

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

JAMES HALL	:	
	:	
AND	:	
	:	
N. C. "CLINT" MOSER, JR,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No. 2:13-cv-00663-MHT
	:	
JIM BENNETT, Secretary of State	:	
for the State of Alabama,	:	
	:	
Defendant.	:	

PLAINTIFFS' SUPPLEMENTAL SUBMISSION IN FOLLOW-UP TO RE-ARGUMENT

On November 13, 2014, following the re-assignment of the above-styled cause to this Honorable Court, the Court heard re-argument on the parties' summary judgment motions.

During the course of that argument, the Court asked a series of questions of both parties. This supplemental submission is directed to three specific areas of inquiry: (1) the relief Plaintiffs seek; (2) whether the time frame for the Special Election process in this case was typical of the time frame for U.S. House Special Elections in Alabama; and (3) whether it is relevant that there has never been an independent candidate on the ballot in Alabama in a Special Election for a seat in the U.S. House, or whether the relevance or weight of that factor depends on whether or not there is evidence of how many have tried. Each area of inquiry will be addressed below.

I. Relief Sought:

The Court asked Plaintiffs whether the relief Plaintiffs seek is injunctive and declaratory relief based on a determination that the 3% signature requirement¹ is unconstitutional as applied to independent candidates in all Special Elections in Alabama for all state and federal offices or just as applied to independent candidates in Special Elections in Alabama for a seat in the United

¹ Section 17-9-3(a)(3), *Code of Alabama* (1975)(as amended).

States House of Representatives.

After further consideration of the Court's inquiry and a further review of the record, Plaintiffs hereby advise the Court that in this case they just seek a declaration that the 3% signature requirement is unconstitutional as applied to Special Elections in Alabama for a U.S. House seat and an injunction prohibiting the requirement from being applied to an independent candidate in Special Elections in Alabama for a U.S. House seat.

II. Historical Time Frame for Special Elections in Alabama for a Seat in the U.S. House:

Secondly, the Court inquired as to whether the time frame provided for the Special Election in the instant case was typical of the time frame provided for Special Elections for a U.S. House seat in Alabama historically. Since the re-argument, the undersigned has undertaken to research the time period historically and has obtained the Governor's Proclamations for the previous Special Elections for the U.S. House of Representatives in Alabama.²

The question is relevant conceptually for two reasons. First, in light of Plaintiffs' claim here that the truncated time period provided in this case for gathering signatures made the 3%

² Special Elections for U.S. House seats have been held in Alabama in 1941, 1944, 1947, 1972, 1989, and 2013. [See DE 63-1, inadvertently omitting the 1944 Special Election] The Department of Archives and History reports that it was unable to locate the Governor's Proclamation for the 1989 Special Election. [Exhibit "A" Cover letter]; but the undersigned's independent research ascertained the relevant dates for that Special Election.

For Special Elections for a U.S. House seat in Alabama, the Governor's Proclamation historically has just set out the date for the general Special Election at issue, not the dates for Special Election primaries. As the Court is aware, under § 17-9-3(a)(3), an independent candidate has to have the signature petition filed by the date of the first primary, whether the election is a regular election or a Special Election. While the date of the primary vis a vis the general election is set by § 17-13-3 for regular general elections, the date for the primaries for Special Elections expressly is excluded from that statutory section and is discretionary, as the Court heard during re-argument. To the extent information was available through independent research as to the date of any Special Primary elections for the U.S. House seat for which a general Special Election was held., that information is provided. Throughout this litigation, the Defendant has advised the Court that the first primary has to be sufficiently in advance of the general Special Election to account for the UOCAVA factor, ballot printing, etc.; so obviously, even as to those past Special Elections for which the date of the Special Primary Election is not available, it logically follows that the Special Primary was well in advance of the general Special Election. That is consistent with the Defendant's representation to the Court that the period until the first Special Primary Election in the race at issue in the instant case was "unique(ly)" long. [DE23-10]

signature requirement a severe burden, it is relevant to know how it compares historically to previous Special Elections in Alabama for a seat in the U.S. House. Secondly, while, by definition it should be clear that the time frame permitted for a Special Election always will be severely truncated relative to the time frame provided for a regularly scheduled election, evidence of the historic time frames for Special Elections for a U.S. House seat is relevant in considering whether this same sort of truncated time frame is likely to be repeated in future Alabama Special Elections for a U.S. House seat.

As the data described below demonstrates, the truncated time frame provided for the 2013 Special Election for the U.S. House seat from Alabama's 1st District at issue in this case was typical of or longer than the time frame historically provided for a Special Election in Alabama for a seat in the U.S. House, albeit a bit longer than most previous ones. The time period provided for the Special Election at issue, from the date of the Governor's Proclamation until the general Special Election was 4 months, 2 weeks.³

As will be more thoroughly analyzed below, of the previous Special Elections in Alabama for a seat in the U.S. House, one (the 1941 race) was 4 months, 3 weeks. Every other previous Special Election in Alabama for a seat in the U.S. House provided for an even shorter period than was allotted in the instant case, with the Special Election of 1947 allowing just 2 months, 10 days for the entire Special Election process. Obviously, the shorter the time frame, the more severe the burden for gathering the required number of signatures.

³ The general Special Election in the instant case was held on December 17, 2013. If the time period is calculated from May 23, 2013, the date on which Congressman Bonner publicly announced his intention to resign, (effective August 15, 2013), or from the July 29, 2013 date on which the Defendant made a public announcement of the Special Election to accommodate this Court's UOCAVA concerns, rather than the August 3, 2013 date on which the Governor's Proclamation was issued setting the dates for the Special Election, the time frame in the instant case was, of course, even longer, thereby further supporting the Plaintiffs' position, based on "past experience" and "ballot access history," that the burden in any Special Election in Alabama for a U.S. House seat will be at least as severe or more severe than the burden demonstrated in the instant case, based on the even shorter time frame for all Special Elections in Alabama.

In the race at issue in this case, on August 3, 2013, the Governor issued his Proclamation announcing Congressman Jo Bonner's resignation from his seat as Alabama's Representative from the 1st District to the U.S. House of Representatives and setting the dates for the general Special Election to fill the vacant seat, as well as dates for the Special primary and the Special primary run-off (if necessary). [DE 23-4] The general Special Election in the instant case was scheduled for either 3 months from the Proclamation (November 5, 2013), in the event no Special Primary Run-off were required, or 4.5 months (December 17, 2013), in the event a Special Primary Run-off (on November 5, 2013) were required. It ended up being 4.5 months.

The historical information on this issue for previous Special Elections in Alabama for a seat in the U.S. House of Representatives is as follows⁴:

1. **The 1989 Special Election:** Following the December 13, 1988 death of Congressman Nichols, an April 4, 1989 general Special Election was scheduled for his seat in Alabama's U.S. House District 3. The first Special Primary Election was held on February 14, 1989. [Exhibit "A" cover letter and independent research]
2. **The 1972 Special Election:** Congressman George Andrews, from Alabama's U.S. House District 3, died on December 25, 1971. On January 7, 1972, the Governor issued his Proclamation setting the general Special Election for April 4, 1972. [Exhibit "A" 1/7/72 Proclamation]
3. **The 1947 Special Election:** On November 18, 1946, the Governor issued a Proclamation scheduling a January 28, 1947 general Special Election for Alabama's U.S. House District 8, based on the resignation of then Congressman John Sparkman. [Exhibit "A" 11/18/47 Proclamation]
4. **The 1944 Special Election:** On December 1, 1943, the Governor issued a Proclamation

⁴ Exhibit "A" attached hereto is comprised of a cover letter from the Alabama Department of Archives and History and the Governor's Proclamations for previous Special Elections in Alabama for a U.S. House seat, except for the 1989 Special Election.

scheduling a March 14, 1944 general Special Election for Alabama's U.S. House District 3, following the November 22, 1943 death of then Congressman Henry B. Steagall, [Exhibit "A" 12/1/43 Proclamation] The undersigned's independent research indicates that a Special Primary Election was held on January 11, 1944 and a Special Primary Run-off Election was held on February 8, 1944.

5. **The 1941 Special Election:** On February 1, 1941, the Governor issued a Proclamation scheduling a June 24, 1941 general Special Election for Alabama's U.S. House District 7 seat, following the resignation of Congressman Walter Bankhead who had held that seat. [Exhibit "A" 2/1/41 Proclamation]

Based on the foregoing historical information, it is clear that the time frame provided in the 2013 U.S. House Special Election at issue in this case, between the Governor's Proclamation and the date on which such general Special Election actually was held, was a longer period of time than the time frame between the Governor's Proclamation and the date of the general Special Election in almost every other Special Election for a U.S. House seat in Alabama.⁵

Similarly, to the extent historical data is available about the time period preceding the Special Primary Elections held in the Special Elections identified above (the signature gathering period), it is clear that the time period in the instant case was longer than the time period provided for other Alabama Special Elections for a U.S. House seat.

In the instant case in 2013, whether the time period is calculated, as the Secretary urges, from (a) May 23, 2013, when Congressman Bonner publicly announced his intention to resign in August of 2013 (notwithstanding the provision in Alabama Administrative Code § 820-2-4-.05 that requires an independent candidate's signature petition to bear the date of the general Special Election for which ballot access is sought in order to be valid), from (b) the July 29, 2013 announcement of the Special Election (moved up to address UOCAVA concerns), or from (c) the

⁵ 2013 - 4 months, 2 weeks; 1989 - less than 4 months; 1972 - less than 3 months; 1947 - 2 months, 10 days; 1944 - 3 months, 2 week; 1941 - 4 months, 3 weeks.

August 3, 2013 Governor's Proclamation formally setting the dates for the Special Election until September 24, 2013 when the first Special Primary Election was held, the time period for collecting signatures was somewhere between 52 and 106 days.⁶

In the two other Special Elections for a U.S. House seat in Alabama for which we have dates for the Special Primary Elections, the time period between the Governor's Proclamation and the first Special Primary Election in the 1989 Special Election was 63 days (12/13/88 - 2/14/89) and in the 1944 Special Election it was 41 days (12/1/43 - 1/11/44).

The experience in the instant case and the historical experience in Alabama is that the time period provided for the general Special Elections for a U.S. House seat is four months or less and the time frame for independent candidates to gather signatures (the period of time between the Governor's Proclamation and the first Special Primary Election) is two months or less. Yet the number of signatures the independent candidate is required to gather and file within that period of two months or less is the same number required for a regular election for which Alabama law provides an "unlimited" period of time.

As the Defendant has acknowledged throughout - indeed as he emphasized in arguing against the TRO/Preliminary injunction - the Special Election process, by definition, must move

⁶ Of course, the Record also reflects the Secretary's own words in the instant case, describing the signature gathering period for this 2013 Special Election as a "unique(ly)" long period of time because of the early public statement by Bonner about his planned mid-August resignation. [DE 23 at 10]

Plaintiffs have argued that the relevant period of time is the time between the Proclamation date and the first Special Primary that must control; for, as the Secretary has argued, until there actually is a vacancy, under § 17-15-3, the Governor has no authority to issue his Proclamation setting a date for the Special Election, [DE 23, Exh. "D"; DE 28 at 3, n.1 - Governor can't order special election until vacancy becomes effective], and Alabama's Administrative Code invalidates any independent's signature petition that does not reflect the date of the general Special Election. Ala. Admin. Code § 820-2-4-.05. But if the Court accepts Defendant's argument that the signature period in the instant case ran from the earlier May 23, 2013 date, the evidence is even stronger from "past experience" that any independent candidate in a future Special Election in Alabama for a U.S. House seat will have far less time to meet the 3% signature requirement than an independent candidate had for the 2013 seat, rendering the burden even more severe than the severe burden present here, as established by the un rebutted evidence.

quickly within a short time frame. [*See e.g.* DE 23 at 3 & 34 - need to fill vacancy as quickly as possible to minimize time without representation; DE 23 at 3 - signature deadline must be set early to be in compliance with UOCAVA 45 day rule; DE 23 at 30 - signature deadline must be set early to give time to verify; DE 23 at 20; DE 23-2, at 5-6 - “Everyone must act quickly in the context of a special election; “extraordinary pace”; DE 23, Exh. “D”; DE 28 at 3, n.1 - Governor cannot order special election until vacancy becomes effective].

The evidence of the severe burden this truncated time frame imposed on the independent candidate in this case is unrebutted. Obviously, since the time frame in the instant case was longer than such relevant time frame historically, the burden only gets more severe than this, not less and the historical record shows that this invariably will be the case for any Special Election in Alabama for a U.S. House seat.

III. The Analytical Relevance of the Fact that No Independent Candidate Ever Has Been on the Ballot in a Special Election in Alabama for a Seat in the U.S. House:

Thirdly, Plaintiffs would like to follow up on the Court’s question regarding the historical fact that no independent candidate ever has gotten access to a Special Election ballot in a U.S. House race in Alabama. [DE 29-1] In response to argument by Plaintiffs relying on this historical fact, the Court asked whether the parties had any information as to how many, if any, have tried, other than Mr. Hall. There are both factual and legal responses to this question.

Factually, while it might be difficult to come up with a meaningful number as to how many have tried (in the sense of filing a signature petition that fell short of the number of required signatures or that obtained the requisite number, but filed after the deadline), only the Defendant would have access to such numbers and, notwithstanding Defendant’s assurance to the Court at oral argument on November 13, 2013, that he would look into getting that number for the Court, [Tr. 11/13/13 oral argument at 43-44], Defendant never provided any such information. It is not clear that such evidence is compiled; but the legal argument, in any event, certainly does not depend on the answer.

Such figures, even if compiled, would never be able to account for the number of prospective candidates who effectively were denied ballot access because the signature requirement within such a severely truncated time frame effectively rendered the Special Election ballot inaccessible. Such prospective candidates would have been deterred because of what appeared to be the complete futility of trying to meet an impossible burden and the tremendous waste of resources that would be entailed in pursuing a futile goal, well beyond one's reach. Their names would not appear in any historical records, but their experience would be further proof of the severity of the burden.

It would completely undermine the reason for looking to "past experience" or "ballot access history" if one were to conclude that the absence of an independent candidate from Special Election ballots historically is insignificant in the absence of evidence as to how many tried and failed. Such a focus would unfairly ignore the outright deterrent effect of severe ballot access burdens and would completely undermine the constitutional inquiry required by established case law.

There is, of course, wholly un rebutted record evidence in this case of two experienced prospective independent candidates in this category, one of whom began the effort and abandoned it in futility because of the high number of signatures and the truncated time frame, and the other who knew its futility from the start and had to focus on other races because of the impossible burden from the number of signatures required in the truncated time frame in the U.S. House Special Election. [DE 25-2; 25-3]

Plaintiffs raised this issue of "ballot access history" or "past experience" because it is legally (and logically) relevant to the requisite analysis. It is one factor to consider. As the Court wrote in *Mandel v. Bradley*, 432 U.S. 173, 177 (1977) "Past experience will be a helpful, if not always unerring guide; **it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not,**" quoting from, *Storer v. Brown*, 415 U.S. 724, 742 (emphasis added). See also, *Lee v. Keith*, 463 F.3d 763, 769 (7th Cir. 2006)(A

court should consider “ballot access history” as “an important factor in determining whether restrictions impermissibly burden the freedom of political association.”), *citing, Storer*, 415 U.S. at 742.

In *Lee v. Keith*, 463 F. 763, 769 (7th Cir. 2006), the court noted that three independent candidates were actually able to qualify for ballot access in the first year the stringent restrictions at issue became effective, but that in the 12 election cycles since, not one independent candidate had qualified.

Without any inquiry as to how many had tried and failed during that period, the Court found this effectively made independent candidacies “nonexistent” over a 25 year period and this was a critically important factor in its conclusion that the ballot access restrictions at issue constituted a “severe burden.” *Id.*

Similarly, neither the *Mandel* Court nor the *Storer* Court looked to how many had tried; rather it was simply the absence of independent candidates from the ballot that constituted the relevant “past experience” and relevant “ballot access history” to which the Courts have looked.

The fact that there has never been an independent candidate on the ballot in a Special Election in Alabama for a seat in the U.S. House is the factually and legally relevant “ballot access history” in this case to be considered in the analytical framework. It is impossible to know how many have been deterred from even trying because of the severe, indeed, historically insurmountable burden on gathering signatures posed by the dramatically truncated time period that has attended and will by definition attend every Special Election for a seat in the U.S. House in Alabama.⁷

⁷ Attached hereto as Exhibit “B” is a November 19, 2013 article appearing on the “Smart Politics” website of the University of Minnesota’s Humphrey School of Public Affairs. It reflects the reality that close to 20% of all Democratic members of the U.S. House of Representatives and 10% of Republicans were elected through Special Elections. The Special Election for a U.S. House seat is a significant phenomenon around the country for both voters and candidates and it can arise anytime without advance notice. The unconstitutional burden Alabama’s 3% signature requirement places on voters and candidates in Special Elections for a seat in the U.S. House must be cured.

Respectfully Submitted.

/s/ David I. Schoen
Counsel for Plaintiffs
(ASB-0860-O42D)

CERTIFICATE OF SERVICE

I hereby certify that I have caused a true and correct copy of the foregoing Evidentiary Submission on all counsel of record by filing the same through this Court's ECF system on this 14th day of December, 2014.

/s/ David I. Schoen
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