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**Senate Committee of Federal and State Affairs  
Neutral Testimony on Senate Bill 254**

**Thursday, January 18, 2024**

Chairman Thompson and Members of the Committee,

Thank you for the opportunity to provide testimony on Senate Bill 254. Ensuring Kansas has representation in the United States Senate that reflects the will of the people is a noble cause and is grounded in the principles of a representative democracy. But while we are supportive of your overall goal with this legislation, the Office of the Attorney General has concerns about the defensibility of Senate Bill 254 if it were ever brought to litigation.

As you are well aware, the Seventeenth Amendment to the United States Constitution changed the selection of Senators from a legislative function to something done directly by a state's voters. Perhaps less noticed is that the Seventeenth Amendment also established ground rules for filling vacancies in the United States Senate. On that topic, the Amendment 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.

Thus, under this procedure, it is optional whether a state wants to allow temporary appointments at all. But, insofar as the legislature decides to allow appointments, those appointments must be made by the state's "executive."

Senate Bill 254, however, allows a state party delegate convention to choose the temporary replacement. A state party is not part of Kansas' executive branch or any other part of government—political parties are private organizations. Thus, we are concerned that Senate Bill 254 delegates the appointment power outside of the state's executive, which contradicts the Seventeenth Amendment's language.

The Act requires the governor to appoint the individual who is forwarded to them by the chairperson or vice chairperson of the political party committee that conducted the state party delegate convention. The Act indicates that if the governor fails to act upon the appointment, the United States Senator selected by the party “shall be deemed to have been appointed notwithstanding the failure.” The Office of the Kansas Attorney General is concerned that a court might find this procedure to be contrary to the Seventeenth Amendment. Allowing an appointment to be executed without the consent of our state’s executive authority is not, in our judgment, permissible.

But even assuming the governor does not decline to make an appointment, we are concerned that limiting his or her choice to a single person may violate the Amendment as well. As one authority puts it, “[t]he *choice* of a person to fill an office constitutes the essence of an appointment.” 63C Am. Jur. 2d *Public Officers & Employees* § 85 (2023) (citation omitted, emphasis added). In other words, the power to appoint may imply some level of discretion in who is chosen. *Designate; Name; Nominate; Elect; Appoint*, Garner’s Dictionary of Legal Usage (3d ed. 2011) (noting “[a]ppoint implies selection”).

Admittedly, we are not aware of any court decisions on this precise point. Of the forty-six states that allow temporary executive appointments of Senators, none of them currently limit the executive’s discretion as severely as Senate Bill 254 would. See Cong. Research Serv., *U.S. Senate Vacancies: How Are They Filled?*, IF11907 (Oct. 23, 2023), available at <https://crsreports.congress.gov/product/pdf/IF/IF11907>. Given that long history of preserving executive discretion, it is not surprising the issue has not arisen. But that longstanding historical practice itself can be evidence that the original public meaning of the Seventeenth Amendment includes some discretion in choosing a temporary appointee.

Ultimately, then, we believe there is significant litigation risk if Senate Bill 254 were enacted in its present form. Particularly given numerous alternatives that would achieve what we understand to be the key goal of this bill—i.e., maintaining some level of voter intent in filling Senate vacancies—we think the wiser path would be to choose one of the other options discussed below. All of these alternate methods have been adopted in some other state and are on firmer ground because they maintain some level of discretion in the executive.

If the goal is to preserve the executive appointment power, but acknowledge some level of voter intent by choosing a replacement from the same political party as the previous officeholder, the following alternate methods meet that goal. All have been previously utilized in other states and, in our view, are more defensible as consistent with the Seventeenth Amendment:

- A. Requirement that the governor appoint a replacement from the same political party as the previous incumbent.
  - This is the law in five other states: Arizona, Montana, North Carolina, Oklahoma, and Utah.
  - Insofar as there is a worry that a person may change his party registration shortly before appointment just to obtain the office, Oklahoma’s requirement that the

person be a registered voter of the party for at least five years prior deals with that concern.

- This method was most recently utilized in Arizona in 2018 when Jon Kyl, a Republican, was appointed to fill the vacancy created by the passing of Republican U.S. Senator John McCain.

B. Requirement that the governor appoint a replacement from a list of three prospective appointees submitted by the political party of the previous incumbent.

