

Special Sessions Revisited



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Introduction

A special session is a means to address a specific issue that arises outside of a regular legislative session. While the Legislature may address any subject at a regular session, special sessions are limited to a particular matter. Myriad circumstances have historically led to special sessions, such as a pandemic, major court decisions, natural disasters, federal legislation, or economic concerns. In South Dakota, both the Governor and the Legislature have the

constitutional power to call for a special session. This issue memo provides a broad overview of special sessions, as well as the reasons for each of the special sessions that have been held in South Dakota.

South Dakota Constitution

Legislative power is unlimited, except as proscribed by state and federal constitutions.¹ One constitutional limitation on legislative power is the ability of the Legislature to convene itself. The Legislature is authorized to meet only at regular or special sessions.² The South Dakota Constitution expresses no limitation on how many special sessions can be held in a year or how long a special session may last.

The Governor's power to call a special session is provided under Article IV, § 3, which states in relevant part, "The Governor may convene the Legislature or either house thereof alone in special session by a proclamation stating the purposes of the session, and only business encompassed by such purposes shall be transacted." The Governor's constitutional power to call a special session has existed in some form since statehood. Prior to 1972, there was no requirement that the Governor state the purposes of the session in a proclamation (or "call") and that business conducted by the Legislature be limited to those purposes.³ Instead, the prior version stated that the Governor had the power to convene the Legislature on "extraordinary occasions."

The Legislature's ability to call a special session was approved by the voters in 1990. As a result, Article III, § 31 provides, "In addition to the provisions of Article IV, § 3, the Legislature may be convened in special session by the presiding officers of both houses upon the written request of two-thirds of the members of each house. The petition of request shall state the purposes of the session, and only business encompassed by those purposes may be transacted." Since 1990, the Legislature has called special sessions in 2001 and 2011. Both sessions were called for the purpose of redistricting. The Legislature has also called for a redistricting special session to be convened on November 8, 2021.

Special Sessions in Other States

According to the National Conference of State Legislatures, only the governor may call a special session in fourteen states, and in the other thirty-six, the governor and legislature both have the power to call a special session.⁴ The procedure by which a legislature may call the special session varies in how members agree to hold the session and who issues the call. Like South Dakota, many states, such as Alaska⁵ and Colorado⁶, require the assent of two-

¹ *Breck v. Janklow*, 2001 S.D. 28, ¶ 9, 623 N.W.2d 449, 454.

² *In re Opinion of Judges*, 119 N.W.2d 145, 146 (S.D. 1963).

³ Specifically, the former provision stated: "He shall have the power to

convene the Legislature on extraordinary occasions."

⁴ As of this writing, at least one of the fourteen states, Idaho, will decide on a constitutional amendment that would allow its

Legislature to call itself into special session in a future election.

⁵ Alaska Const., Art. II, § 9.

⁶ Colo. Const., Art. V, § 7.

thirds of the members of each house polled in manner prescribed by the state constitution. Some states, like Louisiana⁷, merely require a majority of members to assent, while others, such as Illinois⁸, allow the presiding officers of each house to issue a joint proclamation, as provided by law. Like South Dakota, many states allow presiding officers to issue the notice, although in some states the governor convenes the legislature after being presented with the petition or request of the legislators, such as in New Mexico.⁹

Some state constitutions impose additional restraints or provide a means to address additional subject matter outside the call. Texas's¹⁰ special sessions are limited to thirty days. Utah's¹¹ special sessions called by its legislature are held in cases of "a persistent fiscal crisis, war, natural disaster, or emergency in the affairs of the State[.]" Florida¹² provides that subjects outside the call may be addressed after a two-thirds vote of approval from each house.

Special Sessions Generally

The South Dakota Supreme Court has not yet interpreted the special session provisions of the South Dakota Constitution. Courts in other states, however, have interpreted their respective special session laws and have developed general principles regarding the conduct of special sessions. This case law primarily concerns special sessions convened by a governor.

