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July 8, 2010

The Honorable Joe Manchin III
Governor
State Capitol
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

OFFICE OF THE ATTORNEY GENERAL
SECRETARY OF STATE

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Dear Governor Manchin:

I have received your letter of July 7, 2010, which requests the Attorney General's written opinion and advice upon certain questions of law:

1. Is the Governor of West Virginia legally authorized to proclaim a special election to fill the remainder of the unexpired term in the United States Senate created by the untimely passing of the great United States Senator Robert C. Byrd?
2. If the answer to question number one is "yes," when may such special election, as proclaimed by the Governor, lawfully occur?
3. If the answer to question number two is that a special election may occur prior to the election cycle set forth in law for the year 2012, what law governs the conduct of such special election, especially with regard to election procedures, nominations, filing deadlines, campaign finance, etc.?

Our opinion, and specific answers to the questions posed, are as follows.

I.

OPERATIVE FACTS

On June 28, 2010, the Honorable Robert C. Byrd, D-West Virginia, longest-serving member of the United States Senate in that body's history, passed away, creating a vacancy in his senatorial office.

At the time of Senator Byrd's death, his unexpired term exceeded two years and six months in length.

II.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Amendment XVII. Popular election of Senators

The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

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.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

U.S. Const. amend. XVII.

§ 3-10-3. Vacancies in offices of state officials, United States senators and judges

Any vacancy occurring in the office of secretary of state, auditor, treasurer, attorney general, commissioner of agriculture, United States senator, judge of the supreme court of appeals or in any office created or made elective to be filled by the voters of the entire state, judge of a circuit court or judge of a family court is filled by the governor of the state by appointment. If the unexpired term of a judge of the supreme court of appeals, a judge of the circuit court or judge of a family court is for less than two years or if the unexpired term of any other office named in this section is for a period of less than two years and six months, the appointment to fill the vacancy is for the unexpired term. If the unexpired term of any office is for a longer period than above specified, the appointment is until a successor to the office has timely filed a certificate of candidacy, has been nominated at the primary election next following such timely filing and has thereafter been elected and qualified to fill the unexpired term. Proclamation of any election to fill an unexpired term is made by the governor of the state and, in the case of an office to be filled by the voters of the entire state, must be published prior to the election as a Class II-0 legal advertisement in compliance with the provisions of article three,

chapter fifty-nine of this code and the publication area for the publication is each county of the state. If the election is to fill a vacancy in the office of judge of a circuit court or judge of a family court, the proclamation must be published prior to the election as a Class II-0 legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code and the publication area for such publication is each county in the judicial or family court circuit.

W. Va. Code § 3-10-3.

III.

DISCUSSION

We begin and end with the fundamental proposition that “[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

West Virginia Code § 3-10-3 provides for the filling of “[a]ny vacancy occurring in the office of secretary of state, auditor, treasurer, attorney general, commissioner of agriculture, United States senator, judge of the supreme court of appeals or in any office created or made elected to be filled by the voters of the entire state, judge of a circuit court or judge of a family court . . .” The statute contains a bright line governing when a vacancy may be filled by appointment for the entire remaining term of the former officeholder, rather than by election:

If the unexpired term of a judge of the supreme court of appeals, a judge of the circuit court or judge of a family court is for less than two years or if the unexpired term of any other office named in this section is for a period of less than two years and six months, the appointment to fill the vacancy is for the unexpired term. If the unexpired term of any office is for a longer period than above specified, the appointment is until a successor to the office has timely filed a certificate of candidacy, has been nominated at the primary election next following such timely filing and has thereafter been elected and qualified to fill the unexpired term.

That bright line—two years for a judge, two years and six months for all other offices—has been in the statute for more than eighty years.

The statutory language and procedure are entirely straightforward where a vacancy occurs in an office with a four year term, to-wit, secretary of state, auditor, treasurer, attorney general or commissioner of agriculture. However, West Virginia Code § 3-10-3 contains an inherent ambiguity where a vacancy occurs in an office with a longer term, to-wit, judge of the supreme

court of appeals (twelve years), circuit or family court judge (eight years), or United States Senator (six years). Where a vacancy arises in one of those offices in an even-numbered year, after a regularly scheduled primary election but while the length of the unexpired term still exceeds two years (judge) or two years and six months (United States Senator), there is a "coverage gap" in the statute. Specifically, if would-be candidates for election to the vacant office must wait for the next primary election, the individual holding the seat pursuant to appointment will necessarily hold it for more than two years (judge) or two years and six months (United States Senator), the bright-line periods of time for an appointment to the entirety of the remaining term.

