



# Beginning and End of the Terms of United States Senators Chosen to Fill Senate Vacancies

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## Summary

Under the Constitution, the Rules of the Senate, statutory law, and consistent Senate practice, an individual elected to the United States Senate in a special election *during a session* of Congress to succeed an appointed Senator may begin his or her term of office upon receipt by the Senate of “credentials” in proper form from the state, and by taking the constitutionally required oath of office in open Senate session. The appointed Senator who is being succeeded remains in office until the new “Senator-elect” is qualified (i.e., is sworn in and seated as a “Senator” by the Senate).

If a newly elected Senator-elect has won a special election to succeed an appointee during the time that the Congress is in *sine die* adjournment, and thus is not able to present credentials to the Senate and be seated, that Senator-elect is sworn in on the first day of the new session of Congress, but is considered to have begun his or her term of office on the day after the election. The appointed Senator in that case—in the case of a special election during a *sine die* adjournment—is considered to have served only until the day of election.

The formal Rules of the Senate require the receipt of “credentials” in proper form concerning an individual presenting himself or herself for membership in the Senate before the oath of office is administered. Such “credentials” are the election (or appointment) certificates signed by the governor and the secretary of state of the state from which the individual was chosen. It should be emphasized that under the Constitution, the official canvassing of votes, counting of military and other absentee ballots, tabulation and certification of vote counts, and the final certification of election results are administered and conducted under procedures established by the individual states. The actual transmittal of the proper election certificate, and the timing of certification, is thus dependent in the first instance on state laws and procedures.

The long-standing Rule of the Senate requiring proper certification from a state concerning the state’s choice for Senator could be waived by unanimous consent, and has on some rare occasions in the past been waived for specific causes and reasons relating to the unintentional or inadvertent delay of the transmittal of credentials in proper form. While this has in the past allowed a Senator-elect to be sworn in and seated by “unanimous consent or without objection” prior to the time that the Senate had actually received the valid, required credentials in physical form, the modern practice is for the Senate to wait for the receipt from the proper state officials of such credentials.

If no special election has been held in the state to fill the remainder of the term of a Senator who has died, resigned, or otherwise left office, then the Senator who had been appointed by the governor to fill the remainder of that term serves until that term’s expiration at noon on January 3 (in the year immediately following the November general election for the new six-year term). The Senator-elect chosen in the regular, general election in November may clearly not be seated (by virtue of such general election) for any remaining session of the current, immediate Congress (a so-called “lame duck” session), since that would allow a term of more than six years, contrary to the United States Constitution. If the governor had failed to appoint a Senator for the remainder of the current term, or if the Senator appointed to fill that term resigns prior to January 3, then the governor could appoint the individual who had won the November election to fill out the remainder of the current term as well.

This report has been updated and will be revised as new decisions and events warrant.

The 17<sup>th</sup> Amendment to the United States Constitution provides that a vacancy in the United States Senate is to be filled by election, but may also be filled temporarily, if authorized under state law, by a gubernatorial appointee who serves in the Senate until “the people” fill the vacancy for the remainder of the term “by election.”<sup>1</sup> In our system of federalism and shared powers, the several states have the initial authority (with a reserved, superseding authority in Congress) over the “Times, Places, and Manner” of elections of Senators and Representatives, including *special* elections for the Senate.<sup>2</sup> This authority of the states extends to procedural and administrative aspects of elections such as officially canvassing the vote in local jurisdictions, counting military and other absentee ballots, and compiling and officially certifying the results of the election.<sup>3</sup> The official certification of the results of a special election by the state officials, under state law and procedures, thus determines, initially, the timing for the Senator-elect to present the proper “credentials” required by the Senate for seating.

