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House of Representatives Vacancies: How Are They Filled?

Vacancies in the office of U.S. Representative occur when an incumbent Member dies, resigns, or leaves office for any reason before the end of their term. Multiple special elections to fill vacancies in the House of Representatives typically take place in each Congress. The same procedures apply if a Representative-elect dies between the election and the day on which the new Congress to which they were elected convenes.

Constitutional Provisions

The Constitution provides for vacancies in the House of Representatives in Article I, Section 2, clause 4:

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

The Constitution thus requires that all House vacancies must be filled by special election. State governors—"the Executive Authority"—are authorized to issue the orders for special elections. In contrast with the Senate, there is no constitutional provision for the appointment of interim Representatives.

Scheduling Special Elections

The U.S. Code (2 U.S.C. §8a) authorizes state legislatures to provide for scheduling of special elections to fill House vacancies:

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

Responsibility for ordering a special election is thus vested in the governors of the states, while scheduling is prescribed in state law. Once a vacancy has occurred, most state laws set a window of time, or prescribe an exact number of days after the vacancy occurs, in which nomination procedures begin and the special election must be held.

Scheduling for elections for House vacancies that occur during the first and second sessions of a Congress present different issues to state authorities.

Scheduling for First Session Vacancies

State election authorities generally, though not always, seek to schedule special elections for House vacancies to coincide with some regularly scheduled election date in the affected district. For vacancies occurring during the first session of a Congress, this typically means coordinating

special House elections to coincide, if possible, with local elections, including those for municipal and county governments, or special purpose other district-wide regional elected bodies that are generally held in odd-numbered years, during the first session of a Congress. By holding a special election on the same date as other elections in the district, state and local governments can avoid the cost and logistical effort as associated with conducting an election, for example, establishing polling places, mobilizing election workers, etc., on a one-time basis. They can also arguably expect greater voter turnout than for a free-standing election.

Scheduling for Second Session Vacancies

Procedures governing vacancies occurring during the second session of a Congress differ from state to state, and are largely dependent on the amount of time intervening between the vacancy and the next general election. For instance, if a House seat becomes vacant within six months of the end of the Congress, some states provide that the seat shall remain vacant for the balance of the term. Others may schedule special primaries to be held the same day as the regular primary and special general elections to be held the same day as the regular general election, when the seat is filled for the next Congress. In these cases, the winner of the special general election is sworn in for the remainder of the term, unless Congress has adjourned *sine die* before election day. If the same nominee wins both the simultaneous special and regular general election, they will also be a Representative-elect, sworn in when the new Congress convenes.

Winners of House special elections held, as noted above, concurrently with those for the next Congress may not be sworn in as Representatives in the expiring Congress if that Congress has adjourned *sine die* before election day. They are, however, accorded the status of incumbent Representatives for the purposes of seniority, office selection, and staffing.

Scheduling Special Elections in Extraordinary Circumstances

Following the terrorist attacks of September 11, 2001, Congress enacted provisions in the U.S. Code (2 U.S.C. §8(b)) for special elections to fill House vacancies in extraordinary circumstances. These are defined as occurring any time the Speaker of the House of Representatives announces that vacancies in House membership exceed 100. Under these circumstances, the Code mandates that special elections to fill House vacancies shall take place not later than 49 days after the Speaker's announcement, unless the regular general election for the House, or another special election for the office involved, is scheduled to be held within 75 days of the vacancy announcement.

Nominations

Nomination procedures for House of Representatives special elections to fill vacancies vary widely among the states. Some states require a special primary election to determine the major party nominees, while minor party and independent candidates generally qualify by filing petitions, the required number of which is set by state law, to gain placement on the general election ballot. A plurality of votes is sufficient to win the nomination in most states, but some require a majority—50% or more of the votes cast—to win nomination in the primary. They include Alabama, Arkansas, Georgia, Mississippi, Oklahoma, South Carolina, and South Dakota. In these states, if no candidate attains a majority, then a runoff, or second, primary is held at a later date, in which the two candidates winning the most primary votes compete for the nomination. North Carolina provides for a runoff (termed a second primary in that state) if no candidate receives more than 30% of the vote, and if one of the candidates requests the second primary. Another variation, the “top-two” primary, is used by California and Washington: all candidates are listed on the same primary ballot. The two candidates winning the most votes, regardless of their partisan affiliations, advance to the general election.

Louisiana provides a system that combines, in some instances, the primary and general election. In Louisiana, all candidates who qualify for ballot access compete in the primary election, in which a majority of votes is necessary to elect. A candidate receiving 50% of the vote is declared elected, and no general election is held. If no candidate receives a majority, the two candidates receiving the most votes, regardless of party affiliation, compete in a second election, termed a general election. Louisiana mandates the all-parties primary for regular as well as special elections. Texas provides for an all-parties special primary election, but only to fill House vacancies. All candidates qualifying for placement on the ballot participate in the election, in which a majority is necessary to elect. A candidate receiving 50% of the vote is declared elected. If no candidate receives a majority, the two candidates receiving the most votes, regardless of party affiliation, compete in a second election, termed a runoff in Texas.

Other states provide for nomination by party-established procedures, such as party congressional district caucuses and conventions, or meetings of party committees or interested party members in jurisdictions comprising the affected congressional district.

General Elections

In nearly all states a plurality is sufficient to elect in general elections to fill House vacancies. Georgia, as noted above, requires a majority to elect in all congressional and statewide special elections. Louisiana requires a majority to elect within the context of its all-parties primary system, as also noted above.

Staff Disposition

House Rule II, cl. 2(i)(1) provides that “[t]he Clerk shall supervise the staff and manage the office of a Member, Delegate, or Resident Commissioner who has died, resigned, or been expelled until a successor is elected.” The U.S. Code further provides that staff of a deceased or resigned Representative are compensated until a successor is elected to fill the vacancy, performing duties under the direction of the Clerk of the House, or until the term expires (2 U.S.C § 5324).

House Vacancies in the 117th Congress

A President elected to an initial term may in some cases nominate a number of incumbent Representatives to executive branch positions, leading to eventual resignation of the nominees and their replacement by successors in special elections. For instance, in 1993, incoming President Bill Clinton nominated Representatives Les Aspin of Wisconsin as Secretary of Defense, Mike Espy of Mississippi as Secretary of Agriculture, and Leon Panetta of California as Director of the Office of Management and Budget. Upon Senate confirmation, they resigned from the House, and the vacancies created by their resignations were filled by special elections held on May 4, April 13, and June 8, 1993, respectively.

At the time of this writing (January 8, 2021), President-elect Joe Biden has indicated his intent to nominate the following incumbent House Members to executive positions in his Administration: Representatives Marcia Fudge of Ohio as Secretary of Housing and Urban Development and Deb Haaland of New Mexico as Secretary of the Interior. Their positions will require Senate confirmation. Assuming confirmation, they would resign their House seats prior to taking executive branch office. Representative Cedric Richmond of Louisiana is to be appointed Senior Advisor to the President and Director of the Office of Public Engagement, a position that does not require Senate confirmation. At some appropriate time, he would also resign his House seat. Following their anticipated resignations, the seats of all three in the House would be filled by special elections, according to their respective states’ procedures.

In addition, the House of Representatives in the 117th Congress convened on January 3, 2021, with one vacancy—Representative-elect Luke Letlow of Louisiana died December 29, 2020. The vacancy in the seat to which he was elected will be filled according to Louisiana’s special election procedures.

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