

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA *ex rel*
WEST VIRGINIA CITIZEN ACTION GROUP,

Petitioner,

v.

No. 101494

EARL RAY TOMBLIN,
President of the West Virginia
State Senate; et al.

Respondents.

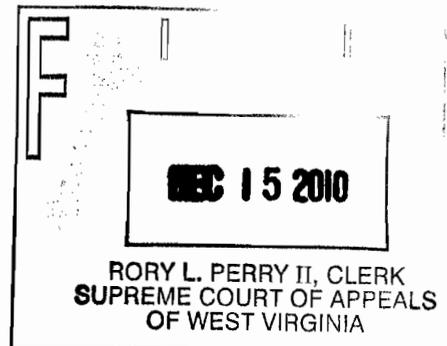
STATE OF WEST VIRGINIA *ex rel.*
THORNTON COOPER,

Petitioner,

v.

No. 10-4004

Honorable EARL RAY TOMBLIN,
Acting Governor of the State of
West Virginia and President of the
West Virginia State Senate; et al.



**BRIEF AMICUS CURIAE OF THE
WEST VIRGINIA EDUCATION ASSOCIATION**

1. **Introduction**

This Brief is filed pursuant to the scheduling order entered herein and is attached to a motion for leave to proceed as amicus curiae pursuant to Rev. R.A.P. 30.

2. **Statement of Interest of the West Virginia Education Association**

The West Virginia Education Association (WVEA) is the largest teachers' organization in the State. The WVEA family includes classroom teachers and other

licensed professional staff, education support professionals, higher education faculty and classified staff, future teachers and retired school employees. WVEA has worked to improve public education in West Virginia for nearly 150 years. WVEA has members in each of the state's 55 counties. WVEA itself is a democratic organization which was founded on the belief of one person, one vote.

The filling by elective public offices by persons elected to hold those positions is an essential ingredient of our democratic government. WVEA members participate extensively in elections including voting, the process of endorsement of candidates, campaigning and "get out the vote" efforts. Whether viewed individually or collectively, the right of the citizenry, including employees of a public sector heavily regulated by the State, to elect a Governor is basic to our democratic form of government. Instead of having the vacancy filled for nearly two years by an ex officio substitute¹, the two year vacancy should be filled by a person specifically elected by the populace of the entire State to be Governor. The importance of this right to WVEA's members compels their representative to urge this Court to apply the *Constitution* as written and direct an immediate election for Governor for the remainder of the term.

Members of the WVEA are part of the largest enterprise of state government-- education. To add a practical dimension to the separation of powers doctrine arguments made by both Petitioners, the role of the Governor in education bears examination. The Governor plays a critical role in both the legislative process. One of his or her most far reaching powers is the power to approve or disapprove of legislation, including

¹ The position of amicus is not in any way directed at the incumbent Acting Governor. WVEA's position would be the same whoever happened to be serving as Acting Governor.

appropriations. The Governor controls much of the spending process. Further, the Governor appoints members to critical public agencies such as the West Virginia Board of Education and the boards governing higher education. At this moment the response of those agencies to the finance and performance conflicts from within the State, as well as the new and well financed federal educational goals and incentives, is critical to the progress of education. The political process and its mechanisms of accountability -- which must absorb, resolve and mold a resolution of those dynamics -- should be fully functional. Two years is a significantly longer period than one year for an Acting Governor who was never elected to the position to leave a more permanent impact on the State.

3. Argument: A “new” election should be ordered.

A fundamental tenant of the democratic process is that the citizenry should be able to vote on persons who will fill elected positions.

When former Governor, now U.S. Senator, Manchin resigned on November 15, 2010 the next general election was scheduled nearly two years hence, November 6, 2012. This is seven days short of two years and without question more than thirty days in the future. Since the vacancy occurred during the “first three years of the term” of then-Governor Manchin, Article VII, section 16 of *The Constitution of West Virginia* requires that a “new”² election be held.

² The history of the frequent and bitter elections held from 1863 to 1872 recounted at pp. 26-32 of the *Petition* in the *Cooper* case, No. 10-4004, leaves no doubt that a “new” election means something other than waiting two years for the next election.

After restating Article VII Section 16 in its first paragraph, *West Virginia Code*, section 3-10-2 creates an irrelevant factor -- whether the vacancy occurs within 30 days of the next scheduled general election. If the vacancy occurs within the 30 day period, the “acting governor shall issue a proclamation, fixing a time for a special election to fill such vacancy . . .” But, if the vacancy occurs “more than 30 days next preceding a general election, the vacancy shall be filled at such election...”. Thus, if the vacancy occurs more than 30 days before a general election then the next general election, whether it is 31 days or two years and 353 days in the future, becomes the “new election” promised by Article VII Section 16.³

The coincidence of the proximity of the vacancy to the next election becomes the controlling factor; while, the duration of the vacancy -- in this case two years -- becomes irrelevant. The next election is accordingly transformed into a “new election.”

If the drafters and adopters of the *Constitution* intended that the vacancy be filled at the next general election, the phrase “new election” in Article VII Section 16 is not necessary. Indeed, the entire sentence would be largely superfluous, because the next general election is obviously the default for when the election would be held.

Summary

The *Constitution* in general language provides for a “new election” if the position is vacated by the previously elected governor more than one year before the next general

³ While the period of time by which the general election is missed may be relevant to the mechanics of the nomination and primary process, it has nothing to do with compliance with the constitutional mandate of holding a “new” election if the vacancy will last for more than one year.

election. *Code 3-10-2* contorts that plain rule into linking the required “new election” to the minimal likelihood of the vacancy occurring within 30 days of a general election. The more-than-one-year requirement is thus limited to the situation which “just miss” a general election by less than 30 days.

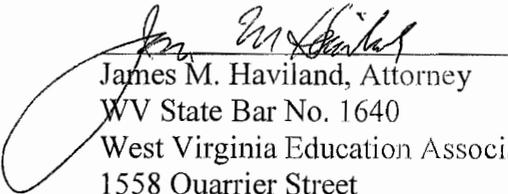
The framers of the 1872 *Constitution*, as ratified by the populace, drew the line at one year. Within that year an election did not make practical sense. Beyond the one year line, the democratic benefits of state-wide election, instead of the short-term position of an Acting Governor, is required. In that manner the burdens and pressures of the office will be shouldered for nearly two years by a Governor specifically elected on a state-wide basis. This Court should order an election. Such an election will not otherwise happen.

4. **Conclusion**

The Respondents should be ordered to schedule and hold a special election for the unexpired term.

Respectfully submitted,

WEST VIRGINIA EDUCATION
ASSOCIATION, by counsel



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