



FILLING UNITED STATES SENATE VACANCIES
IN NEW YORK

Committee on Election Law

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The nominations of three sitting United States Senators to fill cabinet positions in the Obama Administration, coupled with the resignations of President Obama and Vice President Biden from the Senate, has generated considerable discourse as to the appropriate method of filling Senate vacancies.¹ Such vacancies are presently filled according to the laws of the state in which the vacancy occurs. The methods of filling vacancies range from immediately holding a special election to the appointment of a new Senator by the Governor of the state until the next congressional election. At the federal level, a constitutional amendment has been proposed that would require Senate vacancies to be filled by special election.²

Under these circumstances, and because one of the Senate vacancies this year arose in New York, the Committee on Election Law submits the following analysis of New York's laws governing Senate vacancies as compared with the laws of other states and its proposed modification of New York's law. The Committee recommends that, instead of electing a replacement Senator at the next practicable Congressional election (as the present law provides), New York should hold that election at the next practicable general election. In other words, the election would still take place at a regular general election day on the Tuesday after the first

¹ The arrest of Illinois Governor Rod Blagojevich on charges in part relating to his conduct in filling the Illinois Senate seat vacated by President Obama has added intensity and controversy to this discussion. In New York, by contrast, there has been considerable political excitement regarding Governor David Paterson's appointment of a successor to Senator Hillary Rodham Clinton, but no suggestion of any sort of impropriety at any point in the process.

² S.J. Res. 7, 111th Cong., 1st Sess.

Monday in November, but it could take place in odd-numbered years as well as in even-numbered years. The Governor would retain the power to appoint an interim Senator pending the results of the election, but the Senator chosen at the election would assume office upon the issuance of a certificate of election. This modification would significantly shorten the maximum amount of time any appointed Senator could serve but would still provide for an election conducted under the full electoral process under almost all circumstances.

1. The Current Law in New York

New York Public Officers Law § 42(4-a) provides for gubernatorial appointment of a new Senator to serve until a replacement can be elected at the next congressional election. Section 42(4-a) expressly sets sixty days before the primary date in each even numbered year as the cutoff for determining whether the election will take place that year at the general election or whether it must await the next congressional election two years later. Senators appointed under Section 42(4-a) serve until January 3 of the year following the election (the opening date for the new Congress) and any Senator so elected serves out the balance of the original term of the Senator who vacated the office.³

³ As an illustration, the assassination of Senator Robert Kennedy in 1968 took place less than 60 days before the New York primary in that year. As a result, Governor Rockefeller appointed Representative Charles Goodell to serve as Senator until January 3, 1971. Because Senator Kennedy's term would have expired in 1971, the 1970 election was for a full six-year term. This year, Governor Paterson appointed Representative Kirsten Gillibrand as Senator in place of Senator Clinton, who had been elected in 2006 for a term from January 3, 2007, until January 3, 2013. Senator Gillibrand will therefore serve until January 3, 2011, and an election

Elections to fill vacancies under Section 42(4-a) are conducted in the same manner as ordinary elections. Political parties may nominate candidates to appear on the general election ballot through the regular primary system under Article 6 of the Election Law. Candidates obtain positions on the primary ballot by petition (or by designation from a convention or by receiving 25% of the votes at a convention) under the Election Law Sections 6-104 and 6-136.⁴ Candidates may also petition to appear on the general election ballot on independent lines pursuant to Election Law §§ 6-138 through 6-142.

Prior to 1951, New York law provided that the election to fill a Senate vacancy could take place at the regular election date in any year. In 1948, following the death of Senator Robert F. Wagner, Sr., Governor Dewey appointed John Foster Dulles to the vacant Senate seat. After Senator Dulles in turn was defeated by Herbert Lehman in the 1949 general election, the Legislature amended the law to provide that the election take place in an even numbered year, during a regular congressional election. L. 1951, c. 257.⁵

will be held in 2010 for the remaining two years of Senator Clinton's term.

