

# LEGAL QUANDARIES IN THE ALABAMA SENATE ELECTION OF 2017

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## INTRODUCTION

President Donald Trump's decision to nominate Alabama Senator Jeff Sessions as his Attorney General resulted in a vacancy in the Senate and triggered a special election. The special election, however, revealed the many complexities of the Seventeenth Amendment, special elections generally, and Alabama state law specifically. These complexities came into focus particularly in the context of a hotly contentious election in which Republican nominee Roy Moore would ultimately be charged with multiple allegations of sexual misconduct involving minors from decades past.<sup>1</sup>

This Article traces a series of legal quandaries that arose from the special election, some of which remain open questions for future Alabama elections, and for United States Senate elections more generally.<sup>2</sup> Part I examines the scope of the Alabama governor's power to call for a special election under the Seventeenth Amendment and state law. Part II scrutinizes the complications for replacing a late-withdrawing candidate and for counting votes cast for a candidate who resigns. Part III identifies proposed gambits, from postponing the election to write-in campaigns, which never came to fruition. Part IV examines the timing surrounding certification of election results in Alabama. Part V looks at gaps in Alabama's recount and election contest procedures. Finally, Part VI identifies the most significant opportunities to clarify Alabama law to avoid uncertainty in future elections.

## I. SCHEDULING A SPECIAL ELECTION

Alabama Governor Robert Bentley appointed the state's attorney general, Luther Strange, to fill the vacancy until the state could hold a special election.<sup>3</sup> Mr. Bentley then scheduled the special election to

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1. See, e.g., Stephanie McCrummen, Beth Reinhard & Alice Crites, *Woman Says Roy Moore Initiated Sexual Encounter when She Was 14, He Was 32*, WASH. POST (Nov. 9, 2017), [https://www.washingtonpost.com/investigations/woman-says-roy-moore-initiated-sexual-encounter-when-she-was-14-he-was-32/2017/11/09/1f495878-c293-11e7-afe9-4f60b5a6c4a0\\_story.html](https://www.washingtonpost.com/investigations/woman-says-roy-moore-initiated-sexual-encounter-when-she-was-14-he-was-32/2017/11/09/1f495878-c293-11e7-afe9-4f60b5a6c4a0_story.html).

2. Some early ideas for this Essay were first developed at my blog. See, e.g., Derek T. Muller, *Sorting Out the Alabama Senate Election Possibilities in Light of Roy Moore*, EXCESS OF DEMOCRACY (Nov. 9, 2017), <http://excessofdemocracy.com/blog/2017/11/sorting-out-the-alabama-senate-election-possibilities-what-happens-to-the-votes-of-a-withdrawn-candidate>.

3. See U.S. CONST. amend. XVII (“[T]he 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.”); ALA. CODE § 36-9-7 (2013) (“The Governor may make temporary appointment of a senator in the Senate of the Congress of the United States from Alabama whenever a vacancy exists in that office, the appointee to hold office until his successor is elected and qualified.”).

coincide with the 2018 regularly-scheduled primary and general elections.<sup>4</sup> Mr. Strange took office in February 2017, and an election to fill his seat wouldn't take place until November 2018.<sup>5</sup> This isn't an unusual practice; most states schedule the special election to take place when the next general election occurs.<sup>6</sup>

But Alabama law requires something else:

Whenever a vacancy occurs in the office of senator of and from the State of Alabama in the Senate of the United States more than four months before a general election, the Governor of Alabama shall forthwith order an election to be held by the qualified electors of the state to elect a senator of and from the State of Alabama to the United States Senate for the unexpired term. If the vacancy occurs within four months of but more than 60 days before a general election, the vacancy shall be filled at that election. If the vacancy occurs within 60 days before a general election, the Governor shall order a special election to be held on the first Tuesday after the lapse of 60 days from and after the day on which the vacancy is known to the Governor, and the senator elected at such special election shall hold office for the unexpired term.<sup>7</sup>

Mr. Bentley believed that “forthwith” permitted him to hold the election nearly two years after the vacancy. He didn't do so arbitrarily. On May 23, 2013, Representative Jo Bonner announced his retirement from Congress, and a special election was scheduled for later that year.<sup>8</sup> Independent candidates tried to secure ballot access, which required them to obtain signatures from 3% of the voters who cast ballots for the office of governor in the last election in the jurisdiction where they seek office.<sup>9</sup> They sued and argued that they had difficulty securing sufficient signatures in the few months leading up to the special election. They specifically contrasted the special election deadline with the general election, which

4. Alex Aubchon, *Bentley Announces Senate Special Election Dates*, ALA. PUBLIC RADIO (Feb. 15, 2017), <http://apr.org/post/bentley-announces-senate-special-election-dates#stream/0>.

