*To be argued by*
**KATHLEEN M. SULLIVAN, ESQ.**
**(*Time Requested:* 30 MINUTES)**

# STATE OF NEW YORK
# COURT OF APPEALS

DEAN G. SKELOS, as a duly elected Member
of the New York State Senate,

Plaintiff-Respondent,

- against -

DAVID A. PATERSON, as Governor of the State of New York,
RICHARD RAVITCH, as Lieutenant Governor of the State of New York and
LORRAINE CORTES-VASQUEZ, as Secretary of State of the
State of New York,

Defendants-Appellants.

**REPLY BRIEF OF DEFENDANTS-APPELLANTS**
**Nassau Co. Index No. 13426-2009**
**App. Div., 2nd Dept. Case No. 2009-06673**


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## PRELIMINARY STATEMENT

Despite 83 pages of briefing, Respondent has no answer to the plain language of Public Officers Law ("POL") § 43: "If a vacancy shall occur, otherwise than by expiration of term, with no provision of law for filling the same, if the office be elective, the governor shall appoint a person to execute the duties thereof until the vacancy shall be filled by an election." Respondent admits there was a vacancy in the office of Lieutenant Governor when Governor Paterson ascended to that post. Resp. Br. 40. Respondent admits there is no other provision of law for filling the same—indeed, Respondent insists that Article IV, § 6 of the Constitution is *not* a provision for filling the same, instead interpreting it to mean that a vacancy in the lieutenant governorship can never be filled. Resp. Br. 40-41. Respondent argues that the office of lieutenant governor can be filled *only* by election (Resp. Br. 32-33), belying his passing suggestion that the lieutenant governorship is not an elective office (Resp. Br. 57-60). The plain language of POL § 43 thus authorizes the Governor's appointment of the Lieutenant Governor, and that should be the beginning and end of this case.

Unable to refute this simple, straightforward statutory argument, Respondent resorts to mischaracterizing and distorting the record in ways that show remarkable disrespect for a sitting Governor. *First*, Respondent wrongly asserts that the Governor grounded his appointment of the Lieutenant Governor in some

extraconstitutional principle of emergency or necessity. Resp. Br. 3, 60-63, 78. That is not so. The Governor has always rested his authority solely on the plain text of POL § 43. Any reference in the courts below to the grave fiscal crisis in the State went solely to the issues of irreparable harm and balance of equities, factors the parties were obligated to address because Respondent sought a preliminary injunction. The crisis in the Senate and the financial crisis helped lead the Governor to exercise his power, but the Governor does not and has never suggested that crisis or emergency is the source of his power.

*Second*, Respondent suggests that the Governor made his decision to appoint the Lieutenant Governor "sudden[ly]" and faults him for waiting 400 days into his tenure to do so. Resp. Br. 13, 36. The Governor in fact made his decision only after careful deliberation and patient efforts to exhaust other options for getting the Senate back to work after the "coup" attempted by Respondent and his putative co-plaintiff Senator Espada. The Governor thus exercised the power carefully and responsibly, showing appropriate restraint and comity toward the legislative branch, and appointing someone who is conceded by Respondent and the courts below to be well-qualified.

*Third*, Respondent asserts that the Governor engaged in "decei[t]," "secrecy" and "false public statements" in appointing the Lieutenant Governor. Resp. Br. 12-13. This claim is baseless, as the appointment was announced publicly in a

televised press conference. Respondent was free to walk into an Albany courthouse to file his complaint immediately upon that announcement.

When such innuendo and misdirection is put aside, Respondent's constitutional argument boils down to two propositions: that the Governor's appointment of a lieutenant governor cannot be constitutional because it has not been done before, and that such an appointment is undemocratic because the so-called "elective principle" makes appointments to vacancies illegitimate. Both propositions, however, are incorrect.

*First*, as this Court's sister court in Rhode Island stated in holding that the governor of that State had the clear power to appoint a lieutenant governor under provisions similar to New York's, "the mere fact that a constitutional power has not been exercised does not prove the power does not exist." *In re Advisory Op. to the Governor*, 688 A.2d 288, 291 (R.I. 1997) ).

In any event, governors *have* appointed lieutenant governors and analogous statewide officers before. Governors including Ronald Reagan have appointed lieutenant governors to fill vacancies in that office under authority similar to that in New York's POL § 43. New York governors including Theodore Roosevelt for a long time regularly appointed Attorneys General and Comptrollers to fill vacancies in those offices until the Legislature adopted current POL § 41. And, contrary to Respondent's claim that a vacancy in the New York lieutenant governorship has

been historically unfillable by statute, the POL or its predecessor provided authority for filling vacancies in that office in both 1847 and 1943.

*Second*, while elections are basic to our democracy, elections cannot be held every time there is a vacancy, and thus the "elective principle" cannot control when vacancies in public office must be filled in between elections. That is the very reason Article XIII, § 3 of the Constitution requires the Legislature to enact statutes for filling vacancies, and that is the very reason the Legislature enacted POL §§ 41, 42 and 43.

Nor do such interim appointments to fill vacancies defeat democracy. Our democracy survives today even though four (soon five) unelected U.S. Senators, including New York's own Senator Kirsten Gillibrand, sit only by virtue of gubernatorial appointment. Our democracy likewise survives today even though the Legislature appointed Comptroller Thomas DiNapoli to fill the vacancy left by Alan Hevesi's resignation. No one was heard to object to those appointments, as Respondent does here, on the ground that absent an election, "problematic individuals could be foisted upon the public, outside the remote contemplation of the voters" Resp. Br. 45.

Thus, Respondent offers no reason why the "elective principle" somehow allows every public office in the State save one (the lieutenant governorship) to be filled by appointment. Nor can the answer be that the Governor should not have

power to appoint his own successor. Our democracy survived not only when President Nixon appointed Gerald Ford Vice-President upon Vice-President Spiro Agnew's resignation, but also when President Ford appointed New York Governor Nelson Rockefeller to succeed himself as Vice-President after President Nixon's resignation. Respondent's so-called "elective principle" thus cannot be squared with the plain text of the POL and the Constitution, and those governing documents, as explained in Appellants' opening brief and as further explained below, clearly support the Governor's appointment.

## ARGUMENT

### I. RESPONDENT FAILS TO REFUTE THE GOVERNOR'S STATUTORY AND CONSTITUTIONAL AUTHORITY TO APPOINT A LIEUTENANT GOVERNOR TO FILL A VACANCY

As Appellants and the multiple Amici Curiae supporting Appellants have demonstrated, the Governor's appointment was a valid exercise of the Governor's power under POL § 43 and nothing in the Constitution negates that power. In thirty pages of briefing on the constitutional argument (Resp. Br. 31-60), Respondent cite only nine cases, and not one of them deals with issue of how to read the Constitution and POL § 43 consistently.

Respondent thus has no answer to Appellant's argument that POL § 43 is easily read in an "intelligible and harmonious" fashion together with Article IV, § 6 and Article XIII, § 3. *People ex rel. Henderson v. Snedeker*, 14 N.Y. 52, 54

(1856). In *Snedeker*, this Court held that a statute providing that a deputy county clerk "should perform all the duties" of the county clerk in the event of a vacancy in that office did not negate the Governor's authority under another statute to appoint "some fit person to execute the duties" of that office, replacing the interim deputy clerk. *Id.* at 53-54; *see People ex rel. Smith v. Fisher*, 24 Wend. 215 (1840). Similarly here, when a vacancy occurs in the lieutenant governorship, the Temporary President of the Senate shall "perform all the duties of lieutenant-governor during such vacancy," but the Governor may fill that vacancy by appointment under POL § 43 prior to the next gubernatorial election, and when such vacancy is filled, the Temporary President ceases to perform the duties.[1]

Respondent's rejection of this simple and straightforward reading of the governing law misinterprets the relevant statutory and constitutional provisions, ignores relevant judicial precedents, and mischaracterizes political history.

### A. POL § 43 Authorizes The Filling Of Vacancies

Respondent fails to show why POL § 43, a provision entitled "Filling other vacancies," does not authorize the governor to do exactly that. Respondent

[1] Respondent does not bother to cite to *Snedeker* or *Fisher* but appears to dismiss them as involving the "replacement of deputy clerks and sheriffs with appointed clerks or sheriffs and the like" (Resp. Br. 44). But these decisions show that this Court long ago settled the question whether the Governor may appoint someone to "execute the duties" of public office in order to fill a vacancy notwithstanding that another law also provided for an interim caretaker to "perform the duties" of that office during a vacancy. They held that he could indeed do so, and nothing in those decisions turned on the nature of the office at stake.

confusingly suggests (Resp. 36-37) that "titles and headings of POL § 43" cannot be treated as part of the act, unlike "headings of chapters or sections of a code." Resp. Br. 37. But the "heading[] of POL § 43" *is* a "heading of [a] section[] of a code," and thus under Respondent's own authority is "part of the act itself." McKinney's Statutes § 123(a) ("Titles are to be distinguished from headings of chapters or sections of a code, which are sometimes treated as part of the act itself."). *In the Matter of Suffolk Regional*, 11 N.Y.3d 559, 570-71 (2008) (*see* Resp. Br., 37), is not to the contrary, since it merely notes that a heading may not negate the plain meaning of the text. But the plain meaning of the text of POL § 43 is in accord with the heading "Filling other vacancies"; otherwise the Legislature would not have used the terms "execute the duties thereof" in the first sentence or "hold" office in the second sentence. Respondent does not even address the numerous decisions confirming this plain reading of the text of POL § 43 by holding that this provision empowers the Governor to "fill vacancies." *See* App. Br. 25-26 (citing cases).

Nor does Respondent provide an answer to the practical and legal quandary created by the Appellate Division's ruling that gubernatorial appointments under POL § 43 do not actually fill the vacancy in office. Countless Mayors, Councilors, Fire Commissioners, Alderman and City Supervisors have been appointed to office by New York governors since POL § 43's enactment in 1909. These appointees

have long assumed, along with the courts of this State and its chief legal officer, that they actually held title to office. *See* App. Br. at 26. For instance, Governor Rockefeller appointed Dr. James O'Rourke as the Mayor of Yonkers in 1966 to fill a vacancy caused by the resignation of the incumbent, responding to Attorney General Louis J. Lefkowitz's advice that "the vacancy in the office of mayor of the City of Yonkers may be filled only by appointment of the Governor of the State of New York [pursuant to POL § 43] until the vacancy shall be filled by election." B-22. Under Respondent's and the Appellate Division's interpretation, these public officers were wrong to assume that they held title to office and were free to assume a second office despite the incompatible officers doctrine. Such an interpretation violates Respondent's own canon (Resp. Br. 40) that "[t]he purpose of statutory interpretation is to avoid absurd results."[2]

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[2] Nor does Respondent's grab bag of statutory arguments from the POL compel a contrary conclusion. *First*, Respondent's contention that POL § 43 does not apply because the vacancy created in the office of Lieutenant Governor upon Appellant Paterson's elevation to Governor is not a "vacancy" within the meaning of POL § 30 (Resp Br. 55-56) is contrary to authority clearly holding that "a person who accepts and qualifies for a second office and incompatible office is generally held to vacate, or by implication resign, the first office." *Smith v. Dillon*, 44 N.Y.S.2d 719, 723 (3d Dep't 1943); *see also People ex. rel. Earwicker v. Dillon*, 38 A.D. 539, 540 (2d Dep't 1899) ("the acceptance of a second office, incompatible with the first, operates to produce a vacancy in the latter"); *Sulli v. Board of Sup'rs of Monroe County*, 24 Misc. 2d 310, 314 (N.Y. Sup. Ct. 1960) (observing that "the acceptance of a second public office renders the first office vacant").

*Second*, Respondent's argument that Appellants' reading of POL § 43 is somehow foreclosed by POL §33(1) because the Lieutenant Governor can be

### B. Article IV, § 6 Does Not Mandate That Vacancies In The Office Of Lieutenant Governor Remain Permanently Unfilled, And Such Permanent Vacancies Would Create Needless Instability

Respondent, like the Appellate Division, contends that Article IV, § 6 requires that a vacancy in the office of Lieutenant Governor must remain vacant and cannot be filled.[3] But nothing in the text of Article IV, § 6 says this. To the

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removed only by impeachment (Resp. Br. 56-57) is similarly unavailing because it confuses two distinct concepts. POL § 33(1) relates to the *removal* power of the *Governor* over members of his own executive branch; it has nothing to do with the *Legislature's* power to *impeach* a member of the executive branch. *Compare* Article VI, § 24 *with* Article IV, § 5. In any event, POL § 33(1) expressly limits the Governor's power of removal to those circumstances not covered by some other "*special provision of law*." POL § 33(1). Accordingly, even if Article VI, § 24 applies to the removal (rather than impeachment) of a Lieutenant Governor, there is no inconsistency between POL § 33(1) and Article VI, § 24 because POL § 33(1) would expressly defer to the constitutional provision.

*Third*, contrary to Respondent's assertion (Resp. Br. 40, n. 14), POL § 37 does not negate the "catch all" nature of POL § 43. POL § 30 merely requires that the governor be given notice of any vacancies that may occur in public office, and that the governor in turn notify the relevant body or officer authorized by *some other law* to fill the vacancy in the event that *some other law* so provides. Clearly, if no such law exists, the governor would be authorized to fill the vacancy under POL § 43.

*Fourth*, Respondent asserts (Resp. Br. 57-58) that the Lieutenant Governor is not an "elective office" for purposes of POL § 43, but as set forth in Appellant's opening brief (App. Br. 22), this is incorrect. Moreover, if the Lieutenant Governor is not an "elective office" for purposes of the POL, there would be no reason for the Legislature to have specifically excluded the Lieutenant Governor from the reach of POL § 42, entitled "Filling vacancies in elective offices," which it did precisely because *Ward* held the Lieutenant Governor an elective office under the POL.

[3] This reading is contrary to the Attorney General's unofficial statement of July 6, 2009, which suggests that Article IV, § 6 is a provison of law for filling a vacancy in the office of lieutenant governor. *See* Resp. Br. 11-12 n.4.

contrary, Article IV, § 6 states that the "temporary president of the Senate shall perform all the duties of Lieutenant Governor *during such vacancy*" (emphasis added). There would be no need to use the term "during the vacancy" if the Temporary President was intended to permanently perform the duties of the Lieutenant Governor. And if the Framers had so intended, they could have stated that the Temporary President "shall become" Lieutenant Governor, as they did in Article IV, § 5 when describing the Lieutenant Governor's ascension to Governor.

Nor does Respondent's contention that the Constitution mandates a permanent vacancy in the office of Lieutenant Governor make any practical sense. The Lieutenant Governor performs executive duties that cannot be performed by the Temporary Senate President without violating the separation of powers.[4] In his 1953 Annual Message, Governor Dewey stated: "'In our State the executive duties are so exceedingly heavy that an able Lieutenant Governor, holding the full confidence of his associates, is essential to the proper conduct of the people's

[4] Numerous such executive duties are specified by law. For example, the Lieutenant Governor is authorized to visit all correctional facilities (Correction Law § 146), county jails and workhouses (Correction Law § 500-j), and facilities operated by the Office of Children and Family Services (Executive Law § 519); is an ex officio member of the board of trustees of the State University of New York College of Environmental Science and Forestry (Education Law § 6003); is an ex officio member of the New York State Committee on Open Government (POL § 89); is the chair of the Minority Woman Owned Business Enterprises ("MWBE") Executive Leadership Council and the MWBE Corporate Roundtable; is an ex officio member of the New York State Financial Control Board; and is an ex officio member of the New York State Defense Council (Unconsolidated Laws § 9111).

business.'" A-311-12. There is no reason to suppose that the Framers intended to cripple "the conduct of the people's business" by providing that the Governor should be deprived of a working deputy for up to the entirety of his term.

Respondent's permanent-vacancy argument would also create a practical anomaly because the Constitution assigns to the Lieutenant Governor the "casting vote" in the event of senatorial deadlock. Article IV, § 6, cl.1. Under Respondent's argument, the Temporary Senate President's performance of the duties of Lieutenant Governor while still a Senator would entitle him to *two votes* in the event of a tie. As then-Temporary Senate President Joseph Bruno remarked at a 2008 forum, he would be "happy to have two votes" under such an interpretation.[5] But nothing in our democratic tradition supports such a principle of one person, two votes.

Respondent's permanent-vacancy argument also ensures that the State's government will suffer needless instability. Contrary to Respondent's suggestions, the Temporary Senate President's performance of the duties of lieutenant governor does not guarantee an orderly succession, for the identity of the Temporary Senate President may shift multiple times throughout a gubernatorial term. The Senate

[5] Remarks of Senator Joseph Bruno at The Nelson A. Rockefeller Institute of Government, *Gubernatorial Succession and the Powers of the Lieutenant Governor: A Public Forum*, (May 29, 2008) ("Rockefeller Forum"), at 15, *available at: http://www.rockinst.org/pdf/public_policy_forums/2008-05-29-public_policy_forum_gubernatorial_succession_and_the_powers_of_the_lieutenant_governor.pdf*

crisis this past summer illustrates how shifting political alliances can lead to uncertainty over who holds title to the Temporary Senate Presidency. The risk remains that the State will again have competing Temporary Senate Presidents, especially given the narrowness of the current Senate majority. The criminal case pending against Senator Hiram Monserrate increases that risk. *See* N.Y.L.J., Aug. 17, 2009, at 20 (noting order by Queens Supreme Court Justice William M. Erlbaum denying Senator Monseratte's motion to dismiss criminal complaint).

Even without such a crisis, the holder of the Temporary Presidency can shift after a mid-term election:

> You also have the possibility that the acting lieutenant governor would change if there's a change in the majority in the Senate, which could happen before the next gubernatorial election. You could have one acting lieutenant governor on December 31st and a different acting lieutenant governor on January 2nd. If that should be during the period of time when the acting lieutenant governor is acting as a governor, I don't know what would happen.[6]

And if a November election results in a tie in the Senate, the State could go from having a Temporary Senate President to having no one to perform the duties of the Lieutenant Governor at all; as one of Respondent's own Amici has noted, the Temporary Senate President "disappear[s] like the Cheshire cat" if an election results in a Senate evenly divided on party lines:

> Now, let's suppose as a result of a November election the Senate splits 31-31. Now comes time to elect a majority leader. There is

[6] Remarks of Professor Richard Briffault, Rockefeller Forum, at 33.

> none. If there is none, then there's no acting lieutenant governor, and there's no way to resolve that, unless somebody in the Senate agrees by some compromise to resolve that problem. . . . I don't think Bruno would lose his seat, but I would have asked him, 'What happens if you are tied? You disappear like the Cheshire cat in Alice in Wonderland.'"[7]

Nothing in the text of Article IV, § 6 requires the State to be cast into such instability and uncertainty over who stands next in line to succeed the Governor or who may temporarily perform the duties of lieutenant governor. The Governor's interpretation reads POL §43 consistently with Article IV, § 6 to avoid such unnecessary and destabilizing results.

### C. Article XIII, § 3 Does Not Bar The Governor From Appointing A Lieutenant Governor Pursuant To POL § 43

Respondent argues that Article XIII, § 3 "makes clear there is no right to appoint a Lieutenant Governor." Resp. Br., 38. This is incorrect. As demonstrated in Appellants' opening brief (App. Br. 37-41), there is no contradiction between POL § 43 and the time periods specified by Article XIII, § 3, because the courts of this State have historically construed Article XIII, § 3 to allow appointments to extend beyond the time period specified in that section when necessary. *See, e.g., Wilson v. Cheshire*, 254 N.Y. 640, 640 (N.Y. 1930) (per curiam, under Cardozo C.J.).

[7] Remarks of Professor Peter Galie, Rockefeller Forum, at 40-41.

Respondent has no response to Appellants' showing in this regard. Respondent attempts (Resp. Br. 44) to distinguish *Trounstine v. Britt*, 163 A.D. 166 (1st Dep't 1914), *rev'd on other grounds*, 212 N.Y. 421 (1914), as merely a case about judicial offices created by law, but that fact has no bearing on the holding of the case, which is that, where the Constitution does not permit an election to be held immediately for a vacancy filled by appointment, such election must be held at the earliest legally permissible date. Here, because Article IV, § 1 precludes election for Lieutenant Governor separately from the Governor, the earliest practicable and legally permissible date is the next quadrennial election.

Respondent finally argues that, because the vacancy in the office of lieutenant governor occurred in March 2008 but the Governor did not appoint Lieutenant Governor Ravitch until July 2009, the appointment is somehow invalid. Resp. Br. 39-40. Article XIII, § 3, however, does not specify when an appointment must begin; it merely provides when it must end. Here, pursuant to Art. XIII, § 3, any appointment by Governor Paterson to fill the vacancy left by his ascension to the office of governor must expire at the end of the year following the next constitutionally provided election for that office—in this case, the next gubernatorial election in November 2010.