Under Article I, Section 5, clause 1 of the Constitution, the Senate is the final judge of the elections, returns, and qualifications of its own Members, and controls the seating of its Members.<sup>4</sup> Furthermore, the Senate (in a similar manner as the House) has the express constitutional authority to make its own rules for its proceedings.<sup>5</sup> To seat a “Senator-elect” and make such person a “Senator,” the Senate requires the presentation of proper “credentials” from the person claiming the seat, and the taking of the constitutionally required oath of office.<sup>6</sup> Such proper “credentials” are the election certificates duly signed by the governor and secretary of state.<sup>7</sup> This long-standing Senate Rule could be waived by unanimous consent, and has been waived on certain rare occasions in the past, although the modern practice in the Senate is to require presentation of proper credentials prior to seating.<sup>8</sup>

## Special Elections to Fill Remainder of Term

If the special election to fill the remainder of the Senate term occurs *during a session of Congress*, the sitting Senator who had been appointed to fill the original vacancy serves until the

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<sup>1</sup> “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>2</sup> U.S. CONST., Art. I, Sec. 4, cl. 1.

<sup>3</sup> *Smiley v. Holm*, 285 U.S. 355, 366-367 (1932); *Storer v. Brown*, 415 U.S. 724 (1974); *Jenness v. Fortson*, 403 U.S. 431 (1971); *Bullock v. Carter*, 405 U.S. 134, 145 (1972).

<sup>4</sup> *Roudebush v. Hartke*, 405 U.S. 15 (1972); *Reed v. County Commissioners*, 277 U.S. 376, 388 (1928); *Morgan v. United States*, 801 F.2d 445 (D.C. Cir. 1986). See discussion in Justice Joseph Story, *Commentaries on the Constitution of the United States*, Volume II, § 831, at pp. 294-295 (1833).

<sup>5</sup> Article I, Section 5, cl. 2; *United States v. Ballin*, 144 U.S. 1 (1892).

<sup>6</sup> Senate Rule II; Riddick and Frumin, *Riddick’s Senate Procedure, Precedents and Practice*, S. Doc. No. 101-28, 101<sup>st</sup> Cong., 2d Sess. 696-699, 699-702, 704-710 (1992) [hereinafter *Riddick’s Senate Procedure*]. See, for example, in the House, discussion in *Deschler’s Precedents of the U.S. House of Representatives*, Ch. 2, § 3, p. 98, § 6, pp. 131-132, and Ch. 9, § 47, p. 481: “[E]lection does not, of itself, constitute membership.... Neither do election and return create membership ....” citing to a committee report (H.Rept. 1431, 73<sup>rd</sup> Cong., 2d Sess. (1933)), and the election case of *Hammond v. Herrick*, 1 Hinds’ Precedents § 499.

<sup>7</sup> Senate Rule II, para. 3.

<sup>8</sup> See *Riddick’s Senate Procedure*, *supra* at 707-708. In past times of less efficient communications, because of certain inadvertent and unintentional delays or interruptions in the mails, or for some other technical reason, the Senate by “unanimous consent or without objection” swore in a Senator before the proper credentials were physically received.

new Senator is elected and “qualified.”<sup>9</sup> “Qualified” here is used as a verb, and simply means taking the constitutionally required oath of office given by the Senate<sup>10</sup> (i.e., being sworn and seated because the Senator-elect is determined to have met the qualifications for office of age, citizenship, and inhabitancy), and is shown by the credentials presented to be “duly elected.”<sup>11</sup>

If the special election to fill the remainder of the Senate term occurs when the Senate is adjourned *sine die*, the newly elected Senator would be considered, for purposes of when his or her term begins, to be entitled to the seat the day after election. A *sine die* adjournment is when Congress has adjourned without a specific day on which it will return during that session, and indicates that Congress is not scheduled to meet again until a day established by law (or the Constitution) for the next session or the next Congress. If in *sine die* adjournment, the oath of office could not be taken in open session and the credentials could not be presented, and so the Senator-elect is given the oath of office and seated as a Senator on the first day of the next session of Congress, but is considered to have started his/her term the day after the election. In the case of an election to replace the temporary appointee which takes place during a *sine die* adjournment, the Senator who had been appointed serves only until the day of election.<sup>12</sup>