State constitutions generally provide that the call designates, recommends, or specially names legislation to consider. Some courts have held that the call itself must contain particular language, meaning that an overly vague call is impermissible, and any legislation enacted pursuant to it is unconstitutional.¹³ The more general view is that while a call must provide direction on the subject matter to be addressed, it can be stated in broad terms.¹⁴ Additionally, some courts have determined that a call may be revoked prior to the special session being convened, thereby preventing the special session from occurring.¹⁵ However, it is questionable whether a call can be revoked after the special session has convened.

The requirement that a legislature only act upon the subject matter of the call is the most litigated special session issue. The reason for requiring the purpose of the special session be announced is for public notice and to be a check upon legislative action.¹⁶ Moreover, some court decisions indicate that a legislature may not formally investigate matters outside of the subject matter to be addressed at a special session.¹⁷

Most importantly, courts have consistently stated that any legislation that is passed outside the subject matter of the call is unconstitutional.¹⁸ A governor signing legislation outside the scope of the call does not cure the error.¹⁹ Legislation passed at a special session must be "germane," bear a "rational nexus," or have a "natural connection" to the subject matter of the call.²⁰

⁷ La. Const., Art. III, § 2.

⁸ Ill. Const., Art. IV, § 5.

⁹ N.M. Const., Art. IV, § 6.

¹⁰ Tex. Const., Art. III, § 40.

¹¹ Utah Const., Art. VI, § 2.

¹² Fla. Const., Art. III, § 3.

¹³ *Denver & R. G. R. Co. v. Moss*, 115 P. 696, 699 (Colo. 1911).

¹⁴ *Com. ex rel. Schnader v. Liveright*, 161 A. 697, 703 (Pa. 1932).

¹⁵ *In re Opinions of the Justices*, 12 A.2d 418, 420 (Me. 1940). Not all

courts agree that a call may be revoked before the special session begins unless such power is expressly granted. *Royster v. Brock*, 79 S.W.2d 707, 711 (Ky. Ct. App. 1935).

¹⁶ *Richmond v. Lay*, 87 S.W.2d 134, 135 (Ky. Ct. App. 1935).

¹⁷ *State ex rel. Fatzer v. Anderson*, 299 P.2d 1078, 1085 (Kan. 1956).

¹⁸ *Wieder v. People*, 722 P.2d 396, 398 (Colo. 1986); *Jones v. Laurel Cty.*, 600 S.W.2d 489, 490 (Ky. Ct.

App. 1980); *Arrow Club, Inc. v. Nebraska Liquor Control Comm'n*, 131 N.W.2d 134, 138 (Neb. 1964).
¹⁹ *Trenton Graded Sch. Dist. v. Bd. of Educ. of Todd Cty.*, 129 S.W.2d 143, 145 (Ky. Ct. App. 1939); *Smith v. Curran*, 256 N.W. 453, 455 (Mich. 1934).

²⁰ *State v. Conover*, 703 N.W.2d 898, 903 (Neb. 2005); *Empire Sav., Bldg. & Loan Ass'n v. Otero Sav. & Loan Ass'n*, 640 P.2d 1151, 1155 (Colo. 1982).



The scope of the call may change. An amended call modifying the subject matter to be addressed may be issued up to and through a special session.²¹ Legislation enacted pursuant to an amended call issued during a special session has been upheld because public notice is achieved through the amended call.²²

Special Sessions in South Dakota²³

The first special session in South Dakota was held October 15-17, 1889, to organize and elect two U.S. Senators--at the time U.S. Senators were chosen by state legislatures until the passage of the 17th Amendment to the U.S. Constitution. Since then, the Legislature has met in special session twenty-seven times:²⁴

