominence in the larger national political arena. It seems apparent, however, that the substantial levels of interest in the states and at the federal level in the process—as opposed to individual special elections—subsided after 2010. For instance, the special election to fill the Massachusetts Senate vacancy

⁸⁸ Sen. Russell Feingold, Remarks in the Senate, *Congressional Record*, daily edition, vol. 155 (January 29, 2009), p. S 1068.

⁸⁹ *Respectfully Quoted: A Dictionary of Quotations Requested from the Congressional Research Service*, Suzy Platt, ed. (Washington: Library of Congress, 1989), p. 38.

caused by the resignation of Senator John Kerry generated modest national publicity and does not seem likely to stimulate revived interest in the process.

On the federal level, the question of reforming Senate vacancy procedures appears to have been a short-lived phenomenon, at least for the present. In the 111th Congress, H.R. 899 would have provided expedited special elections to fill Senate vacancies, and S.J.Res. 7 and H.J.Res. 21 would have required that all Senate vacancies be filled by special election. The former faced the hurdles all bills must pass in the legislative process, plus the possibility that its constitutionality might be subject to challenge. The latter two measures, as with all proposed constitutional amendments, faced the considerable obstacles to passage and ratification deliberately embedded in the Constitution by the founders. None of the three passed beyond the stage of investigation in committee.

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