

electionlineWeekly — July 22 2010 **electionline.org**

I. In Focus This Week

Who decides? States consider how to fill Senate vacancies

Byrd's death forces special session in West Virginia

By [Kat Zambon](#)

On July 19, members of the West Virginia state legislature passed [HB 201](#) to fill the U.S. Senate vacancy left by the late Robert Byrd, the sixth and most recent senator from the 111th U.S. Congress who was unable to complete his term.

As they leave Charleston following the July 21 [adjournment of the second extraordinary legislative session](#), Mountain State legislators can take heart knowing that their colleagues in at least 19 other states faced 37 bills dealing with the complex question of how to fill U.S. Senate vacancies.

All vacancies in the U.S. House of Representatives must be filled by election but vacancies in the Senate may be filled by appointment if the governor has been authorized to do so by the state legislature, which is the case in most states. However, the practice is not without controversy. Some of the more recent appointments have led to calls for reform.

HB 201 in West Virginia, which only applies to this particular election, set the special primary election for August 28 and specifies that the state will pay for the election, according to [WBOY](#). It passed 29-0 in the state senate and 83-7 in the state house with many of the dissenters concerned about the speed with which the bill passed. [Carte Goodwin](#), former counsel to Democratic Gov. Joe Manchin, was appointed July 16 to represent West Virginia in the U.S. Senate until after the special election and he was sworn in July 20.

Most of the legislation proposed in state houses, including [HB 103](#) in Alaska, [SB 30](#) in Colorado, [HB 213](#) and [SB 356](#) in Florida, [SB 193](#) in Kansas, [SB 61](#) in Ohio and several bills in the Maryland and New York state houses would strip the governor of the authority to appoint senators and/or force special elections in the event of Senate vacancies. [HM 215](#) in Florida would "urge Congress to adopt constitutional amendment requiring elections to fill vacancies in U.S. Senate and end appointments to fill those vacancies."

In New Jersey, [A 2355](#) would require the governor to appoint a senator from the same political party as the vacating senator and eliminate the special election option but [A 596](#) would require that Senate vacancies can only be filled by special election.

[SB 569](#) in Hawaii would increase from three to five "the number of prospective appointees from which the governor is to make a temporary appointment in the event of a" U.S. Senate vacancy. Both [HB 2503](#) and [HB 4113](#) in Illinois establish processes whereby a governor's Senate appointment would also require approval by the general assembly or a commission.

[SB 994](#) in California simply spells out that the state is responsible for the costs of such a special election and [H 298](#) in Vermont would have eliminated the need for special primary elections to fill vacant Senate seats with instant runoff voting.

One thing that most of these bills have in common is that they failed when put to a vote in state legislatures. "Most of these laws are usually related to particular vacancies and the relationship is so transparent that it's hard to overcome popular resentment toward patently partisan posturing," Charles Stewart, an MIT political science professor and consultant with the Pew Center on the States said.

Donald Ritchie, Senate historian said governors frequently appoint senators who will serve as placeholders and agree not to seek election. For example, when Pres. John F. Kennedy was elected, the governor appointed Ben Smith because Edward Kennedy, at age 28, was too young to fill his brother's seat.

Governors also often appoint candidates that they believe have a good chance of winning an election, though Ritchie said this strategy can backfire.

"I frankly don't see it as an undemocratic thing for an elected governor to appoint" a senator to fill a vacant seat, Ritchie said, "but these days we like direct elections and direct democracy."

At the same time, special elections are "very expensive and only small numbers of voters show up for special elections." Holding a special election to fill a vacancy "works in a smaller state like Alaska ... but in California where you have 35 million people it costs millions and millions of dollars to hold an election."

Repeal of 17th Amendment brewing within the Tea Party

Meanwhile, some members of the Tea Party have called for the repeal of the [17th Amendment](#) which specifies that the state legislature can empower governors to make temporary appointments in the Senate before an election can be held. The [Idaho Republican Party](#) platform adopted June 26 supports the amendment's repeal.

"While giving that power back to state legislatures would seem to go against the Tea Party's grassroots nature, supporters argue that if senators were beholden to state legislatures, they would not, for instance, have passed Pres. Obama's health care overhaul, which requires the expansion of state Medicaid programs," according to [The New York Times](#).

Before the 17th Amendment, state legislatures typically elected senators in the session immediately following the fall elections, according to Stewart. If one candidate did not win a majority of the votes in an initial vote, the legislature would vote at least once a day until someone was elected.

However, candidates rarely declared their intentions until after the legislature had convened. Candidates and their supporters came to the state capital when the legislative session started and parties held caucuses to choose nominees the night before balloting began. When the parties didn't unite behind a single candidate, the process descended into chaos.

"In general, the majority party got to determine who the new senator was, but if the majority party was split, then it could be days, or weeks, before a senator was chosen. In these cases, the senator was often chosen through secret deals among party leaders," Stewart said.

After 1910, state legislatures began working towards popular election of senators. Under the Oregon Plan, legislators pledged to support the candidate who received a majority of votes in a statewide referendum, but the plan fell apart when a referendum with three candidates didn't produce a majority winner and the state legislature became deadlocked. "This illustrated to reformers the importance of instituting popular election more directly, and gave impetus to the movement that led to the 17th Amendment," Stewart said.

"If you think it's bad for the governor to appoint a senator, why would you think it would be good for the state legislature to do it?" Ritchie said, adding that before the 17th Amendment, some states went without full representation in the Senate for a long time. "Wouldn't the voters prefer to elect their own senators? ... I don't necessarily see what the advantages are."

"But the Constitution's been amended before, it could be amended again."