5. Bernie Woodall, *Alabama's New Governor Orders Speedier Election to Fill Senate Seat*, REUTERS (Apr. 18, 2017, 1:49 PM), <https://www.reuters.com/article/us-alabama-politics/alabamas-new-governor-orders-speedier-election-to-fill-senate-seat-idUSKBN17K2A7>.

6. See *Filling Vacancies in the Office of United States Senator*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/elections-and-campaigns/vacancies-in-the-united-states-senate.aspx> (last updated Dec. 2017).

7. ALA. CODE § 36-9-8 (2013).

8. See Ken Roberts, *Jo Bonner Resigns to Accept UA Job*, TUSCALOOSA NEWS (May 24, 2013, 12:01 AM), <http://www.tuscaloosaneews.com/article/DA/20130524/News/605151884/TL/>; Abby Livingston, *Alabama Special Election Scheduled*, ROLL CALL (July 26, 2013, 8:20 PM), <http://www.rollcall.com/news/politics/alabama-governor-sets-special-election-dates-to-replace-bonner>.

9. ALA. CODE § 17-9-3(a)(3) (2006).

includes no such truncated timeframe to collect signatures.<sup>10</sup> In September 2016, a federal district court agreed that the law severely burdened independent candidates.<sup>11</sup> (The decision was rendered well after the special election, and on appeal the state argues that the case should have been dismissed as moot.<sup>12</sup>) Mr. Bentley's decision to hold the election concurrent with the general election would alleviate the burden on independent candidates seeking ballot access.

But Mr. Bentley immediately faced a legal challenge to his scheduling of the special election. Plaintiffs argued that Mr. Bentley must "forthwith order an election" if the vacancy arose "more than four months before a general election," and that only in instances where the vacancy occurred between four months and sixty days of the next scheduled general election could the governor hold the special election concurrent with the general election.<sup>13</sup> These plaintiffs were hardly alone. A memorandum from the state's Legislative Reference Service agreed that the special election could not be scheduled for the next general election.<sup>14</sup>

Before this dispute could be resolved, however, Mr. Bentley resigned from office on April 10, 2017.<sup>15</sup> His replacement, Kay Ivey, subsequently scheduled a special election for December 12, 2017.<sup>16</sup> So, did Ms. Ivey schedule the special election, or *reschedule* it? (The distinction might matter later in the event Ms. Ivey were to be called upon to postpone the special election due to controversies arising surrounding a candidate.)<sup>17</sup> There is a good reason to think Ms. Ivey simply *scheduled* the special election because Mr. Bentley lacked the power under state law to schedule it when he did. (Unless, of course, he was required to hold the election at least somewhat later to permit access for independent candidates.) There was no rescheduling; there was, simply, for the first time under Alabama law, a scheduled special election ordered "forthwith" under state law.

Indeed, the notion that the governor has the power to unilaterally alter an election date once scheduled does not appear to fit within the structure of Alabama's statutes more generally. Consider state law to that effect:

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10. See *Independent Candidate Sues Ala. Over Ballot Access*, ALA. PUBLIC RADIO (Sept. 16, 2013), <http://apr.org/post/independent-candidate-sues-ala-over-ballot-access#stream/0>.

11. *Hall v. Merrill*, 212 F. Supp. 3d 1148, 1168 (M.D. Ala. 2016), *argued*, No. 16-16766 (11th Cir. Dec. 13, 2017).

12. Brief for Appellant at 20, *Hall v. Merrill*, No. 16-16766 (11th Cir. Jan. 26, 2017).

13. ALA. CODE § 36-9-8 (2013); see Complaint at 2–3, *Zeigler v. Bentley*, No. 900338 (Ala. Cir. Ct. 2017).

14. Memorandum from the Ala. Legislative Reference Serv. on the Election to Fill the Vacancy of Sen. Jeff Sessions (Feb. 13, 2017) (on file with the author).

15. Alan Blinder, *Robert Bentley, Alabama Governor, Resigns Amid Scandal*, N.Y. TIMES (Apr. 10, 2017), <https://www.nytimes.com/2017/04/10/us/robert-bentley-alabama-governor.html>.

16. Mike Cason, *Could Alabama GOP Withdraw Roy Moore as Senate Candidate?*, AL.COM (Nov. 10, 2017), [http://www.al.com/news/index.ssf/2017/11/could\\_alabama\\_gop\\_withdraw\\_roy.html](http://www.al.com/news/index.ssf/2017/11/could_alabama_gop_withdraw_roy.html)

17. See *infra* Part III.A.

“The Governor . . . must give notice of a special election to elect a senator for an unexpired term in the same manner and for the same time as is prescribed for special elections to fill a vacancy in the office of members of the House of Representatives in Congress.”<sup>18</sup> The “same manner,” in term, refers back to another provision of Alabama law dictating the times and places of holding the elections.<sup>19</sup> And special elections “are to be held and conducted . . . and, unless otherwise expressly provided, regulated in all respects by the provisions in relation to general elections.”<sup>20</sup>

