



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 *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 an 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 an 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 may be waived by unanimous consent, and has in the past on some occasions for various causes and reasons relating to the delay of the transmittal of credentials in proper form. This has allowed a Senator-elect to be sworn 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 17th 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.”¹ 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.² 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.³ 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.⁴ Furthermore, the Senate (in a similar manner as the House) has the express constitutional authority to make its own rules for its proceedings.⁵ 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.⁶ Such proper “credentials” are the election certificates duly signed by the governor and secretary of state.⁷ This long-standing Senate Rule can be waived by unanimous consent, and has been so waived on several occasions in Senate history. In such instances there may have been a delay or interruption in the mails, or some other technical or justifiable reason for the Senate, by “unanimous consent or without objection,” to swear in a Senator before the proper credentials were physically received by the Senate.⁸

If the 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 new Senator is elected and “qualified.”⁹ “Qualified” here is used as a verb, and simply means taking the

¹ “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.”

² U.S. CONST., Art. I, Sec. 4, cl. 1.

³ *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).

⁴ *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)).

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

⁶ Senate Rule II; Riddick and Frumin, *Riddick’s Senate Procedure, Precedents and Practice*, S. Doc. No. 101-28, 101st 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, 73rd Cong., 2d Sess. (1933)), and the election case of *Hammond v. Herrick*, 1 Hinds’ Precedents § 499.

⁷ Senate Rule II, para. 3.

⁸ See *Riddick’s Senate Procedure*, *supra* at 707-708.

⁹ 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).

constitutionally required oath of office given by the Senate¹⁰ (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.”¹¹

If the 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 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 that case, that is, 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.¹²

As explained by the Senate Parliamentarian Robert Dove, quoting from a resolution unanimously adopted by the Senate (S.Res. 129, 85th 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.”¹³ 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.”¹⁴

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.”¹⁵ 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 Stewart’s election, November 8, 1938” because the Senate had been in *sine die* adjournment at the time of the election.¹⁶ Similarly, in 1957, the Senate adopted a resolution noting that the term

¹⁰ U.S. CONST., Art. VI, cl. 3. See 5 U.S.C. § 3331.

¹¹ 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.

¹² See now 2 U.S.C. § 36

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

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

¹⁵ Senate Election, Expulsion and Censure Cases, 1793-1990, supra, Case 120, p. 362-363.

¹⁶ United States Senate Election, Expulsion and Censure Cases, 1793-1990, supra, p. 363.

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, 1956.¹⁷ 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."¹⁸

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

¹⁷ 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.

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

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