

Date of Hearing: April 29, 2021

ASSEMBLY COMMITTEE ON ELECTIONS
Marc Berman, Chair
AB 1495 (Berman) – As Amended April 20, 2021

SUBJECT: Vacancy elections: United States Senate.

SUMMARY: Requires the Governor, when a vacancy occurs in California's representation in the United States (US) Senate, to schedule a statewide election for the US Senate seat to be held at the next regularly scheduled statewide primary election that is at least 148 days away, with a general election for the US Senate seat being held at the ensuing statewide general election, except as specified. Specifically, **this bill:**

- 1) Requires the Governor, if a vacancy occurs in California's representation in the US Senate, to do one of the following:
 - a) Issue a writ of election for a statewide general election to fill the vacancy, with a statewide primary election for the US Senate seat being held at the next regularly scheduled statewide primary election that is at least 148 days away, and the statewide general election for the US Senate seat being held at the ensuing regularly scheduled statewide general election. Provides that the person elected at the general election holds office for the remainder of the term.
 - b) If the next regularly scheduled primary election that is at least 148 days away falls after the term ends, consult with the Secretary of State (SOS) about whether it is practical to issue a writ of election to fill the vacancy before the end of the term. If the Governor determines that it is practical, permits the Governor to issue a writ of election for special statewide primary and general elections to fill the vacancy. If the Governor does so, the person elected at the special general election holds office for the remainder of the term.
- 2) Specifies that when a US Senate vacancy election appears on the same ballot as a regular election for the subsequent term of the same seat, the vacancy election will appear on the ballot immediately after the regular election. Requires voter information guides, sample ballots, ballot materials, and ballots to include a notice advising voters that the ballot contains both a regular election to elect a person to a full term, and for the remainder of the unexpired term of the vacated Senate seat, as specified. Requires the SOS to prescribe the language of the notice.
- 3) Repeals a provision of law that permits a person who is appointed to fill a vacancy in the US Senate to hold office for the remainder of the unexpired term if the vacancy occurs during a term that will expire on January 3 following the next general election, except as specified.
- 4) Makes corresponding and technical changes.

EXISTING LAW:

- 1) Requires, pursuant to the Seventeenth Amendment to the US Constitution, that the US Senate be composed of two Senators from each state, elected by the people thereof, for six years. Provides that when a vacancy happens in the representation of any state in the Senate, the

executive authority of the state shall issue a writ of election to fill such a vacancy, provided, however, that the Legislature of a state may allow the executive to make a temporary appointment until the people fill the vacancy by election as the Legislature may direct.

- 2) Permits the Governor to appoint an elector of the state who possesses the qualifications for office to fill a vacancy in the representation of California in the US Senate until a successor is qualified and admitted to the US Senate. Requires an election be held to fill the vacancy at the first general election after the occurrence of the vacancy or at any special election unless the vacancy occurs during a term that will expire on January 3 following the next general election, in which case the person appointed holds office for the remainder of the unexpired term unless the vacancy is filled at a special election held prior to that general election.
- 3) Provides, notwithstanding any other provisions of the Elections Code, that when a special primary or general election to fill a vacancy in the US House of Representatives or the State Legislature is consolidated with a statewide election, that the candidates to fill the vacancy shall appear on the consolidated ballot immediately preceding the candidates for that same seat in Congress or the seat in the Legislature that most nearly encompasses the same geographical area at the statewide election. Permits the elections official, at the official's option, to print a separate and distinct ballot for the special election to fill the vacancy.

FISCAL EFFECT: Unknown

COMMENTS:

- 1) **Purpose of the Bill:** According to the author:

California is one of 45 states that allows its Governor to appoint a person to fill a vacancy in the US Senate. When a vacancy occurs early in a six-year Senate term, that appointee serves until an election is held to select the person who serves the remainder of the term. If the vacancy occurs in a term that is scheduled to end in January following the next statewide general election, however, California law allows the appointee to hold office for the remainder of the unexpired term.

Earlier this year, then-Senator Kamala Harris resigned her US Senate seat in advance of being inaugurated as Vice President. That resignation created a vacancy in California's representation in the US Senate for the first time in 30 years, and triggered a reexamination of California's laws for filling such vacancies. Since the last vacancy occurred in 1991, two appellate courts issued decisions that raise questions about whether California's US Senate vacancy procedures are consistent with the Seventeenth Amendment to the US Constitution. In particular, it is unclear whether state law allowing an appointee to hold office for the remainder of a Senate term under certain circumstances complies with the Seventeenth Amendment.

