

W. T. MATHEWS, *Attorney General*.  
By: GEORGE P. ANNAND, *Deputy Attorney General*.

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**OPINION NO. 1954-350. United States Senator—Filling of vacancy in office of.**

CARSON CITY, October 1, 1954.

HONORABLE CHARLES H. RUSSELL, *Governor, Executive Chamber, Carson City, Nevada*.

DEAR GOVERNOR RUSSELL: Reference is hereby made to your letter of September 29, 1954, wherein you request the opinion of this office upon the following inquiries.

1. Is there now a vacancy in the office of United States Senator, to be filled by election of the people at the general election on November 2, 1954?
2. If your answer to question 1 is "yes" then how and in what manner is an election to be held and the nominations made for the office?

Your request is brought about by reason of the unfortunate and untimely death of our senior United States Senator McCarran on the evening of September 28 at Hawthorne, Nevada. The inquiries present the question and the problem of filling of the vacancy in the senatorial office so long and so ably filled by the late Senator. Senator McCarran's term of office has some two years to run, expiring on January 3, 1957. The regular general election of State and county officers is to be held November 2, 1954, according to law. The primary election for the ensuing November election at which candidates for public office are nominated has long since been held. The paramount question then is, shall the vacancy in said office be now filled on November 2 by an election by the people, or by you as Governor of the State. Supplementing my letter to you of September 30, 1954, expressing my conclusions in the matter, we submit the following:

**OPINION**

The applicable constitutional provisions and statutory law governing the instant question are as follows:

Article XVII, Constitution of the United States, providing for the popular election of United States Senators, reading:

The senate of the United States shall be composed of two senators from each state, elected by the people thereof, for six years; and each senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

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.

Sections 2592 and 2593, Nevada Compiled Laws, 1929, providing:

SEC. 2592. Certificates of nominations of candidates for United States senator shall be filed with the secretary of state of Nevada, who shall certify the names of all candidates as shown therein to the various county clerks as now required by law in case of candidates for state officers, and the several county clerks in preparing the ballots to be voted for at any such general election, shall place thereon the

names of all such candidates under the words "U. S. Senator—Vote for One." and there shall be a margin at the right-hand side of these names at least one-half inch wide, where the voter may indicate his choice of said candidates by marking a cross or X.

SEC. 2593. In case of a vacancy in the office of United States senator caused by death, resignation, or otherwise, the governor of Nevada may appoint some qualified person to fill said vacancy, who shall hold office until the next general election, and until his successor shall be elected and qualified.

Section 8, Article V, Constitution of Nevada empowers the Governor to make appointments in certain cases, by providing:

When any office shall, from any cause, become vacant, and no mode is provided by the constitution and laws for filling such vacancy, the governor shall have the power to fill such vacancy by granting a commission which shall expire at the next election and qualification of the person elected to such office.

Section 25, Primary Election Law, as amended at 1947 Statutes 478, so far as applicable here, provides:

Vacancies occurring after the holding of any primary election shall be filled by the party committee of the county, district, or state, as the case may be. Such action shall be taken not less than thirty days prior to the November election.

The amendment of 1947 simply added the 30-day clause. The other portion was placed in the law at its enactment in 1917.

Section 30 of said Primary Law, as amended at 1949 Statutes 14, provides, "Party candidates for United States senator and representative in Congress shall be nominated under the provisions of this act, and in like manner, as state officers are nominated."

The power and authority enabling the respective states to provide for the election of United States Senators stems from and is based solely upon the Seventeenth Amendment to the Constitution of the United States. It was and is that amendment that empowered the Nevada Legislature to enact the above-mentioned state statutes dealing with the election of United States Senators, and we think that the answer to the inquiry presented here is to be based upon the conclusions to be drawn from the language contained in the state statutes as governed by the consent thereto embraced in the Seventeenth Amendment, and not necessarily as like statutes pertaining to purely state matters are construed.

The Seventeenth Amendment first provides that in the event of a vacancy in the office that the executive authority of the State shall issue writs of election to fill such vacancy. This certainly is evidence that the framers of the amendment sanctioned elections to fill the vacancy even to the extent of special elections. The proviso contained in the amendment empowers the executive of the State *to make temporary appointments* until the people fill the vacancy by election as the Legislature may direct. Most certainly the framers of the amendment by the use of the term "temporary appointments" never intended that an undue or prolonged vacancy should be filled by appointment. We submit that the language employed in the proviso cannot reasonably be construed to mean a general election at which a United States Senator would be elected for a new term of office, in the usual course of events, as it may be claimed Section 2593, Nevada Compiled Laws, warrants such a construction, necessitating an appointment by the Governor for the entire remainder of the unexpired term in question. We dissent from such view or contention. We submit if such a construction had been placed upon the proviso contained in the Seventeenth Amendment and also upon Section 2593, Nevada Compiled Laws, upon the death of Senator Pittman, November 10, 1940, some five days after the general election wherein the Senator was reelected for a six-year term, that there would have been no need for the subsequent elections to fill the vacancy in the then existing term of office beginning January 3, 1941. The record is clear