⁴ Senate candidates petitioning to obtain a position on the primary ballot must obtain petition signatures from 15,000 enrolled voters or 5% of the party enrollment, whichever is less, with at least 100 signatures (or 5% of the enrollment, whichever is less) in at least 15 different congressional districts. If the vacancy occurs less than seven days before the end of petitioning or after the date for holding a statewide convention, nomination is made using party procedures to fill vacancies. Election Law § 6-116.

⁵ Following the assassination of Senator Kennedy in 1968, the two-year delay to fill that vacancy by election was unsuccessfully challenged in *Valenti v. Rockefeller*, 292 F. Supp.

New York law imposes no limitation on whom the Governor may appoint to fill a Senate vacancy (aside from the requirement that the appointee fulfill all necessary qualifications to serve as a Senator). Specifically, the Governor is free to appoint a new Senator from any political party and from a different party than the Senator who had originally been elected to serve the term.⁶

New York uses an entirely different system for filling vacancies in the United States House of Representatives and in the New York Legislature. Under Public Officers Law §42(1)-(4), at any time after the vacancy occurs, the Governor may call a special election, which must then take place within 40 days of the Governor's call (Public Officers Law §42(3)).⁷ The parties choose candidates to appear on their ballot lines in the special election under procedures set forth in party rules, usually by some form of caucus among the constituted party committees within the district. Election Law § 6-114. There is no opportunity for candidates to petition to appear

851 (S.D.N.Y. 1968), *aff'd*, 393 U.S. 405 (1969).

⁶ In all the three New York Senate vacancies filled under Section 42 and its predecessors, the Governor chose a new Senator from his own party. The appointments of Sen. Dulles in 1949 and Sen. Goodell in 1968 substituted Republicans in place of Democrats. This year, Sen. Gillibrand, a Democrat, replaced Sen. Clinton, also a Democrat.

⁷ Section 42(3) expressly gives the Governor full discretion in choosing the date for the special election. However, no special election may be called for Congress after July 1 of an even numbered year or for the state legislature after April 1 of an even numbered year unless a special session of one of those bodies has been called between September 19 and the general election date of that year. Public Officers Law § 42(4).

on a primary ballot for the nomination of a party, nor is there any opportunity to run on an independent line.

2. An Overview of Systems Used in Other States

Thirty-two other states employ a procedure similar to New York's for filling Senate vacancies: gubernatorial appointment of an interim senator to serve until the next congressional or general election, with four states requiring that the governor appoint an interim senator from the same political party as the former senator.⁸ The remaining seventeen states provide for a special election unless the vacancy occurs within a certain proximity to the next general election but not so close to the general election as to preclude a reasonable opportunity for candidates to campaign.⁹ Of those states, all but three (Oklahoma, Oregon, and Wisconsin) provide for special elections only if the vacancy occurs during an odd-numbered year or at the beginning of an even numbered year (or too late during an even numbered year to use the general election date).

3. The mechanics of a special election.

⁸ A chart showing the different rules in each state may be found in Appendix A to this Report.

⁹ The usual period – measured either by the amount of time between the vacancy and the special election or by the minimum amount of time a vacancy can occur before a general election and be filled at that general election – is 60 to 90 days. Massachusetts requires special elections to be held between 145 and 160 days from the date of the vacancy, Arkansas has a 120 day period, and Mississippi a period of up to 100 days. The Committee notes that these legislatively established time periods suggest that the bare minimum amount of time necessary to conduct a campaign for United States Senate in any state is 60 days.

Crafting a process for special elections requires analysis of the mechanics and logistics involved. These considerations often affect policies vital to our political system, which are discussed in Part 4 below. These considerations include:

- a. Should the special election be partisan or non-partisan?
- b. How do candidates obtain a position on the ballot?
- c. Should party members have the right to choose their party's nominee in a primary?
- d. How much time is appropriate to enable candidates a reasonable opportunity to campaign?
- e. How is the election date set?
- f. Does the winner of the special election serve the full remainder of the term or only until the next congressional or general statewide election?

