



## LEGISLATIVE REFERENCE SERVICE

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# MEMORANDUM

**To:** LRS File  
**Date:** February 13, 2017  
**Re:** Election to Fill the Vacancy of Sen. Jeff Sessions

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This memorandum discusses the procedures prescribed in existing law to temporarily appoint and permanently elect an individual to fill the vacancy of former United States Senator Jeff Sessions.

### A. Temporary Appointment.

Existing law provides for the temporary appointment of a Senator to fill a vacancy in office. Upon the vacancy, 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.”<sup>1</sup>

### B. Election to Fill Vacancy.

Existing law also expressly provides procedures for an election to fill the vacancy in office of a U.S. Senator for the unexpired term.<sup>2</sup> The time frame for the required election is contingent upon the proximity of the vacancy to the next scheduled General Election. The following chart summarizes the election time frames for filling the vacancy:

Occurrence of Vacancy	Timing of Election
More than <b>four months</b> before the General Election	Governor orders a special election “forthwith”
Within <b>four months</b> but more than <b>60 days</b> before a General Election	The vacancy is filled at the General Election
Within <b>60 days</b> of a General Election	The Governor orders a special election held on the first Tuesday after the lapse of 60 days from the date the vacancy is known to the Governor

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<sup>1</sup> Section 36-9-7, Code of Alabama 1975.

<sup>2</sup> Section 36-9-8, Code of Alabama 1975.

### C. Filling the Vacancy of Senator Sessions.

Upon Senator Jeff Sessions' confirmation as Attorney General of the United States on February 9, 2017, Governor Robert Bentley appointed Luther Strange to temporarily fill the vacancy until a successor is elected and qualified. An election must now be held to permanently fill the vacancy for the remainder of Senator Sessions' term.

Because the vacancy occurred more than four months before the next General Election, the Governor is required under Section 36-9-8, Code of Alabama 1975, to call a special election "forthwith." The term "forthwith" does not suggest a specific time frame in which the election must be held. The Alabama Supreme Court has opined that the term lacks "definiteness" and "certainty" as to "the matter involved."<sup>3</sup> The Alabama Court of Criminal Appeals has also stated that the term may have "a relative meaning, implying a longer or shorter" period according to the connection of its use and nature of the requirement.<sup>4</sup> Context appears to be a seminal consideration in interpreting the meaning of the term.

Black's Law Dictionary (Sixth Ed.) defines "forthwith" as follows:

Immediately; without delay; directly; within a reasonable time under the circumstances of the case; promptly and with reasonable dispatch.

The Eleventh Circuit has defined forthwith in certain contexts as requiring "reasonable promptness, diligence or dispatch."<sup>5</sup> Similarly, the Second Circuit has defined forthwith to mean "immediately, without delay, or as soon as the object may be accomplished by reasonable exertion."<sup>6</sup>

In the context of Section 36-9-8, Code of Alabama 1975, it appears that "forthwith" suggests a shortened time frame. The law divides the time in which an election must be held into three specific categories: (1) more than four months before the General Election; (2) less than four months, but more than 60 days before the General Election; and (3) less than 60 days from the General Election. It is a practical and reasonable interpretation of the statute to conclude that the Legislature intended for the Governor to call a special election immediately or without delay if the vacancy occurred more than four months from the next General Election.<sup>7</sup> Otherwise, there is no need for the three durational divisions in the statute and it could have been written to provide that if the vacancy occurred more than 60 days from the General Election, the vacancy would be filled at the next General Election.

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<sup>3</sup> *State ex. Rel. Gunn v. Argo*, 151 So. 844 (Ala. 1933).

<sup>4</sup> *Haisten v. State*, 59 So. 361 (Ala. Crim. App. 1912).

<sup>5</sup> *Libby v. U.S.*, 840 F.2d 818, 821 (11th Cir. 1988)(quoting *United States v. Bradley*, 428 F.2d 1013, 1016 (1970) (defining forthwith in the context of Federal Criminal Procedure Rule 41(c))(abrogated by *U.S. v. Henderson*, 116 S. Ct. 1638 (1996)).

<sup>6</sup> *City of New York v. McAllister Bros., Inc.*, 278 F.2d 708, 710 (2d Cir.1960).

<sup>7</sup> To discern legislative intent, a court must first look to the language of the statute; if, giving the statutory language its plain and ordinary meaning, the court concludes that the language is unambiguous, there is no room for judicial construction. *Bessemer v. McClain*, 957 So. 2d 1061 (Ala. 2016).

#### **D. Uniformed and Overseas Citizens Absentee Voting Act.**

The Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”) requires states to send absentee ballots to overseas servicemembers and citizens residing overseas at least 45 days before federal elections.<sup>8</sup> The Secretary of State has reported that, in order to comply with this requirement, ballots must be mailed to overseas servicemembers and citizens residing overseas at least 54 days prior to an election.

Section 36-9-8, Code of Alabama 1975, was enacted prior to UOCAVA.<sup>9</sup> Although the 60-day requirement in Section 36-9-8 may pose difficulties with compliance with UOCAVA, it does not appear to present a problem for calling a special election to fill the vacancy left by Senator Sessions. With approximately one year and nine months to the next general election, there is sufficient time for the Governor to call a special election in compliance with Section 36-9-8 and UOCAVA. Special elections have been held in this state in a significantly compressed time frame when compared to the instant circumstance. For example, in 2013, U.S. Representative Joe Bonner resigned on August 2. A special primary election was held on September 24, 2013, a runoff in the Republican primary took place on November 5, 2013, and the special general election was held on December 17, 2013.

#### **E. Conclusion.**

It appears that Section 36-9-8, Code of Alabama 1975, requires Governor Bentley to hold a special election to fill the vacancy of Senator Jeff Sessions without delay at some time prior to the 2018 General Election.

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<sup>8</sup> 42 U.S.C. § 1973ff – 1973ff-7.

<sup>9</sup> Section 36-9-8, Code of Alabama 1975, was first enacted in 1915 and was last amended in 1940. UOCAVA was originally enacted in 1986 and was amended by the Military and Overseas Voter Empowerment Act (MOVE) in 2009, to include the 45-day overseas ballot requirement.