1. February 8-11, 1916: The Governor called this special session to address what he perceived to be defects in primary election law and recommended that certain changes be made.
2. March 18-23, 1918: The Governor observed that certain issues related to or impacted by World War I should be addressed, but also cited many other issues that the Legislature should consider, including insurance law, banking law, resolving conflicts in constitutional amendments, and ratifying the 18th Amendment to the U.S. Constitution.
3. December 2-4, 1919: The Legislature was asked by the Governor to ratify the 19th Amendment to the U.S. Constitution.
4. June 21-29, 1920: The Governor's opening message called the Legislature's attention to numerous areas of law he considered to be an emergency including, but not limited to, bonuses for soldiers, home building, issues related to educational institutions, certain aspects of infrastructure, placing prisoners on public work, and court reform.
5. June 22-July 1, 1927: The Governor indicated many topics for the Legislature to address in his opening message, including certain appropriations, fish and game activities, cigarette tax, the President's visit, and Missouri River improvement.
6. July 31-August 5, 1933: The Governor called attention to the conditions caused by the drought and the Great Depression and requested a means to address the situation. Furthermore, to increase revenue, the Governor requested a tax on the manufacture and sale of non-intoxicating beer and wine with the proceeds going to poverty relief.
7. December 21-24, 1936: A special session was called by the Governor "for the sole purpose of enacting into law such legislation as will at once make effective" certain provisions of the Federal Social Security Act of 1935.

²¹ *Jaksha v. State*, 385 N.W.2d 922, 927 (Neb. 1986). This is not a universal holding, as at least one Arkansas court has held that a governor may not issue a supplemental call once the special session has started. *Sims v. Weldon*, 263 S.W. 42, 44-45 (Ark. 1924). Somewhat uniquely, Utah's constitution explicitly provides that

the Legislature may conduct "such other legislative business as the Governor may call to its attention while in session." Utah Const., Art. VII, § 6.

²² *Jaksha*, 385 N.W.2d at 927.

²³ See also Issue Memorandum 94-26 available on the Legislative Research Council website.

²⁴ As official notice by proclamation of the earliest special sessions does not appear to exist in state records, the reasons for the earliest special sessions are gleaned from the Governor's opening message to the Legislature at the special session.



8. July 10-12, 1944: "The World War II Special Session" was convened by the Governor "for the purpose of considering legislation of special and emergency nature relating to the rights and interests of citizens of our state now engaged in the war effort of the nation."

9. February 6-16, 1950: The Legislature was convened by the Governor "for the purpose of considering legislation dealing with our power problems, and any other appropriate, special and emergency matters affecting our state and its people."

10. May 18, 1981: The South Dakota Supreme Court declared 1981 SB 235 unconstitutional. The result of this ruling meant the State would collect a highway motor fuel tax but could not spend the revenue. A special session was convened by the Governor to "consider the elimination of the motor fuel tax which may be collected but not spent" and "to use its [the Legislature's] collective judgment to address the serious transportation problems of the State of South Dakota, including the expenditure of funds for the maintenance, construction and supervision of highways and bridges of the state."

11. September 23-24, 1981: The Governor called a special session to address a water development opportunity and rail transportation. The Legislature was asked to "decrease the possibility of damage or injury to the Madison water formation underlying western South Dakota; [t]o allow and create the opportunity for additional municipal, industrial and domestic water development, including western South Dakota communities who need improved quality and/or increased quantities of water; [t]o create a State Water Development fund; and [t]o address the serious transportation problems created by the imminent abandonment of the north line/main line."

12. May 2-3, 1984: This special session called by the Governor also concerned water development and associated challenges cited in the proclamation. The Legislature was requested "to address [an] institutional barrier to continued progress in the area of water development" and "address the organizational structure and, thereby, the substantive opportunity for increased water development in South Dakota."

13. July 16, 1987: At a time when many states were competing for the location of the Superconducting Super Collider,²⁵ a special session was called by the Governor "to meet the requirements set forth by the U.S. Department of Energy for location of the Superconducting Super Collider, to meet our commitment to neighbors who support us and to take the action necessary to put South Dakota in the most favorable position possible in the national competition for location of the Superconducting Super Collider."

14. October 3, 1991: The Governor called this special session for the purpose of redistricting.

15. November 26, 1991: Following the redistricting process the prior month, the Governor called the Legislature back to fix several, specific errors in the redistricting plan.