As discussed below, the Committee believes that the best practicable solution is to require that elections to fill vacant United States Senate seats take place on a regular general election day (i.e. the first Tuesday after the first Monday in November (Election Law 8-100(1)(c)) and that the nominee be chosen under the same primary system as in any other election in New York.

4. The Applicable Policy Considerations

Determining how to fill Senate vacancies requires the weighing and balancing of a number of policy considerations, some of which are contradictory with others.

- a. *Policies supporting the present rule.* Before determining that the present rule should be changed, it is wise to consider the policies underlying that rule. Under the present system, any Senator elected will have been elected through the full election system as practiced in

New York, including being nominated through the primary process.¹⁰ The election will have been waged after a full opportunity to campaign under New York's regular election rules. Moreover, the election will have been held during a congressional election year, when voter turnout throughout the State is usually higher than in odd numbered years, when only municipalities are voting. As a result, a Senator elected under the current system has the advantage of being elected with a full mandate and has no obstacles to using the full political power of the Senate seat for the remainder of the term. Supporters of the current rule would further argue that there is nothing inherently undemocratic with the gubernatorial appointment of an interim Senator pending the election of a Senator to fill the balance of the vacant term. The Governor is, of course, elected by the voters of the entire State and has been entrusted with at least as much political responsibility as any elected official within the State.

- b. *Criticism of the present rule.* The primary criticism of Section 42(4-a) is that it permits a gubernatorially appointed Senator to serve far longer than necessary, potentially for as long as 30 months. A fair and well-organized election can be held in far less time than

¹⁰ The primary process is not available if a Senate vacancy occurs (a) more than 59 days before the primary date (which falls somewhere between September 9 and September 15) but (b) after the date for party conventions (in May if conventions are held) or after seven days before the end of petitioning (68 days before the primary (Election Law § 6-158)). Nominations to fill such vacancies are made under party rules for filling vacancies, under Election Law § 6-116.

that. An elected Senator may be considered inherently preferable to an appointed one as having been democratically chosen, especially if the Governor appoints an interim Senator from a different party than the party that held the seat before it became vacant. Moreover, an appointed Senator who serves for more than a short period of time may be able to take unfair advantage of his or her incumbency when the election to fill the vacancy is finally held.¹¹

- c. *Candidates Should be Afforded a Reasonable Time to Campaign.* Unless an election is held only between candidates well known to the electorate, the electorate can hardly be considered able to make an informed decision without a reasonable opportunity to learn about the candidates, or without the candidates having a reasonable opportunity to communicate with the electorate, which in turn involves raising funds, organizing a campaign staff, and campaigning through such activities as advertising, debating, making public appearances, and meeting with the press. These considerations apply especially in a large state such as New York. As an empirical matter, it would appear reasonable to expect that the shorter the time to campaign, the more likely that the parties would choose as candidates either those who were connected to an established political organization or who were able to self-fund a statewide campaign.¹² In this connection, the Committee

¹¹ This latter argument is, however, undermined in part by the historical record in New York. In both instances when an appointed Senator went to the polls, the appointed Senator was defeated – in the instance of Senator Goodell more than two years after his appointment.

¹² For example, the special election to replace Senator Gillibrand in the House of

notes that the Association has favored moving the regular New York primary date from September to the springtime in order to lengthen the time in which candidates may campaign.

