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House and Senate Vacancies: How Are They Filled?

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Summary

Vacancies in Congress occur due to the death, resignation, or declination (refusal to serve) of a Senator or Representative, or as the result of expulsion or exclusion by either house. The Constitution requires that vacancies in both houses be filled by special election, but in the case of the Senate, it empowers state legislatures to provide for temporary appointments by the state governor until special elections can be scheduled.

In practice, most Senate vacancies are filled by such appointments in the interim, while all House vacancies are filled by special elections. If, however, a House vacancy occurs late in the life of a Congress, many states will leave the seat empty until general election day, when a special election for the balance of the term and a regular election for the forthcoming Congress are held simultaneously.

Nominations for Senate special elections are usually by primary, while those for House special elections can be by primary, nominating petition, or party action, as specified by state law.

A plurality is necessary to win in most special elections, although there are significant variations in certain states.

Procedures Governing Vacancies

Vacancies in Congress occur when a Senator or Representative dies, resigns, declines to serve, or is expelled or excluded from either house.

Senate

Procedures governing vacancies in the Senate were initially established by Article I, Section 3 of the Constitution, as later amended by paragraph 2 of the 17th Amendment. The latter states:

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.

Appointment of Interim Senators. Prevailing practice is for state governors to fill Senate vacancies by appointment, with the appointee serving until a special election has been held, at which time the appointment expires immediately. In the event a seat becomes vacant between the time of a general election and the expiration of the term, however, the appointee usually serves the balance of the term, until the next regularly scheduled general election. This practice originated with the constitutional provision that applied prior to the popular election of senators, under which governors were directed to make temporary appointments when state legislatures were in recess. It was intended to ensure continuity in a state's Senate representation during the lengthy intervals between state legislative sessions.

The governor's direct authority to make interim appointments is specified in the various state laws. Oregon¹ and Wisconsin² do not allow the governor to make interim appointments, requiring, instead, a special election to fill any Senate vacancy. The State of Oklahoma also requires that Senate vacancies be filled by special elections, with an exception. If the vacancy occurs after March 1 of any even-numbered year and the term expires the following year, no special election is held; rather, the governor is required to appoint the candidate elected in the regular general election to fill the unexpired term.³ At least five states restrict the governor's power to appoint interim Senators. Alaska, Arizona, and Hawaii require the governor to fill Senate vacancies with a person affiliated with the same political party as the previous incumbent.⁴ Utah and Wyoming require the governor to select an interim senator from a list of three candidates proposed by the state central committee of the political party with which the previous incumbent was affiliated.⁵

Many states limit the term of office for interim senators to the date set for the special election. In these cases, the term of the interim senator expires immediately upon the election of the popularly chosen successor, who serves the balance of the Senate term, whether it is a few weeks or several years. Moreover, when an interim appointment is made late in the term, it is often customary for the interim senator to resign his or her seat immediately after the election, and for the governor to appoint the special election winner to serve the balance of the term. It is also customary, for the purposes of determining seniority, for the newly elected replacement senator to be sworn in as soon as possible.

Nominations. Nomination procedures for Senate special elections vary widely among the states. The majority require a special primary election to determine the major

¹ Or. Rev. Stat. §188.120 (2001).

² Wis. Stat. § 17.18 (1999-2000).

³ Okla. Stat. tit. 26, §12-101.

⁴ Alaska Stat. §15.40.010 (2001); Ariz. Rev. Stat. §16.222 (2001); and Haw. Rev. Stat. § 17-1 (2001).

⁵ Utah Code Ann. § 20A-1-502(2) (2001) and Wyo. Stat. § 22-18-111 (i) (2002).

party nominees, while minor party and independent candidates generally qualify by filing a requisite number of petitions for general election ballot placement. Finally, some states provide for nomination by party-determined procedures, such as by the party's state committee, or at a state party convention. Louisiana and Texas, which provide the major exceptions to these rules, are treated in the next section of this report.

General Elections. Generally, the governor has the authority to set the dates for both primary and general special elections within either a window of time or a specific number of days after the vacancy occurs, according to state requirements. In the interests of convenience, enhanced voter interest and participation, and economy, special elections are often scheduled to coincide with regular elections. A plurality of votes in the primary and general elections is sufficient to nominate or elect in most cases, although a number of southern states require a majority to nominate, providing for a runoff election if no candidate attains a majority.

Special election procedures in Georgia, Louisiana, and Texas constitute significant variations from the norm. Georgia requires a majority to elect in all congressional and statewide special elections. Louisiana and Texas provide for an all-parties special primary election. All candidates qualifying for placement on the ballot participate in the election, in which a majority is necessary to elect. Any candidate receiving more than 50% of the vote is declared elected. If no candidate receives a majority, the two receiving the most votes, regardless of party affiliation, compete in a second election, termed a general election in Louisiana and a runoff in Texas. Louisiana mandates the all-parties primary for regular as well as special elections, while the Texas practice is unique to that state's special elections.

One of the more interesting developments in Senate special elections in recent years was Oregon's 1996 decision to conduct both the primary and general elections to fill a Senate vacancy by mail-in ballot only, with no in-person voting at polling places.⁶

Staff Disposition. In the event of a Senator's death, his or her staff continue to be compensated for a period not exceeding 60 days (unless the Senate Committee on Rules and Administration determines that more time is needed to complete the closing of the office), performing duties under the direction of the Secretary of the Senate.⁷

House of Representatives

The Constitution provides for cases in which House seats become vacant in Article I, Section 2, clause 4:

⁶ In 1998, voters in Oregon passed a ballot initiative that requires Oregon's biennial primary and general elections to be conducted by mail. This "vote-by-mail" system replaces traditional polling place elections, but voters can still hand-deliver their ballots to designated drop sites.