With respect to the judicial offices, the ambiguous provisions of West Virginia Code § 3-10-3 must be construed in light of the West Virginia Constitution, since these are purely state offices. (See *State ex rel. Robb v. Caperton*, 191 W. Va. 492, 446 S.E.2d 714 (1994), discussed *infra*.) With respect to the office of United States Senator, however, the statutory provisions must be construed in light of the United States Constitution, and, specifically, United States Constitution, Amendment XVII.

The clear purpose of the Seventeenth Amendment was to give effect to the direct voice of the people in the selection of their Senators. See Sen. Rep. No. 961, 61st Cong., 1st Sess. (1911). The plain language of the provision mandates that vacancies occurring in the United States Senate be filled by election, with the Governor of a state ("executive authority") being directed to issue a writ of election. *Jackson v. Ogilvie*, 426 F.2d 1333 (7th Cir. 1970); *ACLU v. Taft*, 385 F.3d 641, 649 (6th Cir. 2004).

State legislatures have wide decision-making authority to determine a state's procedures to "empower the executive thereof to make temporary appointments until the people fill the vacancies by election . . ." E.g., *Valenti v. Rockefeller*, 292 F. Supp. 851 (W.D.N.Y. 1968), *aff'd*, 393 U.S. 404 (1969); *Judge v. Quinn*, No. 09-2219, 2010 WL 2652204 (7th Cir. June 16, 2010). However, any state statute governing the procedures for filling a senatorial vacancy, such as West Virginia Code § 3-10-3, must be construed in aid of the Seventeenth Amendment, not in derogation thereof.

In short, the statute must be construed to embody the principle of popular sovereignty, i.e., the people's right to vote. "We believe it to be the policy of the lawmakers of this State to permit the voters generally to participate in the selection of candidates for all offices in primary elections, whenever possible . . ." *State v. O'Brien*, 141 W. Va. 662, 673, 91 S.E.2d 865, 876 (1956).

At this point, we would be remiss in not addressing a contrary position which has been posited by the Secretary of State. Her analysis, we believe, gives insufficient weight to the dictates of Seventeenth Amendment, and instead relies primarily upon the case of *State ex rel. Robb v. Caperton*, 191 W. Va. 492, 446 S.E.2d 714 (1994), a case involving a circuit court vacancy, not an office within the ambit of the Seventeenth Amendment.

Pursuant to the West Virginia Constitution, art. VIII, § 4, points of law in a Supreme Court of Appeals case are articulated through syllabus points affixed to the Court's opinions. *E.g.*, *State ex rel. Medical Assurance of West Virginia, Inc. v. Recht*, 213 W. Va. 457, 583 S.E.2d 80 (2003); *Tweed v. Racing Commission*, 138 W. Va. 531, 76 S.E.2d 874 (1953). In *Robb*, the seven syllabus points affixed to the opinion deal solely with vacancies in "office of justice of Supreme Court or judge of circuit court . . .," and the only constitutional provisions cited are West Virginia Constitution, art. IV, §§ 7 and 8 (general provisions governing election of state and county officers), and West Virginia Constitution, art. VIII, § 7 (general provisions governing election of justices and judges).

Further, the Court's discussion of the Seventeenth Amendment in the body of the opinion dealt with a question not presented here, specifically, the existence (or not) "of any federal constitutional attack that has been made successfully on a state's constitutional or legislative enactment for filling vacancies in state offices." *Robb*, 191 W. Va. at 497, 446 S.E.2d at 719 (emphasis supplied).

Thus, the *Robb* opinion does not provide a basis for decision in this situation. Even the policy considerations (although outside the scope of this opinion) are different; although many individuals and groups advocate the appointment rather than election of judges, no one has advocated the appointment of United States Senators for almost a century.

Additionally, the Secretary of State's opinion would appear to "read out" the unambiguous statutory language providing that "[p]roclamation of any election to fill an unexpired term is made by the governor of the state . . ." W. Va. Code § 3-10-3. Said language clearly empowers the Governor to call a special election where, as here, a vacancy occurs after the regularly scheduled even-year primary election but outside of the statutory limit for an appointment.

It is the opinion of the Attorney General that where there exists a vacancy in a United States Senate seat, West Virginia Code § 3-10-3 reflects a clear intention on the part of the West Virginia Legislature to uphold our citizens' rights under the Seventeenth Amendment. The Amendment allows "the legislature of any state [to] empower the executive thereof to make temporary appointments until the people fill the vacancies by election . . .," and in § 3-10-3, the Legislature authorized the Governor to proclaim an election to fill the vacancy where, as here, the vacancy exceeds two years and six months in duration.