These provisions, taken together, make it difficult to believe that the Alabama legislature empowered the governor to schedule and reschedule, unilaterally, without constraint, special elections.<sup>21</sup> The constraints on timing and tying the special election to the requirements for general elections suggest that once the special election is scheduled, the governor’s involvement ceases.<sup>22</sup>

## II. LATE DROPOUTS AND REPLACEMENTS

Mr. Strange and Mr. Moore received the two highest vote totals in the Republican primary, and Mr. Moore won the runoff on September 26, 2017.<sup>23</sup> He would face Doug Jones, a Democrat, in the December 12 election.<sup>24</sup>

When allegations against Mr. Moore concerning sexual misconduct involving a minor arose on November 9, legal options were limited just thirty-three days before Election Day. In 2014, Alabama amended its laws to require that a withdrawal must occur at least seventy-six days before Election Day in order for a replacement to be eligible to take that

18. ALA. CODE § 36-9-9 (2013).

19. See ALA. CODE §§ 17-15-3 to -4 (2006).

20. ALA. CODE § 17-15-7 (2006).

21. *Accord* Judge v Quinn, 612 F.3d 537, 552 (7th Cir. 2010) (“[I]t was settled that the state executive’s power to issue a writ of election carried with it the power to establish the time for holding an election, but only if the time had not already been fixed by law.”); Zachary D. Clopton & Steven E. Art, *The Meaning of the Seventeenth Amendment and a Century of State Defiance*, 107 NW. U. L. REV. 1181, 1203 (2013).

22. Professor Rick Hasen suggested that there would be possible Due Process and Equal Protection concerns with postponing the election date. See Rick Hasen, *No, the Alabama Legislature Should Not Be Able to Constitutionally Cancel the Special Senate Election to Avoid a Democratic Win*, ELECTION L. BLOG (Nov. 11, 2017, 12:12 PM), <http://electionlawblog.org/?p=95953>. He rightly raises serious concerns. But even if some early voters had already cast ballots in the election, one wonders whether a constitutional challenge would succeed. Early-cast votes wouldn’t be counted in a canceled election, and those voters would have the full opportunity to participate in the next rescheduled election. Regardless, the legal uncertainty and mere threat of litigation may have been sufficient to thwart such last-minute changes, even if otherwise permitted by state law.

23. Alexander Burns et al., *Alabama Election Results: Roy Moore Advances in Race for U.S. Senate Seat*, N.Y. TIMES (Sep. 27, 2017, 4:27 PM), <https://www.nytimes.com/elections/results/senate-special-election-primary-runoff-alabama>.

24. *Id.*

candidate's place on the ballot.<sup>25</sup> Parties seeking to replace their nominees have the same seventy-six-day deadline.<sup>26</sup>

Until 2014, the deadline was forty-five days<sup>27</sup> (even then, it would have been too late to replace Mr. Moore). The Alabama legislature in 2014 unanimously enacted HB 62, codified as Act 2014-6.<sup>28</sup> The law provided a number of changes to the Alabama election code, but chief among them was the decision to push back this withdrawal deadline from forty-five days to seventy-six days. There had been ongoing litigation involving the United States Department of Justice concerning the existing deadline, which the United States argued ran afoul of the Uniformed and Overseas Citizens Absentee Voting Act.<sup>29</sup> Pushing back the withdrawal deadline would permit ballots to be printed and circulated to overseas voters earlier.

Act 2014-6 also included opportunities for parties themselves to replace candidates. The state executive committee of a political party may fill a vacancy that occurs “by death, resignation, revocation, or otherwise.”<sup>30</sup> And under the revisions of Act 2014-6, candidates disqualified by a political party may be replaced up until seventy-six days before the election.<sup>31</sup> The Alabama Republican Party did not revoke Mr. Moore's nomination—although surely a different kind of chaos would ensue if the party attempted to do so.

But these are provisions concerning *replacements*. Candidates might still drop out prior to Election Day. Act 2014-6 extended new rules for candidates who chose to withdraw from the race too late to be replaced. In the event that a candidate withdrew within the seventy-six-day window, “the name of the candidate shall remain on the ballot and the appropriate canvassing board may not certify any votes for the candidate.”<sup>32</sup> A similar provision extended if the party withdrew the nomination from a candidate.<sup>33</sup>

Alabama's Secretary of State, John Merrill, repeatedly assured voters that if a candidate withdrew his name before the election, and that candidate won the election, the results of the election would be “null and

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25. ALA. CODE § 17-6-21(c) (2006 & Supp. 2017).