AB 1495 ensures that California law is consistent with the Seventeenth Amendment to the US Constitution by providing for an election to be held to fill a vacancy in California's representation in the US Senate, even if the vacancy occurs during the last two years of the US Senate term. In order to ensure the greatest participation in those vacancy elections, as well as to avoid the costs and disruptions of standalone statewide special elections whenever possible, AB 1495

generally requires US Senate vacancy elections to be consolidated with regularly scheduled statewide elections. If the timing of a vacancy does not allow a US Senate vacancy election to be consolidated with the last statewide primary and general election held during that term, AB 1495 establishes a procedure for the Governor to schedule special primary and general elections for the remainder of the term if it is practical to do so.

- 2) **Filling Vacancies in Elective Office:** Under existing law, when a vacancy occurs in an elective office in California, there are four main ways that such a vacancy is handled, with the applicable procedure typically depending on the office in question and on the timing of the vacancy. In most cases, a vacancy is filled either by an appointment or by holding a special election. Less commonly, a specified public official is designated to take over an office in the event of a vacancy in that office (most notably, the Lieutenant Governor takes over when there is a vacancy in the office of Governor). In a few instances, state law allows the elective office to remain vacant for the remainder of the term of office (typically, this applies in situations where a vacancy occurs near the end of a term of office).

Each of these procedures for dealing with a vacancy in an elective office presents tradeoffs. Allowing vacancies to be filled by appointment means that those vacancies can be filled quickly and at little expense, thereby ensuring that a person is in place to perform the duties of that office and to represent the public in a timely manner. On the other hand, filling vacancies by appointment means that the voters do not have the opportunity to choose the person who represents them for a period of time. Furthermore, allowing a vacancy to be filled by appointment can present questions about whether the appointee will represent the interests of the voters, or of the officer (or entity) who appointed that person.

Requiring a special election to be held to fill a vacancy means that the voters always make the ultimate decision about who represents them in elective office. When vacancies can only be filled through a special election, however, voters go without any representation in that office until a special election can be held. Furthermore, special elections can be costly and can suffer from low and non-representative voter participation, particularly in situations where the election cannot be consolidated with a regularly scheduled election.

In some cases, state law allows a vacancy in an elective office to be handled using a combination of procedures. For instance, state law may allow a person to be temporarily appointed to fill a vacancy in a public office until an election is held to choose the person who will serve out the remainder of the term of office. The procedure for filling US Senate vacancies is an example of such a situation.

Under California law, when a vacancy occurs in the US Senate, the Governor may appoint a person to fill that vacancy. If the term of office for that US Senate seat ends in the January after the next regularly scheduled statewide general election, then the Governor's appointee serves for the remainder of the term, and no election is required. If the term of office for the US Senate seat does *not* end in the January after the next regularly scheduled statewide general election, however, then the Governor's appointee serves only until an election is held and the successful candidate in that election is sworn-in to the Senate. The election to fill the remainder of the Senate term may either be held at the next regularly scheduled statewide general election, or at a statewide special election.

This bill does *not* change the Governor’s authority to appoint a person to fill a vacancy in the US Senate until an election is held to choose a person who will serve the remainder of the term. Instead, the primary change that this bill makes is to require an election to be held to fill the remainder of the Senate term *even if* the term is scheduled to end in the January following the next regularly scheduled statewide general election, unless it is not practical to hold an election before the term would end. A person who is elected to fill a US Senate vacancy at the regularly scheduled statewide general election that immediately precedes the end of the US Senate term likely would serve only a few weeks after the election until the start of the next congressional session in January of the following year. Nonetheless, as described in more detail below, opinions from two federal appellate courts suggest that an election must be held to choose someone to serve out the remainder of the US Senate term when feasible, even if the person elected would only serve in the US Senate for a few weeks before the commencement of the next full term.

- 3) **Seventeenth Amendment and Temporary Appointments to the US Senate:** Until 1913, US Senators were selected by the legislature in each state in accordance with Article I, section 3 of the US Constitution. With the ratification of the Seventeenth Amendment to the US Constitution in April 1913, however, US Senators are now directly elected by the people in each state.

In addition to requiring the direct popular election of US Senators, the Seventeenth Amendment also established a new procedure for handling vacancies in a state’s representation in the US Senate. Specifically, the text of the amendment provides that “[w]hen 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,” but also permits “the legislature of any state [to] empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.”