Although the reference in West Virginia Code § 3-10-3 to the "primary election next following such timely filing . . ." creates an additional ambiguity, well established rules of statutory construction and judicial rules of decision-making support the proposition that a special

primary election should be held in this situation.¹ Where a statute is ambiguous, statutory rules of construction dictate that it be construed to give force and effect to the Legislature's intent. *Burgess v. Moore*, ___ W. Va. ___, 685 S.E.2d 685 (2009); *Smith v. State Workers' Compensation Commission*, 159 W. Va. 108, 219 S.E.2d 361 (1975). Additionally, where a statute is susceptible of more than one construction, one which renders the statute constitutional, and the other which renders it unconstitutional, the statute will be given the construction which sustains constitutionality. Syl. pt. 2, *State ex rel. Frazier v. Meadows*, 193 W. Va. 20, 454 S.E.2d 65 (1994), citing *State ex rel. Slatton v. Boles*, 147 W. Va. 674, 130 S.E.2d 192 (1963); and *Board of Education v. Board of Public Works*, 144 W. Va. 593, 109 S.E.2d 522 (1959). Finally, "[w]here a particular construction of a statute would result in an absurdity, some other reasonable construction, which will not produce such an absurdity, will be made." *Coal and Coke Ry v. Conley*, 67 W. Va. 129, 67 S.E.2d 613 (1910); *United Bank v. Stone Gate Home*, 220 W. Va. 375, 647 S.E.2d 811 (2007).

In this case, the Secretary of State's reading of West Virginia Code § 3-10-3 creates a situation which, while perhaps not absurd, would certainly be awkward and unintended: two elections in November 2012, one to fill a Senate vacancy of (by then) a few weeks, and another for a full term of office.

Finally, it is the opinion of the Attorney General that the power of the Governor to proclaim a special election carries with it the power to set the date of the election, filing dates for candidates, and all other election procedures; without such ancillary power, the authority to proclaim an election would be meaningless. In this regard, West Virginia Code § 3-1-2 provides that "[u]nless restricted by the context, the provisions of this chapter shall apply to every general, primary and special election in which candidates are nominated or elected" (Emphasis added.)

The Attorney General stands ready to work with the Executive and Legislative Branches to ensure that in light of the shortened time frames for a special election, proper consideration is given to minority party participation, elimination of barriers to absentee voting (Uniformed and Overseas Citizens Absentee Voting Act), and any other procedural issues which may arise.

¹Reference to a primary election was added to the statutory language in 1990, apparently in response to an Opinion of the Attorney General. 63 Op. Att'y Gen. ___ (January 31, 1990). In said Opinion, the issue was whether potential candidates for a vacancy in the Thirteenth Judicial Circuit should be nominated by state party convention or chosen by the electorate in a special primary election. Then-Attorney General Roger W. Tompkins ruled that the candidates should be chosen by the electorate in a primary election, as a different interpretation would make other language in the statute meaningless.

IV.

OPINION OF THE ATTORNEY GENERAL

1. Is the Governor of West Virginia legally authorized to proclaim a special election to fill the remainder of the unexpired term in the United States Senate created by the untimely passing of the great United States Senator Robert C. Byrd?

ANSWER: Yes. West Virginia Code § 3-10-3, construed in aid of the United States Constitution, Amendment XVII, authorizes the Governor to proclaim a special election to fill the remainder of Senator Byrd's unexpired term, since said unexpired term exceeded two years and six months at the time the vacancy occurred.

2. If the answer to question number one is "yes," when may such special election, as proclaimed by the Governor, lawfully occur?

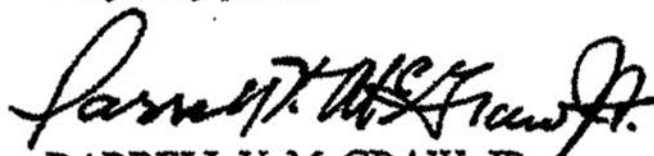
ANSWER: The date of the special election may be set by the Governor in the proclamation. Since a general election is already scheduled for Tuesday, November 2, 2010, it is suggested that a special primary election be held at a time which maximizes the opportunity for all potential candidates to prepare for both the special election and the general election, and for all voters, including those in the Armed Services, to participate and have their voices heard.

3. If the answer to question number two is that a special election may occur prior to the election cycle set forth in law for the year 2012, what law governs the conduct of such special election, especially with regard to election procedures, nominations, filing deadlines; campaign finance, etc.?

ANSWER: The conduct of the special election may be set by the Governor, in the proclamation, to conform as closely as possible to existing election law, West Virginia Code § 3-1-1 *et seq.*, with necessary modifications. The power to proclaim a special election, which is specifically contained in West Virginia Code § 3-10-3, necessarily carries the ancillary power to set the parameters of said special election; otherwise, the power to proclaim the election would be meaningless.

Please feel free to contact me if we can provide additional guidance in this matter, or if you have any questions.

Very truly yours,

A handwritten signature in black ink, appearing to read "Darrell V. McGraw, Jr.", written in a cursive style.

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL