Legislative Vacancies: A Patchwork of Laws for Patching Holes in State Legislatures

The membership of legislatures is always changing. Retirements, term limits and competitive districts all contribute to near-constant membership changes in state legislatures, and not all those changes are conveniently timed to coincide with a regular election cycle—vacancies in the middle of a legislative session are common. And, no one wants to see prolonged gaps in representative democracy.

As with virtually everything else related to elections, state laws on filling those vacancies vary widely state to state. If vacancies in constitutional, local and congressional offices are also considered, the variance is even wider. Here, The Canvass grapples with just state legislative vacancies.

Why do vacancies occur?

Legislative vacancies happen for a number of reasons:

- Appointment, election or seeking election to another position;
- Retirement from office;
- The incumbent accepted another job;
- Death, legal issues and other reasons.

2015 was a big year for vacancies. The year before, in 2014, the numbers were far lower. That makes sense: in a year with a regularly scheduled election in most states, governors who took office in early 2015 may have dipped into a well-qualified pool of candidates—sitting legislators—to fill out their administration. Term limits could also play a role in creating vacancies, as legislators facing their limit may be more inclined to seek new opportunities, or may leave early so as to give an incumbency boost to their same-party successors. But that depends, of course, on how vacancies are filled.

How do states deal with vacancies?

25 states require a special election to fill a legislative vacancy. When those special elections occur varies—more on that later.

The other 25 states use a variety of methods to fill vacancies. Colorado, Illinois, Indiana, New Jersey, and North Dakota allow the political party of the departing member's district to appoint a successor.

Colorado recently demonstrated this process when Republican Party members in Senate District 27 appointed Representative Jack Tate to fill the vacancy created by the
resignation of Senator David Balmer, who resigned to take a position with the Humane Society Legislative Fund. Supporters of this process say it minimizes controversy and cost, and it keeps the continuity of the most recent election as well as the party balance in the legislature. “I think it makes sense to have it handled that way as it provides expediency, meets legislative urgency, and assures that the person chosen is well connected to the political views of the district. All important considerations, especially when there is a close 18-17 majority in the Senate,” says now-Senator Tate, referring to Colorado’s current Senate split, with the Republicans in charge.

Two states on the “party fills the seat” list add an extra wrinkle. In North Dakota, the qualified electors of a legislative district in which a legislative vacancy occurs may petition for a special election to be called by the governor to fill the vacancy. And in New Jersey, if the vacancy occurs while the legislature is in session, a special election must be conducted within 51 days. Otherwise, the party appoints the replacement.

Eight states—Arizona, Montana, Nevada, New Mexico, Oregon, Tennessee, Washington and Wyoming—leave the appointment decision up to the board of county commissioners for that district, with some caveats. Arizona, Washington, and Wyoming require the board to appoint from a list of candidates supplied by the political party of the outgoing legislator, and state law in Nevada and Oregon requires the replacement to be of the same political party. Montana has an uncommon requirement: if the vacancy occurs 85 days or more before the general election in the second year of the four year term, an individual is elected to fill the vacancy instead of appointed by the county commissioners.

In Tennessee if there are fewer than 12 months remaining in the term of a general assembly member (terms are two years) then the vacancy is filled by the governing body of the replaced legislator’s county of residence at the time of his or her election; if there are more than 12 months remaining, then the successor is elected in a special election. For a vacancy in the Senate, when there are more than two years remaining in the term (terms are four years) but fewer than 12 months before the next general election, the special election is held with that general election.

Eleven states—Alaska, Hawaii, Idaho, Kansas, Maryland, Nebraska, North Carolina, South Dakota, Utah, Vermont, and West Virginia—give appointment power to the governor with certain restrictions. Idaho, Utah and West Virginia require the governor to appoint someone from a list of candidates provided by the political party of the departing incumbent. Kansas, Maryland and North Carolina require the governor to appoint one candidate selected by the political party of the incumbent. Hawaii law says a list of three nominees must be presented for appointment by the governor, but in the Aloha State Senate if a vacancy occurs at least 10 days prior to the close of filing for the mid-term primary election (terms are for four years), an individual is elected to fill the vacancy instead of making an appointment since Senate terms are longer.

Lastly, Ohio allows fellow members of the Legislature to appoint a successor in the event of a vacancy. The election is only among members of the political party that held the now-vacant seat.

Specials elections—good or bad?