- This is the law in five states: Hawaii, Kentucky, Maryland, West Virginia, and Wyoming.
- This method was most recently utilized in Hawaii in 2012 when Brian Schatz, a Democrat, was appointed to fill the vacancy created by the passing of Democratic U.S. Senator Daniel Inouye.

If the goal is rather to maximize voter intent, the legislature could require an expedited special election. This could be done in combination with a short-term executive appointment (with or without party-registration requirements) or the legislature could do away with executive appointments entirely.

C. Requirement that the governor call an expedited special election after selecting a temporary replacement.

- This is the law in nine states: Alabama, Alaska, Connecticut, Louisiana, Massachusetts, Mississippi, Texas, Vermont, and Washington.
- This method was most recently utilized in Alabama in 2017 when Luther Strange, a Republican, was appointed to fill the vacancy created by the resignation of Republican U.S. Senator Jeff Sessions. A special election chose Doug Jones as his replacement. (Notably, this was a party switch: Sessions and Strange were Republicans; Jones was a Democrat.)

D. Filling vacancies by special election only.

- This is the law in four states: North Dakota, Oregon, Rhode Island, and Wisconsin
- This method was most recently utilized in Oregon in 1995 when U.S. Senator Bob Packwood, a Republican, resigned and no temporary appointment was allowed to be made. In the expedited special election, the voters selected Ron Wyden, a Democrat, to fill the unexpired term.

For your reference, examples of laws enacting each of these methods are included as exhibits.

Exhibit A: Maryland

- Political party list
- Md. Code Ann., Elec. Law § LAW § 8-602

Exhibit B: Arizona

- Same-party appointment
- Ariz. Rev. Stat. Ann. § 16-222

Exhibit C: Massachusetts

- Short-term appointment and expedited special election
- Mass. Gen. Laws Ann. ch. 54, § 140

Exhibit D: Wisconsin

- No appointment with expedited special election
- Wis. Stat. Ann. § 17.18

Thank you again for the opportunity to provide testimony on Senate Bill 254.

Respectfully,

OFFICE OF THE ATTORNEY GENERAL  
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Matt Bingesser  
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West's Annotated Code of Maryland  
Election Law (Refs & Annos)  
Title 8. Elections (Refs & Annos)  
Subtitle 6. United States Senators (Refs & Annos)

MD Code, Election Law, § 8-602  
Formerly cited as MD CODE Art. 33, § 8-602

§ 8-602. Special election to fill vacancy

Effective: July 1, 2016  
Currentness

**Appointment of successor by Governor**

(a)(1)(i) If there is a vacancy in the office of United States Senator, the Governor shall appoint an eligible individual to fill the vacancy as provided in this paragraph.

(ii) The Governor shall appoint one of three individuals whose names are submitted to the Governor in writing, within 30 days after the occurrence of the vacancy, by the State Central Committee of the political party, if any, with which the vacating Senator had been affiliated at the time of the Senator's last election or appointment.

(iii) Each individual whose name is submitted to the Governor must have been a registered voter affiliated with the political party of the vacating Senator on the date immediately preceding the date on which the vacancy occurred.

(iv) The Governor shall make the appointment within 15 days after names are submitted by the State Central Committee of the appropriate political party.

(v) If names are not submitted by the State Central Committee of the appropriate political party within 30 days after the occurrence of the vacancy, the Governor shall appoint within another period of 15 days any qualified individual who was a registered voter affiliated with the political party of the vacating Senator on the date immediately preceding the date on which the vacancy occurred.

(vi) If the vacating Senator was not affiliated with a political party at the time of the Senator's last election or appointment, the Governor shall appoint any qualified individual within 15 days after the occurrence of the vacancy.

(2) Except as provided in paragraph (3) of this subsection, the appointed individual shall serve until a successor is elected pursuant to subsection (b) of this section to fill the remainder of the term.

(3) The appointed individual shall serve for the remainder of the term if the vacancy occurs after the date that is 21 days before the deadline for filing certificates of candidacy for the election that is held in the fourth year of the term.

**Declaration of special election**

(b) If the vacancy occurs on or before the date that is 21 days before the deadline for filing certificates of candidacy for the next succeeding regular statewide election, the Governor shall issue a proclamation immediately after the occurrence of the vacancy declaring that a special primary election and a special general election shall be held at the same time as the next regular statewide primary election and regular statewide general election.