### D. Appointment Is A Routine And Common Method Of Filling Vacancies In Elective Office, Including The Office Of Lieutenant Governor

Respondent's entire constitutional argument rests on the proposition that "it has never been done before." But "it has never been done before" is not a theory of constitutional interpretation. *See Cuomo v. Chemung County Legislature*, 122 Misc. 2d 42, 45 (N.Y. Sup Ct. 1983) (failure of Governor Cuomo to fill prior vacancy in office of sheriff did not preclude him from later exercising power of appointment conferred by statute); *In re Advisory Op. to the Governor*, 688 A.2d 288, 291 (R.I. 1997) (holding that the governor may appoint a lieutenant governor, observing that "the mere fact that a constitutional power has not been exercised does not prove the power does not exist").

In any event, the claim that Governor Paterson's action is unprecedented is simply false. The Public Officers Law and a similar statute have been used to replace the lieutenant governor in this State on at least two separate occasions. At least fourteen other States currently authorize the governor to appoint a lieutenant governor in the event of a vacancy. Several state Supreme Courts, faced with the exact issue before this Court, concluded that the governor has the constitutional authority to do so. Finally, gubernatorial appointive power is routinely used in similar contexts, both in New York and across the country, to fill vacancies in significant elective office by gubernatorial appointment.

1. The Public Officers Law Has Been Used To Fill Vacancies In The Office Of Lieutenant Governor

Respondent emphasizes (Resp. Br. 32) that no Governor has appointed a lieutenant Governor in for over 200 years, but greatly exaggerates the relevance of that fact to this appeal. The relevant time frame dates not to 1777 but to 1944. Prior to the amendment of Art. I, § 1 in 1938, the term of office for both the Governor and Lieutenant Governor was only two years, and thus the State was not faced with the possibility of an extended vacancy in the office of Lieutenant Governor. *See Issues Are Raised By Wallace Death*, N.Y. Times, July 17 1943, C-20. Moreover, the POL was amended in 1944 in response to the Court's decision in *Ward v. Curran*, 266 A.D. 524 (3d Dept), *aff'd*, 291 N.Y. 642 (1943), to exclude the lieutenant governor from the possibility of special or mid-term election under POL § 42. Not until the lieutenant governor was excluded from POL §42 did it become clear that POL § 43 was the relevant catch-all provision and thus that the Governor could appoint a lieutenant governor in the event of a vacancy. Vacancies prior to 1944 thus are not relevant to the gubernatorial appointive power at issue here.

Moreover, as *Ward* again makes clear, the POL or a predecessor statute *has* been used to fill vacancies in the office of Lieutenant Governor. *Ward* held that filling a vacancy caused by lieutenant governor's death was not only permissible but mandatory under POL § 42. Similarly, as Respondents themselves point out

(Resp. Br. 47-48), in 1847, Hamilton Fish, who later became Governor, was elected to the office of lieutenant governor to fill the vacancy caused when Lieutenant Governor Addison Gardner became a Judge of the Court of Appeals, pursuant to a statute passed in September of that year. Thus Governor Paterson has precedent for using the POL to fill a vacancy in the lieutenant governor's office.

2. Other State Constitutions Empower Governors To Appoint Lieutenant Governors, And Other State Supreme Courts Have Held Their Governors Authorized To Appoint Lieutenant Governors

At least fourteen other States (including Alaska, California, Colorado, Florida, Idaho, Indiana, Louisiana, Maryland, Montana, Ohio, South Dakota, Utah, and Wisconsin) currently grant their governors responsibility for filling the vacancy of lieutenant governor by appointment, and at least two (Montana and Florida) empower the governor to do so without legislative approval.[8]

[8] At least two states (Indiana and Alaska) empower the Governor to appoint a lieutenant governor to fill a vacancy in office until the legislature is able to act. Thus in 1948, Governor Ralph F. Gates sought an official opinion from the Attorney General as to his duties in respect of a vacancy in the office of lieutenant governor created by the resignation of Richard T. James. The Attorney General concluded: "I am of the opinion that it is the power and duty of the Governor to fill by appointment the vacancy now existing in the office of Lieutenant Governor." 1948 Ind. Off. Opp. No. 30, at 168. C-16. The Attorney General further held that any lieutenant governor so appointed should hold office until the next gubernatorial election, and not the next general election as was the case with other state officers. *Id*. at 169-170. *See also* Letter to Governor Sarah Palin from the Office of Attorney General, dated July 10, 2009 *available at* http://www.law.state.ak.us/pdf/opinions/opinions_2009/09-007_succession2.pdf

Moreover, since as early as 1896 and as recently as 1998, the Supreme Courts of California, Ohio, Wisconsin, Rhode Island and Florida, faced with the exact issue raised here, each have confirmed that their governors have authority to appoint a lieutenant governor in the event of a vacancy. Respondent protests that "Appellants seek to impose the jurisprudence of other states on this state" (Resp. Br. 80 n.24), but has no answer to Appellants' arguments that these decisions instructively construe provisions similar to New York's and belie Respondent's claim that Governor Paterson acted without precedent. Strikingly, Respondent is himself unable to cite a single other State that adopts his position that a vacancy in the lieutenant governorship that cannot be filled by interim election also cannot be filled by gubernatorial appointment.

Thus, in *People ex rel. Lynch v. Budd*, 114 Cal. 168 (1896), the Supreme Court of California upheld Governor James H. Budd's appointment of William T. Jeter to the office of lieutenant governor to fill the vacancy caused by the death of the incumbent, Spencer G. Millard, just 10 months after Millard assumed office. The Court held that power to appoint a lieutenant governor was "unmistakably within the language" of Article V, § 8 (California's equivalent to Article XIII, § 3). Moreover, the Court rejected the argument that the provision that the appointment "expire at the end of the next legislature or at the next election by the people," required Governor Budd to call for an the election of the office at the upcoming

general election, holding that the term "next election" in Article V, § 8 means the "election ... which the constitution has provided for filling that particular office; that is, the next gubernatorial election." *Id*. 171. Lieutenant Governor Jeter remained in office for over three years until his successor was elected the next gubernatorial election.

Following the Supreme Court's decision in *Budd*, the California Governor has exercised the power to appoint a lieutenant governor to fill a vacancy at least four times. Governor Ronald Reagan exercised this power twice, once in 1969 and again in 1974. In 1916, Governor Hiram W. Johnson appointed William D. Stephens to the office of lieutenant governor after John M. Eshleman died in office. Less than one year later, Stephens became the Governor of California after Johnson resigned, and Governor Stephens served the state in that role for almost two years.

Just six years after the decision in *Budd*, the Ohio Supreme Court issued a writ of mandamus to compel Governor George K. Nash to "exercise his clear duty" to appoint a lieutenant governor to fill the vacancy caused by the resignation of the incumbent lieutenant governor, notwithstanding that Governor Nash, "entertaining doubts with respect to his duty ... neglects, declines and refuses to fill the vacancy." *State ex rel. Trauger v. Nash*, 66 Ohio St. 612, 620-621 (Oh. 1902). Governor Nash had appointed the incumbent lieutenant governor Carl N. Nippert

to judicial office, and upon accepting this appointment, Nippert resigned as lieutenant governor. The Ohio court, construing statutory and constitutional provisions almost identical to Art. XIII, § 3 and POL § 43, held:

> The only provision in the constitution controlling the case in hand is the one already adverted to [the Ohio equivalent to Art. XIII, § 3]; and the legislature having, but a plain, unambiguous mandatory enactment, directed the governor to fill the vacancy by appointment it is, in our judgment, his clear duty to do so.

66 Ohio St. at 622. Moreover, the court held that the statutory command that a successor be elected at "the first proper election" held after the vacancy required only that that the appointee's successor be elected at "the first election at which a lieutenant governor would have been chosen had no such vacancy occurred." *Id*. 623. In accordance with this decision, Governor Nash appointed Harry T. Gordon to the position of Lieutenant Governor and Gordon served as Ohio's Lieutenant Governor until the next gubernatorial election in 1904. Since the decision in *Nash*, there have been at least two more gubernatorial appointments to the office of Lieutenant Governor without legislative confirmation.[9] Lieutenant Governor Hugh L. Nichols was appointed to office in 1911, and after he because a judge on the

[9] Yet further appointments have been made since 1989, when the Ohio Constitution was amended to add a legislative confirmation requirement to the gubernatorial power of appointment. For instance, in January 2005, Bruce Edward Johnson was appointed Ohio's sixty-third lieutenant governor after his predecessor was appointed State Treasurer.

Ohio Supreme Court, Governor James M. Cox appointed W.A. Greenlund as his replacement.

Similarly, in *State ex re. Martin v. Ekern*, 280 N.W. 393 (Wis. 1938), the Supreme Court of Wisconsin concluded that Governor Phillip L. LaFollette "was authorized to appoint Herman L. Ekren to the office of lieutenant governor which became vacant upon the resignation of Henry A. Gunderson." *Id*. 397. The Court rejected petitioner's attempt to read the lieutenant governor out of the plain language of Wisconsin's equivalent of POL § 43 and Article XIII, § 3, observing that the Wisconsin equivalent of POL § 43 had been enacted "as a blanket provision to take care of any omission in the laws for filling vacancies" and that its "plain provisions" were "clear and unambiguous" and "broad enough" to include the office of lieutenant governor. *Id*. 399. The Court continued:

> Nor can we say that the construction which in our opinion must be given to [a law similar to POL §43], is so violative of the spirit of our constitution and the fundamental concepts therein expressed, to impel a holding that the legislature never intended to authorize the governor to appoint a lieutenant governor when a vacancy occurs in that office.

*Id*. 400. Lieutenant Governor Ekren thus held office until January 3, 1939 after the next gubernatorial election.

In 1968, in *In re Advisory Opinion to the Governor*, 217 So.2d 289 (Fl. 1968), the Florida Supreme Court confirmed that the newly adopted Florida constitution empowered the Governor to appoint a lieutenant governor to fill a

vacancy in that office. *Id.* at 292; *see also State v. Day*, 14 Fla. 9, 16 (Fl. 1871) (holding that a vacancy in the office of lieutenant governor could constitutionally be filled by gubernatorial appointment). Following this decision, Republican Governor Claude R. Kirk, Jr. appointed Ray C. Osborne to serve as the State's first lieutenant governor since 1889.