As discussed above, special elections are the most common way states fill legislative vacancies. According to Ballotpedia, there were 88 special elections in 27 states in 2015. What effect do special elections have on election administrators? Unexpected extra elections come with extra costs. Voters in Allegan and Lapeer counties, in Michigan, found out the hard way in November 2015 when unexpected vacancies in two state House seats required the printing of new ballots (the old ones had to be discarded and the new special election added to the ballot) and the opening and staffing of several additional polling places were required in order to include several towns ships in the district that did not have planned elections. Pennsylvania election officials estimated a $70,000 price tag to fill the vacant 161st district seat in the House of Representatives in mid-2015.

The high cost of special elections is especially evident when there is only one candidate on the ballot. Senator Sharon Runner (R-California) was elected unop posed to fill a legislative vacancy in 2015 and shortly thereafter introduced a bill to allow the Governor to cancel special elections when there is only one candidate on the ballot. “Expenses add up fast for counties across California when special elections are called,” said Runner in an August 2015 press release. “Elections are a vital part of our democratic process, but it is not always necessary to spend millions of taxpayer dollars on an election when only one name appears on the ballot.”

Unanticipated costs are only one issue. Traditionally special elections are low turnout affairs. Officials in Bexar County, Texas, found how low this past April when an estimated 2,25 percent of voters voted in the special election for House District 124. This draws into question whether turnout that low actually reflects the will of the people in a district. States may seek other options to avoid low turnout and high costs—some states, such as Alaska, California, Hawaii and Maryland allow special elections to be conducted entirely by mail.

Still many states continue to use special elections because of the belief that it is the most democratic way to fill legislative vacancies. Delegate David Moon (D) has introduced or co-sponsored several pieces of legislation to require special elections to fill vacancies in Maryland. “Our state currently has a patchwork system for filling vacant offices, where we hold special elections for Congress, appointments by party central committees for state House and Senate, temporary gubernatorial
appointments with special elections for U.S. Senate, and gubernatorial appointments for Comptroller and Attorney General,” says Moon. “I prefer special elections as they give more power to voters. My motivation for these bills is to respect the will of the voters to the maximum extent possible.”

What about legislative trends?

Legislative interest in vacancies and special elections tends to be consistent. In 2015, 95 bills were introduced in 33 states with 12 bills in 11 states enacted. Things legislators can address:

- **When special elections are held:** several bills are designed to line up special elections with the next regularly scheduled general election or to require governors to declare the date within a specified time frame. Some states have even attempted to prevent special elections from being held in certain months to ensure decent voter turnout or sought to authorize them in off years.

- **Who pays:** one trend that has emerged, especially among larger states, is the question of who pays for special elections. As noted above, special elections required by states can carry a hefty price tag for jurisdictions that weren’t expecting them. With that in mind, there have been 17 bills over the past two years in states such as California, Georgia, Massachusetts, Ohio and Texas prescribing the state as the main funder of special elections to fill legislative vacancies.

- **Not holding an election if there’s only one candidate:** in addition to the California bill mentioned above, **Arkansas** also sought to avoid a special general election with legislation to cancel the general if there is only one candidate left after the special primary election.

- **How U.S. Senate seats are filled:** the U.S. Constitution stipulates that U.S. House seats are filled by election but leaves it up to states to decide how to fill open Senate seats. Hawaii shortened the time frame in which the vacancy must occur prior to submitting nomination papers for regularly scheduled elections from 60 days to 21 days in effect giving more time for the special election to be held at the same time as the regular election. **Montana** moved to line up special elections for U.S. Senate seats to occur with regularly scheduled elections but does allow for an appointment to be made (from the same political party). **North Dakota** now requires a special election to be held to fill U.S. Senate vacancies within 95 days, unless it occurs 95 days before the expiration of the term.

Vacancies can affect partisan control of legislatures

This year, Kentucky is the state to watch. A March special election to fill four vacancies in the House could result in a tied chamber—50-50. Democrats have controlled the House since 1921 and currently have a 50-46 majority, while the Senate and governorship are in Republican hands. If the House flips, then no chambers will be left in the south in the hands of Democrats.

Though to be fair, states still can encounter this problem when appointments are made. That’s the case in **West Virginia**, where the Democratic governor is questioning which party member to appoint to the seat of a vacating Senator who had switched from Democrat to Republican after the 2014 elections, which gave Republicans control of the chamber, 18-16. It’s now up to the State Supreme Court to decide the issue.

Is voting in more than one state prohibited?

