
De Soto

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To Caelan Bailey <cbailey2@wvpublic.org>

Q: The question is if, hypothetically, De Soto were to have changed his party affiliation from Republican to Democrat before being expelled from the House of Delegates, would that create a vacancy for a Republican or a Democrat?

A: This is a novel situation in recent West Virginia history. Current laws and our court cases do not provide clarity, so the resolution will have to be informed by additional facts that have not come to light yet.

Specifically, a lot depends first on whether Mr. DeSoto is removed or expelled from office versus excluded from office.

Expulsion would occur if Mr. DeSoto takes the oath and took office, and is later expelled from the House under House rules and procedures. In that case, the replacement/appointee would have to be of the same political party as Mr. DeSoto at the time he is expelled. For example, if Mr. DeSoto is registered as a Democrat after taking the oath and subsequently expelled, the vacancy would be filled with a person also registered as a Democrat.

Alternatively, exclusion occur if Mr. DeSoto is refused, or prohibited from taking, the oath of office. If he is excluded, it is most likely that the political party affiliation must be disregarded because the vacancy statute seems to require the vacancy to be filled by a person of a particular political party only when a vacating member “held” the office—that is, if Mr. DeSoto is refused the oath, he never technically held the office. In that case, following the vacancy statute, the Governor would have to wait 15 days from the date of the vacancy, then appoint a person who’s eligible based on all requirements for the office but may be affiliated with any or no political party.

Note, importantly, a Court could read the Code to suggest that the member should be a Republican because that is the party of the prior office holder. That would require a judicial determination, and would depart from prior belief that the prior office holder’s political party is irrelevant to the vacancy statute. Put differently, a “vacancy” does not occur and the procedures in the vacancy filling statute does not apply when a prior office holder leaves office at the end of a term. There, the seat is simply filled by the person who ran and won the seat. Here, the vacancy is created after someone wins an election—that’s the scenario where the vacancy filling statute does apply.

Again, however, because no one took the office to create the vacancy after the 2024 General Election, it is more likely that the vacancy is filled by appointment of the Governor of a person affiliated with any or no political party, rather than the party of the office holder whose term ended in the regular fashion.

As you can see, this is an unsettled question of law and we must wait and see if, and in the event how, Mr. DeSoto is expelled or excluded from office. From there, depending on the means, the end will be easier to determine.

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