

No. \_\_\_\_\_

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**CHARLESTON**

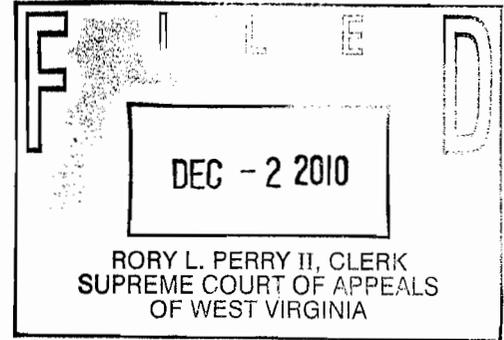
**STATE OF WEST VIRGINIA ex rel.  
THORNTON COOPER,**

**Petitioner,**

**v.**

**Honorable EARL RAY TOMBLIN,  
Acting Governor of the State of  
West Virginia and President of the  
West Virginia State Senate;  
Honorable RICHARD THOMPSON,  
Speaker of the West Virginia  
House of Delegates; and  
Honorable NATALIE E. TENNANT,  
Secretary of State of the State of  
West Virginia,**

**Respondents.**



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**PETITION FOR WRIT OF MANDAMUS**

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**THORNTON COOPER  
Petitioner**

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**December 2, 2010**

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**TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA:**

Pursuant to **Rule 16** of the **Revised Rules of Appellate Procedure**, **Thornton Cooper**, the **Petitioner** and **Relator** herein, hereby respectfully submits his **Petition for Writ of Mandamus**.

**III. QUESTIONS PRESENTED.**

- (1) IF A VACANCY OCCURS IN THE OFFICE OF THE GOVERNOR OF WEST VIRGINIA DURING THE FIRST THREE YEARS OF THE GUBERNATORIAL TERM, DOES ARTICLE VII, § 16, OF THE WEST VIRGINIA CONSTITUTION REQUIRE THAT A NEW ELECTION BE HELD TO FILL THAT VACANCY WITHIN A FEW MONTHS AFTER IT ARISES?**
- (2) DOES W. VA. CODE § 3-10-2 VIOLATE ARTICLE VII, § 16, OF THE WEST VIRGINIA CONSTITUTION?**

**IV. STATEMENT OF THE CASE.**

Thornton Cooper, the Petitioner and Relator herein, is a native and resident of, and registered voter in, the City of South Charleston, Kanawha County, West Virginia. He has been a member of the Democratic Party since 1971, when he first registered to vote. Petitioner Cooper is also a property owner and taxpayer. He owns real estate in Kanawha County. He is also the co-owner of several pieces of real estate in Tucker County. He pays real-estate and personal-property taxes in Kanawha County and real-estate taxes in Tucker County.

Petitioner Cooper is familiar with the political process and has run for public office on a number of occasions. He has been involved with political campaigns since he was a teenager. In 2006 and 2010, he was elected to four-year terms as a member of

the Kanawha County Democratic Executive Committee. In 2008, he attended the Kanawha County Democratic Convention and the West Virginia Democratic Convention as a voting delegate.

In March 2007, as a proxy for a member of the West Virginia Democratic Executive Committee, Petitioner Cooper drafted the language for a successful amendment to the Bylaws of that committee. That amendment, which took effect April 1, 2007, allows independent or nonaffiliated voters to vote in Democratic primary elections in West Virginia.

The positions advanced and the relief requested herein reflect Petitioner Cooper's positions as an individual and not as a member of the Democratic Party or as a member of the Kanawha County Democratic Executive Committee.

On Monday, June 28, 2010, Petitioner Cooper learned that the Honorable Robert C. Byrd, United States Senator from West Virginia, had died earlier that day. Senator Byrd's death created a vacancy in his six-year term in the United States Senate.

During the next few weeks, Petitioner Cooper closely followed discussions as to whether a special election would be held to fill most of the remainder of Senator Byrd's unexpired term. Eventually, Governor Joe Manchin, III, announced that he would appoint a gentleman named Carte Goodwin to fill the senatorial vacancy on an interim basis until a new election could be held to fill the remainder of the term. Governor Manchin also indicated that he desired to run in that election.

Thereafter a special session of the West Virginia Legislature was held on a number of topics, including the issue of senatorial succession. On Monday, July 19, 2010, three (3) weeks after Senator Byrd's death, the West Virginia Legislature passed

Enrolled Committee Substitute for House Bill No. 201, which took effect from passage. The bill was promptly signed into law. The bill created a new statutory section, designated *W. Va. Code* § 3-10-4a (with a sunset provision), that established a special primary election, which would be held on Saturday, August 28, 2010, and a special general election, which would be held on the date of the regular general election, November 2, 2010, to fill the vacant Senate seat.

After the bill was signed into law, Carte Goodwin was sworn in as interim United States Senator and Governor Manchin and a number of other individuals filed to run for the remainder of Senator Byrd's term.

Once Governor Manchin announced his candidacy, there was much discussion about whether, and under what circumstances, a new election would need to be held to fill out the remainder of Mr. Manchin's gubernatorial term in the event that he won both the special Democratic primary election on August 28, 2010, and the special general election on November 2, 2010.

During July and August of 2010, Petitioner Cooper carefully reviewed constitutional and statutory provisions applicable to the gubernatorial-succession issue. He reached the legal conclusion that the final sentence of Article VII, § 16, of the *West Virginia Constitution* required that a prompt gubernatorial election be held, in 2011, if Governor Manchin resigned in 2010. That sentence reads as follows: "Whenever a vacancy shall occur in the office of the governor before the first three years of the term shall have expired, a new election for governor shall take place to fill the vacancy."

Furthermore, Petitioner Cooper preferred that both a special primary election and a special general election be held during the first half of 2011 if Governor Manchin resigned in 2010.

However, Petitioner Cooper was informed that some governmental officials were taking the position that, even if Governor Manchin resigned in 2010, no election to fill the possible gubernatorial vacancy should be held before 2012. Upon learning the positions of those officials, Petitioner Cooper decided to do what he could to bring about the above-discussed two special elections in 2011 in the event that Governor Manchin resigned from his position in 2010.

As Petitioner Cooper understands *W. Va. Code* § 55-17-3(a), it generally requires him or any other petitioner who seeks to make a state official a respondent in a mandamus proceeding to give a specific type of written notice to that official and to the West Virginia Attorney General at least thirty (30) days prior to filing a petition for writ of mandamus in either in a circuit court or in this Honorable Court. So far, this Honorable Court has not ruled that statutory provision to be unconstitutional. See, *Motto v. CSX Transportation, Inc.*, 220 W. Va. 412, 647 S.E.2d 848 (2007).

Although *Motto* involved a lawsuit for flood damages, Petitioner Cooper believes that the expansive language of the statute applies to mandamus proceedings as well. The relief that he is seeking, if granted, would probably require the expenditure of millions of dollars from public funds. While he strongly doubts the constitutionality of the statutory subsection, at least insofar as it appears to impinge upon this Honorable Court's original jurisdiction in mandamus proceedings under Article VIII, § 3, of the

*West Virginia Constitution* against state officials, he still attempted to comply with the statute.

Accordingly, on Monday, August 9, 2010, in that effort to comply with *W. Va. Code* § 55-17-3(a), Petitioner Cooper mailed out, by United States Certified Mail, identical notices to five (5) elected officials of his intent to go to court if Governor Manchin resigned. Each notice was called "Notice by Thornton Cooper of his Intention to Institute Legal Proceedings Relating to Requiring Prompt Special Elections to Fill Possible Gubernatorial Vacancy." A copy of the notice and certificate of service is included in the Appendix as Petitioner's Exhibit No. 1. (Appendix, pp. 1-6) These notices were mailed to the Honorable Joe Manchin, III, (then) West Virginia Governor, the Honorable Natalie E. Tennant, West Virginia Secretary of State, the Honorable Earl Ray Tomblin, President of the West Virginia State Senate, the Honorable Richard Thompson, Speaker of the West Virginia House of Delegates, and the Honorable Darrell McGraw, West Virginia Attorney General. Five (5) certified-mail receipts that were mailed back to Petitioner Cooper indicated that the notices were received on August 10, 2010, by an agent for all five (5) of the addressees.

In each notice, Petitioner Cooper requested that Governor Manchin call the West Virginia Legislature into another special session to enact legislation that would require the holding of special elections to fill any possible vacancy that might be caused by the latter's during the first three (3) years of his second term. Petitioner Cooper requested that any candidates for the unexpired gubernatorial term file within thirty (30) days after the vacancy arose, that the special primary election be held within ninety (90) days

after the vacancy arose, and that the special general election be held within 150 days after the vacancy arose.

In each notice, Petitioner Cooper further stated that if “such legislative relief is not provided in a timely manner, Mr. Cooper plans to institute a proceeding in a court of competent jurisdiction in an effort to obtain appropriate judicial relief to protect his voting rights and those of over a million other registered voters.”

Petitioner Cooper believes that, as of the date of the filing of this Petition, he is the only person to have filed such a notice with respect to the issue of a gubernatorial-succession election.

Governor Manchin won both the special Democratic primary election held on August 28, 2010, and the special general election held on November 2, 2010. During the last three months of his gubernatorial term, he never called the West Virginia Legislature back into session to address the gubernatorial-succession issue.

On November 8, 2010, Senate President Earl Ray Tomblin gave a press conference on gubernatorial succession. He said that the West Virginia Constitution states that “when a vacancy arises in the office of governor, the senate president shall act as governor until the vacancy is filled”. Senate President Tomblin indicated that “our current laws – which have been on the books for over a century -- clearly provide that the new election will occur in 2012. Legal experts agreed on this point unanimously before a legislative committee studying this subject only a few weeks ago”. However, he further stated that if “my fellow West Virginians express an overwhelming desire to have a quick election, I will work with the Legislature to make

that a reality.” His remarks at that press conference are included as Petitioner’s Exhibit No. 2. (Appendix, p. 7)

Last month, Petitioner Cooper watched a video of the October 12, 2010, presentation before the legislative subcommittee to which Senate President Tomblin made reference at that press conference. Three attorneys – Brian Skinner, Counsel for the House of Delegates, Ray Ratliff, Counsel to the Senate President, and WVU Law School Professor Robert Bastress – did give presentations to the subcommittee. However, at that subcommittee meeting, Professor Bastress stated his opinion that the statutory provision governing gubernatorial succession was in conflict with the constitutional provision governing gubernatorial succession. Therefore, it is not correct to suggest that Professor Bastress agreed with the proposition that “our current laws . . . clearly provide that the new election will occur in 2012”.

On November 14, 2010, Petitioner Cooper informed the news media that, before bringing a proceeding before this Honorable Court, he would give Senate President Tomblin until November 30, 2010, either to call the West Virginia Legislature into special session on the gubernatorial-succession issue or to announce a schedule for calling a prompt new election.

Following certification of the election results, Joe Manchin, III, resigned as Governor on Monday, November 15, 2010, and was subsequently sworn in as United States Senator.

On Monday, November 15, 2010, Senate President Earl Ray Tomblin was administered a private oath of office reflecting the fact that he was agreeing to serve as

Acting Governor of West Virginia. On Tuesday, November 16, 2010, he was administered a more public oath of office to the same effect.

Petitioner Cooper has been informed, and believes, that Acting Governor Tomblin is now drawing a gubernatorial salary of the basis that he is Acting Governor.

As of the end of November 2010, Acting Governor Tomblin had neither called the Legislature into special session to address the gubernatorial-succession issue nor issued a proclamation scheduleing a prompt new election (or elections) to fill the gubernatorial vacancy.

Accordingly, Petitioner Cooper is now filing this Petition for Writ of Mandamus.

The **Honorable Earl Ray Tomblin** is made a Respondent herein in his official capacity as Acting Governor of West Virginia and as President of the West Virginia State Senate. In his capacity as Acting Governor, he has certain responsibilities over the conduct of some elections, such as issuing proclamations.

The **Honorable Richard Thompson** is made a Respondent herein in his official capacity as Speaker of the West Virginia House of Delegates, which capacity also includes the possibility of serving as acting Governor if Acting Governor Tomblin decides to stop serving as Acting Governor.

The **Honorable Natalie E. Tennant** is made a Respondent herein in her official capacity as Secretary of State of the State of West Virginia, which capacity includes broad powers over the conduct of elections in West Virginia. She is the chief election official of West Virginia.

Petitioner Cooper is aggrieved by the likely deprivation, under the letter or application of current statutory law, of his constitutional right, as a resident of, and voter

in, Kanawha County and West Virginia, and as a taxpayer, to vote for a gubernatorial candidate in 2011. He wants this Honorable Court to order the Respondents to schedule a special primary election and a special general election to be held during the first half of 2011.

**V. SUMMARY OF ARGUMENT.**

As a result of the resignation by Governor Joe Manchin, III, on November 15, 2010, there is now a gubernatorial vacancy to be filled. The term to which he was elected runs through Monday, January 14, 2013. On November 15, 2010, Senate President Earl Ray Tomblin became Acting Governor under the provisions of Article VII, § 16, of the *West Virginia Constitution*.

Petitioner Cooper asserts that the final sentence of that constitutional section requires that a new election be held as soon as possible to allow the voters of West Virginia to fill the vacancy. In his opinion, much of the language of *W. Va. Code* § 3-10-2, which governs gubernatorial succession, is in conflict with the constitutional provision that it is supposed to implement.

He desires that this Honorable Court grant a writ of mandamus against Respondent Tomblin, Respondent Richard Thompson, Speaker of the House of Delegates, and Respondent Natalie E. Tennant, Secretary of State, to require them to hold a prompt special primary election and a prompt special general election to fill the gubernatorial vacancy within the next few months.

Petitioner Cooper also wants this Honorable Court to rule that much of *W. Va. Code* § 3-10-2 is unconstitutional as being violative of Article VII, § 16.

## **VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION.**

Petitioner Cooper seeks to have the Clerk schedule this case for oral argument under *Rev. R. A. P. 20* before this Honorable Court.

Petitioner Cooper requests oral argument because the case is one of first impression, that is, whether the Constitution requires that a new election (or new elections) be held as soon as possible so that the voters of West Virginia may fill a gubernatorial vacancy within the next few months (rather than waiting until 2012 to do so). This is obviously also a case of fundamental importance with statewide implications. This case also involves the constitutionality of a statute.

To the best of Petitioner Cooper's knowledge, there are no material facts in dispute in this case.

For the above reasons, oral argument before this Honorable Court would appear to be appropriate in this proceeding.

He also seeks to have this Court issue a rule to show cause.

## **VII. ARGUMENT.**

**(1) IF A VACANCY OCCURS IN THE OFFICE OF THE GOVERNOR OF WEST VIRGINIA DURING THE FIRST THREE YEARS OF THE GUBERNATORIAL TERM, DOES ARTICLE VII, § 16, OF THE WEST VIRGINIA CONSTITUTION REQUIRE THAT A NEW ELECTION BE HELD TO FILL THAT VACANCY WITHIN A FEW MONTHS AFTER IT ARISES?**

**(a) APPROPRIATENESS OF MANDAMUS IN THIS CASE.**

A writ of mandamus will not issue unless three (3) elements coexist: (1) a clear legal right in the petitioner to the relief sought, (2) a legal duty on the part of the respondent to do the thing which the petitioner seeks to compel; and (3) the absence of

another adequate remedy. *Burdette v. Zakaib*, 224 W. Va. 325, 685 S.E.2d 903 (2009).

As a West Virginia resident, voter, and taxpayer, Petitioner Cooper asserts that he does have a clear legal right to the relief sought herein because Article VII, § 16, of the *West Virginia Constitution* does require that a new election be held within a few months after November 15, 2010, the date upon which the vacancy in Governor Manchin's second gubernatorial term arose.

Because Respondent Tomblin is Acting Governor, he is the chief executive officer of West Virginia, with extensive authority to call an election through the issuance of a gubernatorial proclamation and the constitutional duty to do so. Under Article VII, § 5, of the *West Virginia Constitution*, the "chief executive power shall be vested in the governor, who shall take care that the laws be faithfully executed". Respondent Tomblin has a clear duty to comply with the last sentence of Article VII, § 16.

