

January 10, 2011

Speaker Rick Thompson  
President Earl Ray Tomblin  
Chairs, Joint Committee of Government and Finance

Re: Required Report on Special Elections

Honorable Speaker and President:

As required by WV Code §3-10-4a(c)

“(c) The Secretary of State, shall by January 10, 2011, report to the Joint Committee of Government and Finance findings regarding of the operation of the special elections undertaken pursuant to subsection (b) of this section. This report shall provide analysis of: direct and indirect costs to the state associated with the conduct of the election; benefits and disadvantages of conducting an election on a Saturday; the impact of compressed time periods on efficient election administration; and whether this election process impacted early voting and participation by military and overseas voters.”

I am pleased to submit this report on the special elections conducted in 2010 pursuant to HB 201.

**Fiscal impact of special elections:**

The State reimbursed the county commissions a sum of \$3,083,501.50<sup>1</sup> in direct costs related to the special primary and the additional ballot preparation costs for the separate election in conjunction with the November 2 election. A total of \$33,913.85 in additional monies requested by the counties was denied as unnecessary or unreasonable by my office.

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<sup>1</sup> Actual costs were significantly reduced by several cost-saving measures specifically permitted by HB 201 (including: poll worker training avoided; consolidated precincts; fewer poll workers employed; fewer paper ballots printed; etc.). The Secretary of State estimates the savings at a minimum of \$500,000.

Additional indirect cost estimates include:

\$9,200	in overtime and compensatory time for Secretary of State employees;
\$(unkown) <sup>2</sup>	in overtime wages and benefits for state agencies who normally have employees work on Saturday regular time but had to pay overtime due to the special holiday;
\$207,476 <sup>3</sup>	in overtime wages and benefits for county and municipal employees, and other incidentals not reimbursed by the state;
\$9,750	in legal expenses defending law suits challenging the election;
\$7,000	in contracted technical support for election equipment;
\$1,000,000 <sup>4</sup>	in lost liquor sales from prohibition of sales on an election day;
\$110,000	in lost taxes (11%) from same;

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\$1,344,426+ subtotal

The estimated total direct and indirect cost for the special election (primary and general) was more than \$4.43 million.

**Other indirect impacts:**

- Training of municipal election officials for upcoming (2011) municipal elections had to be delayed due to the time demands placed upon our election division employees.
- Other functions and duties of county clerks' offices were delayed due to time demands placed upon employees.
- Other projects and functions of the Secretary of State (including bill drafting, Public Campaign Financing form development, work on internet voting pilot, etc.) were delayed.

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<sup>2</sup> State Auditor could not provide an estimate for impact upon 157 separate state agencies.

<sup>3</sup> No single source to provide an estimate for county and municipal expenses. Survey by WV Association of Counties revealed responses by eight counties. Extrapolating from those eight counties yields an estimate of \$207,476.

<sup>4</sup> Estimate obtained from limited responses to surveys conducted by retail association and Secretary of State.

**Effect of conducting primary on a Saturday:**

Voter turnout for the special primary, which was conducted on a Saturday, was an historic low of 12.28%. We are unaware of any post-election survey of non-voters, but we conclude that the holding of the primary on a Saturday negatively impacted the turnout. Should more scientific data be required, a survey could be commissioned. We received reports that voters were not accustomed to voting on a Saturday and that voters apparently had other things to do on weekends. However, many factors impact voter turnout including the competitiveness of the election.

Selection of a Saturday created problems for county commissions and clerks because many regular precinct locations were unavailable on a Saturday. That caused temporary shifts of precinct locations which were in place only for the one special election. Switching sites created some voter confusion and may have negatively impacted voter turnout.

A Saturday election also contributed to increased expenses for the counties and the state [see fiscal impact discussion above]. City and county employees normally utilized in conjunction with elections on a weekday were not scheduled to work on a Saturday. Not only were they required to work at holiday pay, but they also may have surpassed 40 hours and received overtime. It is not possible to assign a true cost to the "Saturday" factor because many employees receive the normal weekday election-day as a holiday and are paid overtime or holiday pay if they are required to work the weekday holiday.

