

Date of Hearing: March 27, 2019

ASSEMBLY COMMITTEE ON ELECTIONS AND REDISTRICTING

Marc Berman, Chair

AB 460 (Kiley) – As Introduced February 11, 2019

SUBJECT: United States Senate vacancy.

SUMMARY: Eliminates the ability of the Governor to appoint a person temporarily to fill a vacancy in one of California's United States (US) Senate seats, and instead requires all such vacancies to be filled by a special election. Specifically, **this bill:**

- 1) Repeals provisions of law that allow the Governor to appoint a person to fill a vacancy that occurs in the representation of California in the US Senate.
- 2) Requires vacancies in the office of US Senate to be filled through a special election, and requires such a special election to be conducted in the same manner and on the same timeframe as currently applies for elections to fill vacancies in the Legislature and in the US House of Representatives.
- 3) Makes conforming and technical changes.

EXISTING LAW:

- 1) Requires, pursuant 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 vacancies by election as the Legislature may direct.
- 2) Requires, pursuant to the US Constitution, that the US House of Representatives be composed of members chosen every second year by the people. Requires, when a vacancy happens in the representation from any state, that the executive authority of the state issue a writ of election to fill such a vacancy.
- 3) Requires the Governor to call an election to fill any vacancy in the Legislature, except as specified.
- 4) 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 his or her 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.
- 5) Requires the Governor to issue a proclamation calling a special election within 14 calendar days of the occurrence of a vacancy in the Legislature and in the US House of

Representatives. Provides that no special election is held if a vacancy occurs in the Legislature after the close of the nomination period in the final year of the term of office. Provides that if a vacancy occurs in the US House of Representatives after the close of the nomination period in the final year of the term of office, a special election may be held at the Governor's discretion.

- 6) Requires a special election held to fill a vacancy in the Legislature or the US House of Representatives to be conducted on a Tuesday that is at least 126 days, but not more than 140 days, following the Governor's issuance of the proclamation calling the special election. Permits the special election to be conducted within 180 days following the proclamation if it allows the special primary or special runoff election to be consolidated with the next regularly scheduled statewide election or the next regularly scheduled local election that comprises at least 50 percent of all the voters eligible to vote on the vacancy.
- 7) Requires a special primary election to be held either nine weeks or ten weeks prior to the date that is set by the Governor for the special runoff election, as specified.

FISCAL EFFECT: Unknown

COMMENTS:

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

When a vacancy occurs in a California Congressional seat or in either house of the California legislature, the Governor is required to call an election to fill the vacancy within 14 days. When a vacancy occurs in a California Senate seat, however, state law authorizes the Governor to appoint an individual to fill the vacancy. This individual will serve until the next scheduled election, where they are permitted to seek re-election for the seat. Under current law, the Governor does have the option to call a special election, instead of filling the seat through an appointment, but this option has yet to be utilized.

While California is the most populous state in the union, the state is only represented by two Senators, just like every other state. Arguably, there is more power vested in the hands of each California Senator because of the sheer number of people they are responsible for representing. This means we should employ additional precautions when considering our election or appointment processes for the office, so that the Senate can be as responsive as possible to the will of the people.

California would not be the first state to require Senate seats to be filled solely through an election. North Dakota, Oklahoma, Oregon, Rhode Island, and Wisconsin require Senate seats to be filled by a special election, and each of these states employ an expedited election process, so that the seat remains vacant for a minimal period of time. California already possess the framework for an expedited election timeframe, which is already employed for vacant seats in the state legislature, as well as the U.S. House of Representatives.

- 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 scheduled statewide election, then the Governor's appointee serves for the remainder of the term, and no election is required, though the Governor has the option of calling a special election to fill the vacancy if he or she desires. If the term of office for the US Senate seat does *not* end in the January after the next scheduled statewide 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 scheduled statewide general election, or at a statewide special election that is called by the Governor.

- 3) **Legislative and US House Vacancies Must be Filled by Election:** As detailed above, the California Constitution requires that any vacancy in either house of the state Legislature be filled by a special election. Similarly, the US Constitution requires that vacancies in the US House of Representatives be filled by election. Allowing vacancies in these seats to be filled by appointment would require an amendment to the California Constitution (in the case of Legislative vacancies) or the US Constitution (in the case of the US House of Representatives); a statutory change would be insufficient to permit those vacancies to be filled by appointment.

On the other hand, the US Constitution originally required the US Senators representing a state to be chosen by the Legislature of that state. The Seventeenth Amendment to the US Constitution, which was adopted in 1913, ended that practice and required members of the US Senate to be directly elected by the people. The Seventeenth Amendment requires the Governor of a state to call an election to fill a vacancy in the US Senate, but it also permits state Legislatures to empower the Governor of their state to make temporary appointments until an election is held to fill the vacancy as the Legislature directs.

- 4) **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 five 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 his or her 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.)