26. ALA. CODE §§ 17-13-23, 17-6-21(b) (2006).

27. Act of Apr. 25, 2006, No. 2006-570, 2006 Ala. Laws 570, 570.

28. Act of Feb. 10, 2014, No. 2014-6, §1, 2014 Ala. Laws 6, 6.

29. *See, e.g.*, United States v. Alabama, 998 F. Supp. 2d 1283 (M.D. Ala. 2014).

30. ALA. CODE § 17-13-23.

31. ALA. CODE § 17-6-21(b).

32. ALA. CODE § 17-6-21(c) (2006 & Supp. 2017).

33. ALA. CODE § 17-6-21(b) (“The name of a candidate who is the subject of the amendment and who is disqualified by a political party . . . shall remain on the ballot, not be replaced by the name of another candidate, and the appropriate canvassing board shall not certify any votes for the candidate.”).

void.”<sup>34</sup> That’s a view long consistent with the “American rule”<sup>35</sup> in elections, and in the state of Alabama. That rule provides that a jurisdiction counts votes for a deceased, ineligible, or otherwise withdrawn candidate as they would ordinarily be counted.<sup>36</sup> In the event that candidate wins the election, the election is declared null and void, the office is declared vacant, and a new election is held.<sup>37</sup> A 2001 interpretation from then-Attorney General Bill Pryor agreed.<sup>38</sup>

There are good reasons for the American rule. As the Alabama Supreme Court explained in a 1955 case, it would be unusual for the second place vote-getter, who in that case received just 49 votes, to take the office, when the deceased and winning candidate had received 1,590 votes.<sup>39</sup> A preference for plurality, if not majority, winners remains strong in our election system.

A notable application of the American rule occurred in 2000 in Missouri, when Senator Mel Carnahan died the week before the election but received the most votes. The office was declared vacant, the governor appointed a senator, and a special election was held later.<sup>40</sup>

But Act 2014-6 appears to have changed that. It added the provision that the “canvassing board *may not certify any votes for the candidate.*”<sup>41</sup> The decision not to certify any votes for the candidate suggests that they are simply not counted at all, as if they were blank ballots.<sup>42</sup> The highest vote-getter after that would actually be the winner. This appears to embrace the alternative to the American rule, or the “English rule.”<sup>43</sup> And the additions in Act 2014-6 only appear to anticipate changing this rule for

34. See, e.g., Cason, *supra* note 16; Louis Jacobson, *Given Roy Moore’s troubles, could Luther Strange run as a write-in candidate in Alabama?*, POLITIFACT (Nov. 14, 2017, 6:06 PM), <http://www.politifact.com/punditfact/statements/2017/nov/14/amanda-carpenter/given-roy-moores-troubles-could-luther-strange-run/>.

35. See 26 AM. JUR. 2D ELECTIONS § 361 (2014) (“According to the American rule, votes cast for a deceased or disqualified person are not to be treated as void or thrown away, but are to be counted, although the voters knew of the death or disqualification. However, under the English rule, the voter’s knowledge is material, and votes cast for a person known to be deceased or disqualified are to be treated as void and thrown away, and are not to be counted in determining the result of the election as regards the other candidates . . .”).

36. *Id.*

37. See, e.g., *Banks v. Zippert*, 470 So. 2d 1147 (Ala. 1985); *Alabama ex rel. Cleveland v. Stacy*, 82 So. 2d 264 (Ala. 1955).

38. Ala. Att’y Gen., Opinion No. 2001-041 (Nov. 30, 2000).

39. *Stacy*, 82 So. 2d at 265–66.

40. See Phillip Bump, *Five People Have Won Election to Congress, Despite Being Dead*, WASH. POST (Oct. 1, 2014), [https://www.washingtonpost.com/news/the-fix/wp/2014/10/01/five-people-have-won-election-to-congress-despite-being-dead/?utm\\_term=.5968c72e119b](https://www.washingtonpost.com/news/the-fix/wp/2014/10/01/five-people-have-won-election-to-congress-despite-being-dead/?utm_term=.5968c72e119b).

41. ALA. CODE § 17-6-21(c) (2006 & Supp. 2017) (emphasis added); see also ALA. CODE § 17-6-21(b) (2006).

42. Cf. *Jacobs v. Yates*, 27 S.W.3d 734, 737 (Ark. 2000) (election challenger petitioned that commission “should not certify any votes” cast for opponent in election).

43. See *supra* note 35 and accompanying text.

late-withdrawing candidates. It does not amend the rules for, say, deceased candidates, in which case the American rule and the traditional Alabama rule would control the result.

Mr. Merrill's spokesman conceded that an alternative interpretation of the statute may exist.<sup>44</sup> And the Alabama attorney general had never weighed in on Act 2014-6's changes to the law. But in the event that Mr. Moore withdrew, whether the American rule or the English rule controlled would dictate different strategies for opponents of Mr. Moore who did not want to support Mr. Jones. If the American rule applied, the best strategy would be to cast votes for Mr. Moore, which would lead to a new election. If the English rule applied, then voters would need to get behind a single write-in candidate whom they believed could defeat Mr. Jones.