As explained by the Senate Parliamentarian Robert Dove, quoting from a resolution unanimously adopted by the Senate (S.Res. 129, 85<sup>th</sup> Congress), “Senators elected during a session to succeed appointees shall commence on the day they qualify,” that is, when the Senator-elect is “duly qualified by taking, in open Senate, as provided by Rule II, the oath required by the Constitution and prescribed by law.”<sup>13</sup> The principle behind adopting this resolution was explained by the majority leader, Senator Johnson, to clear up misconceptions and to emphasize that “The appointee holds the office and draws the pay until the Senator-elect takes the oath, as above stated.”<sup>14</sup>

When in *sine die* adjournment, however, the newly elected Senator’s term is considered to have started the day after the election, and the appointed Senator’s term to have ended on election day. The issue arose, for example, in 1938-1939 in the context of an election, held after the Senate had adjourned *sine die*, to fill a Senate vacancy which had previously been filled by a temporary appointment of the governor. The Tennessee governor’s appointee in May of 1937, George Berry, served only “until November 8, 1938, when a successor, Tom Stewart, was elected to fill the remainder of the term.”<sup>15</sup> Stewart was a district attorney in Tennessee and did not actually present himself and take his seat until January 16, 1939. The outgoing appointee, Senator Berry, wanted to be compensated as Senator through the time until the new Senator-elect was qualified and seated. The Senate determined on February 2, 1939, however, in accordance with the Judiciary Committee’s findings and the statutory provisions, “that Berry’s term had ended on the day of

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<sup>9</sup> See *Riddick’s Senate Procedure*, *supra* at 710; and Robert Dove, *The Term of A Senator – When Does It Begin and End?* S. Doc. 98-29, at 10-11 (Revised 1984).

<sup>10</sup> U.S. CONST., Art. VI, cl. 3. See 5 U.S.C. § 3331.

<sup>11</sup> Note *Powell v. McCormack*, 395 U.S. 486 (1969). The certificate of election is considered *prima facie* evidence of the fact of proper election. Objections can be raised to the “qualifications” or the “election” of a Senator-elect at the time of swearing in, and a decision eventually rendered by the Senate on such questions under its authority at Art. I, Sec. 5, cl. 1. See, generally, CRS Report R40105, *Authority of the Senate Over Seating Its Own Members: Exclusion of a Senator-Elect or Senator-Designate*, by Jack Maskell.

<sup>12</sup> See now 2 U.S.C. § 36

<sup>13</sup> Dove, *The Term of A Senator – When Does It Begin and End?* *supra* at 10.

<sup>14</sup> Dove, *The Term of A Senator – When Does It Begin and End?* *supra* at 10.

<sup>15</sup> *Senate Election, Expulsion and Censure Cases, 1793-1990*, *supra*, Case 120, p. 362-363.

Stewart's election, November 8, 1938" because the Senate had been in *sine die* adjournment at the time of the election.<sup>16</sup> Similarly, in 1957, the Senate adopted a resolution noting that the term of service of the governor's appointee, Senator Thomas A. Wofford, terminated on election day, November 6, 1956, and not on January 2, 1957, because Strom Thurmond won the election for the unexpired term on that November 6 election date, and that Senator Thurmond's renewed service began on the day after election, November 7, 1956, and not January 3, 1957, because the Senate had adjourned *sine die* on July 27, 1956.<sup>17</sup> As noted in the document updated by Parliamentarian Robert Dove, quoting the majority leader, Senator Johnson, "Numerous cases have arisen since the adoption of the law in 1935 where persons were elected to succeed appointees while the Senate was in *sine die* adjournment, and the above rule has been uniformly followed."<sup>18</sup>