Stores exclusively selling liquor were forced to be closed on a normally busy day (see fiscal impact discussion on previous page).

Selection of a Saturday did allow the state school systems to avoid closing school for a day. This probably will have a positive effect on efforts to meet the 180-day school calendar. If future special elections are contemplated during a school term, this benefit must be weighed against the negatives.

**Impact of compressed time frames on efficient election administration:**

This office and county clerks were able to conduct two separate elections in 107 days by altering or amending some time constraints that exist by code and regulation for regular election cycles. However, the Federal mandate of the 2009 MOVE Act, requiring that overseas voters be sent their absentee ballots at least forty-five (45) days before the general election, was problematic. Fourteen States (but not West Virginia) are being sued or compelled by the Department of Justice for failure to meet that federal mandate. Our special primary election was

not covered by the MOVE Act, but we worked hard to ensure that we met the 30-day federal reasonableness standard. The legislation creating the special elections modified or exempted some code requirements for the special primary. However, all future elections involving federal offices must meet the MOVE Act mandate. Therefore, we will not have that safety net available for all future special elections.

The MOVE Act mandate presented the greatest administrative difficulty for conducting the general election within sixty (60) days of the special primary. Following the primary, canvassing and certification requires several days. Programming the software and designing, proofing, and printing the ballots requires many days. With only a 60-day time frame between primary and general election, all of those required actions must be concluded within fifteen (15) days after the election in order to meet the 45-day federal ballot mandate. Furthermore, both the 15-day and 60-day time limits include weekends and holidays. We were able to meet this extremely constricted time constraint because the vast majority of the general election ballot programming and design had been completed following the regular May primary.

In addition to the twenty-three (23) specific law exemptions itemized in HB 201, the Legislature gave further administrative authority to this office. The ability to issue administrative orders to deal with conflicts in code written for a much longer election cycle gave me needed flexibility. Among the orders issued under this authority were instructions and requirements concerning canvassing and certification processes.

Objections to the compressed timelines were received from county commissions, whose discretion over when to conclude canvassing and certify results was markedly constrained. Questions were raised about whether quorums could be met by participation by phone, whether declaration orders and certifications could be "post-dated". And, although it did not occur, a contingency process was required for what would have happened had any commission failed to meet or could not make a quorum. None of these issues were directly addressed by current code or by the special legislation.

I was compelled to use my special administrative order authority in other circumstances. One precinct opened without the number of poll-workers required by code. No alternate could be immediately found and no voter could be deputized to work. I issued an administrative order permitting that precinct to remain open until additional workers were present.

By my order, two voters who were not covered by UOCAVA, who would have otherwise been disenfranchised due to travel, were authorized to use the Kanawha County pilot on-line voting system.

By my order, absentee ballots for the special primary were required to be provided to overseas and military voters thirty (30) days before the special primary. Thus, we insured that the overseas and military voters received their ballots by the old (in effect prior to the MOVE Act) DOJ deadline.

It might have been argued that the special election process denied unofficial political parties and independent candidates fair access to the ballot. The special session legislation provided for restricted times to submit petitions, but attempted to balance that restriction by reducing the number of signatures required. Another change provided by the legislation reduced the numbers of signatures necessary to qualify for waiver of the filing fee. One candidate did utilize both law changes. We have not received any complaints from any candidate. However, the severe time constraints did cause problems with the verifications of voters' signatures on the nomination certificates.

Another element of the legislation was the shortened filing period for candidates. Also, the candidates could not qualify by having their candidate certificates postmarked by the close of filing period. Nevertheless, fifteen (15) candidates filed. One was disqualified for failure to complete his form correctly.