**Credits**

Added as Art. 33, § 8-602, by Acts 1998, c. 585, § 2, eff. Jan. 1, 1999. Transferred to Election Law § 8-602 by Acts 2002, c. 291, § 2, eff. Jan. 1, 2003. Amended by Acts 2002, c. 291, § 4, eff. Jan. 1, 2003; Acts 2016, c. 511, § 1, eff. July 1, 2016.

**Formerly** Art. 33, § 8-602.

MD Code, Election Law, § 8-602, MD ELEC LAW § 8-602

Current with all legislation from the 2023 Regular Session of the General Assembly. Some statute sections may be more current, see credits for details.

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Arizona Revised Statutes Annotated  
Title 16. Elections and Electors (Refs & Annos)  
Chapter 2. Election Dates (Refs & Annos)  
Article 3. Other Elections; Special Provisions Relating to Election of Certain Officers (Refs & Annos)

## A.R.S. § 16-222

## § 16-222. Vacancy in the office of United States senator or representative

Effective: August 3, 2018

Currentness

**A.** When a vacancy occurs in the office of United States senator or representative in Congress by reason of death or resignation, or from any other cause and except as provided in subsection D of this section, the vacancy shall be filled at the next general election. At such an election the person elected shall fill the unexpired term of the vacated office.

**B.** For a vacancy in the office of representative in Congress, if the next general election is not to be held within six months after the date of the occurrence of the vacancy, the governor shall call a special primary election and a special general election to fill the vacancy. The governor shall call the special primary election and establish its date within seventy-two hours after the office is officially declared vacant. Notwithstanding §§ 16-313, 16-351 and 16-542, for a candidate for office at an election held pursuant to this subsection, the following apply:

1. The special primary election shall be held not less than one hundred twenty nor more than one hundred thirty-three days after the occurrence of the vacancy, and the special general election shall be held not less than seventy nor more than eighty days after the special primary election.

2. Nomination papers and nomination petitions shall be filed not later than thirty days after the date of the proclamation calling the election.

3. Any court action challenging the nomination of a candidate shall be filed not later than 5:00 p.m. on the fifth business day after the last day for filing nomination papers and petitions.

4. The superior court shall hear and render a decision within five days after the filing of the action.

5. Beginning fifteen days before the date of the election, the county recorder or other officer in charge of elections shall mail early ballots within forty-eight hours after receipt of a complete and correct early ballot request from persons qualified to vote.

**C.** For a vacancy in the office of United States senator, the governor shall appoint a person to fill the vacancy. That appointee shall be of the same political party as the person vacating the office and, except as provided in subsection D of this section, shall serve until the person elected at the next general election is qualified and assumes office. If the person vacating the office changed political party affiliation after taking office, the person who is appointed to fill the vacancy shall be of the same political party that the vacating officeholder was when the vacating officeholder was elected or appointed to that office.

**D.** If a vacancy in the office of United States senator occurs more than one hundred fifty days before the next regular primary election date, the person who is appointed pursuant to subsection C of this section shall continue to serve until the vacancy is filled at the next general election. If a vacancy in the office of United States senator occurs one hundred fifty days or less before the next regular primary election date, the person who is appointed shall serve until the vacancy is filled at the second regular general election held after the vacancy occurs, and the person elected shall fill the remaining unexpired term of the vacated office.

**E.** For a vacancy in the office of representative in Congress that occurs simultaneously with at least one hundred additional vacancies in the office of representative in Congress as prescribed by 2 United States Code § 8, a special general election to fill the vacancy in this state shall be held not more than forty-nine days after the declaration of the vacancy unless a regularly scheduled general election or previously scheduled special general election is held within seventy-five days after the declaration of the vacancy.

**Credits**

Added by Laws 1979, Ch. 209, § 3, eff. Jan. 1, 1980. Amended by Laws 1984, Ch. 214, § 4; Laws 1993, Ch. 136, § 2; Laws 2008, Ch. 273, § 9, eff. June 19, 2008; Laws 2012, Ch. 361, § 2; Laws 2018, Ch. 316, § 1.