that an appointment to fill the vacancy in the term ending January 3, 1941, was made by the Governor and another appointment for the two-year period of the new term was also made. It is also a most clear record that in the general election of 1942, Honorable James G. Scrugham and the appointee Senator Bunker were candidates for the remainder of the unexpired term of the late Senator Pittman, Scrugham being elected to full out the term expiring January 3, 1947, dying in office in June 1945. Governor Carville was appointed to fill the vacancy. It is clear that thereafter in the 1946 primary Governor Carville and the then Representative Bunker filed for the new term of Senator, Bunker defeating Carville and in turn being defeated by Senator Malone for the new term. Certainly this record alone is ample precedent for the election to fill vacancies in the office of United States Senator at the next ensuing general election held in the State and most materially departs from the rule that the term "general election" in all cases means the election at which the officer would be regularly elected regardless of any vacancy therein. It must be remembered that Senator Pittman died immediately after the general election was held in November 1940, and no further general election would then be held until November of 1942, with a primary election therefor in September of that year. Here the death occurred prior to the next general election by the people after the primary election therefor had been held.

On November 25, 1940, the then Attorney General, the late Gray Mashburn, at the request of Governor Carville, rendered his opinion relative to the filling of the vacancy caused by the death of Senator Pittman, such opinion being Number B-20, reported in the Biennial Report of the Attorney General, 1940-1942, page 243. It will be noted in the opinion that reference is there made to a letter opinion of November 14, 1940. This letter opinion was a brief opinion outlining the views of the Attorney General and later incorporated in the opinion of November 25, 1940.

In the course of the opinion the Attorney General had occasion to discuss the Seventeenth Amendment and its relation to temporary appointments and the relation of Section 2593, Nevada Compiled Laws 1929 thereto, saying:

That the Governor of Nevada is and will be legally empowered to appoint a suitable person to temporarily fill the vacancy in the new term of the late Senator Pittman, under and by virtue of the provisions of Section 2593, Nevada Compiled Laws 1929. Said section 2593 is a part of an Act of the Legislature of this State expressly enacted by it in 1915 pursuant to the permissive power granted the Legislature by the Seventeenth Amendment to the United States Constitution, for the very purpose not only of providing a law for the election of United States Senators, but also to provide for the filling of vacancies temporarily in such offices when necessary. Section 2593 being enacted by express permission of Congress as expressed in the Seventeenth Amendment, we think it most necessarily follows that said section must be construed in the light of the language contained in such amendment, and not construed in the light of expressions of the Supreme Court of Nevada in cases dealing with purely local and State offices governed by the Constitution of Nevada. The Seventeenth Amendment, as quoted in my opinion of November 14, provides that the Legislature may empower the executive of any State to make "temporary appointments until the people fill the vacancy by election as the Legislature may direct." Any expression in a State law authorizing its executive to appoint a United States Senator, we think, must be qualified and limited by the term "temporary appointments."

Later in the opinion he referred to the report of the Committee on Privileges and Elections of the United States Senate reported by such committee on the seating of Senator Gerald P. Nye, in Senate Election Cases, 1913-1940, being Senate Document No. 147, 76th Congress, 3rd Session, wherein a North Dakota statute enacted prior to adoption of the Seventeenth Amendment was drawn in question. The committee said:

Nowhere is express reference made to the Constitution of the United States, and, nowhere in said act does language used indicate that the Legislature of the State of

North Dakota had the seventeenth amendment to the Constitution of the United States in mind when the act of March 15, 1917, *supra*, was passed. Certainly the reasonable presumption is that if the Legislature of North Dakota had intended to incorporate into the act of March 15, 1917, *supra*, the provisions of the seventeenth amendment to the Constitution of the United States, it would have given the executive of that State the power, as the seventeenth amendment provides, to make a *temporary appointment* only, until the people should fill the vacancy by election. (Italics ours.)