If Respondent Tomblin vacates his position as Acting Governor, Respondent Thompson, as Speaker of the West Virginia House of Delegates, is next in line to become Acting Governor.

Respondent Tennant is the West Virginia Secretary of State. Pursuant to *W. Va. Code* § 3-1A-6, she is the chief election official of West Virginia. She has broad powers over the administration of elections in West Virginia. Currently, Respondents Tomblin and Tennant share the responsibility to conduct an election or elections to fill the vacancy in question.

There is no other adequate remedy and mandamus is appropriate here as in similar cases of less than statewide significance. Mandamus is the proper remedy to

compel a city council to submit a question to the voters where the law provides for such submission a city council fails to do so. *Burnell v. City of Morgantown*, 210 W. Va. 506, 558 S.E.2d 306 (2001); *State ex rel. Elliott v. Adams*, 155 W. Va. 110, 181 S.E.2d 276 (1971) Where town officials have refused to hold a regular election on the date provided by law, and the time prescribed by law for holding the election had passed, mandamus would be granted compelling officials to hold a regular election at the earliest date possible. *State ex rel. Wooffter v. Town of Clay*, 149 W. Va. 588, 142 S.E.2d 771 (1965). Where an election is necessary to fill a vacancy in a municipal office, the Supreme Court has the power to compel election by mandamus. *Killian v. Wilkins*, 203 S.C. 74, 26 S.E.2d 246 (1943).

Furthermore, the text of Article VII, § 16, of the *West Virginia Constitution* is included in the text of *W. Va. Code* § 3-10-2, and is therefore part of Chapter 3 of the *West Virginia Code*. Under *W. Va. Code* § 3-1-45, any “officer or person upon whom any duty is imposed by this chapter [Chapter 3] may be compelled to perform his or her duty by writ of mandamus. . . . A mandamus shall lie with the supreme court of appeals, or any one of the judges thereof in vacation, returnable before court, to compel any officer herein to do and perform any duty required of him or her. . . .”

**(b) ACTUAL OR CONTEMPLATED GUBERNATORIAL SUCCESSION BY PRESIDENTS OF THE WEST VIRGINIA STATE SENATE.**

Unchanged in its text since the 1872 Constitution was ratified, Article VII, § 16 of the *West Virginia Constitution* reads as follows:

**Vacancy in Governorship, How Filled**

§ 16. In case of the death, conviction on impeachment, failure to qualify, resignation, or other disability of the governor, the president of the Senate shall act as governor until the vacancy is filled, or the disability removed; and if the

president of the Senate, for any of the above named causes, shall become incapable of performing the duties of governor, the same shall devolve upon the speaker of the House of Delegates; and in all other cases when there is no one to act as governor, one shall be chosen by joint vote of the Legislature. *Whenever a vacancy shall occur in the office of governor before the first three years of the term shall have expired, a new election shall take place to fill the vacancy.* [emphasis added]

Because no West Virginia governors have died in office and only one governor before Joe Manchin, III, failed to serve out his gubernatorial term or terms, there is little precedent to follow in analyzing the above constitutional section and even less in analyzing its final sentence. Prior to 2010, there were, to Petitioner Cooper's knowledge, only three (3) occasions on which senate presidents either became acting governor or commenced legal proceedings in anticipation of becoming acting governor.

Under the *1863 Constitution*, the provisions relating to the governor were set forth in Article V thereof. More specifically, Article V, §§ 1 and 6, of the *1863*

*Constitution* read as follows:

§ 1. The chief Executive power shall be vested in a Governor, who shall be elected by the voters of the State, and hold his office for the term of two years, to commence on the fourth day of March next succeeding his election. The person acting as Governor shall not be elected or appointed to any other office during his term of service.

§ 6. In case of the removal of the Governor from office, or of his death, failure to qualify within the time prescribed by law, resignation, removal from the Seat of Government, or inability to discharge the duties of the office, the said office with its compensation, duties, and authority, shall devolve upon the President of the Senate; and in case of his inability or failure from any cause to act, on the Speaker of the House of Delegates. The Legislature shall provide by law for the discharge of the Executive functions in other necessary cases.

From a review of these two provisions, it is clear that gubernatorial elections, under the *1863 Constitution*, were held every two years, as opposed to every four

years under the *1872 Constitution*. There were no gubernatorial term limits under the *1863 Constitution*. Nor was there any provision for a new election if a vacancy arose during a two-year gubernatorial term. The president of the senate could hold both offices simultaneously throughout the remainder of a two-year term. One interesting provision in the *1863 Constitution* was that the governor could not be appointed or elected to any office while he was serving as governor.

After being elected three (3) times, West Virginia's first Governor, Arthur I. Boreman, would have completed his third gubernatorial term on March 4, 1869, if he had not resigned on February 26, 1869, so that he could be elected United States Senator by the West Virginia Legislature. WEST VIRGINIA ENCYCLOPEDIA (Ken Sullivan ed.) 75, 231. William E. Stevenson, who had been elected in 1868, still became Governor on March 4, 1869. *Id.* at 231, 683. Senate President Daniel D. T. Farnsworth became West Virginia's second Governor on February 26, 1869, and served until Mr. Stevenson was sworn in as third Governor six days later. Mr. Farnsworth then returned to the West Virginia State Senate. *Id.* at 231.

Probably the main legal significance of Governor Farnsworth's brief tenure was that it may have underscored deficiencies in the *1863 Constitution* that were addressed in part by the addition of the "new election" language in Article VII, § 16, of the *1872 Constitution*.

The first case to construe that new constitutional provision arose from a protracted election contest that arose sixteen (16) years after ratification. During the last portion of the term of West Virginia's seventh Governor, E. Willis Wilson, a Democrat who had been elected in 1884, a general election was held in November

1888, at which the two gubernatorial nominees were Republican Nathan Goff, Jr., and Democrat Aretas B. Fleming. Goff's initial lead of 106 votes was challenged by Fleming and both candidates were sworn in as Governor on Inauguration Day on March 4, 1889. WEST VIRGINIA ENCYCLOPEDIA, p. 286. Governor Wilson refused to vacate his office. *Id.*

Next, Senate President Robert Carr filed a petition for writ of mandamus with this Court on the basis that the office of governor had become vacant on March 4, 1889, and that E. Willis Wilson, a "private citizen", had refused to surrender his office to Senate President Carr. *Carr v. Wilson*, 32 W. Va. 419, 9 S.E. 31 (1889). Mr. Carr argued that because the office of governor was vacant, he, as senate president, had the right and duty under Article VII, § 16, to act as Governor. *Id.*

This Court denied the petition for writ of mandamus and stated that the facts that no declaration of the result had been made by the appropriate legislative officials and that the declaration had been postponed until the election contest was decided did not create a condition of things, within the meaning of that constitutional section, as would entitle the President of the Senate to act as governor. *Id.* The Court further held that, under the circumstances, the Governor elected for the immediately preceding term, Governor Wilson, had the right and was under the duty, by virtue of Article IV, § 6, of the *West Virginia Constitution*, to continue to discharge the duties of his office until a successor was declared elected. *Id.* As a result of this decision and of the lengthy election contest, E. Willis Wilson continued to serve as Governor until Aretas Fleming was sworn in as West Virginia's eighth Governor on February 6, 1890. WEST VIRGINIA BLUE BOOK (Darrell E. Holmes ed. 2007) 330.

In its opinion, the Court also made the following comment:

. . . . But the president of the senate can come into the office of governor, or rather act as governor temporarily *ex officio*, as president of the senate, only on the contingency or state of facts specified in section 16, art. 7; that is: "In case of the death, conviction on impeachment, failure to qualify, resignation, or other disability of the governor;" and under a rule of construction, when there is a general rule, exceptions must be strictly construed, and cases must fall within the exceptions.

[*Carr v. Wilson*, 32 W. Va. at 425, 9 S.E. at 33]

As he understands the above language, Petitioner Cooper is of the opinion that the president of the state senate may act as governor only if he or she also remains president of the state senate. If he or she relinquishes the office of senate president, then he or she may no longer act as governor under Article VII, § 16.