- d. *Nomination by Primary.* Holding an election among candidates chosen through the primary system obviously affords the electorate the same participation it has in general elections, a policy that is legislatively mandated in the Election Law. Without the opportunity for any direct input into the selection of candidates, voters could arguably be forced to choose between hand-picked candidates of political machines and otherwise legitimate candidates could be excluded from the process.¹³ On the converse side, allowing nomination by primary in special elections would materially lengthen the special election process, especially given New York's current rules for obtaining ballot access.¹⁴

Representatives will be between the Minority Leader of the Assembly and a businessman who plans largely to self-fund his campaign. *See* N.Y. Daily News, Feb. 2, 2009; http://www.nydailynews.com/news/politics/2009/02/01/2009-02-01_election_in_gillibrand_district_big_trou.html.

¹³ This argument would of course also apply to the special elections held for vacant seats in the House of Representatives and the Legislature. It should be noted, however, that the terms of all of those seats are for two years, with the result that anyone elected at a special election would have to face the voters again within two years, as distinct from a U.S. Senate term of up to six years.

¹⁴ The current political calendar provides for a period of more than 90 days between

e. *Voter turnout.* Ideally, a United States Senator should be elected at an election with a significant voter turnout. Although special elections in New York historically generate low voter turnout, those elections have been for offices considerably less visible than the United States Senate, so it may be speculative to infer that a special election for Senator would generate a low turnout.¹⁵ In addition, voter turnout around the state is significantly

the first day for circulating petitions and the primary. Since Section 42 requires an election to fill a Senate vacancy occurring 60 days before the primary, 60 days would appear to be the minimum time needed to finalize the ballot under the current rules. The Association has long urged liberalization of New York's ballot access rules. *See The Petition Process*, 41 *The Record of The Association of the Bar of the City of New York* 710 (1986), *The Objection Process*, 43 *Record* 7 (1988), *The Litigation Process*, 44 *Record* 731 (1989). Liberalization of those rules (including the provision of alternate means to gain ballot access and reducing the opportunity to deny ballot access through litigation) would reduce the amount of time needed for candidates to gain access to the ballot and thus the overall time needed to hold a primary election.

¹⁵ In 2001, when the mayoral primary was moved from September 11 because of the attack on New York City on that date, voter turnout in the Democratic primary as rescheduled was 785,000. This figure was significantly lower than the voter turnouts for the 1989 and 1977 Democratic primaries, which were 1.08 million and 896,000, respectively. *See* http://en.wikipedia.org/wiki/New_York_City_mayoralty_elections. Interestingly, the turnout for the Democratic runoff primary in 2001 was nearly identical at 790,000, whereas the turnout for the 1977 runoff was 786,000, reflecting a 110,000 voter drop off from the initial primary. *See*

greater in even numbered years (which have elections for President or Governor, Congress, and the legislature) than in odd numbered years (which have elections for municipal office). Conversely, a statewide election for United States Senate might be expected on its own to attract a significant number of voters who might otherwise not have voted.¹⁶

- f. *Setting a Date for a Special Election.* Special elections can either be scheduled by statute (e.g. within a fixed number of days from the date that the seat became vacant) or by discretion (the governor or an administrative body picks the date) or a combination of the two. Each approach presents hazards. If the date is fixed by statute, a special election could be held at a time when many voters were away from home and therefore less likely to vote (such as during a religious or national holiday or during the summer). If it is within the discretion of a public official, then the public official might be tempted to choose a date that would be to the advantage of the official's party.
- g. *Additional Cost of a Statewide Special Election.* Holding a statewide election requires considerable public expenditures including printing the ballot and preparing voting machines, training and paying for inspectors, mailing voter guides and cards to voters, renting premises, and police and custodial overtime. Because these costs are incurred at

id.