It certainly is possible to vote in more than one state; just ask the **Kansas resident**, who voted in Colorado and in Kansas, thinking it was just fine. That doesn’t mean it’s a good idea, or necessarily legal. At least nine states have addressed “dual voting” by prohibiting voting in the same election in more than one state—Kansas, Kentucky, Maine, Missouri, New Hampshire, Oregon, South Dakota, Virginia and Washington. Kansas is the newest of those nine, as the state passed **Senate bill 34** in 2015 to clarify the definition of voting more than once and to give the secretary of state the authority to prosecute election crimes. The bill also increased the crime from misdemeanor to a felony.
We’ve said it once, and we’ll say it again—online voter registration was the elections story of 2015. The calendar may have turned but the momentum isn’t going away any time soon. Two more states—Iowa and New Mexico—launched their online voter registration systems as the new year turned, bringing the total to 29 states, plus the District of Columbia, with live systems. That’s a big jump in just a year—only 20 states were live in January 2015—and it should continue to go up throughout this year. Here’s the 2016 outlook for online voter registration.

**What’s on the horizon and how will litigation affect future efforts?**

The Ohio Senate passed legislation (Senate bill 63) authorizing online voter registration in June of 2015, but the House has not yet acted on the bill. This could change as the chamber is set to review the bill in early 2016, making the Buckeye State once again one to watch.

Wisconsin also considered online voter registration legislation in the fall of 2015. While the bill was not acted upon, and may have been overshadowed by the reorganization of the Government Accountability Board (GAB) and the passage of a campaign finance reform bill, the Badger State is another to watch in 2016. Rhode Island also narrowly missed out on passing legislation in 2015 when House bill 6051 stalled in the Senate. It could make the agenda again this year.

“Online voter registration has gained momentum in the states because it has become incredibly clear that moving online streamlines the registration process while improving the security, accuracy, and cost-effectiveness of administering elections,” said Samuel Derheimer, manager of The Pew Charitable Trusts’ election initiatives. “It’s only a matter of time before the rest of the country adopts this proven tool.”

Iowa just launched its online voter registration system earlier this month. But it’s already drawn concerns from the American Civil Liberties Union (ACLU) about excluding those who do not have a driver’s license or a state-issued ID card. In most states the online voter registration systems link up with the Department of Motor Vehicles (DMV) database to verify eligibility, so a driver’s license or other state ID number is required. If you don’t have one, what do you do? That’s the question the ACLU is raising as Iowa heads into the first weeks of having an active system.

Online voter registration supporters note that traditional paper registration is still available for those who may need it or simply prefer it. Several states with online voter registration (though still a minority of them) now do offer persons without state-issued IDs the opportunity to register or update their records online.

## States using both legislation and executive authority to implement online voter registration

Three states—Florida, New Mexico and Oklahoma—passed legislation to create online voter registration systems in 2015 (though the systems in Florida and Oklahoma are not live). Hawaii, Massachusetts, Nebraska, West Virginia and the District of Columbia also launched their systems in 2015 after previously enacting legislation. States overwhelmingly prefer to authorize online voter registration through legislation—of the states that are live, 21 passed legislation to create the systems. It’s the preferred method from a legislative standpoint.

On the flip side, four states—Alaska, Iowa, Pennsylvania and Vermont—moved forward with online voter registration in 2015 without enacting legislation. In total nine states have taken the road less traveled by launching online voter registration without approval from the legislature. Kentucky may become the 10th sometime early in 2016.

**Bookmark This**

**Ballot Battles: The History of Disputed Elections in the United States**, by Edward B. Foley, provides a comprehensive look at how challenged elections have helped shape the government and elections system we know today. Starting in the 1790s, when a rigged gubernatorial election in New York in 1792 nearly ended in calls for another revolution, through the disputed elections of the 19th century, to the 2000 presidential election and the 2008 Minnesota U.S. Senate race, the U.S. has faced many a challenge to its vote-counting procedures. Close elections have a way of gripping public attention and since a race in the Mississippi House was recently decided by drawing straws, they aren’t going away any time soon. Part history, part analysis and implicitly a cautionary tale, Ballot Battles is well worth reading. And if it is the future you’re worried about, read the draft Procedures for the Resolution of a Disputed Election Foley has also created, in his work with the American Law Institute.
From the Chair

Senator Dave Robertson chairs the elections and government reform committee in the Michigan Senate. He represents the 14th Senate District which includes parts of Genesee and Oakland counties. Before being elected to the Senate, he served in the Michigan House of Representatives from 2002 to 2008. He spoke to The Canvass in October 2015.

- “My philosophy is to maintain the integrity of the ballot box and the elections process in all aspects. I want to make sure that voter lists are accurate and guarantee that every person that is legally eligible can cast their vote.”

- “The legislature is looking at the issue of eliminating straight-ticket voting. There is great value to having voters look at the names on the ballot and make an informed choice.” (Editor’s note: the Michigan legislature passed a repeal of straight-ticket voting in December 2015 and was signed by the Governor this month. See NCSL’s page on straight-ticket voting for more information).