In the case of one of the five vacancies in California’s representation in the US Senate that was filled by appointment, the 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. 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 *U.S. Senate Vacancies: Contemporary Developments and Perspectives*, a report prepared by the Congressional Research Service in January 2018, 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. According to the report, of the 118 Senators appointed prior to 2017 who subsequently sought election, 52.5% who pursued election were successful, while 47.5% were defeated, often in the primary election.

- 5) **Statewide Special Election Costs and Logistical Issues:** Under existing law, when there is a vacancy in California’s representation in the US Senate, the Governor has the *option* of calling a statewide special election to elect the person who will serve out the remainder of the unexpired term. Such a situation, however, has never occurred. Instead, in every instance where an election was held to choose a person to serve out the remainder of an unexpired US Senate term, that election was conducted at the same time as and was held in coordination with the next occurring statewide general election.

Under this bill, any vacancy that occurred in the US Senate almost certainly would require at

least one standalone statewide special election to be held, and in many circumstances, two separate standalone statewide special elections would need to be held. Even if a special primary or special runoff election could be consolidated with a regularly occurring statewide election, the timelines in this bill would not allow both the primary and the runoff election to be consolidated with regularly occurring statewide elections.

Although the exact cost of conducting a standalone, statewide special election is unknown, based on the costs of California's standalone presidential primary election in February 2008 and of the statewide special election held in May 2009, the costs of a single statewide special election likely would be at least \$70 million, and could be closer to \$100 million. If the state were required to hold two separate standalone statewide special elections (a special primary and a special runoff election), the costs would increase accordingly.

Furthermore, requiring the state and county elections officials to conduct two statewide special elections in a nine to ten week period (as would be required if a US Senate vacancy election went to a runoff election) could create significant logistical challenges, and could increase the risk of significant election process failures and of voter confusion. The Elections Code gives elections officials 30 days to complete post-election canvass activities that are required by state law for most elections. While elections officials sometimes are able to complete those activities more quickly following special vacancy elections, many counties typically require the full amount of time provided to complete post-election canvass activities after a statewide election. Furthermore, elections officials begin preparations for statewide elections months in advance, including beginning the mailing of ballots to military and overseas voters 60 days before an election (under federal law, ballots are *required* to be sent to military and overseas voters no later than 45 days before a federal election for those voters who have requested a mailed ballot as of that date). At least some of these timelines may need to be adjusted to make it logistically possible to conduct a statewide special primary election and a statewide runoff election in a nine to ten week period.

- 6) **Extended Vacancies and California Representation in the United States Senate:** Under the existing procedure for calling special elections to fill vacancies in the State Legislature and in the US House of Representatives—which would apply to US Senate vacancies under this bill—the soonest that a special primary election can be held to fill a vacancy is 56 days after the occurrence of the vacancy, and a special primary election may occur as long as 131 days after the vacancy occurs. A special runoff election—which is required if no candidate receives greater than 50% of the votes in the special primary election—is held between 126 and 194 days after the occurrence of the vacancy. Factoring in the time necessary for elections officials to process ballots and finalize election results, and depending on whether the US Senate is willing to seat a Senator-elect before elections officials finalized their required post-election tasks, it could be several days to several weeks after a special election was held until the Senator-elect was able to be sworn in to the US Senate.

Because each state, regardless of population, is entitled to two seats in the US Senate, states with larger populations have less representation in the Senate relative to their populations than states with smaller populations. As the most-populous state in the nation, California has the lowest level of per-capita representation in the US Senate of any state in the nation.

If this bill were to become law, and any vacancy in the state's representation in the US Senate could be filled only by an election, any such vacancy would result in California being

without representation in that seat for at least two months, and potentially for as long as seven months. During that time, California's already low level of representation in the US Senate relative to its population would be even lower.

- 7) **Other States:** According to information from *U.S. Senate Vacancies: Contemporary Developments and Perspectives*, a report prepared by the Congressional Research Service in January 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.

- 8) **Arguments in Support:** In support of this bill, California Common Cause writes:

United States Senator is one of the most important elected offices in the country; voters should not have to wait up to two years to weigh in on who should be their statewide representative on the national stage....

A special election is more democratic than an appointment. Appointments are effectively elections with an electorate of one, and there is no check or safeguard in the current process against the governor appointing a senator whose views and not representative of the state electorate. The appointed senator would also receive a major but unearned incumbency advantage in retaining their seat by having up to a two year head start in building up name recognition, soliciting campaign contributions from a position of power, and garnering endorsements.

- 9) **Previous Legislation:** This bill is substantially similar to AB 2512 (Kiley) of 2018, which failed passage in this committee on April 11, 2018, by a vote of 2-5.

REGISTERED SUPPORT / OPPOSITION:

Support

California Common Cause
Election Integrity Project California, Inc.

Opposition

None on file.

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