On January 7, 1997, the office of lieutenant governor of Rhode Island become vacant when the incumbent, Robert A. Weygand, became a member of the U.S. House of Representatives. The Rhode Island Supreme Court held that Article 9, § 5 of the Rhode Island Constitution, which authorized the Governor to "fill vacancies in office not otherwise provided for by this Constitution or by law, until the same shall be filled by the general assembly, or the people" empowered the Governor to appoint a replacement lieutenant governor in "clear and unambiguous terms." *In re Advisory Op. to the Governor*, 688 A.2d 288, 291 (R.I. 1997). The court held that constitutional provisions allowing for the performance of the functions of the office of Lieutenant Governor by others did not constitute "the filling of a *vacancy* in that office." *Id*. (emphasis in original). Moreover, the Court rejected the argument that, because no Governor had previously sought to appoint a lieutenant governor, then-Governor Lincoln Almond was precluded from doing so, holding that the "historical outline is … scarcely controlling" and "cannot overcome a clear and unambiguous grant of constitutional power." *Id*. at 291.

Following this decision, Governor Almond appointed Bernard Jackovy as Lieutenant Governor, and the two served together for the remaining two years of Almond's term.

As Respondent's Amici point out (Hutter App. Div. Br. 19-20 ), the relevant constitutional or legislative provisions in California, Ohio and Wisconsin were later amended to provide for appointment with advice and consent of the legislature, or in the case of Rhode Island, to provide for the General Assembly to elect a replacement lieutenant governor. If the People of New York or their elected representatives likewise wish to change the method for filling a vacancy in the office of lieutenant governor currently required by Art XIII, § 3 together with POL § 43, they may easily do so. In the meantime, the Governor has the authority accorded by the plain meaning of those provisions.

3. Vacancies In Other Significant Elective Offices Are Filled By Appointment

Gubernatorial appointive power is also routinely used to fill vacancies in elective offices, including significant statewide offices. For instance, the New York Governor is empowered to appoint U.S. Senators pursuant to POL § 42(4-a) and such appointments may last beyond next annual election or political year. Pursuant to this authority, Governor Paterson appointed Senator Kirsten Gillibrand on January 23, 2009 to fill the vacancy caused when then Senator Hillary Clinton assumed the office of U.S. Secretary of State, and she will not face election until

November 2010. No one has suggested that Governor Paterson did not have the power to appoint Senator Gillibrand or that the appointment is somehow unconstitutional because she will serve over two years as Senator before she faces an election.

Indeed, there are currently four sitting U.S. Senators, with a fifth about to be sworn in, who were appointed by governors pursuant to statutory authority without advice and consent of the legislature. Thus, Senator Roland Burris of Illinois was appointed under by then-Governor Rod Blagojevich on December 30, 2008, to replace President Barack Obama and will hold the seat until 2011. Senator Edward Kaufman was appointed by the Governor of Delaware, Ruth Ann Minner, on January 15, 2009, to replace Vice President Joseph Biden and will hold that seat until 2011 after a special election. Similarly, on January 3, 2009, Senator Michael Bennet was appointed by Colorado Governor William Ritter to replace Interior Secretary Kenneth Salazar and will hold that seat until the end of the term in 2011. Finally, George LeMieux of Florida was appointed by Governor Charlie Crist on August 30, 2009, to replace Senator Melquiades Martinez and, once he is sworn into office, will hold that seat until 2011.

Similarly, New York State Comptroller Thomas DiNapoli was appointed by the State Legislature pursuant to POL § 41 to fill the vacancy left by the resignation of Comptroller Alan Hevesi in February 2007, and will serve almost a

full four-year term without ever facing a popular election. Moreover, prior to the amendment of addition of POL § 41 in 1928, the governor was empowered to fill vacancies in the offices of both Attorney General and state Comptroller by appointment. Indeed, since 1797, when Governor John Jay appointed Samuel Jones as the first State Comptroller, New York governors have exercised this power over dozen additional times to appoint 10 state comptrollers and two state attorneys general to fill vacancies in office caused by the resignation or death of the incumbent, including Governor Theodore Roosevelt's appointment of Theodore P. Gilman to the office of State Comptroller in 1900.[10]

Finally, a vacancy in the office of the U.S. Vice-President—an office that is itself modeled on the New York office of Lieutenant Governor—is filled by presidential appointment. On two occasions, the U.S. President has exercised this power to appoint his own Vice-President. Thus in 1973, President Richard Nixon appointed Gerald Ford Vice-President after Spiro Agnew resigned. And in 1974, President Ford appointed former Governor of New York Nelson Rockefeller to the office of Vice-President to fill the vacancy left by Ford's ascension to the Presidency. Indeed, Ford himself became President upon the resignation of Nixon, without ever having been elected either President or Vice-President.

[10] Other appointees include Gardner Stow, James A. Parsons, Philio C. Fuller, Asher P. Nichols, Frederic P. Olcott, Nathla L. Miller (who later became Governor), Otto Kelsey, William C. Wilson, Clark Williams, William J. Maier and Joseph V. O'Leary.

4. The Governor's Authority Is Not Limited By Law Reform Proposals That Were Never Enacted

Respondent and the Hutter Amici seek to rely on ambiguous convention and commission debates as well as proposals that were never adopted. Resp. Br. 45-52; Hutter App. Div. Br. 7-12. But this Court has explicitly cautioned against using legislative *inaction* as an interpretive aid. *See Clark v. Cuomo*, 66 N.Y.2d 185, 190-191 (1985) ("Legislative inaction, because of its inherent ambiguity, 'affords the most dubious foundation for drawing positive inferences'") (citations omitted); *New York State Ass'n of Life Underwriters, Inc. v. New York State Banking Dept.*, 83 N.Y.2d 353, 363 ( 1994) ("inaction by the Legislature is inconclusive in determining legislative intent"). *See also Zuber v. Allen*, 396 U.S. 168, 185 (1969) ("Legislative silence is a poor beacon to follow"); Laurence H. Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 Ind. L.J. 515, 533 (1982) ("[I]t is crucial that we resist the temptation to treat either text or silence as mere evidence of unenacted ideas or desires on the part of others.") (emphasis omitted).

In any event, Respondent's and the Hutter Amici's lengthy historical exegeses fail to cite a single pronouncement from any of these entities to the effect that the Governor lacks the power to appoint a Lieutenant Governor under POL § 43. Instead, Respondent and the Hutter Amici quote selected passages from the

proceedings in order to *infer* that those entities did not believe that such a power exists. But this evidence is equally susceptible to the opposite conclusion.

For example, the Hutter Amici (Hutter App. Div. Br. 8) cite proposition No. 923 from the 1967 Constitutional Convention, in which Richard Kuhnen moved that the "Senate, upon recommendation of the Governor, shall advise and consent to the appointment of a person to fill the vacancy of the remaining term of the Lieutenant Governor" suggesting that if the Governor had appointment power, the proposition would never have been introduced. But proposition No. 923 is equally susceptible of conclusion that the Governor did have such power under POL § 43 and the reformers simply wished to constrain that power by requiring Senate advice and consent.

Citations to law reform proposals that were never adopted therefore cannot determine the constitutional question at issue on this appeal. *See Kuhn v. Curran*, 294 N.Y. 207, 218 (1945) (observing that "[c]onflicting inferences may be drawn from" the failure by the Constitutional Convention to adopt or debate a proposed amendment).

## II. RESPONDENT HAS NOT DEMONSTRATED HIS STANDING TO BRING THIS ACTION

Respondent cannot answer Appellants' argument that Senator Skelos' alleged injury is "wholly speculative" and "contingent on events that may never come to pass" and thus fails the test of ripeness and is not justiciable. *See* App. Br.

50-52. Respondent counters with nothing more than the bare assertion that "Appellants' position … is not the law … of ripeness" while erroneously suggesting that Appellants' argument is somehow untimely. Resp. Br. 7. As explained in Appellant's opening brief, however, this Court has held that ripeness may be raised at any time as it affects subject matter jurisdiction. App. Br. 51. And Appellants appropriately raised ripeness in response to the Appellate Division's unexpected reliance on inchoate, future injury to uphold standing. A-5.

### A. Respondent Fails To Allege Any Direct Or Personal Injury

Respondent, a single Senator, has alleged no direct or personal injury but merely purported harms to the Senate "as a whole." App. Br. 43-50. Here, Respondent's "abstract institutional injury" cannot "rise to the level of cognizable injury in fact" required to establish standing. *Silver v. Pataki*, 96 N.Y.2d 532, 539, n. 5 (2001).

Respondent does not dispute that *Silver* is the controlling case on legislator standing, nor that his alleged injury from participating in a legislative session "presided over by an interloper" (Resp. Br. 21) is "common to all the Senators" (Resp. Br. 26). Respondent merely suggests, without authority, that such generalized injury *should* be sufficient to confer standing on a legislator, lest "'an important constitutional issue . . . be effectively insulated from review.'" Resp. Br.

28.[11] This argument, however, is directly contrary to the central holding of *Silver.* Constitutional issues, no matter how important, may not be litigated by parties, including legislators, who lack any distinct and personal injury, as Respondent admits he lacks here. Resp. Br. 26. *Silver* expressly provides that in certain circumstances legislators will not have standing where they suffer only "abstract institutional injury," even if this means they are left without redress. *Silver*, 96 N.Y.2d at 539, n. 5; *see also Urban Justice Center v. Pataki*, 38 A.D. 20, 25 (1st Dep't 2000).

Respondent fares no better in seeking to avoid *Silver*'s holding that a legislator has standing only where an *actual* vote has been *actually* nullified. Ignoring the plain language of *Silver*, Respondent argues that he need not "simply stand and wait for the interloper to act." Resp. Br. 27. But that is exactly what

[11] Here, Respondent cites *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801 (2003) and *Boryzewski v. Brydges*, 37 N.Y.2d 361, 364 (1975). But both *Saratoga* and *Boryzewski* involved *taxpayer*, not *legislator* standing. Moreover, the limitations of *Boryzewski* have been noted multiple times. *See, e.g.*, *Wein v. Comptroller*, 413 N.Y. 633, 397 (N.Y. 1979) (*Boryzewski* "was not based on any … constitutional principle" and taxpayers do not have standing to challenge State issuance of bonds); *Colella v. Board of Assessors of the County of Nassau*, 95 N.Y.2d 401, 410-411 (N.Y. 2000) (distinguishing *Boryzewski* and holding that taxpayer plaintiffs do not have standing where they failed to allege injury different from "the public at large"). *Federal Election Commission v. Akins*, 524 U.S. 11 (U.S. 1998) (Resp Br. 30) is similarly of no avail here. *Id*. at 23-24 (permitting voters to challenge FEC decision, holding that "informational injury, directly related to voting, … is sufficiently concrete and specific such that the fact that it is widely shared does not deprive Congress of the constitutional power to authorize its vindication in the federal courts").