16. May 25, 1993: Following the death of Governor George S. Mickelson in a plane crash, a special session was called by his successor, Governor Miller. The special session was intended to confirm the appointment of a new lieutenant governor, authorize a memorial for all victims of the plane crash, appropriate funds for transition expenses, and appropriate funds for the purchase of a state aircraft. Earlier that May, a prison riot had also broken out at the State Penitentiary in Sioux Falls, and so the Legislature was also asked by the new Governor to appropriate funds related to repairing the damage caused by the riot.

²⁵ The Superconducting Super Collider was a particle accelerator with a planned 54.1-mile circumference designed to conduct

research into high-energy physics. Texas was the chosen location, and the facility was partially constructed. Due to serious budget

problems, the U.S. Congress scrapped the program in 1993.



17. July 11-12, 1994: This session was called by the Governor in response to the South Dakota Supreme Court holding that the video lottery program, as enacted by the Legislature, was unconstitutional. The Legislature was asked to "place a proposed constitutional amendment to Article III, § 25 pertaining to the state lottery or video games of chance on the general election ballot and to address revenue and fiscal issues arising from the Supreme Court decision of Poppen v. Walker."

18. September 9, 1994: Part of the Governor's efforts to address the shutdown of video lottery was to issue Executive Order 94-9 to implement a series of budget cuts. Counties sued the Governor, and the Sixth Circuit Court determined that the statute the Governor had relied upon in executing these cuts was an unconstitutional delegation of legislative authority. Faced with no sure way to make up for the budget shortfall, another special session was convened. The Governor called upon the Legislature to again address the "revenue and fiscal issues arising from the Supreme Court decision of Poppen v. Walker."

19. April 14, 1997: The Governor called for a special session to address the revenue and expenditure issues caused by blizzards and floods.

20. December 28-29, 2000: This special session was called by the Governor to consider resolutions and legislation for the sale and disposal of the South Dakota Cement Plant, and for the disposition of the proceeds from the sale.

21. October 23-24, 2001: The Legislature called this special session for the purpose of redistricting.

22. June 26-27, 2003: In the years prior to this special session, many insurance carriers stopped providing coverage in South Dakota. One of the main factors in this departure was a law requiring that insurance carriers in the state insure a certain number of individuals considered "high-risk." The Governor called this special session for "the creation, implementation and funding of a risk pool for individual health insurance policies and to provide alternatives for existing basic and standard guaranteed issue individual health insurance policies."

23. October 14, 2005: The Governor called for a special session concerning the development of a facility or lab for scientific research or technological development at the former Homestake Mine in Lead.

24. October 24, 2011: The Legislature called this special session to redistrict both legislative districts and the Supreme Court districts.

25. June 12, 2017: In response to a South Dakota Supreme Court ruling that a state agency does not have the legal authority to allow people access to flooded waters or ice over private property without legislative approval, the Governor called this special session to consider legislation relating to public recreational use of certain waters overlying public and private property.

26. September 12, 2018: Two reasons were given for this special session called by the Governor. The first was in response to the U.S. Supreme Court decision in *South Dakota v. Wayfair* that permitted states to collect sales tax from online businesses without a physical presence in the state. Thus, the Legislature was asked to consider "the collection and remittance of sales tax by remote sellers." It was also asked to consider "the timeframe by which state officers can enter office."

27. October 5, 2020: In response to the COVID-19 pandemic, the Governor requested that the Legislature amend the General Appropriations Act for FY 2021 for the appropriation of federal funds relating to coronavirus relief received by the state and to consider a resolution recommended by the Special Committee on Appropriations.



Conclusion

Major national events such as the Great Depression and World Wars I and II were often the impetus for early special sessions, although much normal state business was also addressed. In later years, special sessions have predominantly focused on urgent state needs. Special sessions have not occurred frequently, although they have become more common since the early 1980s. There is no guiding case law in South Dakota on the issue. Case law from other states, however, may help illustrate some possible principles of special sessions.

Draft

This issue memorandum was written by Brigid Hoffman, Legislative Attorney, on August 31, 2021, for the Legislative Research Council. It is designed to provide background information on the subject and is not a policy statement made by the Legislative Research Council.