- “There has been talk of early voting here in Michigan. I’m not inclined to support it. I believe strongly that Election Day should be the focal point. I know how hard it is to win a tough election and I think it would be a disservice to both challengers and incumbents to truncate the election process. It’s a community of people coming together to decide their representatives. Times have changed but the fundamental principles have not.”

- “We’ve moved low turnout elections from February to November to get the largest turnout of voters for those elections. In a sense, eliminating “stealth” elections since there are important questions decided at every election.”

Read the full interview with Senator Robertson.

The Election Administrator’s Perspective

Valerie Unger is the county clerk for Polk County, Ore. The county was named for President James Polk and is one hour south of Portland, one hour west of the Cascade Mountains and one hour east of the Pacific Ocean. Unger currently serves as president of the Oregon Association of County Clerks. She spoke to The Canvass on Dec. 22.

- “Polk County is a “lean running” county in that we are able to run efficiently on a small and tight budget. But now I’m wanting to upgrade our vote tabulation systems and finding the money to do that is a concern. That’s especially true with Oregon’s new motor voter system [automatic registration] taking effect in January. It’s more voter registrations and more ballots to send out.”

- “I think it’s [Oregon’s new motor voter law] going to result in a faster and cleaner process. We’ll be getting the information electronically which helps to cut down on duplication and to have a more accurate voter list.”

- “[Before we moved to all vote-by-mail] we had elections where 65 percent of ballots were absentee ballots. It makes sense that Oregon overwhelmingly supported moving to vote-by-mail. It’s such a convenience for the voters. Overall it has increased turnout consistently compared to voting at the polls.”

- “Sometimes legislators don’t know how the elections process works and may be considering things that will add costs along the way that may not be necessary. County clerks are able to educate and show them the process so they can understand it better. Understanding it beforehand is very important. We are very open to working with them.”

Read the full interview with Unger.
Worth Noting

- Add Maryland to the rapidly growing list of states with automatic voter registration legislation coming in 2016.

- Minnesota Secretary of State Steve Simon, a former legislator, has heard the message loud and clear from local officials in the North Star State—voting machines need to be replaced. Be sure to check out NCSL’s Elections 2020 project which will be exploring the legislative role in selecting elections technology appropriate to each state’s needs, potential state and local funding options, and the web of responsibilities relating to elections technology.

- While many jurisdictions are eager to replace aging voting machines, rural counties in Colorado are concerned about being stuck with the bill for the newly mandated statewide voting system.

- It’s officially a presidential year and all eyes are sure to be on the pivotal swing state of Ohio. Secretary of State Jon Husted is assuring voters and candidates that any issues with voting machines and postmarks from the November election will be fixed with particular emphasis on poll worker training.

- The Iowa caucuses are only days away and the Iowa Democratic Party has announced a tele-caucus initiative to allow service members and other Iowans living abroad to participating in the first-in-the-nation contest. The initiative will allow eligible Iowa voters to register online and then dial in by phone on Feb. 1 to vote for the candidate of their choice. Not quite Internet voting but an interesting twist.

- Speaking of the Buckeye State, the Hamilton County Board of Elections has come up with several recommendations to avoid the problems of 2015 with the main focus on rejuvenating the poll worker force by encouraging a “day off for democracy.”

- While many were enjoying the holiday break, the growing concern about the privacy of voting records was given a jolt after information from 191 million voter records was posted online. Access to voter records is an integral part of any modern campaign so the fallout from this leak will be sure to have repercussions. In the meantime, the Colorado secretary of state’s office confirmed that voter information is public information and no voter’s identity in Colorado was compromised in the leak.

- The Atlantic Monthly has an interesting look at what prompted California move’s to a top-two primary and how it has noticeably changed political party and campaign dynamics in the Golden State.

- The Council of State Governments has partnered with the Federal Voting Assistance Program to create the Overseas Voting Initiative Policy Working Group to examine how to better serve overseas voters. The group’s policy recommendations are now available.

- Electionline’s list of what’s in and what’s out for election administration in 2016 is a great way to start the New Year, especially the story behind “election geeks in the shower.”

Happy New Year Canvass subscribers! Looking forward to a great year chock full of election geekiness.

Big news on the web this month: NCSL’s Election Administration Research Database (EARD) has added nearly three hundred new articles and entries since October! The EARD catalogues articles and scholarly research on a wide range of election issues, including voting technology, voting methods, and litigation of election laws. The reports also reflect a variety of perspectives, ranging from election administrators to nonprofit organizations to academic researchers. With this expansion, the EARD is a better resource for exploring election issues and developing background materials for prospective legislation than ever before.

Thanks for reading, and please stay in touch.

—Wendy Underhill and Dan Diorio