*Silver* requires. Nor can Respondent rely on the baseless, unripe, *potential* "chilling effect" (Resp. Br. 13) on minority members' political speech *if* Lieutenant Governor Ravitch were to "pursue a wholly partisan agenda" (Resp. Br. 23-24). Even if such fears were legitimate, New York courts have rejected claims of standing based on minority legislators' alleged injuries from practices of presiding officers that supposedly diminish their "meaningful participation in the legislative process." *See* App. Br. 49, *citing Urban Justice Center v. Pataki*, 38 A.D.3d 20, 26 (1st Dep't 2000).

Respondent cites two Third Circuit cases on this point (Resp. Br. 24, 29), but neither is apposite. In *Russell v. DeJongh*, 491 F.3d 130, 135 (3d Cir. 2007), the court *denied* Senator Russell standing to challenge the Governor's late submission of appointment nominations, holding that the Senator had failed to point to any vote nullification, thus had failed to satisfy the requirement of injury in fact. In *Dennis v. Luis*, 741 F.2d 628, 631 (3d Cir. 1984), the court held that plaintiff legislators had standing to challenge the governor's appointment of Arnold M. Golden as the *temporary* Commissioner of Commerce after the legislature, which had the right of advice and consent with respect to such appointments, *had rejected* the governor's nomination of Golden to the position of *permanent* Commissioner. Clearly, Senator Skelos has no equivalent right to consent to the governor's appointment of a lieutenant governor; thus, *Dennis* is of

no avail here. Moreover, *Dennis* says nothing about injury related to a Senator's participation in the floor.

Respondent clearly lacks standing to bring this lawsuit under *Silver* and related cases. This Court should reverse the Supreme Court's order and order dismissal of the action.

### B. Respondent Fails to Refute The Attorney General's Exclusive Standing To Challenge Title To Public Office By Way Of A *Quo Warranto* Proceeding

As Appellants demonstrated in the opening brief and as Respondent's co-counsel initially admitted (*see* App. Br. 52-26), an action by the Attorney General in the nature of quo warranto, statutorily codified under New York Executive Law § 63-b, is the exclusive means to adjudicate title to public office. *See, e.g.*, *Delgado v. Sutherland*, 97 N.Y.2d 420, 424 (2002).

In response, Respondent maintains that quo warranto actions are limited to "contested elections" and asserts that "for quo warranto to apply there has to be more than one person contending for the position." Resp. Br. 65-67. This is simply false. In *Greene v. Knox*, 13 *Bedel*, 432 (1903), cited by the Respondent, this Court denied plaintiff taxpayer's challenge to the payment of salaries to public officers whose appointments were purportedly invalid, holding that plaintiff's claim, which involved the "central and pivotal question of title to office," was barred by the exclusivity of the quo warranto action. *Id*. at 437. *Greene* thus

involved *no contested election* and *no rival claimants*, and yet this Court concluded that "we shall adhere to the well-established doctrine that 'quo warranto' is the proper remedy whenever title to office is the real thing at stake." *Id*. *See also People ex rel. Requa v. Noubrand*, 32 A.D. 49 (2d Dep't 1998) (quo warranto the exclusive remedy to challenge appointment to fill vacancy based even where there were no rival claimants). Respondent's attempt to limit quo warranto to cases of contested elections is thus contrary to settled authority and must fail.

Respondent similarly continue to contend that a quo warranto proceeding is not the exclusive remedy where the only issue raised is one of law. Resp. Br. 69-70. As the cases relied upon by Respondent make clear, however, this limited exception is available only via an Article 78 proceeding. *See* App. Br. 54. Respondent has expressly disavowed the option of proceeding under Article 78, including before the Appellate Division. And Respondent here has expressly disavowed proceeding under Article 78.

Moreover, Respondent continues to cite to *LaPolla v. DeSalvatore*, 490 N.Y.S.2d 396 (4th Dep't 1985), which set forth a narrow exception to the exclusivity of quo warranto where a challenged official had yet to assume office, as authority for the proposition that a declaratory judgment action, rather than an Article 78 proceeding, may be used to try title to office where only questions of

law are involved. Resp. Br. 70. But *La Polla* has been overruled by this Court for this very proposition. *See* App. Br. 55, *citing Delgado*, 97 N.Y.2d at 74.

*Finally*, Respondent, relying on the Fourth Department decision *Matter of Dekdebrun v. Hardt*, 68 A.D.2d 241 (4th Dep't 1979),[12] and the question "left open" in *Delgado*, requests that this Court permit his application to proceed because the "Attorney General has already twice *sub silento* signaled that there would be no action on his part" and because to hear his action would be "in the public interest."[13] Resp. Br. 71-73. But this is not the case to reach that "open question" or to answer it in the affirmative. *See* App. Br. 56.

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[12] As the court in *Dekdebrun* itself noted, the issue of whether quo warranto precluded plaintiff's action was not raised by the parties or in the court below. The Fourth Department observed: "Whether quo warranto is a more appropriate remedy … is an issue that was not raised at special term, and *we believe that it is not properly before us.* … Defendant at no time has … questioned the jurisdiction of the court on the basis that a quo warranto proceeding should have been brought by the Attorney General." *Dekdebrun*, 68 A.D.2d at 244-245 (emphasis added); *See also Matter of Mason v. Tapel*, 71 A.D.2d 1050, 1051 (4th Dep't 1979) (declining to apply *Dekdebrun* because quo warranto "was not asserted at Special Term as it was here" and denying petitioner's claim because the "proper and traditional remedy for the relief sought … is quo warranto."). Here, unlike the defendants in *Dekdebrun*, Appellants have expressly voiced their objection to Respondent's action on quo warranto grounds since the time the action was commenced. Moreover, the Fourth Department declined to apply its very own decision in *Dekdebrun* only *four months* after it had issued that opinion. *See Mason*, 71 A.D.2d at 1051(declining to apply *Dekdebrun* and denying petitioner's claim because the "proper and traditional remedy for the relief sought … is quo warranto."). The unanimous opinion in *Mason v. Tapel* was joined by Justice Hancock, who was in the *majority* in *Dekdebrun*.

[13] In this case, while the Attorney General has not joined this action or instituted any proceedings in relation to the appointment of Lieutenant Governor

In *Delgado*, this Court correctly rejected petitioner's attempt to circumvent the Attorney General's important "screening function" and instead chose to *limit* the ability of an individual to challenge title to office, *overruling* those cases that had previously allowed a narrow exception to the exclusivity of a quo warranto proceeding if a declaratory judgment action was brought prior to the challenged officer holder assuming office. 97 N.Y.2d at 425. Consistent with that decision, this Court should reject the Respondent's attempt to *widen* the exception to the exclusivity of a quo warranto action, especially given that the Respondent's reasoning, if accepted, would essentially deprive Executive Law, § 63-b of any import. There is no point conferring exclusive authority on the Attorney General to challenge title to office if an exception exists in the event that the Attorney General declines to exercise that authority. Such an exception would eviscerate the rule. And, most importantly, as noted by then-Justice Cardamone in *Dekdebrun*, any decision to repeal Executive Law, § 63-b belongs to the legislature, and the legislature alone. 68 A.D.2d 247-248 (Cardomone J., dissenting) (also describing the public policy reason that "the chief legal officer of the State is the one clothed

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Ravitch, there is no evidence that Respondent requested that the Attorney General do so or that the Attorney General declined such request. In *Dekdebrun*, the minority observed that if an exception is to be created to the "protective screening process" of quo warranto by way of declaratory judgment, it should "be reserved for those instances where petitioner can demonstrate that … the Attorney General not only has failed to act, but in fact, has *refused* to proceed," noting that "[t]his is the rule in many other States" and further finding that "[s]uch situation is not revealed in the record on this case." 68 A.D.2d at 248 (Cardamone, J., dissenting).

with the authority to guard the people's interests by maintaining an action against those who unlawfully hold public office.")

Therefore, any challenge to the appointment of the Lieutenant Governor may be brought only by the Attorney General in a quo warranto proceeding. The Attorney General is not a party to this action. On this ground alone, this Court should reverse the trial court's decision and dismiss Respondent's action.

## CONCLUSION

For the foregoing reasons, and for the reasons discussed in Appellant's opening brief, the Appellate Division decision should be reversed, the preliminary injunction should be vacated, and the case should be remanded with an order to dismiss.

Respectfully submitted,

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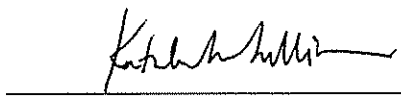

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Date: September 4, 2009

OFFICIAL OPINION NO. 30

April 5, 1948.

Hon. Ralph F. Gates,
Governor of Indiana,
206 State House,
Indianapolis, Indiana.

Dear Governor Gates:

I am in receipt of your letter of March 9th in which you ask my official opinion as follows:

> "Although we do not as yet have the official resignation of Lt. Governor Richard T. James, there is no question that it will be tendered, perhaps shortly.
>
> "There seem to be many different views as to who will succeed to the duties of the various boards and commissions on which the Lieutenant Governor serves.
>
> "It is my understanding that the Lieutenant Governor receives a salary of $6,000 as Lieutenant Governor, and a salary of $1,200 as President of the Senate.
>
> "The law passed in 1941 apparently vested in the Auditor of State membership on the various boards and commissions upon which the Lieutenant Governor served. I shall want an official opinion as to who will take the place of the Lieutenant Governor on all the various boards and commissions.
>
> "Involved in this question is also the question as to the Auditor of State's serving in more than one capacity. I doubt very much if there is any question as to additional compensation, because apparently there was no compensation to the Lieutenant Governor by reason of his serving on the various boards and commissions.
>
> "According to the law, the Lieutenant Governor is the Commissioner of Agriculture. I will want to know whether or not I would have the power to appoint a Commissioner of Agriculture, and if so, how the compensation shall be fixed.
>
> "I have asked Lt. Governor James to furnish me a list of the various boards and commissions on which

> he serves, and I am enclosing that list with this letter. Kindly give me an official opinion on these matters at your earliest convenience."