The statutory provisions of the United States Code with regard to compensation of Senators, referenced in the above precedent, now specifically set out the dates for compensation of those appointed to fill Senate vacancies, and those elected to fill the remaining term in a vacancy. The statute expresses the principle that a gubernatorial appointee to fill a vacancy serves only temporarily until the remainder of the unexpired portion of the original term is filled by the election and qualification of his or her successor, or if the election is during a *sine die* appointment, until election day. The provision now codified at 2 U.S.C. § 36, states

Salaries of Senators appointed to fill vacancies in the Senate shall commence on the day of their appointment and continue until their successors are elected and qualified: *Provided*, That when Senators have been elected during a *sine die* adjournment of the Senate to succeed appointees, the salaries of Senators so elected shall commence on the day following their election.

Salaries of Senators elected during a session to succeed appointees shall commence on the day they qualify: *Provided*, That when Senators have been elected during a session to succeed appointees, but have not qualified, the salaries of Senators so elected shall commence on the day following the *sine die* adjournment of the Senate.

When no appointments have been made the salaries of Senators elected to fill such vacancies shall commence on the day following their election.

In sum, if the Senate is in session, a Senator-elect chosen at a special election to fill an unexpired Senate term previously filled by a gubernatorial appointee may present himself or herself to take the oath of office and be seated when credentials in proper form are received by the Senate (i.e., an election certificate signed by the governor and secretary of state). That Senator is entitled to the salary of Senator on the day he or she so qualifies, and the term and service (as well as the pay) of the Senator/appointee (who is being replaced) continues until the successor is "elected and qualified." However, if the Senate has adjourned *sine die* when a Senator-elect is chosen at a special election to fill an unexpired Senate term previously filled by a gubernatorial appointee, then the term of the appointee ends on the election day of his or her successor, and the newly elected Senator is considered to have the office (and is entitled to pay) the day after the election,

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<sup>16</sup> *United States Senate Election, Expulsion and Censure Cases, 1793-1990, supra*, p. 363.

<sup>17</sup> *Riddick's Senate Procedure, supra* at pp. 1252-1253; Dove, *The Term of A Senator – When Does It Begin and End?* *supra* at 4 – 8.

<sup>18</sup> Dove, *The Term of A Senator – When Does It Begin and End?* *supra* at 9.

even though the Senator could not be sworn and seated until the first day of the next session of Congress.

## **Failure to Hold A Special Election**

In some instances, a state may choose not to hold a special election to fill the remainder of the term of a Senator who had died, resigned, or otherwise left office before the normal expiration of that term. The decision not to hold a special election may be because the remainder of that particular Senate term involves only a potential “short session” after the regular November elections, often referred to as a “lame duck” session of the Congress, and the state decided not to hold a special election for the expiring term concurrently with a general election for a new six-year term beginning in the next Congress on January 3 of the new year. A state could choose to hold two elections on the same day (the day of the regularly scheduled general election) for the two separate terms; one election would be the special election to fill the remainder of the unexpired term from November until January 3, and the other the general election to fill the new six-year term beginning at noon on January 3.

Putting aside the issue of whether a state is *required* to hold a special election at some time to fill the remainder of an unexpired term under the language of the Seventeenth Amendment,<sup>19</sup> it is clear that if no *special* election were held to fill the remainder of the term, the appointed Senator (if one had been appointed by the governor under the provisions of the Seventeenth Amendment and state law) continues in office for the remainder of that term until its expiration on January 3 in the new year (at which time the next six-year term begins).<sup>20</sup> In the regularly scheduled *general* election in November for the new six-year term, the Senator-elect so chosen begins his or her six-year term on January 3 following the November election.<sup>21</sup> That Senator-elect could not be seated in the current, remaining session of Congress (merely by virtue of election in the *general* election in November) because that would allow a term of more than six years, contrary to the provisions of the United States Constitution. In 1978 the Senate found that despite a state law that purported to allow the Senator-elect chosen for a new six-year term to also be seated in the current (“lame duck”) session of Congress, such Senator-elect would not be seated by the Senate since the state’s statutory scheme was contrary to the Constitution.<sup>22</sup> As explained by the former Parliamentarian of the Senate:

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<sup>19</sup> See discussion in United States Court of Appeals decision finding that it is required for the governor to issue a writ of elections to fill the unexpired term of former Senator Obama in a special election in November of 2010, even though that term will expire on January 3, 2011. The special election for the expiring term will be held at the same time as the general election for the new, six-year term. *Judge v. Quinn*, No. 09-2219 (7<sup>th</sup> Cir. June 16, 2010, amended July 22, 2010), see also, order, *Judge v. Quinn*, No. 09C1231 (7<sup>th</sup> Cir. August 2, 2010).

<sup>20</sup> U.S. CONST., art. 1, sec. 3, cl. 1 and 2, amend. XVII, and amend. XX, Section 1.

<sup>21</sup> U.S. CONST., amend. XX, Section 1. As noted by the Court of Appeals for the 7<sup>th</sup> Circuit with regard to the “special” election and the unexpired Senate term in the 111<sup>th</sup> Congress (of former Senator Obama): “However Illinois conducts its election for the vacancy, the state should endeavor to certify the results of that election as soon as possible, so that the replacement senator may present his or her credentials to the Senate and take office promptly. The senator elected to begin service with the 112<sup>th</sup> Congress will take office as the Constitution provides on January 3, 2011. U.S. CONST. amend. XX, sec. 1.” *Judge v. Quinn*, *supra*.

<sup>22</sup> The provisions of the United States Constitution take precedent over state laws on such subjects under the supremacy clause of the Constitution. U.S. CONST., art. VI, cl. 2. The states have authority over the “Times, Places and Manner” of elections to federal office, with a residual power in Congress (which has established by law a uniform day for the general election of Senators and Representatives). U.S. CONST., art. I, sec. 4, cl. 1. This authority over election administration, practices, and procedures does not give the states authority over the substantive terms of federal offices, (continued...)

In 1978 the State of Minnesota had in its statutes a provision which by its terms attempted to vary the practice set out in the 17th Amendment to the Constitution with regard to the filling of vacancies in the representation of any State in the Senate. The 17th Amendment states that, "The people fill their vacancies by election." The Minnesota statute states that any person "who is elected ... for a regular 6-year term ... shall also succeed ... for the remainder of the unexpired term."

The precedents of the Senate show that the Senate has refused to allow any State by statute, executive order, or otherwise to vary the procedure for the election of Senators or to set the time or date for their service to begin.

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The 17<sup>th</sup> Amendment empowered the executive authority to make a temporary appointment to fill a vacancy and it empowered the legislature to enact a law providing for the people to fill the vacancy by election.

The Minnesota statute stated that a single election would be for two separate and distinct purposes:

- (a) to fill unexpired term, and
- (b) for a regular six year term.

The people of Minnesota may not be empowered by their legislature to elect United States Senators for terms greater than that authorized by the Constitution. An election was held in Minnesota for the full six year term. No election was held for the unexpired short term of two months between Election Day and January 3, 1979.

In the Minnesota case involving the Anderson seat there were two separate terms of office to be filled and the State attempted to combine them which would allow a Senator to be elected for more than six years, in violation of the Constitution.

This attempt was not permitted and Senator Anderson continued to serve until he voluntarily resigned in December 1978.<sup>23</sup>

If the Senator appointed to fill the remainder of the term expiring on January 3 resigns prior to that time (or if no one had been appointed to fill the vacancy), then the governor could appoint some qualified individual, including the winner of the regular November general election, to fill the remainder of the unexpired term.

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(...continued)

nor over the qualifications to hold office, which are established in the Constitution. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-835 (1995); *Cook v. Gralike*, 531 U.S. 510 (2001).

<sup>23</sup> Dove, *The Term of A Senator – When Does It Begin and End?* *supra* at 13-14.

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