

## Should lieutenant governor be condemned for waiting?

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The morning after. . . Men and women are waking up today feeling elated or relieved that they won their party's primary election while others are pondering what went wrong. I wrote this op-ed column prior to Election Day, so I am particularly interested in how Mark Walker and Richard Ellis are feeling today. They made the state treasurer's GOP runoff far more newsworthy than anyone could have imagined, but in the wrong way.

Mutual allegations of illegal acts fuel voter apathy (and disgust) like nothing else.

Lt. Gov. Gary Herbert has taken a beating from the media for his cameo appearance. As Utah's chief election officer, his responsibility is to exercise general supervision over all elections and direct authority over elections for federal and state officers. In this capacity, what should he have done about Ellis' allegations of Walker's wrongdoings?

Herbert must have been tempted to take some politically expedient action simply to shift the bright light of public scrutiny off of him. His options were to (1) refer the matter to the attorney general for a special investigation, (2) determine a special investigation unnecessary, or (3) defer taking any action until after the fast-approaching primary. (Remember, the alleged violation occurred on March 10, but Ellis' complaint was not filed until May 30 - just days before absentee and early voting began in early June.)

Ordering a special investigation would have prompted voters to conclude that Walker was guilty even though no judicial process had even started. Determining no investigation was warranted would have led voters to decide that Ellis had filed false claims out of desperation, without a thorough vetting of his claims and related evidence. Deferring failed to provide the voters with any official guidance and led to questioning of Herbert's motives, but seemed most consistent with the Latin phrase *primum non nocere* ("first, do no harm").

Beyond the practical consequences, what was the lieutenant governor's legal responsibility? As a political attorney, I represent many political players before the Federal Election Commission in cases involving allegations of electoral misconduct. The FEC rarely takes public action on election complaints prior to an election - even when they are filed many months before an election.

Indeed, the statutory regime governing the FEC requires several investigatory stages and absolute confidentiality of its intermediate actions in order to prevent the public from drawing premature conclusions that could adversely impact an election before adequate due process is exercised. Accordingly, I was not surprised by Herbert's decision to defer, nor the Utah Supreme Court's siding with him.

Nevertheless, the federal and Utah election laws are different and it is therefore useful to examine what Utah law requires in order to get beyond the political innuendo and miserable ambience of the debacle. Under Utah Code section 20A-1-703, when a complaint is filed with the lieutenant governor, he is required to "gather information and determine if a special investigation is necessary." If he so determines, he must "refer the information to the attorney general."

The attorney general then must appoint special counsel to investigate and then prosecute in the district court if violations are found. If the district court holds a candidate violated the election code, it may void the election, expel the candidate from office, and declare the office vacant.

In conclusion, by making a prudent decision that keeps all of the attorney general's and district court's options viable, rather than a hasty determination that may have irrevocably-and perhaps unjustly-altered the race before all of the facts were known, Lt. Gov. Gary Herbert has provided a great service to our democratic process.

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