<For disposition of the subject matter or derivation of sections repealed, added, or transferred and renumbered by Laws 1979, Ch. 209, §§ 2 to 5, effective January 1, 1980, see Disposition and Derivation Tables preceding Chapter 1.>

A. R. S. § 16-222, AZ ST § 16-222

Current through legislation of the First Regular Session of the Fifty-Sixth Legislature (2023).

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Massachusetts General Laws Annotated  
Part I. Administration of the Government (Ch. 1-182)  
Title VIII. Elections (Ch. 50-57)  
Chapter 54. Elections (Refs & Annos)

## M.G.L.A. 54 § 140

## § 140. Senators and representatives in congress; vacancies

Effective: September 24, 2009

Currentness

<[ Section impacted by 2020, 45, Secs. 1 and 1A, as amended by 2020, 92, Secs. 1 to 3, effective March 23, 2020 and 2021, 5, Secs. 1 and 2, effective March 16, 2021 and 2020, 92 Secs. 15 to 17 effective June 5, 2020 relating to postponing municipal elections in order to address disruptions caused by the outbreak of COVID-19.] >

- (a) Upon failure to choose a senator or representative in congress or upon creation of a vacancy in that office, the governor shall immediately cause precepts to be issued to the aldermen in every city and the selectmen in every town in the district, directing them to call an election on the day appointed in the precepts for the election of such senator or representative. The day so appointed shall not be more than 160 nor less than 145 days after the date that a vacancy is created or a failure to choose occurs. Filing a letter of resignation creates a vacancy under this section, even if the resignation is not effective until some later time, but the date of the election to fill a vacancy under this section shall be after the resignation is effective.
- (b) If a vacancy under this section is created after February 1 of an even-numbered year, the governor shall not issue the precepts required by subsection (a), except as subsection (c) provides for a vacancy for senator.
- (c) If a vacancy is created for senator in congress after April 10 of an even-numbered year, the governor shall issue precepts under this section, unless section 152 requires that office to appear on the biennial state election ballot in that year. If this section prevents issuance of precepts for senator, the office shall appear on the biennial state election ballot in that year. If a vacancy for senator is created after April 10 of an even-numbered year, but on or before the seventieth day preceding the regular state primary, the precepts shall appoint the day of the regular state primary and the biennial state election for holding the special primary and special election required by this section.
- (d) If at the time a senator or representative in congress is elected at the biennial state election, there exists a vacancy in that office, the senator or representative shall also be deemed to have been elected to serve out that vacancy.
- (e) A senator elected to fill a vacancy under this section shall serve for the remainder of the unexpired term.
- (f) Upon failure to choose a senator in congress or upon a vacancy in that office, the governor shall make a temporary appointment to fill the vacancy; provided, however, that the person so appointed shall serve until the election and qualification of the person duly elected to fill the vacancy pursuant to subsection (a) or (c).

**§ 140. Senators and representatives in congress; vacancies, MA ST 54 § 140**

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**Credits**

Amended by St.1973, c. 268; St.2004, c. 236, § 6, eff. Oct. 28, 2004; St.2009, c. 92, eff. Sept. 24, 2009.

<[ Chapter impacted by 2020, 45, Secs. 1 and 1A, as amended by 2020, 92, Secs. 1 to 3, effective March 23, 2020 and 2021, 5, Secs. 1 and 2, effective March 16, 2021 and 2020, 92, Secs. 15 to 17, effective June 5, 2020 relating to postponing municipal elections in order to address disruptions caused by the outbreak of COVID-19.]>

M.G.L.A. 54 § 140, MA ST 54 § 140

Current through Chapter 76 of the 2023 1st Annual Session. Some sections may be more current, see credits for details.

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West's Wisconsin Statutes Annotated  
Organization of State Government (Ch. 13 to 22)  
Chapter 17. Resignations, Vacancies, and Removals from Office

W.S.A. 17.18

17.18. Vacancies, U.S. senator and representative in congress; how filled

Currentness

Vacancies in the office of U.S. senator or representative in congress from this state shall be filled by election, as provided in s. 8.50(4)(b), for the residue of the unexpired term.

**Credits**

<<For credits, see Historical Note field.>>

W. S. A. 17.18, WI ST 17.18

Current through 2023 Act 39, published November 17, 2023.

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