II. Election News This Week

- Late last week the [Uniform Law Commission announced passage of its Uniform Military and Overseas Voters Act](#), designed to act as a model for states to update their election policies to make them more user-friendly with overseas voters (including military deployed in foreign countries). Although these are recommendations for state officials *Stars and Stripes* said voting rights groups praised the move as a common-sense step. [In a statement, the Pew Center on the States said](#) the model will "make it easier for those who defend and represent our nation's democratic ideals around the world to participate in our democracy here at home." The ULC recommends ditching cumbersome requirements like rules mandating notarizing or witness signatures for completed ballots (eight states still do that); allowing the electronic transmission of registration and ballot forms (only 16 states currently allow ballots to be sent via email); and requiring all states mail absentee ballots at least 45 days before an election (25 states and the District of Columbia didn't do that in 2008). The group also called for expanded acceptance of the Federal Write-In Absentee Ballot for all elections, which allows voters to cast a generic ballot if their state-specific one doesn't arrive in time. Implementing many of the changes by this November's election will be impossible, officials conceded. They're looking for a major state lobbying effort in 2011, in hopes of getting a uniform set of rules across the country before the 2012 presidential election.
- Voters in Georgia headed to the polls on Tuesday and as with most elections, things went smoothly in some counties and there were issues in other counties. There were some early morning delays at three polling locations in [Chatham County](#). Voters and poll workers were [locked out of one polling place](#). [Effingham County](#) reported few "hiccups." In [Fulton County](#), 1,287 voters did not receive notification that their polling place had changed. Poll workers in 31 counties used [bar code scanners](#) on voters' driver's licenses at check-in which officials said made the check-in process much faster and smoother. The program was so successful it may become widespread by November. In [Wilkinson County](#), a computer system crash and difficulties with a memory card created an unexpected delay in counting votes in Wilkinson County late Tuesday night. Sonya Barfield, the county's deputy registrar, said her office was waiting for three precincts to report when the computer server began experiencing problems and finally crashed. As for the results of the elections, [in the secretary of state race](#), incumbent candidate Brian Kemp will have to wait a while to see who he will face in November because no candidate received the 51 percent majority.
- *The Associated Press* published a story this week about the [ability to learn the identities of voters and which candidates they supported by checking public records](#). Detailed election data, which lawmakers have demanded to help them with their campaigns and redistricting, often is the culprit. According to the report, ballot secrecy is compromised in places like New Mexico, Florida and California, where election results are broken down with precinct-by-precinct tallies for different types of ballots. In precincts where only one or a handful of voters participated, it's possible to identify voters and determine who they supported by cross-checking public records — a roster of voters who cast ballots in a precinct and the precinct-by-precinct results. The detail of election results varies widely from state to state, and sometimes from county to county. Because of that, it's difficult to pinpoint how often voters potentially have ballot secrecy jeopardized. It apparently happens infrequently, but the potential exists in places where election results are broken down by ballot types and precincts or other small districts. That occurs in some counties or municipalities in Colorado, Delaware, New Jersey, Texas, California, Florida and New Mexico.

III. Research and Report Summaries

electionline provides brief summaries of recent research and reports in the field of election administration. Please e-mail links to research to sgreene@pewtrusts.org.

[Voter Registration in a Digital Age](#) - By Christopher Ponoroff, Edited by Wendy Weiser, Brennan Center for Justice at New York University School of Law, July 13, 2010: This [report](#) examines automated voter registration innovations in a number of states. These innovations include government offices such as

DMVs collecting and transferring voter registrations electronically as well as online voter registration. The researchers find that paperless voter registration is beneficial for both voters and governments.

[Restricting Voter Registration Drives](#) – Project Vote, July 2010: In its most recent policy paper, Project Vote examines recently enacted state laws that regulate third-party voter registration drives. The report provides some examples of these regulations on third-party groups – training requirements, disclosure requirements, transmittal deadlines for registration applications and restrictions on payment on a per application basis. The report finds some of these new laws to be overly restrictive and suggests election officials work with civic organizations to improve the effectiveness of voter registration drives.

IV. Opinions

National: [Overseas voting](#)

Arizona: [Voting probe](#)

California: [Riverside County, II](#); [Vote-by-mail](#)

Delaware: [Open primaries](#)

District of Columbia: [Same-day registration](#); [Board of Elections and Ethics](#)

Georgia: [Paper trail](#)

Illinois: [Special election](#); [Polling-place privacy](#); [Open primary](#)

Indiana: [Voter ID](#)

Kansas: [Secretary of state](#)

Minnesota: [Voter ID](#); [Vote fraud, II](#); [Felon voting rights](#)

Ohio: [Absentee voting](#)

South Carolina: [Voter ID](#)

Tennessee: [Early voting](#)

Virginia: [Polling places](#); [Felon voting rights](#)

West Virginia: [Lincoln County](#)

V. Job Opportunities

Administrative Assistant, Pew Center on the States, Washington, D.C.-- reports to the senior associate, Election Initiatives, and will be part of a project staff including: a director, a senior officer, a project director, two managers, two senior associates, three associates and two interns. The administrative assistant supports the whole team, working closely with the senior associate and director for overall direction. Primary responsibilities for the administrative assistant include oversight of the teams budgeting and contract work; developing, processing and maintaining information and documents that advance project goals; supporting staff in scheduling and travel; and contributing to the smooth functioning of the Trusts' Washington D.C. office. This individual will work in conjunction with other PCS colleagues, including in the Operations, Research and Development, Campaigns, Communications, and other units within the Government Performance Group, and may undertake special projects aimed at improving the overall operation of the project and other projects in PCS. The project and position are approved through June 2012 with the possibility of renewal depending on the initiative's progress, board approval and continued funding. For more information about the position and to apply, visit the [Pew Careers website](#).