Supreme Court of the State of New York
Appellate Division: Second Department

DEAN G. SKELOS and PEDRO ESPADA, JR.,
as duly elected members of the New York State Senate,
Plaintiffs-Respondents,

-against-

DAVID PATERSON, As Governor of the State of New York, and
RICHARD RAVITCH, as Lieutenant Governor of the State of New York,
and LORRAINE CORTES-VAZQUEZ,
as Secretary of the State of New York,
Defendants-Appellants.

Appellate Division Case No. 2009-00678

BRIEF OF AMICUS CURIAE GERALD BENJAMIN, PETER J. GALIE, MICHAEL J. HUTTER AND STAN LUNDINE

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BRIEF OF *AMICUS CURIAE* GERALD BENJAMIN, PETER J. GALIE, MICHAEL J. HUTTER AND STAN LUNDINE

PRELIMINARY STATEMENT

Pursuant to permission granted by this Court by Decision and Order on Application, dated and entered July 30, 2009, Gerald Benjamin, Peter J. Galie, Michael J. Hutter and Stanley Lundine submit this Brief as *amicus curiae*. None of the *amici curiae* have any involvement in this litigation or

any direct interest in the matters preceding it. Rather, the submission is made as a result of the *amici's* academic and governmental involvement in the issue of gubernatorial and lieutenant governor succession over the past 40 years during which period there was an absence of political strife as to that issue, and the belief that they can fairly present the constitutional history, debate, study, and discussion related to this issue, which will assist this Court in rendering its decision.

As to the *amici*:

Gerald Benjamin, a member of the faculty of SUNY New Paltz, is a SUNY Distinguished Professor. He is widely regarded as an authority on the state constitution and has extensively published on the subject of state constitutional change. Professor Benjamin served as a Research Director for the 1994-97 Constitutional Revision Commission.

Peter J. Galie, a member of the faculty of Canisius College, is actively involved in studying and debating issues pertaining to state constitutional law and New York constitutional law and history. He is the author of *The New York Constitution: A Reference Guide and Ordered Liberty: A Constitutional History of New York.* He, too, is regarded as an authoritative commentator on the state constitution.

Michael J. Hutter is a member of the faculty of Albany Law School. From 1979 to 1984 he served as Executive Direction of the NY State Law Revision Commission. In that position, he guided the Commission's research projects, including proposed constitutional amendments regarding the jurisdiction of the Court of Appeals and gubernatorial succession. Professor Hutter has also been involved in litigation regarding the constitutional powers of the State Comptroller and succession to that office upon a vacancy.

Stan Lundine is a former Lieutenant Governor, serving in that office from 1987-1994 when Mario Cuomo was Governor. Among the many governmental matters he was involved with during his tenure, Mr. Lundine conducted a thorough study of issues pertaining to succession to the offices of Governor and Lieutenant Governor when there were vacancies in that office.

QUESTION PRESENTED

Whether the succession to the office of Governor by Lieutenant Governor David Paterson upon the resignation of Governor Eliot Spitzer created a vacancy in the office of Lieutenant Governor which can be filled by an appointment by Governor Paterson without any confirmation by either house of the State Legislature, or both.

Amici submit that the Question Presented must be answered in the negative.

ARGUMENT

POINT I

THE ABSENCE OF A CONSTITUTIONAL OR STATUTORY BASIS ALLOWING A GOVERNOR TO APPOINT A PERSON OF HIS/HER CHOOSING TO FILL A VACANCY IN THE OFFICE OF LIEUTENANT GOVERNOR WITHOUT ANY FORM OF LEGISLATIVE CONSENT OR CONFIRMATION HAS BEEN NOTED AND JUSTIFIED BY LEGAL AND ACADEMIC SCRUTINY OF NEW YORK STATE CONSTITUTION'S PROVISIONS GOVERNING THAT OFFICE OVER THE PAST SEVERAL DECADES AND HAS NEVER BEEN QUESTIONED UNTIL NOW

Analysis of the Question Presented starts with recognition of the existence of substantial study and consideration of it over the course of New York State history and in particular over the past several decades by numerous state officials and agencies, the 1938 and 1967 Constitutional

Conventions, academics, and at least one bar association committee. The unanimous conclusion from the record of history, deliberation and study is that the Governor lacks the authority to appoint a person of his/her choosing to fill a vacancy in the office of Lieutenant Governor without any form of legislative consent or confirmation.

Thus, Attorney General Nathaniel L. Goldstein in a Brief submitted to the Court of Appeals in August 1943 observed:

> No on has ever claimed that this section [Public Officers Law §43] conferred upon the Governor the power to appoint his own successor. Such a contention would lead to the anomalous result that a Governor by appointing a Lieutenant Governor and then resigning could impose upon the people his own choice as their Governor.

(Brief of Appellant, at p. 38 in *Ward v. Curran*, 291 N.Y. 642 [1943], *affg. without op.*, 266 App. Div. 524 [3d Dep't 1943]).