The second case commenced by a senate president in anticipation of becoming acting governor involved Warren McGraw. In 1984 Governor Jay Rockefeller decided to run for the United States Senate seat then occupied by Jennings Randolph, who had decided not to run for reelection. Three of the candidates for governor in 1984 were former Governor Arch Moore, a Republican, and Senate President Warren McGraw and House of Delegates Speaker Clyde See, both Democrats. To run for Governor both Senate President McGraw and House Speaker seat had to forego running for reelection as legislators in their respective legislative districts. Mr. See won the Democratic primary election, thereby defeating Mr. McGraw. In the 1984 general election, Arch Moore defeated Clyde See in the gubernatorial contest and Jay Rockefeller was elected to the United States Senate. Warren McGraw's term as a member of the West Virginia State Senate ended by operation of law at the end of November 1984.

Amid speculation that Governor Rockefeller would resign from his seat before the end of his gubernatorial term to become United States Senator as early as January 3, 1985, Mr. McGraw filed a petition for a writ of mandamus against Senate Clerk Todd Willis to compel the latter to continue to pay Mr. McGraw, as Senate President, after the conclusion of his term as a member of the State Senate. *State ex rel. McGraw v. Willis*, 174 W. Va. 118, 323 S.E.2d 600 (1984). In that case, this Court awarded the writ of mandamus, ruled that the office of the senate president is a distinct and separate office of a two-year duration, and held that the Senate Clerk should honor any requests by Mr. McGraw as President of the Senate after November 30, 1984, and until January 12, 1985. *Id.*

Justice Neely, who authored the opinion, stated that this case was actually about gubernatorial succession. *Id.* In the opinion, the Court pointed out that "Governor Rockefeller has emphatically denied any intention to vacate his office prematurely." *Id.* Nevertheless, the court ruled that the case was ripe because "the question of succession may surface again". *Id.* The part of the opinion that most specifically addresses the issue of gubernatorial succession reads as follows (*Id.*, 323 S.E.2d 600, 601):

Ordinarily, the State faces no dilemma. *W. Va. Const.* art. VII, § 16 and *W. Va. Code 3-10-2* [1977] provide that upon the resignation of the Governor, the President of the Senate acts as governor "until the vacancy is filled". However, the current President of the Senate, the petitioner in the case before us, did not seek reelection to his West Virginia Senate seat. The petitioner's term as Senator expires on 30 November 1984. It is, nonetheless, the opinion of this Court that the petitioner's term as President of the West Virginia Senate continues until our Senate reconvenes in regular session on 9 January 1985 and his successor is sworn into office under *W. Va. Const.* art. VI, § 18. Therefore, should a vacancy in the office of Governor arise the President of the West Virginia Senate would become this State's chief executive.

However, Governor Rockefeller served out his full term as governor before being sworn in as United States Senator.

**(c) CONSTRUCTION OF THE “NEW-ELECTION SENTENCE” IN CONJUNCTION WITH OTHER CONSTITUTIONAL PROVISIONS.**

The final sentence of Article VII, § 16, of the *West Virginia Constitution*, which Petitioner Cooper calls the “new-election sentence”, reads as follows:

Whenever a vacancy shall occur in the office of governor before the first three years of the term shall have expired, a new election shall take place to fill the vacancy.

In analyzing the meaning of that sentence, Petitioner Cooper will first focus on the meaning of the sentence itself. Next he will discuss how that sentence is to be understood in context with the language of other sections in Article VII. Then he will address how that sentence is to be understood in context with the language of sections of other constitutional articles.

In every case involving the application or interpretation of a constitutional provision, the analysis must begin with the language of the constitutional provision itself. *Committee to Reform v. Thompson*, 223 W. Va. 346, 674 S.E.2d 207 (2008).

The new-election sentence is composed of two clauses: an adverb clause that begins with the subordinating conjunction “whenever” followed by an independent clause beginning with the adjective “a”. Both the conjunction “whenever” and the adjective “new” relate to time. When shall that new election take place? It shall take place whenever a vacancy occurs in the office of governor, if that vacancy arises during the first 36 months of the gubernatorial term.

As Petitioner Cooper understands the sentence, it means the following: “As soon as possible after a vacancy arises in the office of governor during the first 36

months of the gubernatorial term, a new election shall take place to fill that vacancy.”

The word “whenever” is equivalent to “as soon as” and “at whatever time” and is synonymous with, or equivalent to, the words “upon which”, “where”, “in case”, and “if”.

*People v. Merhige*, 212 Mich. 601, 180 N.W. 418, 422 (1920).

Furthermore, the new-election sentence must be read in conjunction with other provisions of Article VII, which relates to the executive department.

The first two sentences of Article VII, § 1, of the *West Virginia Constitution* read as follows:

The executive department shall consist of a governor, secretary of state, auditor, treasurer, commissioner of agriculture and attorney general, who shall be the *ex officio* reporter of the court of appeals. Their terms of office shall be four years and shall commence on the first Monday after the second Wednesday of January next after their election.

Another way of saying the first Monday after the second Wednesday of January is to say whatever Monday falls during the seven-day period beginning on January 13<sup>th</sup> and ending on January 19<sup>th</sup>. Unlike Presidential terms, which run from January 20<sup>th</sup> to January 20<sup>th</sup> four years later, gubernatorial terms are not *exactly* four years in length. Presidential terms last 1,461 days (365 + 365 + 365 + 366), or 208 weeks and five (5) days. Gubernatorial terms are actually 208 weeks (that is, 1,456 days, or three years, eleven months, and 26 days) or 209 weeks (that is, 1,463 days, or four years and two days) in length.

The Monday in 2009 on which Governor Manchin was inaugurated fell on January 19, 2009. The term to which he was elected will end 208 weeks later, on Monday, January 14, 2013. He vacated his office on November 15, 2010, nearly 26 months before the end of his term.

When read in conjunction with the above term-of-office sentence, the new-election sentence requires that a new election be held if a vacancy occurs during the first 36 months of a gubernatorial term of about 48 months.

In construing a constitution, what is implied is as much a part of the instrument as what is expressed. *State ex rel. Moore v. Blankenship*, 158 W. Va. 939, 217 S.E.2d 232 (1975). As a voter and as an occasional candidate for public office, Petitioner Cooper submits that one thing that is implied by the new-election sentence (and that is not contradicted by any other specific language in the *West Virginia Constitution*) is that the period for filling a gubernatorial vacancy, as measured from the date that the vacancy arises to the date that the newly elected governor is sworn in, must be *shorter* than the period remaining in the unexpired term as of the date of his or her inauguration. Therefore, if Governor Manchin had resigned on January 14, 2012, the period for filling the gubernatorial vacancy would have to be less than six months, which would fall in mid-July 2012, because only six months would then remain in the unexpired term.

The second thing that is implied by the new-election sentence, when read in conjunction with the term-of-office sentence, is that the duration of the period for filling a gubernatorial vacancy, no matter when it arises during the 36-month period, should be less than six months. If a vacancy that arises in mid-January 2012 can be filled by a newly elected governor in mid-July 2012, why can't a vacancy that arises in mid-November 2010 be filled by a newly elected governor in mid-May 2011? By making a vacancy that arises during the last 12 months of a gubernatorial term exempt from the new-election language, the voters who ratified the 1872 *Constitution* must have

intended that one-half of that twelve-month period, that is *six months*, was to serve as a cap on the length of service by an individual not elected by the people throughout the state to serve as acting governor, unless that service began during the last year of the gubernatorial term.

Next, it is important to compare the language of Sections 16 and 17 of Article VII. The first part of Article VII, § 17, of the *West Virginia Constitution* reads as follows:

#### **Vacancies in Other Executive Departments**

§ 17. If the office of secretary of state, auditor, treasurer, commissioner of agriculture or attorney general shall become vacant by death, resignation, or otherwise, it shall be the duty of the governor to fill the same by appointment, and *the appointee shall hold his office until his successor shall be elected and qualified in such manner as may be prescribed by law.* . . .