¹⁶ The run-off election held in 2008 for the U.S. Senate seat in Georgia (after no candidate received a majority in the general election) generated a turnout of 2.1 million voters as compared to 3.7 million voters for the same contest in the general election.

multiple levels of government from state to local, the State Board of Elections has no definitive quantification of the cost of holding a statewide election. Board personnel have informally estimated some of these costs at between \$30 and \$40 million per election on a statewide basis; however, the costs that the board has been able to itemize (which total between \$20 and \$30 million) do not include such major items as police overtime, costs of additional personnel such as coordinators, door clerks, and interpreters, staff overtime, transportation of voting machines, and renting premises on dates other than election day. Consequently, the total cost of a special statewide election may well be substantially greater even than \$40 million.¹⁷

- h. *The cost of campaigning.* The high cost of waging a Senate campaign in New York, especially for an open seat, also merits consideration. Since 2000, the cost of serious major party campaigns for Senate have ranged from \$25 to over \$30 million, while the cost of gubernatorial elections has approached \$40 million.¹⁸ If a Senator is elected at a

¹⁷ Correspondence from John W. Conklin, Director of Public Information, New York State Board of Elections.

¹⁸ See New York Times, Nov. 7, 2006; *Assessment of U.S. Senate Campaign Expenditures*, Department of Communications, University of Washington, Paper # 2005-2. This includes elections that were waged competitively, such as the Senate election in 2000, as well as those that were not, specifically the Senate elections in 2004 and 2006. It should also be noted that gubernatorial campaigns are subject to New York's permissive campaign finance law which allows individual contributions of over \$50,000, as compared with the current federal limit of

special election for a term less than the full remainder of the term for the vacant seat, the Senator will be compelled to raise and spend as much as \$40 to \$50 million just in order to serve the remainder of one term.

- i. *The advantages of having an interim Senator in office.* During any period in which a New York Senate seat is vacant, the citizens of New York are by definition underrepresented. In that Senators are at times expected to stand up for what they perceive to be the interests of their states and constituents, the loss of a Senator – regardless of party – handicaps any state, particularly a large state such as New York. Having an interim Senator appointed by the Governor (who presumably will have an interest in choosing a Senator who can protect the interests of New York) until a successor can be elected affords some mitigation against underrepresentation.
- j. *Party Control of the Seat.* Under Section 42, the Governor is free to appoint a Senator from any political party, with the result that, if the Senator who vacated the seat was from a different party from the Governor, the seat would change parties. As noted in Part 2 above, four states that permit their governors to fill Senate vacancies by appointment require their governors to appoint someone from the same party as the former Senator. New York's rule thus permits the Governor (who is a statewide elected official to whom the voters have entrusted great political responsibility) to appoint the person the Governor believes best qualified, regardless of party. The counterargument would hold that, since the Senate is organized by political party and since the voters chose the former Senator

\$4,800 (in both instances covering both primary and general election).

from a particular party, it should be for the voters and not the Governor to decide whether the balance of power in the Senate should change as a result of the vacancy. Requiring that the Governor name an interim Senator from the same party as the former Senator would also eliminate the possibility of an Executive appointment of a Senator to another position in order to change the balance of power in the Senate.¹⁹

5. A Practicable Revision in New York

¹⁹ The nomination of New Hampshire Republican Senator Judd Gregg as Secretary of Commerce raised considerable speculation that New Hampshire's Democratic Governor John Lynch would appoint a Democrat to the seat and potentially increase the number of Senators organizing as Democrats to 60, which would theoretically enable the Democrats voting as a party bloc to cut off filibusters. Governor Lynch however announced his intention to appoint a Republican to succeed Sen. Gregg, and the issue was further mooted when Sen. Gregg withdrew as a nominee and remained in the Senate. See J. Goldfeder, *The 17th Amendment and Vacant Senate Seats*, N.Y.L.J., Feb. 27, 2009, at 6.