Finally, the possibility remained of pulling a "Torricelli." In 2002, Senator Robert Torricelli of New Jersey resigned under some controversy thirty-five days before the general election.<sup>45</sup> Democrats sought to replace him with Frank Lautenberg on the ballot, despite a deadline requiring such substitutions occur at least fifty-one days before the election.<sup>46</sup> The New Jersey Supreme Court concluded that the state legislature could not have intended to limit the opportunity to replace a candidate where there was adequate time to do so.<sup>47</sup> The decision to ignore the plain text of the state statute was not without criticism.<sup>48</sup> It is unclear whether Alabama's courts would have adopted a similar gambit as New Jersey's, or whether the difficulty of replacing overseas or other early-vote ballots would render this case factually distinguishable even if state law might bend like New Jersey's.

Regardless, Mr. Moore never withdrew, the Alabama Republican Party never revoked his nomination, and these contingencies never came to pass. No other explanation or interpretation has been offered for the amendments in Act 2014-6. And it may remain a point of contention in future elections absent further clarification.

### III. ELECTION GAMBITS

A defiant Mr. Moore refused to withdraw from the race. What choices did the party and voters have? They could, of course, vote for Mr. Moore,

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44. See *supra* note 34 and accompanying text.

45. Jessica Reaves, *Person of the Week: Robert Torricelli*, TIME (Oct. 3, 2002), <http://content.time.com/time/nation/article/0,8599,357879,00.html>.

46. *Id.*

47. N.J. Democratic Party, Inc. v. Samson, 814 A.2d 1028, 1039 (N.J. 2002).

48. See, e.g., Robert A. Levy, *Toricelli-to-Lautenberg: Perverting the Rule of Law*, CATO COMMENT. (Oct. 7, 2002), <https://www.cato.org/publications/commentary/toricellilautenberg-perverting-rule-law>.

or his Democratic opponent. But, what other alternatives? Proposed gambits arose.

#### A. Seventeenth Amendment

First, some wondered about postponing the election. As explained earlier, there are reasons to suggest that this would not be permitted under state law.<sup>49</sup> But another proposal arose, a part of a memorandum circulated in Washington, D.C.<sup>50</sup> Suppose Mr. Strange resigned his seat. That, some posited, would create a new “vacancy,” which would then trigger the opportunity for the governor to schedule a new special election to fill the new vacancy.

The Seventeenth Amendment is best read as providing otherwise.<sup>51</sup> Its text 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.<sup>52</sup>

“When vacancies happen,” the governor “shall issue writs of election to fill such vacancies.”<sup>53</sup> But, the state legislature may permit the governor “to make temporary appointments until the people fill the vacancies by election as the legislature may direct.”<sup>54</sup> As explained earlier, pursuant to the final clause, the Alabama legislature directed that special elections occur pursuant to a series of rules that are triggered once the call for a special election is issued, regardless of any subsequent vacancy of the temporary appointment.<sup>55</sup>

49. See *supra* notes 7–22 and accompanying text.

50. Jonathan Martin, Maggie Haberman, & Alexander Burns, *Why Trump Stands by Roy Moore, Even as It Fractures His Party*, N.Y. TIMES (Nov. 25, 2017), <https://www.nytimes.com/2017/11/25/us/politics/trump-roy-moore-mcconnell-alabama-senate.html>.

51. See, e.g., Rick Hasen, *The Latest Ploy GOP Considers to Avoid a Roy Moore Senate Problem Likely Violates the 17th Amendment*, ELECTION L. BLOG (Nov. 15, 2017, 7:15 PM), <http://electionlawblog.org/?p=96022>.

52. U.S. CONST. amend. XVII.

53. *Id.*

54. *Id.*

55. Cf. Clopton & Art, *supra* note 21, at 1187 (“Among other things, the Seventeenth Amendment requires states to hold elections each time a seat becomes vacant. State legislatures may give governors permission to fill vacancies temporarily, but the people ultimately must elect a new senator.”); see also *Judge v. Quinn*, 612 F.3d 537, 547 (7th Cir. 2010) (“[I]t tells the executive what to do—that is, to issue a writ of election and thereby assure that the replacement senator will, like the original one, be popularly elected.”); *id.* at 551 (“The proviso qualifies this chain of events by

Setting that aside, what if the legislature did empower the governor to reschedule the election in the event a temporary appointment stepped down? The “vacancies” in the Seventeenth Amendment are best understood as vacancies in the office of elected senators, and the writs of election relate to those vacancies. In contrast, the “temporary appointments” are a separate executive act, one independent of (but complementary to) the power to issue writs of election. The temporary appointments, even if they vacate the office, do not create a “vacancy” for purposes of the Seventeenth Amendment. That’s because the “people fill the vacancies by election.”<sup>56</sup> A temporary appointment stepping down creates no such vacancy for the people to fill, because the vacancy has been in existence since it first “happen[ed].”<sup>57</sup>