[emphasis added]

Unlike the initial filling of gubernatorial vacancies under § 16, which is performed through “devolution” down a line of succession, the initial filling of vacancies in the offices of what are referred to in the next sentence of § 17 as the “subordinate officers of the executive department” under § 17 must be done by the governor, as the chief executive officer of the state. Under § 5 of the same article, the “chief executive power shall be vested in the governor, who shall take care that the laws be faithfully executed.” Furthermore, while the vacancy-filling provisions of § 16 are, in essence, self-executing, the vacancy-filling provisions of § 17 require the enactment of legislation by the West Virginia Legislature. The term “as may be prescribed by law” does not appear in § 16.

The principle of interpretation of written instruments, that the express mention of the one thing implies the exclusion of another, is of ancient origin and extends to all

instruments requiring judicial construction, contracts, deeds, statutes, and constitutions. *Harbert v. Harrison County Court*, 129 W. Va. 54, 39 S.E.2d 177 (1946). Effect should be given to every part and to every word of a constitutional provision. *State ex rel. Rist v. Underwood*, 206 W. Va. 258, 524 S.E.2d 179 (1999).

Because the framers of the 1872 *Constitution* understood the provisions of § 16 to be self-executing, they did not plan to authorize the enactment of legislation to carry out those provisions. Clearly then, as now, if an acting governor failed promptly to issue a proclamation to carry out the mandates of the new-election sentence, an aggrieved citizen could seek a writ of mandamus to require that acting governor to do so.

Because the filling of vacancies in the executive department is explicitly addressed in Article VII of the *West Virginia Constitution*, under the headings of “Vacancy in Governorship, How Filled” for §16 and “Vacancies in Other Executive Departments” for § 17, the general default language in Article IV, relating to elections, terms of office, and the filling of vacancies, does not apply in this case.

Therefore, the case of *Miller v. Burley*, 155 W. Va. 681, 187 S.E.2d 803 (1972) (decided on rehearing), is clearly not on point. In that case, this Court required the counting of write-in votes for the office of sheriff that were cast in a general election in 1970 less than two weeks after the former sheriff had died. It cited Article IV, § 7, of the *West Virginia Constitution* as authority for a syllabus point that “any vacancy in a state or county office which occurs at any time before a general election shall be filled by appointment which shall expire at such time after the next general election as the

person elected to fill such vacancy shall be qualified and the vacancy for the unexpired term shall be filled at such general election.”

Since that case was decided, it has been distinguished. This Court failed to follow *Miller* in *State ex rel. Robb v. Caperton*, 191 W. Va. 492, 446 S.E.2d 714 (1994). In that case, Richard A. Robb, then the Chairman of the Kanawha County Republican Executive Committee, sought a writ of mandamus to order Governor Gaston Caperton to issue a directive of election to fill the office of Kanawha County Circuit Judge. In denying the requested relief and in refusing to follow *Miller*, this Court held that Article VIII, § 7, of the *West Virginia Constitution*, relating to the manner of filling a vacancy for the office of a justice of the Supreme Court or a judge of a circuit court, takes precedence over the more general provisions of §§ 7 and 8 of Article IV, relating to the filling of vacancies for state and county officers. *Id.* In that decision, this Court also held that questions of constitutional construction are in the main governed by that same rules applied in statutory construction; that the general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter where the two cannot be reconciled; and that a specific constitutional provision will be given precedence over a general constitutional provision relating to the same subject matter when the two cannot be reconciled. *Id.*

Petitioner Cooper submits that because the specific provisions of Article VII of the *West Virginia Constitution* expressly govern the election, terms of office, and filling of vacancies as to members of the executive department and those provisions are in conflict with, and cannot be reconciled with, the general “default” provisions of Article IV of the *West Virginia Constitution* as to the election, terms of office, and filling of

vacancies of elected officials, the specific language of Article VII must likewise be given precedence.

Next, the principle that we West Virginians get to pick our own leaders is repeatedly set forth in the *West Virginia Constitution*: For example, under Article II, § 2, the “powers of government reside in all the citizens of the State, and can be rightfully exercised only in accordance with their will and appointment.” Likewise, under Article III, § 2, all “power is vested in, and consequently derived from, the people. Magistrates are their trustees and servants, and at all times amenable to them.”

Furthermore, the constitutional tension resulting from the fact that the same individual simultaneously holds offices (even though he may not be actively functioning in both offices) in two separate branches of state government can only be abated by a prompt election to fill the gubernatorial vacancy. Under Article V, § 1, of the *West Virginia Constitution*, the “legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the power of more than one of them at the same time, except that justices of the peace shall be eligible to the Legislature.” Under Article VI, § 13, no “person holding any other lucrative office or employment under this State, the United States, or any foreign government; no member of Congress; and no person who is sheriff, constable, or clerk of any court of record, shall be eligible to a seat in the Legislature.” The (federal) constitutionality of the latter provision was upheld in *Wilson v. Moore*, 346 F. Supp. 635 (N. D. W. Va. 1972).

The need for a prompt gubernatorial election is probably even more pressing now than it would have been in the late nineteenth century. Under Article VI, § 18 of

the original 1872 *Constitution*, the Legislature, after 1873, was only to meet biennially; and “the regular biennial session of the Legislature shall commence on the second Wednesday of January, 1875, and every two years thereafter, on the same day.” Under Article VI, § 22, of the original 1872 *Constitution*, no session, after 1873, “shall last longer than forty-five days, without the concurrence of two thirds of the members elected to each house.”

Since a two-year period would consist of 730 days (731 days in periods including Leap Day), and the legislative session was normally not to exceed 45 days, there would be continuous periods of at least 685 days in which the Legislature was not in session, punctuated by 45-day legislative sessions. Therefore, it would be very likely that a senate president serving as acting governor could issue a proclamation calling an election to fill a gubernatorial vacancy, with the election being held within three or four months thereafter, even though the Legislature never met during the entire period that he was serving as acting governor.

Obviously, with annual sixty-day sessions, not to mention extended and extraordinary sessions, the likelihood that such a new election could be proclaimed and held without the state senate being in session has been significantly reduced as a result of a number of amendments to the above two constitutional sections.

For the foregoing reasons, this Honorable Court should order a prompt election to fill the gubernatorial vacancy.

**(d) CONSTRUCTION OF THE “NEW-ELECTION SENTENCE” IN LIGHT OF THE FREQUENCY OF ELECTIONS DURING THE EARLY 1870’S.**

Having discussed various provisions of the *West Virginia Constitution* that aid in the construction of the new-election sentence, Petitioner Cooper will now address the frequency of elections during the period in which the ratification occurred.

The fundamental principle in constitutional construction is that effect must be given to the intent of the framers of such organic law and of the people who ratified and adopted it. *State ex rel. K. M. v. West Virginia DHHR*, 212 W. Va. 783, 575 S.E.2d 393 (2002); *State ex rel. Rist v. Underwood*, *supra*. In determining what the voters of West Virginia intended in 1872 when they ratified the *West Virginia Constitution*, including Article VII, § 16, and its new-election sentence, it is important that one understands the frequency of the elections that they were then experiencing.

For purposes of clarity, Petitioner Cooper will herein refer to the final election (after the completion of any party conventions or primary elections) at which the voters select the individual who is to hold an office as a “general election”, even though that term has other definitions in other contexts. If only one office is on the ballot at a general election, he may further describe that election as a “special general election”.

Under the 1863 *Constitution*, there was at least one general election each year. A new set of delegates was elected each year. Delegates served one-year terms. State senators were elected to two-year terms; one half of the state senate was elected each year. Many of the state and county officials who now serve four-year terms would then have served two-year terms. A general election was held on the fourth Thursday of each October. In addition, in years evenly divisible by four, the Presidential (and

Vice-Presidential) electors were selected on the first Tuesday after the first Monday in November, as they are now.