Attorney General Mashburn also called attention to the appointment and subsequent election of Charles B. Henderson to fill the vacancy in the United States Senate caused by the death of Senator Newlands in 1918, saying:

Further, a precedent for such temporary appointment is found in this State. It must be borne in mind that section 2593 Nevada Compiled Laws 1929 was approved March 6, 1915. The records in the archives of the office of Secretary of State show that on January 12, 1918, Honorable Charles B. Henderson was, by the Governor, appointed United States Senator to fill the vacancy caused by the death of Senator Francis G. Newlands, whose term had some three years yet to run. Senator Henderson received the following certificate of appointment, omitting the formal parts:

This is to certify that, pursuant to the power vested in me by the Constitution of the United States and the laws of the State of Nevada, I, Emmet D. Boyle, the governor of said State, do hereby appoint Charles B. Henderson a Senator from said State to represent said State in the Senate of the United States until the vacancy therein caused by the death of Francis G. Newlands is filled by election, as provided by law.

The record shows that Senator Henderson filed for election for the *remainder* of the *unexpired* term at the November 1918 election, was elected at such election and served the *remainder* of such term. This is a sufficient precedent. (Italics ours.)

Certainly neither the Seventeenth Amendment nor Section 2593 authorizes more than a temporary appointment to fill a vacancy in the office of United States Senator. There being no law in this State authorizing a special election for that purpose, and a general election for the selection of state officers by the people being scheduled by law for Tuesday the second day of November, 1954, we submit that under the circumstances of this case that such election meets the requirements of Section 2593 as construed in *pari materia* with and authorized by the Seventeenth Amendment.

We concur in and adopt the foregoing opinion of Attorney General Mashburn upon the ground that it fully states the law on the subject of temporary appointments to fill vacancies in the office of United States Senator.

We come now to the policy of the law with respect to the filling of the vacancy in the office of United States Senator, a vacancy that will extend to January 3, 1957 from and after January 3, 1955. We think that the instant case with respect to the right of the people to now hold an election on November 2, 1954, for the purpose of electing a United States Senator to fill the vacancy existing in that office, is controlled and governed by the decision of the Supreme Court of Nevada in the case of *Ex Rel. Penrose v. Greathouse*, 48 Nevada 419, decided February 19, 1925.

Briefly the facts were that T. C. Hart was elected District Judge of the Eighth Judicial District at the general election in November 1922, for a 4-year term beginning January 1, 1923. He died on October 12, 1924, leaving some two years and more of the term remaining to be served. On October 14, 1924 the Governor appointed George Kenny of Churchill County to fill the vacancy

in the office, citing in the commission of appointment that the appointment was to continue until the vacancy shall be supplied at the next general election.

The 1924 primary election was held in September 1924 and prior to the death of Judge Hart. The Primary Election Law of 1917 then and as it does now, provides:

Vacancies occurring after the holding of any primary election shall be filled by the party committee of the county, district, or state, as the case may be.

In the event of vacancies in nonpartisan nominations, the vacancy shall be filled by the person who received the next highest vote for such nomination in the primary for such office. If there be no such person then the vacancy may be filled by a petition signed by qualified electors equal in number to five per cent of the total vote cast for representative in Congress at the last preceding general election in the county, district or state as the case may be. Such petition shall be filed on or before fifteen days before the November election.

In 1947, the time in which the nominating petition was required to be filed prior to the November election was amended to provide 30 days instead of 15 days prior to such election. 1947 Stats. 478.

A petition of qualified electors of the judicial district nominating Clark J. Guild as a candidate for District Judge to fill the vacancy was presented to the Secretary of State, who refused to accept such petition upon the ground that there was no vacancy in the office which could be legally filled at the then ensuing November election to be held November 4, 1924. Mandamus was sought in the Supreme Court by petition filed October 18 in behalf of Clark J. Guild. Upon the hearing the Supreme Court ordered the preemptory writ of mandamus to be issued directing Guild's name to be placed upon the ballot as a candidate to fill the vacancy in the office of District Judge, as prayed in the petition for the writ.

The Supreme Court in deciding the question before it quoted and construed Section 22, Article XVII, Constitution of Nevada, and Section 2812, Revised Laws, 1912, now Section 4812, Nevada Compiled Laws 1929.

In course of the opinion the Court said, at pages 421-422:

The substance of the entire argument on the part of the secretary of state is that the existing primary law makes no provision for a nomination to fill a vacancy by petition, occurring, as in this case, within 22 days of the general election.

1. Section 22, Article 17 of the constitution and section 2812 of the Revised Laws of Nevada furnish a complete answer to this contention when read in connection with section 25 of the primary election law (Statutes 1917, p. 276).

Section 22, Article 17 of the constitution provides that—

In case the office of any justice of the supreme court, district judge or other state officer shall become vacant before the expiration of the regular term for which he was elected, the vacancy may be filled by appointment by the governor until it shall be supplied at the next general election, when it shall be filled by election for the residue of the unexpired term.