Two recent federal appellate court decisions (*Judge v. Quinn* (7th Cir. 2010), 612 F.3d 537, opinion amended on denial of reh., (7th Cir. 2020) 387 Fed.Appx. 629; *Tedards v. Ducey* (9th Cir. 2020) 951 F.2d 1041) have raised questions about whether California’s US Senate vacancy procedures are consistent with the Seventeenth Amendment to the US Constitution.

In November 2008, a vacancy occurred in one of Illinois’ US Senate seats when then-US Senator Barack Obama won the presidential election and resigned his US Senate seat. The term of office for that seat was scheduled to end on January 3, 2011. On December 31, 2008, the Governor of Illinois appointed Roland Burris to the US Senate to fill that vacancy. At the time, it was the position of Illinois state officials that Senator Burris would serve until the next Congress began on January 3, 2011, and that an election would not be held to fill the balance of President Obama’s Senate term.

In early 2009, two Illinois voters sued in the US District Court for the Northern District of Illinois, Eastern Division, and sought a preliminary injunction requiring the Illinois governor to “issue a writ for a special election to be conducted as soon as practical” to elect a person to serve the remainder of the term for the vacated US Senate seat to which Senator Burris had been appointed. The plaintiffs argued that Illinois’ law governing US Senate vacancies was inconsistent with the Seventeenth Amendment because it allowed Senator Burris to serve as an appointee for an unreasonably long period of time. The plaintiffs further argued that the Governor’s failure to issue a writ of election similarly violated the Seventeenth Amendment.

The district court denied the request for a preliminary injunction, and the plaintiffs appealed to the 7th Circuit Court of Appeals.

In *Judge v. Quinn* (7th Cir. 2010), 612 F.3d 537, opinion amended on denial of reh'g., (7th Cir. 2020) 387 Fed.Appx. 629, the 7th Circuit Court of Appeals upheld the district court's decision. Its decision did not, however, conclude that allowing Senator Burris's appointment to last for the remainder of the US Senate term was permissible under the Seventeenth Amendment. To the contrary, the court held that when a US Senate vacancy occurs, the state must hold an election to fill the vacancy, even if the Governor makes an appointment to fill the vacancy temporarily. In denying the request for a preliminary injunction, the court noted that there was still time for the Governor to issue a writ of election and for Illinois to hold an election at which voters would select a replacement to serve the remainder of the Senate term. Furthermore, the court rejected the idea that the period of time that a person might serve between being elected at a November election and the end of the term in the following January was "such a short period of time that it should be dismissed as *de minimis*."

More recently, the 9th Circuit Court of Appeals considered a challenge to various procedures that the state of Arizona uses when filling US Senate vacancies in *Tedards v. Ducey* (9th Cir. 2020) 951 F.2d 1041. In its decision, the court held that the Seventeenth Amendment contemplates that when a vacancy occurs in the US Senate, an elected successor will serve for the remainder of the term *in which a vacancy occurred* even if a person is appointed to temporarily fill that vacancy. The *Tedards* court also concluded "that the duty to call an election might not apply if the vacancy happens so late in the term that it is not feasible to hold an orderly election quickly enough that the elected Senator will serve for more than a *de minimis* period of time."

These decisions present questions about whether California's US Senate vacancy procedures are consistent with the Seventeenth Amendment to the US Constitution. In particular, it is unclear whether the provisions of California law that allow an appointee to hold office for the remainder of the term if the term is scheduled to expire following the next general election are consistent with the provisions of the Seventeenth Amendment that allow a Legislature to empower the Governor "to make temporary appointments until the people fill the vacancies by election."

- 4) **Implications for Recent US Senate Appointment:** On January 18, 2021, then-Senator Kamala Harris resigned her US Senate seat in advance of being inaugurated as Vice President, and Governor Gavin Newsom appointed then-Secretary of State Alex Padilla to fill the vacancy, and issued a writ of election ordering that an election to represent California in the US Senate in the seat made vacant by the resignation of Kamala Harris be held on November 8, 2022 in accordance with law. Because the term of office for that US Senate seat ends on January 3, 2023, existing law, as detailed above, permits Senator Padilla to hold office for the remainder of the term unless a special election is held prior to November 2022 for the purposes of electing someone to serve the remainder of that term.

If this bill becomes law and goes into effect, it would require a primary and general election to be held in 2022 to elect a person to serve the remainder of the US Senate term that ends on January 3, 2023. Those elections would be held at the same time as the regularly scheduled statewide primary and general elections.