⁷ S. Res. 458, 98th Cong., 2nd Sess., Oct. 4, 1984; as amended by S. Res. 173, 100th Cong., 1st Sess., Mar. 4, 1987, "Closing The Office of a Senator or Senate Leader Who Dies or Resigns," in U.S. Congress, Senate Committee on Rules and Administration, *Senate Manual, 106th Congress*, "Standing Orders of the Senate," Sec. 72, p. 108 (Washington: GPO, 2000).

When Vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The Constitution thus requires that all House vacancies be filled by special election. There is no constitutional provision for the appointment of interim Representatives.

Scheduling. The responsibility for scheduling special elections is vested in the state legislatures (2 U.S.C. 8):

The time for holding elections in any State, District, or Territory for a Representative to fill a vacancy, whether such vacancy is caused by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.

House vacancies that occur in the first session of a Congress are invariably filled by special elections. The responsibility for ordering a special election is vested in the governors of the states. Most states also either set a window of time, or prescribe an exact number of days after the vacancy occurs, in which nomination procedures and the special election must be held. Within these constraints, state governors and election authorities generally attempt to schedule special elections for a regular election day, in the interests of economy, convenience, and increased voter participation.

Procedures governing vacancies occurring during the second session of a Congress differ from state to state, and are largely dependent on the amount of time intervening between the vacancy and the next general election. For instance, if a House seat becomes vacant within six months of the expiration of the previous incumbent's term, many states allow the seat to remain vacant for a time, providing for a special election to be held on the regularly scheduled election day, at the same time that a regular election for that seat for the ensuing Congress is held. Other states, under these circumstances, do not provide for a special election, and the affected seat remains vacant until the ensuing Congress convenes the following January.

Nominations. Nomination procedures for House of Representatives special elections vary as widely among the states as do those for the Senate. Some states require a special primary election to determine the major party nominees, while minor party and independent candidates generally qualify by filing a requisite number of petitions for general election ballot placement. A plurality is sufficient to elect in most primary states, but some southern states require a majority to nominate in the primary. If no candidate attains a majority, then a runoff, or second, primary is held at a later date, in which the two candidates winning the most primary votes compete for the nomination. Others provide for nomination by such party-established procedures as party congressional district caucuses and conventions, or meetings of party committees or interested party members in jurisdictions comprising the affected congressional district.

General Elections. Special general election procedures for the House of Representatives generally mirror those for the Senate, with some variations. Once again, in most states a plurality is sufficient to elect in the general election. Several states, however, have adopted procedures for House special elections that effectively conjoin the nomination and election process, sometimes in combination with other variations. These include California, Georgia, Louisiana, and Texas.

All qualified candidates for House special elections in California compete in a special primary, regardless of party affiliation. Nomination is by petition. Any candidate receiving more than 50% of the vote in the primary is elected, and the general election is canceled. If no candidate receives the required majority, the single candidate of each party receiving the most votes competes in a special general election, wherein a plurality of votes is sufficient to elect. In the event that candidates of only one party compete in the primary, a plurality is sufficient to elect, and there is no general election.⁸

As noted previously, Georgia requires a majority to elect in all congressional and statewide special elections. If no candidate receives 50% of the vote, then a runoff, or second, election is held between the two candidates gaining the most votes.⁹

Louisiana procedures for House special elections are the same as those applying to its Senate elections. All candidates who qualify for ballot access compete in the primary election, in which a majority of votes is necessary to elect. A candidate receiving 50% of the vote is declared elected. If no candidate receives a majority, the two candidates receiving the most votes, regardless of party affiliation, compete in a second election, termed a general election. Louisiana mandates the all-parties primary for regular as well as special elections.¹⁰

Texas provides for an all-parties special primary election to fill House vacancies. All candidates qualifying for placement on the ballot participate in the election, in which a majority is necessary to elect. A candidate receiving 50% of the vote is declared elected. If no candidate receives a majority, the two candidates receiving the most votes, regardless of party affiliation, compete in a second election, termed a runoff in Texas. Unlike in Louisiana, in Texas the all-parties primary is unique to special elections.¹¹

Winners of House special elections held concurrently with those for the ensuing Congress are often not sworn in as Members of the House of Representatives, since Congress has usually adjourned *sine die* before election day. They are, however, accorded the status of incumbent Representatives for the purposes of seniority, office selection, and staffing.

Staff Disposition. Staff of a deceased or resigned Representative are compensated until a successor is elected to fill the vacancy, performing duties under the direction of the Clerk of the House (2 U.S.C. 92 b,c).

⁸ *California Election Code*, § 10700-10707 (2001).

⁹ *Georgia Election Code*, § 21-2-501 (2001).

¹⁰ *Louisiana Election Code*, tit. 18, § 511, §512, and §1279. The Supreme Court's 1997 decision in *Foster v. Love* (522 U.S. 67 (1997)) affected only the timing of regular general elections in Louisiana; the all-parties nature of the procedure was not in question, and remains intact for both special and regularly scheduled elections.

¹¹ *Texas Election Law*, § 203.001-012, 0A; and 204.021.