Upon receipt of that request I entertained some doubt as to the propriety of issuing an official opinion by reason of the fact that the Lieutenant Governor acts as President of the Senate, which body has authority to judge the qualifications of its own officers and members. However, our Supreme Court has indicated that it is my duty to give an advisory opinion upon this subject.

> Robertson v. State (1886), 109 Ind. 79, 156.

I

The first problem which arises upon the resignation of a Lieutenant Governor is the question as to whether the vacancy thus created may be filled by a gubernatorial appointment. Any such power of the Governor to fill such vacancy must be derived from the Constitution of Indiana, as the power to fill vacancies in elective offices is not an inherent executive function.

> Tucker v. State (1941), 218 Ind. 614, 655.

The court there said that, "In the absence of an express provision, the general executive power does not carry with it the power to fill a vacancy in an elective office." It was further held there that Section 18 of Article 5 of the Constitution authorizes the Governor to fill vacancies in elective State offices. That section of the Constitution reads as follows:

> "When, during a recess of the General Assembly, a vacancy shall happen in any office, the appointment to which is vested in the General Assembly; or when, at any time, a vacancy shall have occurred in any other State office, or in the office of Judge of any court; the Governor shall fill such vacancy, by appointment, which shall expire, when a successor shall have been elected and qualified."

The Tucker case also holds (page 674) that the Lieutenant Governor is an officer in the executive department of the gov-

ernment. See also, Armstrong v. Townsend (1934), 8 Fed. Supp. 953.

The only Indiana case involving the applicability of the above provision of the Constitution to the office of Lieutenant Governor is the case of Robertson v. State (1886), 109 Ind. 79, where the contention in the action was that the election in an off year election of a Lieutenant Governor to fill a vacancy was void. A majority of the court rested its decision that it did not have jurisdiction of the action on the dual grounds that the case was one purely of legislative cognizance and that the case itself had been brought in a court of improper venue. A minority of the court concurred in the latter conclusion but yet proceeded to deliver a dictum to the effect that in the event of a vacancy in the office of Lieutenant Governor, the President of the Senate succeeded to the duties of that office. The primary premise of that dissenting opinion is that the only constitutional function of a Lieutenant Governor is to succeed to the office of Governor and to preside over the Senate and that the President *pro tem* of the Senate could and should well perform those functions.

Since the rendition of that opinion, it has been held that it is implicit in the Constitution that the Lieutenant Governor may be granted duties by the General Assembly in the administrative department of the government.

See: Tucker v. State, *supra;*
Armstrong v. State, *supra.*

> "* * * necessary implications from express provisions of the Constitution are as much a part of the Constitution as the express provisions themselves; * * *."
>
> Robinson v. Moser (1931), 203 Ind. 66, 78.

Under the above cases, it is implicit in the Constitution that the Lieutenant Governor shall perform such administrative duties as may be imposed upon him by the General Assembly. To these duties, if any, the President *pro tem* of the Senate can not well succeed, since he is a legislative officer. Therefore, the primary premise of the dissenting opinions fails by reason of provisions found in the latter cases to be implicit in the Constitution. Furthermore, a member of the

majority of the court, in his individual opinion on rehearing, denied the propriety of any expression by the court on the merits of that case (109 Ind. 157).

Preceding that opinion, the Attorney General gave his opinion to the Governor of Indiana (O.A.G. 1886, p. 222) which is in part as follows:

> "The office of Lieutenant Governor, under the Constitution of Indiana, becomes an essential factor in the proper administration of the affairs of the State. He is elected for the term of four years (R. S. 1881, sec. 128), and by virtue of his office he is President of the Senate, with a right, when in committee of the whole, to join in debate and vote on all subjects, and whenever the Senate shall be equally divided he shall give the casting vote. R. S. 1881, Sec. 147.
>
> "Section 10 of Article IV of the Constitution provides that 'each house, when assembled, shall choose its own officers, the President of the Senate excepted.' R. S. 1881, Sec. 106. This clause of the Constitution is to be considered in connection with section 11 of Article V of the Constitution, which provides: 'Whenever the Lieutenant Governor shall act as Governor, or shall be unable to attend as President of the Senate, the Senate shall elect one of its own members as President for the occasion.' R. S. 1881, Sec. 137. This clause presupposes that there is a Lieutenant Governor.
>
> "Under this provision of the Constitution the Senate may elect a temporary presiding officer when the Lieutenant Governor shall act as Governor, or he shall be unable to attend as President of the Senate.
>
> "Section 10 of Article V of the Constitution provides: 'In case of the removal of the Governor from office, or of his death, resignation or inability to discharge the duties of the office, the same shall devolve on the Lieutenant Governor, and the General Assembly shall by law provide for the case of removal from office, death, resignation or inability both of the Governor and Lieutenant Governor, declaring what officer shall then act as Governor, and such officer shall act accordingly until the disability be removed or a Governor be elected.' R. S. 1881, Sec. 136.

"In pursuance of said clause of the Constitution, the General Assembly of 1867 enacted the following statute: 'In case of the removal from office, death, resignation, or inability of both Governor and Lieutenant Governor, a vacancy occurs in the office of Governor, the President of the Senate shall act as Governor until the vacancy be filled, and if there be no President of the Senate, the Secretary of State shall convene the Senate for the purpose of electing a President thereof.' R. S. 1881, Sec. 5559.

"This provision of the statute is operative only when there is a vacancy in the offices of both Governor and Lieutenant Governor; and in such event the President of the Senate shall become acting Governor until the vacancy be filled, and such vacancy should be filled at the next ensuing November election. R. S. 1881, Sec. 4678.

"The Lieutenant Governor is a State officer. He is elected by the whole people of the State. He presides over a branch of the General Assembly that legislates for the whole State, and upon the removal, resignation or death of the Governor he becomes acting Governor of the State. The Constitution requires him to sign all bills and joint resolutions enacted by the General Assembly. R. S. 1881, Sec. 121. He is a member of the State Board of Equalization that passes on the taxes of the State. Sargent S. Prentiss, who possessed a national reputation as an orator and lawyer, in a speech in the General Assembly of Mississippi, defined a State officer to be as follows: 'On the other hand, I understand a State officer to be one whose jurisdiction extends over the State, and the exercise of the duties of which will operate equally upon all the citizens of the State. Thus the Governor, the Judge of the High Court of Errors and Appeals and other Circuit Courts, are all State officers, because their action is general and not confined to any particular county or portion of the State. It is not the mode of election which gives character to the office, but the duties appertaining to it and the extent of their exercise. For instance, a Judge of the Supreme Court—it will be admitted, I

> presume—is a State officer, though he is elected only from a particular district, but the exercise of the duties of his office extends over the whole State.' Life and Times of S. S. Prentiss, p. 113, 114.
>
> "I think it may be safely assumed that a Lieutenant Governor is a State officer. * * *"

In Tucker v. State (1941), 218 Ind. 614, 653, the court makes the following statement in regard to Section 18, *supra:*

> "Evidence that the Governor was considered the natural and logical repository of the general appointive power is seen in the provision that, in the case of vacancy in any state office, whether in the legislative, or the judicial, or the executive including the administrative department, the Governor shall appoint an incumbent to fill the vacancy until the normal constitutional appointive power may be exercised. * * *"

The court in this dictum indicates a broad interpretation of Section 18, *supra.*

Turning to authorities from other states, we first mention State, *ex rel.* v. Nash (1902), 66 Ohio St. 612, 64 N. E. 558, which was an action in mandate to require the Governor to make an appointment to fill a vacancy in the office of Lieutenant Governor. The Constitution of Ohio, Article 2, Section 27; 11 Page's Ohio General Code, page 201, provided as follows:

> "The election and appointment of all officers, and the filling of all vacancies, not otherwise provided for by this constitution, or the constitution of the United States, shall be made in such manner as may be directed by law; but no appointing power shall be exercised by the general assembly, except as prescribed in this Constitution, and in the election of United States senators; and in these cases the vote shall be taken *'viva voce.'* "

Pursuant to this authority, the General Assembly adopted the following Act:

> "A vacancy occurring in an elective state office other than that of a member of the general assembly or of governor, shall be filled by appointment by the governor until the disability is removed, or a successor is elected and qualified. Such vacancies shall be filled by election at the first general election for the office which is vacant, that occurs more than thirty days after the vacancy shall have occurred. The person elected shall fill the office for the unexpired term. (Cons. Art. XVII, Sec. 2; R. S. Sec. 81.)"

The Court held that the general terms of the constitutional provision and of the statute passed pursuant thereto imposed a mandatory duty upon the Governor to fill the vacanacy in the office of Lieutenant Governor. The court said:

> "The substance of this proceeding appears to us to be confined within a very limited compass. We are not disposed to speculate upon imaginary cases, nor to indulge in discussion concerning contingencies for which possibly sufficient provision may not have been made. We are content to dispose of the case presented to us, and to dispose of it according to the parts of the constitution and of the statutes which are pertinent to it, without resolving ourselves into a legislature or a constitutional convention. We find no provision in the constitution specifically providing for filling a vacancy in the office of lieutenant governor. It is argued that the words 'until the vacancy is filled' refer to a vacancy in the office of lieutenant governor. If that construction is correct,—and we are inclined to think that it is not,—still it is not provided how or by whom the vacancy shall be filled. The only provision in the constitution controlling the case in hand is the one already adverted to (Article 2, Sec. 27); and the legislature having, by a plain, unambiguous, and mandatory enactment, directed the governor to fill the vacancy by appointment it is, in our judgment, his clear duty to do so."

In People *ex rel.* v. Budd (1896), 114 Cal. 168, 45 Pac. 1060, 34 L.R.A. 46, a vacancy caused by the death of the Lieutenant Governor had been filled by the Governor by appointment:

> "But it is conceded by the parties that upon the death of the lieutenant governor the governor may fill the vacancy by appointment. This is unmistakably within the language of Sec. 8, Art. 5, which reads as follows: 'When any office shall from any cause become vacant, and no mode is provided by the Constitution and law for filling such vacancy, the governor shall have the power to fill such vacancy by granting a commission, which shall expire at the end of the next legislature or at the next election by the people.' An office has become vacant, and there is no other mode provided by the Constitution or laws to fill it. * * *"

In State v. Day (1871), 14 Fla. 9, 16, the court had under consideration the following article of the Florida Constitution (Art V, Sec. 7:

> " 'When any office from any cause shall become vacant, and no mode is provided by this Constitution *or by the laws of the State* for filling the vacancy, the Governor shall have the power to fill such vacancy by granting a commission which shall expire at the next election.' * * *" (Our emphasis.)

On page 19, speaking of a statute, the court says:

> "* * * The language is quite as comprehensive as that used in the 7th Section of Article V of the Constitution, which, it is considered, when it refers to 'any office,' includes that of Lieut.-Governor as among those in which a vacancy may be filled by an appointment."

The court held that the Governor had validly filled a vacancy in the office of Lieutenant Governor. It must be noted that this was a subsidiary issue and was not the principal point in the case.

It appears from these decisions from other jurisdictions that the courts find no ambiguity in constitutional language essentially similar to Section 18 of Article 5, above quoted.

> "In construing the meaning of a constitution, its language should be taken in its general and ordinary

> sense, for 'the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.' Gibbons v. Ogden (1824), 9 Wheat. (U. S.) 1, 188. '"If the Courts venture to substitute for the clear language of the instrument, their own notions of what it should have been, or was intended to be, there will be an end of written constitutions."' Greencastle Township v. Black (1854), 5 Ind. 566, 570. A constitution is an instrument of a practical nature, made and adopted by the people themselves, adapted to common wants and designed for common use. When words are used therein which have both a restricted and general meaning, the general must prevail over the restricted unless the nature of the subject-matter of the context clearly indicates that the limited sense was intended. 1 Storey, Constitution, Sec. 451; 1 Cooley, Constitutional Limitations (8th ed.) 130, 171; Commonwealth v. Nickerson (1920), 236 Mass. 281, 128 N. E. 273, 10 A.L.R. 1568; Busser v. Snyder (1925), 282 Pa. St. 440, 128 Atl. 80, 37 A.L.R. 1515; People, *ex rel.* v. Emmerson (1922), 302 Ill. 300, 134 N. E. 707, 21 A.L.R. 636. External aids and arbitrary rules applied to instruments of this popular character are of uncertain value and should be made use of with hesitation and circumspection. 1 Cooley, Constitutional Limitations (8th ed.) 171."

In Greencastle Township v. Black (1854), 5 Ind. 566, 570, the court said:

> "Thus it was urged in argument, and so held by the judges, that the discretion of Courts is more restricted in applying the rules of construction to a plan of government contained in a written constitution, than in the construction of statutes. And the reason is conclusive. Statutes are often hastily and unskilfully drawn, and thus need construction to make them sensible. But constitutions import the utmost discrimination in the use of language. 'They are the permanent will of the people, intended for the guidance of posterity.' * * *"

If, as the above cases indicate, Section 18 is clear and unambiguous, we are not authorized to limit its meaning by construction and the power granted is coextensive with the general and unlimited terms employed and would include the power to fill a vacancy in the office of Lieutenant Governor.

Lest it be argued that Article 5 of Section 10 conflicts with Section 18 of the same article, brief reference must be made to the former section, which reads as follows:

> "In case of the removal of the Governor from office or of his death, resignation, or inability to discharge the duties of the office, the same shall devolve on the Lieutenant Governor; and the General Assembly shall, by law, provide for the case of removal from office, death, resignation, or inability, both of the Governor and Lieutenant Governor, declaring what officer shall then act as Governor; and such officer shall act accordingly, until the disability be removed or a Governor be elected."

This article provides only for the contingencies where there is a dual vacancy in both the office of Governor and Lieutenant Governor.

> 1886 Ind. O. A. G. 222;
> State, *ex rel.* v. Olcott (1920), 94 Ore. 633, 187 Pac. 286, 288-289.

It must be noted that the only instance where Section 18 of Article 5 could not operate if it stood alone would be where the appointive power was itself vacant by reason of the death or incapacity of both the Governor and the Lieutenant Governor. Section 10 was necessary to encompass that possibility. If Section 10 be given an interpretation broader than is justified by the common and ordinary meaning of the language employed, it would create a conflict within the Constitution and not resolve one. That section refers to the devolution of the office of Governor and not that of Lieutenant Governor.

I have examined the debates of the constitutional convention and find no clear indication of the intent of the framers except as expressed in the language of the Constitution. Moreover, in view of the unanimity of the authorities upon the subject, as the Ohio court indicated it is not for this

office to assume the duties of a constitutional convention, I am of the opinion that it is the power and duty of the Governor to fill by appointment the vacancy now existing in the office of Lieutenant Governor.

I am further of the opinion that an appointee to such office assumes all powers and duties imposed thereon by the constitution and statutes.

II

However, since you have specifically mentioned Chapter 183 of the Acts of 1941, and until an appointment is made there will be a vacancy in the office of Lieutenant Governor, it is necessary to discuss that act. It reads as follows:

> "AN ACT providing for the substitution of the auditor of state for the lieutenant governor as a member of boards or commissions of which the lieutenant governor is a member in event of vacancies in the office of lieutenant governor; and declaring an emergency.
>
> "VACANCY IN OFFICE OF LIEUTENANT GOVERNOR—AUDITOR OF STATE SUBSTITUTED.
>
> "Section 1. Be it enacted by the General Assembly of the State of Indiana, That in event there is at any time a vacancy in the office of lieutenant governor, the auditor of state is for the period, or periods of such vacancy hereby substituted for the lieutenant governor as a member of any board or commission of which the lieutenant governor is a member. In all such cases the auditor of state shall perform the duties of a member of any such board or commission until a lieutenant governor is elected and qualified.
>
> "* * *"

In connection with a consideration of that statute the following constitutional provisions should be considered.

Section 1 of Article 3:

> "The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial;

and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."

Section 1 of Article 4:

"The Legislative authority of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives. The style of every law shall be: 'Be it enacted by the General Assembly of the State of Indiana'; and no law shall be enacted, except by bill."

Section 1 of Article 5:

"The executive power of the State shall be vested in a Governor. He shall hold his office during four years, and shall not be eligible more than four years, in any period of eight years."

Section 18 of Article 5:

"When, during a recess of the General Assembly, a vacancy shall happen in any office, the appointment to which is vested in the General Assembly; or when at any time, a vacancy shall have occurred in any other State office, or in the office of Judge of any court; the Governor shall fill such vacancy, by appointment, which shall expire, when a successor shall have been elected and qualified."

With respect to the first three constitutional provisions hereinabove set forth, I would refer you to the case of Tucker v. State (1941), 218 Ind. 614, and to Official Opinion No. 5 of 1945, addressed to the Governor concerning his appointments on certain boards therein specified.

During the same session of the General Assembly which enacted Chapter 183, the four statutes (Chapters 13, 108, 109 and 182) involved in the litigation in Tucker v. State were also enacted. An extended discussion of Tucker v. State would at this time be merely repetitious. It is enough for our purposes here to say that case established that inherently, under

the division of powers as established by the Indiana Constitution of 1851, the executive was vested with sole authority to appoint administrative officers in the executive branch of the government: that except as to those officers in the executive department, which had been appointed by the legislature prior to the adoption of the 1851 Constitution, the legislature had no authority to make appointments in the executive branch and therefore, could not delegate the appointing power to administrative officers other than the Governor.

At page 652, the court said:

> "* * * But the Constitution has vested in the Governor not certain specific powers, executive or otherwise, which carry with them incidentally or secondarily the executive power to appoint to office, but he had been vested with the general executive power of the state which carries with it the general power to appoint to office, not as an incident to some other power, but as a principal power in itself. Logically, then, the appointive power vested in the Legislature, aside from those particular clearly executive powers which vest in it by certain exception, is limited to the incidental power of appointing those who assist in carrying out the legislative functions. And the appointive power of the courts is limited to those instances which are incidental to the judicial functions; and the appointive powers of administrative and ministerial officers in any department must be limited to that which is incidental to their principal administrative or ministerial functions. * * *"

At page 673, the court said:

> "* * * The creation of the offices is a legislative function. The appointment of officers is an executive function. * * *"

In the 1945 Opinions at page 35, the Attorney General said:

> "* * * *As to the offices created since the adoption of said Constitution, the appointive power is in the Governor except officers of those institutions which are identical in kind with those in existence prior to*

*the adoption of the Constitution of 1851 and whose officers were appointed by the Legislature prior thereto."*

The same rule is applicable to appointments to fill vacancies in appointive offices.

See: Tucker v. State, *supra*, page 655.

Chapter 183 is an exercise by the legislature of the executive appointing power and is, therefore, unconstitutional insofar as it attempts to exercise that power in the executive branch of the government, except as to any officers who were appointed by the legislature prior to the adoption of the 1851 Constitution.

Furthermore, the purpose of Section 1 of Article 3 of the Constitution is to prevent exactly the type of legislation exhibited by Chapter 183. Chapter 183, insofar as limited above, is an exercise by officials of one department of the functions of another.

See: State *ex rel.* v. Noble (1889), 118 Ind. 350.

The General Assembly was created by the same power which created the office of Governor and the General Assemby can no more by statute usurp an executive function than can the Governor by decree create a law.

I am, therefore, of the opinion that insofar as the legislature by Chapter 183 attempted to exercise functions of the executive department, it is a violation of the Constitution.

But, finally, and conclusively it seems to me specific constitutional provision is made for filling vacancies in State offices. That provision is Section 18 of Article 5, *supra*. It provides that where a vacancy shall happen in a State office which historically has been filled by the General Assembly prior to 1851, the vacancy shall be filled by the Governor if it occurs during a recess of the General Assembly "or, *when at any time*, a vacancy shall have occurred in any other State office, * * * the Governor shall fill such vacancy, * * *." (Our emphasis.)

Thus, the Governor's executive constitutional authority to fill vacancies is even broader than his inherent authority to make appointments and when the vacancy shall occur in the recess of the General Assembly, as in this case, and a State

officer is involved, by constitutional provision, the Governor is the only one authorized to fill such vacancy. The language of Section 18 is clear. In my opinion it forbids an attempt by the legislature to fill a vacancy of any State office which occurs during a recess of the General Assembly and in any office of the executive department at any time.

For these reasons, I am of the opinion that Chapter 183 is unconstitutional. In doing so, I express no opinion as to the validity of any act by which the Lieutenant Governor is appointed as a member of any board..

III

An incidental question which arises concerns the period during which the Governor's appointee to the office of Lieutenant Governor shall serve. It will be noted that Section 18 of Article 5 of the Indiana Constitution recites that the appointment "* * * shall expire, when a successor shall have been elected and qualified." The specific question is as to whether an election is to be held for the office of Lieutenant Governor in the coming election for a term from election day until the inauguration of the Governor and Lieutenant Governor in January for the full term.

In the only preceding instance of a vacancy in the office of Lieutenant Governor, since the adoption of the 1851 Constitution, the resignation occurred during the first two years of the full term and the Attorney General gave his opinion that a Lieutenant Governor should be elected in the off year election to serve the balance of the term of his predecessor in office.

O.A.G. 1886, p. 222.

The litigation which ensued established only that the General Assembly had exclusive authority to determine the qualifications and validity of the election of the candidate for Lieutenant Governor who received the largest number of votes in such off year election.

Robertson v. State (1886), 109 Ind. 79.

The House of Representatives decided that question in favor of the successful candidate in the off year election. The Senate, on the contrary, refused to admit the validity of the

election and so far as I have been able to determine this deadlock was never resolved. Since the General Assembly, being the authority having the sole power to decide, was not able to arrive at a decision, the question is an open one in this State so far as direct authority is concerned.

As to other constitutional officers, it is established that in the event of a vacancy the Governor's appointment extends only until the next general election and the qualification of the successful candidate thereafter and that such successful candidate does not merely fill the vacancy but holds office for the entire constitutional term.

> State, *ex rel.* v. Schortemeier (1925), 197 Ind. 507, 510.

However, that case indicates that a different result would be reached in the case of the Governor or Lieutenant Governor. It is said there:

> "There is no provision of the Constitution of Indiana which assumes to require that judges of the circuit court shall be elected in any particular year, or that their terms of office shall begin or end at any specified time, which is in contrast with the provision that, 'The official term of the governor and lieutenant-governor shall commence on the second Monday of January in the year one thousand eight hundred and fifty-three; and on the same day every four years thereafter.' Art. 5, Sec. 9, Constitution, Sec. 142 Burns' 1926. * * *"

The constitutional provisions to which the court refers are contained in Article 5 and are as follows :

> "Sec. 2. There shall be a Lieutenant Governor, who shall hold his office during four years.
>
> "Sec. 3. The Governor and Lieutenant Governor shall be elected at the times and places of choosing members of the General Assembly.
>
> "Sec. 4. In voting for Governor and Lieutenant Governor, the electors shall designate, for whom they vote as Governor, and for whom as Lieutenant Governor. The returns of every election for Governor

and Lieutenant Governor shall be sealed up and transmitted to the seat of government, directed to the Speaker of the House of Representatives, who shall open and publish them in the presence of both Houses of the General Assembly.

"Sec. 6. Contested elections for Governor or Lieutenant Governor, shall be determined by the General Assembly in such manner as may be prescribed by law.

"Sec. 9. The official term of the Governor and Lieutenant Governor shall commence on the second Monday of January in the year one thousand eight hundred and fifty-three; and on the same day every fourth year thereafter."

Referring first to Sections 4 and 6, *supra*, it will be noted that a Lieutenant Governor cannot be declared elected until the returns of the elections have been opened and published in the presence of both Houses of the General Assembly and that the General Assembly is the judge of such election. The first regular session of the General Assembly following the election convenes on the Thursday next after the first Monday of January following the election (Art. IV, Sec. 9, Ind. Constitution) and the term of the elected Lieutenant Governor for the full term commences on the following Monday (Art. V, Sec. 9, *supra*). In the absence of a special session called by the Governor, a Lieutenant Governor elected to fill the vacancy could serve then only for the three days from Thursday until Monday in the event the vacancy occurred during the second two years of the term of office of the retiring Lieutenant Governor. It can hardly be thought that the term of a Lieutenant Governor elected to fill a vacancy should be subject to the discretion of the Governor in calling a special session of the General Assembly nor can it be considered that it was intended to elect a person to act as Lieutenant Governor for a term of three days.

It will be noted that Article 18 does not in terms require an election of a successor at any particular time but leaves the time of election to other provisions of the Constitution concerning the officers involved. As to the Governor and Lieutenant Governor, the framers of the Constitution have very carefully provided that they shall be elected only in

presidential years and proceeds to specifically fix the time when they shall take office.

In Official Opinion No. 16, dated February 28, 1948, it was held that where the General Assembly fixed the term of office of a county treasurer, having constitutional authority to do so, the person elected in the November election did not take office until the day fixed by the legislature for the commencement of the term, even though the office was filled at the time of the election by one appointed to fill the vacancy.

In Official Opinion No. 17 of the same date where a mayor was holding over "until his successor shall have been elected and qualified," it was held that there was no authority to elect a mayor at a general election and that a successor could only be elected at a city election, that being the election proper to elect such officers.

Reference may well be made to cases from other states upon this subject. In People, *ex rel.* Lynch v. Budd (1896), 114 Cal. 168, 45 Pac. 1060; 34 L.R.A. 46, the Constitution provided that an appointment to fill a vacancy "* * * shall expire at the end of the next legislature or at the next election by the people." The court held that this phrase meant the next election provided for the filling of that particular office and since the Lieutenant Governor could not be regularly elected in an off year election, the appointee held until the end of his predecessor's term. A like result was reached in State, *ex rel.* v. Nash (1902), 66 Ohio State 616, 64 N. E. 558 and in State, *ex rel.* v. Olcott (1920), 94 Oregon 633, 187 Pac. 286, 289. A contrary result was reached, however, in State, *ex rel.* v. Day (1871), 14 Fla. 9.

In the present instance, the Constitution has specifically stated the beginning of the time when the term shall begin and the length of the term. There is no constitutional authority for the election of a Lieutenant Governor for any other or different term or for the holding of an election at any time other than is necessary to fill such office for such term.

For the reasons stated and having in mind the weight of authority upon the question, as above set forth, I do not believe that an election may be had in the coming election for the office of Lieutenant Governor to fill the vacancy in that office.

CONCLUSION

It is, therefore, my opinion that:

1. It is your duty, as Governor, under Section 18 of Article 5 of the Constitution to appoint a Lieutenant Governor to fill the vacancy in that office caused by the resignation of the incumbent.

2. That Chapter 183 of the Acts of 1941 is unconstitutional and that the Auditor of State has no power or authority to perform any of the duties of the Lieutenant Governor or to succeed him as a member of any board or commission.

3. That the person appointed by you will hold office until the election and qualification of a Lieutenant Governor for the four-year term beginning on the second Monday of January of 1949.

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OFFICIAL OPINION NO. 31

April 5, 1948.

Mr. LeRoy E. Yoder, Chairman,
Public Service Commission,
401 State House,
Indianapolis, Indiana.

Dear Sir:

Receipt is acknowledged of your letter of March 12, 1948 in which you request an opinion as to the jurisdiction of the Public Service Commission over municipal water utilities in the State of Indiana and especially pertaining to the water company in Michigan City, Indiana. Receipt is likewise acknowledged of the enclosed letter from the legal representative of the Department of Water Works of the city of Michigan City, Indiana.

The writer of the enclosed letter states the Department of Water Works of Michigan City, Indiana is constituted and operating under and by virtue of Chapter 235 of the Acts of 1933, being Sections 48-5301 to 48-5327 of Burns. He states that this chapter is an amendment to Chapter 18 of the Acts of 1931 and that it was under the 1931 Act that Michigan City first established its water department; also that the 1933

# ISSUES ARE RAISED BY WALLACE DEATH

## Legal and Political Questions Arise in Regard to Naming His Successor

## MAY NOT FILL THE PLACE

## Republicans Incline to Think It Will Not Be Necessary Until 1946

Special to THE NEW YORK TIMES.

ALBANY, July 17—The death of Lieutenant Governor Wallace raised a series of legal and political questions today concerning his successor.

Governor Dewey is expected to ask a formal opinion from Attorney General Goldstein as to whether a special election must be conducted this year to choose a new Lieutenant Governor or whether Senator Joe R. Hanley, President pro tem. of the Senate, will carry out the functions of the vacated office until the next Governership election in 1946.

The question is of particular importance because of the possibility that Governor Dewey might run for President next year. Should he be elected President the then Lieutenant Governor or the person next in line to the Governor would become acting Governor.

Belief in Republican circles at the Capitol is that it is not necessary to elect a Lieutenant Governor until 1946 and that Senator Hanley, until such time, can serve as President of the Senate and as Acting Governor when the Governor is out of the State. Should that situation prevail and should Governor Dewey be elected President next year, Senator Hanley would become Acting Governor and serve in that office until Jan. 1, 1947.

### Unofficial Ruling Is Reported

Senator Hanley, it is understood, obtained an unofficial ruling last year, when Governor Lehman was about to resign and turn the executive office over to Lieutenant Governor Poletti, that it was unnecessary for him to resign as President pro tem. and majority leader of the Senate.

The situation did not come to a head at that time because of the brevity of Mr. Poletti's service in the Governor's office.

The question of succession has never arisen since the Constitution was amended to provide for a four-year term for Governor. Prior to that time the Governor and Lieutenant Governor were elected only for two-year terms and there never was a question, such as the present one, whether the office could be left vacant for nearly three and a half years.

The Constitution provides that if the Governor leaves office for any reason and there is no Lieutenant Governor, the President pro tem of the Senate shall become Acting Governor and, after him, the Speaker of the Assembly.

Senator Hanley, it is understood would be reluctant to consider resigning his office of Republican majority leader to become Lieutenant Governor, nor would he be required to do so, according to the unofficial legal opinion given last year.

### Situation in 1811 Is Recalled

The last previous Lieutenant Governor to die in office was John Broome of New York City. He died in January, 1811, and John Taylor of Albany was elected President of the Senate in his place.

The next vacancy in the office occurred in 1828, when Lieut. Gov. Nathaniel Pitcher became Acting Governor. On that occasion, Peter R. Livingston and Charles Dayan were successively elected Presidents of the Senate.

In 1829, when Lieut. Gov. Enos T. Throop became Acting Governor, Charles Stebbins and William M. Oliver were, successively, elected Presidents of the Senate.

In 1847, when Lieut. Gov. Addison Gardiner was elected to the Court of Appeals, Hamilton Fish was elected Lieutenant Governor to fill the vacancy under an act passed in September of that year.

The next vacancy came in 1885 when Lieut. Gov. David B. Hill succeeded Grover Cleveland as Governor, and Dennis McCarthy was elected President of the Senate.

In 1910, Lieut. Gov. Horace White succeeded Charles E. Hughes as Governor and George H. Cobb became President of the Senate and, in 1913, when Martin H. Glynn succeeded William H. Sulzer as Governor, Robert F. Wagner became President of the Senate.

In all of those cases, however, a two-year term was involved and there was no necessity for a special election to fill the vacancy in the office of Lieutenant Governor.