- 5) **US Senate Vacancies:** According to the US Senate Historical Office, since the adoption of the Seventeenth Amendment to the US Constitution in 1913, California has had six vacancies in its representation in the US Senate that were filled by a gubernatorial appointment. (This total does not include so-called “technical resignations” in which a Senator who was retiring chose to resign after the election of a successor, but before the expiration of the term. In such situations, the Senator-elect was appointed to serve out the remainder of the unexpired term, thereby giving the incoming Senator the benefits of additional seniority. According to information from the Congressional Research Service, the practice of “technical resignations” ended in 1980 when the major parties agreed that Senators-elect would no longer accrue seniority through appointment because of a technical resignation.)

Of the five vacancies in California’s representation in the US Senate that occurred prior to this year, one vacancy occurred after the general election was held for the next full term of office for that seat. The person who was appointed had not run as a candidate for the full term of office. In the other four cases, the person who was appointed to the US Senate subsequently ran at the election to fill the remainder of the unexpired term. In two instances, the appointee was successfully elected, and in two cases, the appointee was unsuccessful. Until this year, the most recent vacancy in California’s representation in the US Senate occurred when Pete Wilson resigned as US Senator to be sworn in as Governor. On January 7, 1991, Governor Wilson appointed John Seymour to fill the vacancy in the US Senate. Senator Seymour unsuccessfully ran to serve the remainder of the unexpired term, and served in the Senate until his duly elected successor qualified on November 10, 1992.

According to information from the US Senate Historical Office and the Congressional Research Service, individuals who are appointed to fill vacancies in the US Senate often are unsuccessful when they pursue election to the US Senate after having been appointed. Of the 123 Senators appointed prior to this year who subsequently sought election, 52% who pursued election were successful, while 48% were defeated, often in the primary election.

- 6) **Other States:** According to information from *U.S. Senate Vacancies: Contemporary Developments and Perspectives*, a report prepared by the Congressional Research Service in April 2018, 45 states permit some form of appointment by their Governor to fill US Senate vacancies, including all 19 states with a population of six million people or more. Five states (North Dakota, Oklahoma, Oregon, Rhode Island, and Wisconsin) currently do not allow an appointment to fill a vacancy in the US Senate under any circumstances and require all such vacancies to be filled by an election.

Of the 45 states that authorize their Governors to fill Senate vacancies by appointment, 36 states allow the appointed Senator to serve the balance of the term or until the next statewide general election, and nine states provide for gubernatorial appointments but also require a special election to be conducted on an accelerated schedule. In four states, any person appointed by the Governor to fill a vacancy in the US Senate must be of the same political party as the person who vacated the seat.

Similar to California’s existing law governing the filling of US Senate vacancies, it appears that several other states’ laws allow an appointee to the US Senate to hold office for the remainder of the term to which the person was appointed in certain circumstances, and thus may conflict with the Seventeenth Amendment in those cases. According to the US Senate Historical Office, 199 people were appointed to fill vacancies in the US Senate between the

ratification of the Seventeenth Amendment and the start of this year. Based on information from the 7th Circuit Court of Appeals decision in *Judge* and research by committee staff, it appears that in 32 of those cases, an election was never held to fill the remainder of the vacated term as the Seventeenth Amendment generally seems to require.

- 7) **Arguments in Support:** In support of this bill, the California League of Conservation Voters writes:

The 17th Amendment of the U.S. Constitution provides that for vacancies in the U.S. 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." The 17th Amendment is clear that an election must be held to fill the vacancy before the expiration of the term.

To ensure California law conforms with the 17th Amendment, AB 1495 requires the Governor to call an election to fill a U.S. Senate vacancy at the next practical statewide general and statewide primary elections.

Consolidating U.S. Senate special vacancy elections with regularly scheduled, statewide elections will ensure more voter's voices can be heard and make it easier for voters to be educated and prepared to vote. Holding elections on dates voters are not used to has a devastating impact on participation. The last statewide special election held in May of 2009 saw only 20.83% of eligible voters cast a ballot, compared to the 50.45% of eligible voters who turned out to vote in November 2018 the last time California voted for a U.S. Senator.

AB 1495 will strengthen California law by making sure U.S Senate vacancies are filled equitably and provide every voter a fair opportunity to cast a ballot.

- 8) **Related Legislation:** AB 801 (Kiley), which is pending in this committee, eliminates the ability of the Governor to appoint a person temporarily to fill a vacancy in one of California's US Senate seats, and instead requires all such vacancies to be filled by a special election, as specified.

REGISTERED SUPPORT / OPPOSITION:

Support

California League of Conservation Voters

Opposition

None on file.

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