It is admittedly confusing. A temporary appointment stepping down creates, in lay terms, a “vacancy” such that the governor might be empowered to refill with another temporary appointment. But in context, the “vacancies” are best understood as vacancies in the elected candidate. The vacancies are filled after issuing “writs of election,” and temporary appointments serve “until the people fill the vacancies by election.”<sup>58</sup> “Vacancies” arise because of a loss of the people’s elected candidate, and the “vacancies” may only be filled by an election. A contrary view would lead to a potential absurdity. A temporary appointment could simply resign and permit the governor to issue a new writ of election, then continue indefinitely, thwarting the ability of the people to elect a candidate to fill the vacancy until the next general election.

Regardless, this analysis proved unnecessary. The governor had no inclination to postpone the election, and the state legislature had no appetite to attempt to empower her to do so. And this cursory analysis of the text of the Seventeenth Amendment is hardly the final word on the subject. But the uncertainty remains a ripe subject for future, and much deeper, academic exploration of the Seventeenth Amendment.

### *B. Write-Ins*

Because the ballot access and replacement deadlines had long passed, write-in candidacies were floated. Write-in candidates rarely win elections—but there are also few serious write-in candidacies. Senator Lisa

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permitting an appointee to intercede temporarily between the start of the vacancy and the election that permanently fills that vacancy.”).

56. U.S. CONST. amend. XVII.

57. *Id.*

58. *Id.*

Murkowski won a write-in election in Alaska in 2010,<sup>59</sup> and before that Strom Thurmond in 1954.<sup>60</sup>

Some wondered whether Mr. Strange could run as a write-in. Alabama has a “sore loser” law, which prohibits candidates who lost a primary election from appearing on the ballot in the general election.<sup>61</sup> That provision, however, only extends to ballot access rules, or the rules regarding the printing of the name on the ballot. It does not extend to write-in candidacies.<sup>62</sup> The Alabama Secretary of State assured as much.<sup>63</sup> This path might have followed Ms. Murkowski’s (and Mr. Strange had an easier last name to spell), as she also lost her primary before winning a write-in general election.<sup>64</sup>

Another name floated was Richard Shelby, Alabama’s other senator. Nothing would preclude him from running for another office while sitting as senator. In the event he won, he could have resigned his current Senate office, creating a new vacancy in the other position. Or another was Jeff Sessions, in the event he chose to step down from his position as Attorney General. The Hatch Act<sup>65</sup> would prevent a federal employee from running for a partisan office, even as a write-in,<sup>66</sup> but other Attorneys General, including Dick Thornburgh and Robert F. Kennedy, were able to lay the groundwork for a run before resigning from office.<sup>67</sup>

Ultimately, none of these men ended up behind a write-in campaign, and the election proceeded largely without ballot-related disruption.

#### IV. CERTIFICATION OF RESULTS

Mr. Jones won the election, and media outlets declared him the winner within hours of the polls closing on December 12, 2017.<sup>68</sup> There were

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59. Chad Flanders, *How Do You Spell M-U-R-K-O-W-S-K-I? Part I: The Question of Assistance to the Voter*, 28 ALASKA L. REV. 1, 2 (2011).

60. Andrew Glass, *Thurmond Wins Senate Race as Write-in Candidate: Nov. 2, 1954*, POLITICO (Nov. 2, 2016), <https://www.politico.com/story/2016/11/this-day-in-politics-nov-2-1954-230559>.

61. ALA. CODE § 17-9-3(b) (2006 & Supp. 2017); *see also* Ala. Att’y Gen., Opinion No. 2014-061 (May 28, 2014).

62. ALA. CODE § 17-6-28 (2006).

63. *See* Press Release, Ala. Sec’y of State, Casting a “Write-In” Vote, (Oct. 28, 2016), <http://sos.alabama.gov/newsroom/casting-write-vote-press-release>.

64. Flanders, *supra* note 59, at 2.

65. 5 U.S.C. §§ 7321–26 (2012).

66. *See* U.S. Office of Special Counsel, Opinion Letter on the Hatch Act (Apr. 23, 2001), <https://osc.gov/Resources/fh42301.htm>.

67. *See, e.g.*, David Johnston, *Thornburgh Plans to Leave Cabinet to Run for Senate*, N.Y. TIMES (June 5, 1991), <http://www.nytimes.com/1991/06/05/us/thornburgh-plans-to-leave-cabinet-to-run-for-senate.html>.