To demonstrate this point, Petitioner Cooper has included copies of portions of a number of articles from the *Weekly Register*, a politically passionate (and, regrettably, quite racist) Mason County newspaper, whose editor was named George W. Tippet, that was published each Thursday during the early 1870's. Petitioner's Exhibit No. 3, a copy of a portion of the second page of the Thursday, October 27, 1870, edition of the *Weekly Register*, includes editorials urging its readers for vote on that day for Republican candidates. (Appendix, p. 8) Petitioner's Exhibit No. 4, a copy of portions of the second page of the Thursday, November 3, 1870, edition of the *Weekly Register*, includes an editorial criticizing West Virginia voters for electing Democrats to positions of power and also a chart depicting the number of votes that were cast in Mason County on Thursday, October 27, 1870, for the offices of governor, secretary of state, treasurer, auditor, attorney general, supreme court judge, congressional representative, state senator, delegate, circuit clerk, recorder, sheriff, prosecuting attorney, surveyor, and for two assessors. (Appendix, pp. 9-10)

Another statewide election was held on April 27, 1871, to allow voters to vote on a proposed amendment to the 1863 Constitution, known as the Flick Amendment, which, if adopted, would authorize black male West Virginians and male West Virginians who had supported the Confederacy to vote in West Virginia elections. The proposal was to amend Article III, § 1, of the 1863 *Constitution*. Petitioner's Exhibit No. 5 is a reprint of newspaper articles from the April 27 and 28, 1871, editions of the *Wheeling Daily Intelligencer* about the proposed amendment and about the low turnout.

(Appendix, pp. 11-12) The voters approved the measure by a margin of 23,546 to 6,323. The net effect of the election was to swell the ranks of Democratic voters and to elect Democratic candidates. WEST VIRGINIA ENCYCLOPEDIA, p. 244.

On February 23, 1871, the Legislature had called for a referendum on the issue of whether to hold a new constitutional convention. *Id.*, at 165. That referendum (another statewide election) was held on Thursday, August 24, 1871. Petitioner's Exhibit No. 6, a copy of a portion of the second page of the Thursday, August 31, 1871, edition of the *Weekly Register*, includes an editorial applauding the "497 True Men of Mason" who voted on August 24, 1871, for holding a constitutional convention (as opposed to the 1,429 in Mason County who voted against doing so) and a chart depicting how many voted for and against the proposition at each polling place in the county. (Appendix, p. 13) The statewide vote on the proposal was 30,220 in favor and 27,658 in opposition. WEST VIRGINIA ENCYCLOPEDIA, p. 165.

The 1871 general election was held on Thursday, October 26, 1871. By then, the newspaper's editor appeared to have changed sides, now favoring Democratic candidates. Petitioner's Exhibit No. 7, a copy of a portion of the second page of the Thursday, November 2, 1871, edition of the *Weekly Register*, includes an editorial applauding voters for electing Democratic candidates for delegate and a chart depicting the number of votes cast for various candidates for convention delegate at each polling place in the county. (Appendix, p. 14) Across the state, 78 convention delegates were elected, of whom 66 were Democrats, 11 were Republicans, and one was a Unionist Democrat. WEST VIRGINIA ENCYCLOPEDIA, p. 165.

The 1872 Constitutional Convention was held in a converted Methodist church in Charleston from January 16, 1872, through April 9, 1872. *Id.* Petitioner's Exhibit No. 8 is a copy of several pages of the proposed Constitution (including Article VII, § 16); of a proclamation, dated April 10, 1872, by Governor John J. Jacob; and of the schedule for carrying out the referendum, "on the fourth Thursday of August, 1872", on the proposed Constitution, for voting for a whole new set of state, county, and other officials on the same day (the election of such candidates being contingent upon the outcome of the referendum), and, if the proposed Constitution was ratified, for calling the newly elected Legislature into session on the third Tuesday of November, 1872. (Appendix, pp. 15-20)

In 1872, candidates for a general election were normally selected at party conventions. Petitioner's Exhibit No. 9, a copy of a portion of the second page of the Thursday, April 11, 1872, edition of the *Weekly Register*, includes an announcement of a Democratic and Conservative State Convention that is to be held in Parkersburg on May 30, 1872, to nominate state candidates and select delegates to the National Convention and a discussion of the Constitutional Convention. (Appendix, p. 21)

Petitioner's Exhibit No. 10, a copy of a portion of the second page of the Thursday, April 18, 1872, edition of the *Weekly Register*, includes a discussion of the adjournment of the Constitutional Convention on April 9, 1872. (Appendix, p. 22)

Petitioner's Exhibit No. 11, a copy of a portion of the front page of the Thursday, May 2, 1872, edition of the *Weekly Register*, includes the text of a portion of the proposed Constitution, including Article VII, § 16. (Appendix, p. 23)

Petitioner's Exhibit No. 12, a copy of a portion of the second page of the Thursday, May 9, 1872, edition of the *Weekly Register*, includes an announcement of a Democratic and Conservative County Convention to be held at the Mason County Court House on May 20, 1872, for the purpose of nominating county officers and selecting delegates to the May 30, 1872, state convention (Appendix, p. 24)

Petitioner's Exhibit No. 13, a copy of a portion of the second page of the Thursday, May 23, 1872, edition of the *Weekly Register*, includes announcements of a Democratic and Conservative Congressional Convention for the Third Congressional District to be held in Charleston on June 20, 1872, "for the purpose of nominating a Representative in Congress for the Third Congressional District" and of a suggested Democratic and Conservative Senatorial and Judicial Convention to be held at the Jackson County Court House on June 7, 1872, to nominate candidates for state senator and circuit judge. (Appendix, p. 25)

As a result of these conventions, many candidates were nominated. Petitioner's Exhibit No. 14, a copy of a portion of the second page of the Thursday, July 4, 1872, edition of the *Weekly Register*, includes a listing of the Democratic and Conservative state and county tickets and a discussion of incumbent Democratic Governor John Jacob's decision to run as an independent candidate for governor in 1872. (Appendix, p. 26) Petitioner's Exhibit No. 15, a copy of a portion of the second page of the Thursday, July 18, 1872, edition of the *Weekly Register*, includes a listing of the Democratic and Conservative national, state, and county tickets (including Horace Greeley for President and Johnson Camden for Governor). (Appendix, p. 27)

The referendum on the proposed Constitution and the (contingent) general election for state and county candidates was held as scheduled on Thursday, August 22, 1872. Petitioner's Exhibit No. 16, a copy of a portion of the second page of the Thursday, August 22, 1872, edition of the *Weekly Register*, repeatedly implores the newspaper's readers to vote for Johnson Camden and for ratification: "Let Camden and "ratification" be your rallying cry to-day". "Vote to-day for the New Constitution". (Appendix, p. 28)

On Thursday, August 22, 1872, the voters of West Virginia ratified the proposed Constitution by a margin of 42,344 to 37,777, reelected Governor John Jacob, running as an independent, over Johnson Camden, the Democratic and Conservative Party gubernatorial candidate, and rejected a separate proposal that would have restricted the holding of elected public offices to whites. WEST VIRGINIA ENCYCLOPEDIA, pp. 165, 376. However, West Virginia voters still had two more elections to cast ballots in 1872.

The first of those elections was to be held, as usual, of the fourth Thursday in October. Because the contingent 1872 general election for candidates, other than those for federal office, had already been held on August 22, 1872, and because the ratification of the proposed Constitution on the same day had met the contingency, only federal offices had not been filled by that election. The general election on Thursday, October 24, 1872, was only for candidates for the U. S. House of Representatives. Petitioner's Exhibit No. 17, a copy of a portion of the second page of the Thursday, October 17, 1872, edition of the *Weekly Register*, includes a listing of the national Democratic-Conservative ticket and an editorial urging Mason County voters to vote for

Frank Hereford for Congress on Thursday, October 24, 1872. (Appendix, p. 29)

Petitioner's Exhibit No. 18, a copy of a portion of the second page of the Thursday, October 31, 1872, edition of the *Weekly Register*, includes the results in Mason County in the congressional race and advocates the election of Horace Greeley over President Grant on Tuesday, November 5, 1872. (Appendix, p. 30)

West Virginia's final general election of 1872, in the race for President, was held on Tuesday, November 5, 1872. Petitioner's Exhibit No. 19, a copy of a portion of the second page of the Thursday, November 14, 1872, edition of the *Weekly Register*, includes an editorial lamenting the fact that the American people have reelected "the great nepotist and unfeeling tyrant – Grant" and a story announcing that the newly elected Legislature is to meet in Charleston on Tuesday, November 19, 1872. (Appendix, p. 31)

From the foregoing discussion, it is clear that at least seven (7) separate elections were held between October 1870 and November 1872, both inclusive: (1) on October 27, 1870, (2) on April 27, 1871, (3) on August 24, 1871, (4) on October 26, 1871, (5) on August 22, 1872, (6) on October 24, 1872, and (7) on November 5, 1872. During this period, the average interval between these elections was about four (4) months. In 1872 itself, the average interval between the elections was about 38 days.