Balancing the different policies outlined above, the Committee concludes that the greatest practicable improvement would be to amend Section 42(4-a) to provide that a Senate vacancy occurring at least seven days before the last day to file petitions²⁰ of any calendar year be filled at the general election during that year, and (b) to require that the Governor appoint an interim Senator to serve until the certification of the election of the new Senator.²¹ The Senator so elected would serve the balance of the term. The Committee does not

²⁰ This proposal would parallel the provisions in the New York City Charter for filling vacancies at a general election. *See* New York City Charter § 25(c)(2)(4) & (5). The Committee further recommends that the statute expressly provide that the number of petition signatures required and/or the time within which to file petitions relating to such a vacancy could be judicially modified to fit the circumstances of any case in which a vacancy occurred less than seven days before the commencement of the period for collecting petition signatures. The Committee notes that the Association has long held the position that the New York primary date be moved to the spring from September. If the primary date is moved, the amount of time that an interim Senator could serve would be lengthened accordingly. The Committee would urge, however, that further liberalization of New York's ballot access laws as recommended by the Association could reduce the amount of time needed prior to the primary by as much as 45 days.

²¹ In that the election would no longer be linked to congressional elections for a new congress, there is no reason to wait until January 3 (the date when each new Congress convenes) for the elected Senator to take office.

recommend restricting the Governor's choice of an interim Senator based upon political party considerations but believes that the Governor should be free to appoint the person that the Governor believes to be best qualified to serve.

Under the Committee's proposal, candidates would be able to obtain a place on the primary ballot as in a normal election – by designation from the convention, by receiving 25% of the votes at a convention, or by petition – and the voters enrolled in each party would have an opportunity to vote on their party's nominee. If the vacancy occurs after the seventh day before the commencement of the petition period, the Committee would urge that the Courts be expressly empowered to modify the number and geographic distribution of signatures required and/or the deadline for filing petitions in order to meet the needs of any particular situation ²²

The Committee's proposal would enable voters to participate in the nomination of candidates,²³ which a special election could not do unless it provided for special primary elections. This proposal would thus carry out New York's legislative policy favoring voter

²² Moreover, providing more liberalized ballot access rules (or for the ability to adjust the schedule and requirements for petitioning for Senate vacancies occurring after the commencement of the petition process) can significantly reduce the burden of collecting petition signatures in an accelerated time frame or on short notice.

²³ The Committee would further note that vacancies are most likely to occur at the beginning of a presidential administration or term, when positions that would be attractive to incumbent Senators are widely available.

participation through primary elections far better than a special election system that did not provide for primary elections, while a special election system that did provide for special primaries would lengthen the process to more than 150 days and impose great costs on the State and its counties and municipalities.

The Committee's proposal would mean that the longest that any appointed Senator would serve would be approximately 17 months, as compared to a maximum of 30 months under the current system. Allowing for the time necessary to obtain a position on the ballot by petitioning and affording candidates a reasonable opportunity to campaign, a special statewide election would require at least 90, if not 120 days (with more time required if party candidates were chosen by primary).²⁴ A special election would therefore reduce the time

²⁴ The maximum benefit would occur if a seat became vacant immediately after the cutoff before the primary date, for example in late June or early July of a given year. Under the Committee's proposal, the seat would be filled by gubernatorial appointment until the general election in the following year, which would mean that the elected Senator would be certified in late November of the following year, a period of seventeen months. Subtracting the three or four months necessary to hold a special election (or more if the candidates for the special election were chosen by primary) yields a difference of at most fourteen months. The Committee would further note that, in the absence of a special primary, the voters at a special election would be choosing among candidates hand-picked by their party organizations, which would not necessarily achieve a more democratic result than an interim candidate chosen by a governor (who by definition was elected by the voters of the

that the seat was not filled by an elected Senator by at most 13 or 14 additional months beyond what the Committee has proposed, but would undermine the state policy favoring nomination by primary. Using the general election date would avoid the substantial additional cost of holding a special election (or two if primaries were involved) and would hold the election on a date certain when voters should know or expect that they will have something to vote about.

entire state and entrusted with the highest level of political responsibility). The concept of holding a non-partisan special election would make little sense in the context of the Senate, which is organized by political parties and in which the party that controls the Senate has a significant operational advantage over the opposition party.

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