68. Debbie Lord, *Alabama Senate Race Live Updates: Doug Jones Defeats Roy Moore*, ATLANTA J. CONST. (Dec. 13, 2017, 6:28 AM), <https://www.ajc.com/news/national/alabama-senate-race-live-updates-roy-moore-doug-jones/KPRfkdawweoiXICW3FHjXqI/>.

calls—such as from former Missouri Secretary of State Jason Kander<sup>69</sup>—for Alabama to certify that Mr. Jones won and for the Senate to seat Mr. Jones immediately. The Senate anticipated a closely divided vote on a significant tax bill, and Democrats hoped Mr. Jones’s presence might prevent the law’s passage.<sup>70</sup>

Before the Senate seats a candidate, it typically waits for the state to certify that a candidate has actually won the election.<sup>71</sup> And each state’s law is different. Missouri law requires that “[a]s soon as possible after each other election,” a certificate of election shall be issued—and, in the past, that might be within hours of the polls closing.<sup>72</sup> In contrast, Alabama requires that the Secretary of State issue certificates of election within “10 days after receiving the returns of election” from the state’s 67 counties—and the counties have 10 days after the election to give the Secretary of State those returns.<sup>73</sup> Mr. Jones would not be rushed into receiving his certificate, and he was certified the winner within the ordinary process, on December 28, 2017. (In the end, the vote on the tax bill did not turn on a single vote in the Senate, anyway.<sup>74</sup>)

## V. RECOUNTS AND CONTESTS

Mr. Moore argued he would be entitled to a recount, and Mr. Merrill agreed that he could have a recount if he paid for it.<sup>75</sup> But, Alabama law, at least under the text of existing statutes, does not appear to allow such recounts.<sup>76</sup>

For many years, Alabama had no stand-alone recount provisions in its laws. It simply had more general election contest rules. The Code of 1852,

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69. Jason Kander (@JasonKander), TWITTER (Dec. 13, 2017, 6:34 AM), <https://twitter.com/JasonKander/status/940953196217929730>.

70. Adam Levy, *Alabama’s Doug Jones May Not Take Office Until 2018*, CNN (Dec. 13, 2017, 12:11 AM), <https://www.cnn.com/2017/12/12/politics/alabama-senator-join-congress/index.html>; see also Leada Gore, *When will Doug Jones be sworn into the U.S. Senate?*, AL.COM (Dec. 15, 2017), <http://s.al.com/4wKxqvW>.

71. Levy, *supra* note 70.

72. MO. ANN. STAT. § 115.523 (West 2014).

73. ALA. CODE § 17-12-21 (2006).

74. See Act of Dec. 22, 2017, Pub. L. 115-97, 131 Stat. 2054 (ultimately passing Senate by 51-48 vote, with Senator John McCain not voting due to health reasons).

75. See Nikki Schwab, *If You Want a Recount You Can Pay for It, Alabama Secretary of State Tells Loser Roy Moore After Alleged Pedophile Denies Losing*, DAILY MAIL (Dec. 13, 2017), <http://www.dailymail.co.uk/news/article-5173835/If-want-recount-pay-Roy-Moore-told.html#ixzz58Q6olUgL>

76. See, e.g., Rick Hasen, *Breaking: Under Alabama Law, Roy Moore May Not Be Able to Request a Recount If the Margin is More than 0.5%*, ELECTION L. BLOG (Dec. 12, 2017, 9:20 PM), <http://electionlawblog.org/?p=96376>.

for instance, includes a provision<sup>77</sup> substantially similar to its existing election contest rules.<sup>78</sup> But none of these provisions refer to candidates for federal office, either representatives or senators.

In 2002, a close gubernatorial election in Alabama yielded a margin between the two candidates of 0.23% of votes cast, with no ready recount provisions in state law.<sup>79</sup> In 2003, Alabama enacted a new law permitting automatic recounts when the election of any candidate, including “federal” office, resulted in a candidate being defeated by “not more than one half of one percent of the votes cast for the office.”<sup>80</sup> And in 2006, as part of an omnibus election cleanup bill, Alabama enacted a more general recount process for those instances where the margin between candidates exceeded 0.5% of the votes cast.<sup>81</sup>

But its 2006 recount provision referred back to its election contest provisions as reference: “Any person with standing to contest the election under Sections 17-16-40 and 17-16-47 may petition the canvassing authority for a recount of any or all precinct returns.”<sup>82</sup> Those with “standing to contest the election” under those Sections, recall, did not include any federal offices.<sup>83</sup> Indeed, the Alabama Law Institute’s Election Handbook acknowledged the absence of federal offices in this provision.<sup>84</sup>

While states may include recount provisions for elections, including elections for federal offices, final authority formally resides in Congress, which has the power under the Constitution to “be the Judge of the Elections, Returns, and Qualifications of its own Members.”<sup>85</sup> Alabama had, apparently, chosen to leave the matter to Congress, as had historically been the case. The Alabama Law Institute reflected, “The omission of U.S.

77. See, e.g., ALA. CODE OF 1852 § 273 (1852) (“The election of any person declared elected to the office of judge of the circuit court, senator to the general assembly, or to any office which is filled by the vote of a single county, or to any office of justice, or constable, may be contested . . .”).

78. ALA. CODE § 17-16-40 (2006) (“The election of any person declared elected to the office of Governor, Secretary of State, Auditor, Treasurer, Attorney General, Commissioner of Agriculture and Industries, Public Service Commissioner, senator or representative in the Legislature, justices of the Supreme Court, judges of the courts of appeals, judge of the circuit court or district court, or any office which is filled by the vote of a single county, or to the office of constable may be contested . . .”).

79. *Republican Riley Declares Victory in Alabama*, CNN (Nov. 9, 2002), <https://edition.cnn.com/2002/ALLPOLITICS/11/09/elec02.al.g.alabama.governor/index.html>.

80. ALA. CODE § 17-16-20(a) (2006); see also ALA. CODE § 17-16-20(a)(1) (2006).

81. ALA. CODE § 17-16-21 (2006 & Supp. 2017).

82. *Id.*

83. *Id.*; see also ALA. CODE §§ 17-16-40, 17-16-47 (2006).

84. ALA. LAW INST., ELECTION HANDBOOK § 9.10 (18th ed. 2017–18) (“[S]everal offices are not included in Alabama’s law for contesting elections: Lieutenant Governor, U.S. Senator, and U.S. Representative.”), [http://isa.state.al.us/PDF/ali/election\\_handbook/Alabama\\_Election\\_Handbook\\_18th\\_edition.pdf](http://isa.state.al.us/PDF/ali/election_handbook/Alabama_Election_Handbook_18th_edition.pdf).

85. U.S. CONST. art. I, § 5, cl. 1. See generally Derek T. Muller, *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559 (2015); Lisa Marshall Manheim, *Judging Congressional Elections*, 51 GA. L. REV. 359 (2017).

Senators and Representatives is probably due to the fact that each house of Congress is the final judge of its own members' qualifications."<sup>86</sup> (A lawsuit from Mr. Moore seeking a temporary restraining order to prevent Mr. Merrill from certifying the results, but not seeking a recount or contesting the election under existing state statutory law, was promptly dismissed for lack of jurisdiction.<sup>87</sup>)

No contest was ever filed with Congress. Indeed, the choice of Mr. Jones over Mr. Moore avoided a different and complicated question about the Senate's power to expel a member for conduct that arose prior to taking office and known to the voters.<sup>88</sup>

## VI. AFTERMATH AND CONCLUSION

A few of the matters listed above may require legislative fixes, or uncertainty may threaten future elections. First, the duty and timing of the Governor to call for a special election for Senate elections ought to be clarified with a provision offering greater precision than "forthwith."<sup>89</sup> One legislative proposal, which failed to become law during the 2018 Regular Session of the Alabama legislature, would have pushed special elections back to the next regularly-scheduled general election.<sup>90</sup> In this case, such a law would have pushed the election back to November 2018, similar to Mr. Bentley's original plan. (This proposal, while resembling most other states,<sup>91</sup> comes with its own Seventeenth Amendment problems.<sup>92</sup>) Second, whether the "American rule" or "English rule" applies in cases where a candidate withdraws after the substitution deadline should be clarified, at least from the state attorney general, but ideally with detail from the legislature.<sup>93</sup> Third, the uncertainty regarding non-automatic recounts (and election contests generally) for those seeking federal office should be cured.<sup>94</sup> Legislative solutions may be difficult to come by, but the myriad of questions raised by 2017 urge nothing less.

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86. ALA. LAW INST., *supra* note 84, at §9.10; *see also supra* note 81 and accompanying text.

87. *Moore v. Merrill*, 03-CV-2017-0902015.00 (Ala. Cir. Ct. dismissed Dec. 28, 2017), <https://www.scribd.com/document/368034879/Roy-S-Moore-v-John-Harold-Merrill>.

88. *See* Derek T. Muller, *Senate Rules May Not Block Roy Moore*, LAW & LIBERTY (Nov. 15, 2017), <http://www.libertylawsite.org/2017/11/15/senate-rules-may-not-block-roy-moore/>.

89. *See supra* Part I.

90. *See* H.B. 17, 2018 Leg., Reg. Sess. (Ala. 2018); S.B. 18, 2018 Leg., Reg. Sess. (Ala. 2018).

91. *See supra* note 6 and accompanying text.

92. *See generally* Clopton & Art, *supra* note 21 (explaining that laws that push all special elections back to the next regularly-scheduled general election run afoul of the Seventeenth Amendment).

93. *See supra* Part II.

94. *See supra* Part V.