When they ratified the Constitution, the voters of West Virginia must have understood the new-election sentence to mean: "As soon as possible after a vacancy arises in the office of governor during the first 36 months of the gubernatorial term, a new election shall take place to fill that vacancy."

**(e) CONSTRUCTION OF THE “NEW-ELECTION SENTENCE” IN LIGHT OF LEGISLATION ENACTED WITHIN MONTHS AFTER ITS RATIFICATION.**

It is Petitioner Cooper’s position that the framers of the 1872 *Constitution* and those who ratified it considered the new-election sentence to be a self-executing constitutional provision. If a vacancy occurred during the first 36 months of the gubernatorial term, the acting governor was expected promptly to issue a proclamation starting an election process that would be concluded within several months after the vacancy arose. If the acting governor did not promptly issue such a proclamation, an aggrieved citizen could file a petition for writ of mandamus to have a court order the acting governor to do so. Indeed, this is what Petitioner Cooper is now doing.

Since nearly simultaneous enactment of legislation (whether or not any was needed) following the ratification of a constitutional provision may be of some value in construing that provision, Petitioner Cooper obtained copies of gubernatorial-succession legislation passed by the legislators who were elected on the very same day that the 1872 *Constitution* was ratified.

During the long 1872-73 sessions of the Legislature, two separate bills were passed with respect to gubernatorial succession. Petitioner’s Exhibit No. 20 is a copy of portions of Chapter 118 of the Acts of the 1872-73 Legislature. 1872-73 *W. Va. Acts* 342-45, 358-359, and 370-371. (Appendix, pp. 32-35) Chapter 118 was enacted on April 11, 1873, and took effect from passage. The gubernatorial-succession provision was set forth in § 41 of the bill. That section read as follows:

§ 41. In case of the death, conviction on impeachment, failure to qualify, resignation, *removal from the seat of government*, or other disability of the governor, the president of the senate shall act as governor until the vacancy is filled, or the disability *is* removed; and if the president of the senate, for any of the above named causes shall become incapable of performing the duties of

governor, the same shall devolve upon the speaker of the house of delegates; and in all other cases when there is no one to act as governor, one shall be chosen by joint vote of the legislature. *If the vacancy occur before the first three years of the term shall have expired, a new election shall take place to fill the vacancy. The president of the senate, or such officer as shall succeed to the office of governor, shall issue a proclamation fixing the time for holding an election to fill the vacancy, which shall be published in one newspaper in each county where a paper is printed, at least thirty days' prior to such election, directed to the commissioners of election in the several counties, who shall proceed in the manner prescribed for conducting elections.*

[Italicized language was not in the constitutional section. Some of the language in the constitutional section was not included in the statutory section.]

Most of the italicized statutory language was implied by the constitutional provision.

The above statute was amended later that year. Petitioner's Exhibit No. 21 is a copy of portions of Chapter 177 of the Acts of the 1872-73 Legislature. 1872-73 W. Va. Acts 524-29. (Appendix, pp. 36-38) Chapter 177 was enacted on December 20, 1873. That bill amended several paragraphs of the earlier bill, including § 41 thereof. As amended, that section now read as follows:

§ 41. In case of the death, conviction on impeachment, failure to qualify, resignation, or other disability of the governor, the president of the senate shall act as governor, until the vacancy is filled, or the disability removed; and if the president of the senate, for any of the above named causes, shall become incapable of performing the duties of governor, the same shall devolve upon the speaker of the house of delegates; and in all other cases when there is no one to act as governor, one shall be chosen by joint vote of the legislature. Whenever a vacancy shall occur in the office of governor before the first three years of the term shall have expired, a new election shall take place to fill the vacancy.

The above language in the amended version of § 41 is identical to that in the constitutional provision. As Petitioner Cooper understands this amendment, it reflects the proposition that the constitutional section was understood to be self-executing.

The test for determining whether a constitutional provision is self-executing is whether the right it gives or the duty it imposes, may be enforced without the aid of legislative enactment. *State ex rel. Firestone Tire & Rubber Co. v. Ritchie*, 153 W. Va. 132, 168 S.E.2d 287 (1969).

Petitioner Cooper would add that Petitioner's Exhibit No. 21 also gives some idea of how long an acting governor should wait before issuing an election proclamation. Under the December 20, 1873, enactment, the amended § 42 therein states, in part, that, if "there be a vacancy in the representation from this State in the Congress of the United States, the governor shall, within ten days after the fact comes to his knowledge, give notice by proclamation, to be published in such newspapers in the district where such vacancy shall occur, as he shall deem best calculated to give information thereof to the voters of such district; and in such proclamation he shall appoint some day not over sixty nor less than thirty days from the date thereof, for holding the election to fill such vacancy . . . ." 1872-73 W. Va. Acts, at 527.

(Appendix, p. 37)

**(2) DOES W. VA. CODE § 3-10-2 VIOLATE ARTICLE VII, § 16, OF THE WEST VIRGINIA CONSTITUTION?**

The next issue is whether the gubernatorial-succession language in *W. Va. Code* § 3-10-2 violates Article VII, § 16 of the *West Virginia Constitution*. The current language of that statutory section is the result of a series of amendments (the last one of which was a part of a lengthy 1967 bill relating to legal advertisements and the publication of notice) to the above-quoted gubernatorial-succession language that the Legislature enacted in 1873.

W. Va. Code § 3-10-2, in its current form, reads as follows:

§ 3-10-2. Vacancy in office of governor

In case of the death, conviction or impeachment, failure to qualify, resignation or other disability of the governor, the president of the Senate shall act as governor until the vacancy is filled or the disability removed; and if the president of the Senate, for any of the above-named causes, shall be or become incapable of performing the duties of governor, the same shall devolve upon the speaker of the House of Delegates; and in all other cases where there is no one to act as governor, one shall be chosen by the joint vote of the Legislature. Whenever a vacancy shall occur in the office of governor before the first three years of the term shall have expired, a new election for governor shall take place to fill the vacancy. *If the vacancy shall occur more than thirty days next preceding a general election, the vacancy shall be filled at such election and the acting governor for the time being shall issue a proclamation accordingly, which shall be published prior to such election as a Class II-O legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, and the publication area for such publication shall be each county of the state.* But if it shall occur less than thirty days next preceding such general election, and more than one year before the expiration of the term, such acting governor shall issue a proclamation, fixing a time for a special election to fill such vacancy, which shall be published as hereinbefore provided.

*If the vacancy is to be filled at a general election and shall occur before the primary election to nominate candidates to be voted for at such general election, candidates to fill the vacancy shall be nominated at such primary election in accordance with the time requirements and the provisions and procedures prescribed in article five of this chapter.* When nominations to fill such vacancy cannot be so accomplished at such primary election, and in all cases wherein the vacancy is to be filled at a special election, candidates to be voted for at such general or special elections shall be nominated by a state convention to be called, convened and held under the resolutions, rules and regulations of the political party executive committees of the state. The laws prescribing the manner of calling, constituting and holding conventions to nominate candidates for presidential electors shall, insofar as applicable, govern conventions to nominate candidates to fill any vacancy in any office to be filled by the voters of the state as a whole, except that, in lieu of the magisterial district conventions in the several counties, the county executive committee shall call and convene a county convention at the county seat with delegates thereto apportioned to and representative of the several magisterial districts of the county as provided in section twenty-one of article five of this chapter. The county convention shall proceed to select the county's prescribed number of state convention delegates from the several magisterial districts thereof and the chairman and secretary of the convention shall promptly certify the names and addresses of the persons so

selected as delegates to the state convention to the chairman of the state executive committee of the political party.