Section 2812 of the Revised Laws of Nevada provides that—

Whenever any vacancy shall occur in the office of justice of the supreme court or district judge, or any state officer, the governor shall fill the same by granting a commission, which shall expire at the next general election by the

people and upon the qualification of his successor, at which election such officers shall be chosen for the balance of the unexpired term.

These provisions of the organic and statute law show that the legislative policy of the state is to fill the vacancy for the office of district judge by election as soon as practicable after the vacancy occurs.

The 1924 general election, it is clear, was not a general election at which a successor of Judge Hart would have commonly been elected, yet, notwithstanding the inclusion in the constitutional provision and said Section 2812, the term "next general election," the court held that the name of Clark J. Guild should appear on the November election ballot, and this on October 22, 1924.

In passing upon the matter the court said, at page 423:

The ground upon which the respondent sought to justify the position he assumed in refusing to file the nomination petition of Clark J. Guild was that section 25 did not reach the case, because the word "vacancies" used in this section has reference only to vacancies upon the nonpartisan ticket nominated at the September primary, and to no other vacancies, and there was no vacancy upon the ticket for the office of district judge, because that office at the date of the primary was not an office to be filled, and there could be no legal election to fill the unexpired term at the ensuing November election.

Our answer to this contention is that section 25 neither repeals nor limits the particular provision of section 2812, Revised Laws, touching the conduct of an election to fill a vacancy in an office occurring shortly before the general election. In *State v. Hostetter*, 137 Mo. 636, 39 S.W. 271, 38 L.R.A. 208, 59 Am. St. Rep. 515, it is said that a special provision (nearly identical in terms with that of section 2812, Revised Laws) governing the filling of a vacancy in a particular office should be obeyed, even as against a later law on the same general topic, unless the court finds ground to conclude that the later general law was intended to repeal or limit the more particular provision of the prior law.

2. We quite agree with the learned attorney-general that the word "vacancies" as used in section 25 with respect to nonpartisan nominations means a vacancy in some such nomination. But, as said in *State v. Hostetter*, *supra*, where, by reason of death, as in this case, a vacancy in an office occurs shortly before a general election at which some one to fill the office for the unexpired term should be chosen, and no one has been nominated to said office (as in this case), there is a vacancy in the nominations within the meaning of the election law, and such vacancy may be supplied, at any time prior to the election, by a nomination authenticated in the mode pointed out by the ballot law. This ruling of the court is followed in *State v. McClure*, 299 Mo. 688, 253 S.W. 743.

Applying the foregoing language of the court to the situation as disclosed by the facts in the instant case, it is clear that the decision of the court is most pertinent and conclusive authority for holding that an election to fill the vacancy in the senatorial office at the November election is and will be according to law.

There can be no question but that the Seventeenth Amendment goes no further than to provide the Governor of the State with constitutional power to make temporary appointments only. Section 2593, Nevada Compiled Laws 1929, contains no provision extending the Governor's power beyond temporary appointments, even if the Legislature possessed the constitutional power to so provide. Such legislative enactment is clearly to be construed in the light of and controlled in its entirety by the court's decision in the *Penrose v. Greathouse* case. Further, it cannot be well said that the term "next general election" incorporated in Section 2593, has greater potency than the same term as incorporated in Section 22, Article XVII, Constitution of Nevada and Section 2812, Revised Laws.

It is our considered opinion that query No. 1 is to be answered in the affirmative, with the qualification that you, as Governor, have the power to make a temporary appointment to fill the existing vacancy, the term of which will continue to and end January 3, 1955.

Answering query No. 2, it is our opinion that party State Central Committees may each nominate one candidate for United States Senator, and cause proper declarations of candidacy and acceptance thereof to be filed with the Secretary of State not less than 30 days prior to November 2, 1954. The Secretary of State to certify the names of such candidates to the respective County Clerks. Thereafter the regular election procedure to be followed.

The right to extend or amplify this opinion is hereby reserved should the need therefor arise.

This opinion completed October 5, 1954.

Respectfully submitted,  
W. T. MATHEWS, *Attorney General*.

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**OPINION NO. 1954-350(a). Supplemental to Opinion 350.**

CARSON CITY, December 1, 1954.

HONORABLE CHARLES H. RUSSELL, *Governor, Executive Chamber, Carson City, Nevada*.