Completion of ballot design, proofing, and printing in a severely restricted time limit was another special issue. Normally this process is completed in about four months. For the special and general elections vendors and ballot commissioners had only days. A single, state-wide, ballot position drawing provided by the legislation made the primary ballot completion possible. Nevertheless, for the general election the vendors and ballot commissioners struggled, ultimately successfully, to get corrections made in time to meet the federal absentee ballot delivery mandate.

Another issue which was not faced in this election, but might arise in future special elections, included the possibility of a recount demand following a special primary. Quite simply, our law's current recount process cannot be accommodated and still meet the federal mandates with only sixty days between primary and general. It should be noted that a petition process for an exemption does exist for "legal challenges" to elections.

I believe we achieved success through the hard work and extraordinary efforts of many people, but also benefitted from some good luck. Circumstances beyond our control (for example: no candidate requesting a recount) went our way. This office, and local officials, performed professionally and diligently. Our success does not mean that it was easy to accomplish.

Accordingly, I recommend that more than sixty (60) days be scheduled between primary and general elections in the future. I believe that a minimum of ninety

(90) days is required between primary and general and that the same minimum is required prior to a primary.

**Impact upon early voting and voting by overseas and military voters:**

Early voting numbers by percentage were higher than those of the previous (May, 2010) primary. However, as noted in the section discussing the impact of holding the election on a Saturday, the overall voter participation set a record low. I speculate that the early voting turnout may have been boosted by a combination of (a) initial interest and enthusiasm over the unique scenario and (b) lack of interest in voting on election-day which was a Saturday.

The early voting period was compressed (restricted) for the primary; but not for the general election. The shorter period of time may have had the effect of motivating the early voters to vote instead of procrastinating until too late. But, that is speculation. I am unaware of any surveys of the early voters.

Overseas and military voters were provided with the federally required full opportunity to vote in the special election. This was accomplished even though the 45-day requirement of the MOVE Act did not apply to the special primary. We received only one complaint directly. We were advised of no complaints received by the Department of Justice. The only complaint was not over the denial of the opportunity to vote, but was from a voter who had not registered to vote and could not meet the state law registration requirements in time to apply for, receive, and return an absentee ballot. This complaint was not related directly to the special primary, but does suggest problems created by current registration law.

The federally mandated 45-day (46 days by WV Code) absentee ballot mailing requirement did create potential problems for the General Election due to the compressed time between determining the outcomes of the special primary and the preparation of the absentee ballots. Between the August 28 election-day and the absentee ballot mailing deadline of September 17 only twenty days (fourteen working days) existed for counting votes, declaring results, allowing for possible recount, certifying results, programming of software for general election, and designing, proofing, printing and shipping of ballots. Although some persons had suggested that the federal law was not mandatory, subsequent suits filed by the Department of Justice against multiple states clearly indicate that such opinion was misinformed. Nevertheless, West Virginia's election officials met the deadline; an achievement not accomplished by fourteen other states even though they did not have to accommodate a lately-imposed special election.

In terms of overseas and military participation numbers, a total of 494 UOCAVA ballots were received in the special primary. This compares with 512 for the May primary, or a decrease in participation by 18 voters, which represents a decline of

3.52%. The overall voter participation rate in the May primary was 23.88% while the overall voter participation rate for the special primary was 12.28%, or a decline of nearly 50%. The overseas and military voter performance in the special primary represents a much better result than the performance of the regular voter. Therefore, one must conclude that overseas and military voters' ability to vote was not negatively impacted by the special election timeline.

**Secretary of State's Conclusions:**

In conclusion, I make the following recommendations:

1. Provide for more than sixty (60) days between primary and general. I recommend ninety (90).
2. Provide for procedures by which voting results will be declared, or certified, if county commissions are unable to timely perform their duties. The current mandamus procedure is too slow and cumbersome to serve.
3. Consider changes to voter's registration requirements for overseas and military voters.
4. Preserve for the Secretary of State the flexibility and authority to deal with daily emergencies and contingencies that cannot be contemplated by legislation.

Thank your for your consideration of this report.

Respectfully submitted,

Natalie E. Tennant  
West Virginia Secretary of State