The italicized language reflects the portion of *W. Va. Code* § 3-10-2 that would appear to apply in this case. The practical effect of complying with that language would be that the election to fill Governor Manchin's gubernatorial vacancy would not take place until 2012. The only portion of Governor Manchin's second term that the successful candidate to fill that vacancy would be able to fill would begin after the general election that will be held on Tuesday, November 6, 2012, and would run through Monday, January 14, 2013.

If one assumes that that successful candidate were qualified as a winner in time to be sworn in on Monday, November 19, 2012, then the period between that swearing in and the swearing in, on January 14, 2013, of the new governor elected (at that same general election) to a complete four-year term would only be only eight (8) weeks, or 56 days. On the other hand, under the foregoing scenario, Respondent Tomblin would be able to serve as Acting Governor from November 15, 2010, through November 19, 2012, a period of 105 weeks, or 735 days.

Petitioner Cooper submits that this would be an absurd result.

The portions of *W. Va. Code* § 3-10-2 that do not merely restate the text of Article VII, § 16 of the *West Virginia Constitution*, including the new-election sentence therein, are generally inconsistent with the requirement for the holding of a new election.

Furthermore, under that statute, different outcomes result from different times that a vacancy might arise. For example, under the statute, if Governor Manchin had resigned more than thirty (30) days before the November 2, 2010, general election, the vacancy would have been filled at that November 2, 2010, election. If Governor

Manchin had resigned during the 30-day period immediately before the election, a special election would have been called to fill the vacancy. Furthermore, whether the political parties are to use a primary-election process or a party-convention process to choose their nominees for the general election at which the vacancy is to be filled is also subject to when the vacancy arises. These anomalies further underscore the arbitrariness of the statute.

In construing statutes, courts normally adopt an interpretation that will avoid absurd or bizarre consequences, the presumption being that the legislature acted in accordance with reason and common sense and did not intend untoward results. *State v. Jones*, 359 N.C. 832, 616 S.E.2d 496 (2005). Unfortunately, there is no way to harmonize *W. Va. Code* § 3-10-2 with Article VII, § 16, of the *West Virginia Constitution*, except for the part of that statute that merely restates the text of that constitutional provision.

Accordingly, this Honorable Court should hold that the portion of the statute that does not restate the text of the constitutional provision is unconstitutional.

There are additional problems with the party-convention language that is contained in *W. Va. Code* § 3-10-2. When a political party has tens of thousands of members in a county, the only way that that party's county convention can operate efficiently is if only a very small percentage of the party's members in that county actually choose to participate.

Petitioner's Exhibit No. 22 is a copy of a county-by-county voter-registration chart from page 670 of the 2008 West Virginia Blue Book. (Appendix, p. 39) As to the Democratic and Republican Parties, the chart indicates the number of party members

in each county as of the 2008 primary election. In every county in West Virginia there were over 1,000 registered Democrats as of that time. In 27 counties of West Virginia, there were over 10,000 registered Democrats as of that time. Kanawha County's total was 71,943 Democrats. The Republican Party had smaller numbers than did the Democratic Party. Still, in early 2008, in each of 10 counties in West Virginia, there were over 10,000 registered Republicans as of that time.

In 2010, the use of political-party conventions is not a reasonable way to choose Democratic or Republican gubernatorial nominees. Furthermore, the use of political-party conventions to nominate party nominees to public office is generally inconsistent with the ability of a party member to vote by secret ballot.

Accordingly, Petitioner Cooper is of the opinion that any writ of mandamus in this case be moulded to require that a special primary election and a special general election be held in 2011 in a manner that is generally consistent with the holding of the special primary election and the special general election that were held in 2010 to fill the vacancy created by the death of Senator Byrd.

#### **VIII. CONCLUSION.**

For the reasons discussed in this Petition, Petitioner Cooper now prays that this Honorable Court accept his Petition; issue a scheduling order; issue a rule to show cause; schedule this case for argument; and declare that the portion of *W. Va. Code* § 3-10-2 that does not merely restate the text of Article VII, §16, of the *West Virginia Constitution* is unconstitutional as being violative of that constitutional provision.

Petitioner Cooper further prays that this Honorable Court construe or apply the language of the final sentence of Article VII, §16, to mean the following: "As soon as

Petitioner Cooper further prays that this Honorable Court construe or apply the language of the final sentence of Article VII, §16, to mean the following: "As soon as possible after a vacancy arises in the office of governor during the first 36 months of the gubernatorial term, a new election (normally meaning a new special primary election and a new special general election) shall take place to fill that vacancy."

In light of the facts that the Acting Governor has not yet issued an appropriate proclamation and that this Court needs time to hold oral argument on this Petition before issuing an appropriate order, Petitioner Cooper requests that the order contain a deadline in late January 2011 for the filing of certificates of candidacy to fill the gubernatorial vacancy, set forth a date for a special primary election in March 2011, and set forth a date for a special general election in May 2011.

The order should also direct that the elections should be paid for out of public funds.

Respectfully submitted,

THORNTON COOPER

Pro se



Thornton Cooper  
3015 Ridgeview Drive  
South Charleston, WV 25303  
West Virginia State Bar No. 823  
(304) 744-9616 (home)

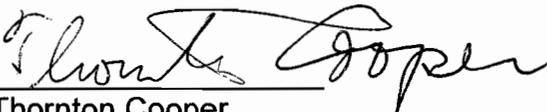
Dated: December 2, 2010

VERIFICATION.

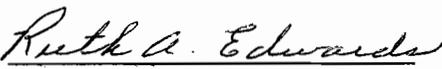
STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to-wit:

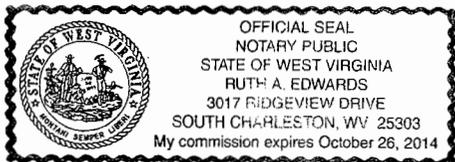
I, **Thornton Cooper**, after first being duly sworn upon oath, state that I am the Petitioner named in the attached and foregoing Petition for Writ of Mandamus, that I have read the same, and that the facts and allegations therein contained are true and correct, except insofar as they are therein stated to be on information and belief, and that, insofar as they are stated therein to be on information and belief, I believe them to be true.

  
Thornton Cooper

Taken, sworn to, and subscribed before me this 2nd day of December, 2010.

  
Ruth A. Edwards, Notary Public

My commission expires October 26, 2014



## CERTIFICATE OF SERVICE

I, **Thornton Cooper**, the Petitioner herein, do hereby **certify** that I have served the foregoing **"Petition for Writ of Mandamus"** and the **Appendix** thereto upon the Honorable **Earl Ray Tomblin**, Acting Governor of the State of West Virginia and President of the West Virginia State Senate, by hand-delivering a copy of the same to the Governor's Office, (304) 558-2000, at the State Capitol Building, 1900 Kanawha Boulevard, East, Charleston, WV 25305; upon the Honorable **Richard Thompson**, Speaker of the West Virginia House of Delegates, by hand-delivering a copy of the same to the offices of his Counsel, Anthony J. Majestro, Esq., (304) 346-2889, at 405 Capitol Street, Suite P-1200, Charleston, WV 25301; upon the Honorable **Natalie E. Tennant**, Secretary of State of the State of West Virginia, (304) 558-6000, by hand-delivering a copy of the same to her office at Building 1, Suite 157-K, 1900 Kanawha Boulevard, East, Charleston, WV 25305-0770; and upon the Honorable **Darrell McGraw**, West Virginia Attorney General, (304) 558-2021, by hand-delivering a copy of the same to his office at the State Capitol Complex, Building 1, Room E-26, Charleston, WV 25305, all on this 2nd day of December, 2010; and do **further certify** on this 2<sup>nd</sup> day of December, 2010, that this Honorable Court should serve its **Rule to Show Cause**, if granted herein, **on those individuals at those addresses**, who may be reached at the aforementioned **telephone numbers**.

  
Thornton Cooper