DEAR GOVERNOR RUSSELL: Receipt is hereby acknowledged of your letter of December 1, 1954, received in this office at 1 p.m. this date, wherein you request the opinion of this office as to whether Alan Bible, the now United States Senator elect, is qualified to take his seat in the United States Senate at this time, preferably today. In view of the fact that Senator Brown was appointed by you on October 1, 1954, in an appointment containing the following language:

I, Charles H. Russell, the Governor of said State, do hereby appoint Ernest S. Brown a Senator from said State to represent said State in the Senate of the United States until the vacancy therein, caused by the death of Patrick A. McCarran, is filled by election, as provided by law.

he is actually filling the office of United States Senator in the United States Senate. The quoted part of the appointment was taken from page 14714 of the *Congressional Record*, dated November 8, 1954. Mr. Bible is at present in Washington, D.C., and this office is most reliably informed that Mr. Brown is willing and will surrender his office to Mr. Bible upon his qualifying as United States Senator.

You quote from my opinion of October 1, 1954, as follows:

It is our considered opinion that query No. 1 is to be answered in the affirmative, with the qualification that you, as Governor, have the power to make a temporary appointment to fill the existing vacancy, the term of which will continue to and end January 3, 1955.

And your request goes to the point of whether the quoted part of the opinion governs at the present time or whether the fact that the Supreme Court of the State of Nevada, on October 8, 1954, held that candidates for the office of United States Senator could be placed upon the ballot for the November election held November 2, 1954, to fill the vacancy for the unexpired term of the late Senator McCarran.

At the time of the furnishing of my official opinion to you concerning the question of filling the vacancy caused by the death of Senator McCarran I could not, at that time, determine with certainty whether an election on November 2, 1954, would be held. I did know from the Constitution of the United States that a new session of Congress would come into being on

January 3, 1955, and that most certainly you, as Governor, had the power under the Seventeenth Amendment to the Constitution of the United States and Section 2593, N.C.L. 1929, to make a temporary appointment pending an election to fill the vacancy, if such be held, so that now it develops your appointment of Senator Brown certainly expresses the thought that the vacancy caused by the death of Senator McCarran could be filled by an election. The question boils down to this—that an election having been held and a Senator elected by the people of Nevada to fill the unexpired term of the late Senator McCarran, it appears that he can assume the office of Senator upon the certification by the board of canvassers that such person was duly elected to fill such vacancy.

It most certainly appears now that Mr. Bible has been declared elected to fill the vacancy existing in Nevada's representation in the United States Senate and that he is now in a position to qualify for such office. Applying the language in Section 2593, N.C.L. 1929, to the matter as it stands now, we are of the opinion that even that particular section of the law warrants the answer that Mr. Bible is now eligible to qualify as United States Senator. The language provided in said section in this connection reads: "and until his successor shall be elected and qualified."

The Supreme Court of this State having sanctioned the election by the people of the United States Senator to fill the vacancy in that office, and such election having been held, it is our considered opinion that Mr. Bible is now qualified to assume his duties in the United States Senate as of this date.

The foregoing opinion is in the form of a letter as time does not permit of a more formal opinion.

Respectfully submitted,  
W. T. MATHEWS, *Attorney General.*

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**OPINION NO. 1954-351. Recordation of written instruments—when mandatory.**

CARSON CITY, October 29, 1954.

HONORABLE ROGER D. FOLEY, *District Attorney, Clark County, Las Vegas, Nevada.*

DEAR MR. FOLEY: Receipt is hereby acknowledged of your letter of October 22, 1954, received in this office October 25, 1954, wherein you request the opinion of this office as to whether Writs of Attachment and Decrees of Distribution of estates should be filed or recorded.

In your letter you refer to certain Statutes of Nevada relating to the inquiry, to wit, Section 8708, N.C.L. 1929; Section 2112, 1929 N.C.L. 1949 Supp., and also Section 1496, N.C.L. 1929.

**OPINION**

An examination of the general law relating to the recording of instruments discloses that in its inception the recording Acts of the respective states first related to the recording of instruments conveying real property. The recording Acts, of course, are purely statutory and subject to such changes as the Legislature may desire to make therein. We agree that the sections of the law quoted in your letter are somewhat contradictory in their provisions insofar as interpretation thereof with respect to your inquiry is concerned.

It is clearly apparent that Section 2112, N.C.L. 1929, as amended at 1949 Statutes, page 84, makes it mandatory upon the Recorder to record the respective instruments therein specifically set forth. With respect to Decrees of Distribution, which are provided for in Section 9882.233, 1929 N.C.L. 1941 Supp., and therein required to be filed with the Recorder, naturally would impart notice of the contents thereof by examination of the file copy. However, this office is of the opinion that where a Decree of Distribution actually conveys title to real property that it then