Notably, the issue in *Ward* was whether under the 1938 State Constitution an election was required to be held to fill the office of Lieutenant Governor upon the death of the then Lieutenant Governor Thomas W. Wallace. Petitioner Ward, the Secretary of the State Committee of the Democratic party of the State of New York, commenced a proceeding in the nature of mandamus to compel the Secretary of State, respondent Curran directing Curran to initiate proceedings in order to have the vacant office filled at the general election in November 1943 the vacant office

filled. (*See*, "Democrats To Sue To Force Election," *N.Y. Times*, August 5, 1983). Then Governor Dewey opposed such an election, seeking to have the office remain vacant for the remainder of Wallace's term, for various political reasons. (*See*, Galie, Ordered Liberty - A Constitutional History of New York [1996], at pp. 271-272; "Issues Are Raised By Wallace Death," *N.Y. Times*, July 18, 1943; "State GOP Fights Election," *N.Y. Times*, August 8, 1943; "Message of Governor Thomas E. Dewy To The Legislature - January 5, 1944," Leg. Doc. [1944] No. 1, at pp. 17-18). Ultimately, Ward prevailed, with the requested election ordered to be held. (*Ward*, 291 N.Y. 642, *supra*).

Of course, Governor Dewey could have sought to avoid those problems and an election by asserting power to appoint someone of his choosing to fill the vacant office pursuant to Public Officers Law §43, in accord with the argument made here by Governor Paterson. However, he did not do so because of the view that such appointive power was not given to him by the Constitution, the view shared by Attorney General Goldstein and presumably Governor Dewey's then counsel, Charles D. Breitel. Governor Dewey and his counsel were certainly aware as well that on the seven prior occasions when the office of Lieutenant Governor became vacant, either through the death or resignation of the Lieutenant Governor,

or through succession to the office of Governor - no appointment to fill the position was made by the then Governor.[1]

Attorney General Goldstein's statement regarding the absence of any appointive power was fully supported by the 1938 Constitutional Convention. There the entire focus of the debate over Art. IV, §§6, 7 (as then numbered) was upon a vacancy in the office of Governor and succession thereto. (Proceedings of the New York State Constitutional Convention, Vol. VIII, "Problems Relating To the Executive Administration and Powers, at pp. 52 *et. seq.*). The Convention continued the successive provisions as established in the 1777 Constitution, the 1821 Constitution, the 1846 Constitution and the 1894 Constitution with one modification. In the event that the office of Governor was vacant and there was no Lieutenant Governor, the temporary president of the Senate or the speaker of the Assembly if there were no temporary president, would serve until the next general election, occurring not less than three months after the office became vacant. (Art. IV, §6; *See*, Galie, *supra*, at p. 271; Temporary State

[1] These occasions were: (1) 1811, death of Lieutenant Governor Broome; (2) 1828, succession to Acting Governor of Lieutenant Governor Pitcher; (3) 1829, succession to Acting Governor of Lieutenant Governor Throp; (4) 1847, resignation of Lieutenant Governor Gardiner; (5) 1885, succession to Governor of Lieutenant Governor Hill; (6) 1910, succession to Governor of Lieutenant Governor White; and (7) 1913, succession to Governor of Lieutenant Governor Glynn. (Vol. 8, 1938 N.Y. Constitutional Convention, "Problems Relating To Executive Administration And Powers", at pp. 52 *et. seq.*; "Issues Are Raised By Wallace Death," *N.Y. Times*, July 18, 1943).

Commission on the Constitutional Convention [1967] Leg. Doc. No. 14, pp. 84-85). This provision and the discussion relating to it (admittedly from summaries), is consistent with the view that any vacancy in Lieutenant Governor not be filled by gubernatorial appointment.

At the 1967 Constitutional Convention the issue of filling a vacancy in the office of Lieutenant Governor arose not only as a stand alone issue but also tied together with the issue of gubernatorial succession generally. (*See*, Proceedings of the New York State Constitutional Convention [1967], Vol. II, at pp. 574-587; Dullea, *Charter Revision In The Empire State: The Politics of New York's 1967 Constitutional Convention*, at pp. 193-194; Temporary State Commission on the Constitutional Convention, *supra*, at pp. 84-93). One proposal in particular is apposite. Richard Kuhnen moved Proposition No. 923:

> In case of vacancy in the office of Lieutenant-Governor alone, or if the Lieutenant-Governor shall be impeached [absent from the state] or otherwise unable to discharge the duties of his office [the temporary president of the Senate shall perform all the duties of Lieutenant-Governor during such vacancy or inability] to fill the remaining term of the Lieutenant-Governor. 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.

(Proceedings of the New York State Constitutional Convention [1967], Vol. II [Propositions], June 12, 1967, at pp. 606-608). The proposition was sent

to the Committee on Executive Branch. Obviously, if such an appointive power was possessed by the Governor, such proposition never would have been introduced, or referred for further study. That convention rejected this option. The final draft copy of the 1967 constitution, the first to directly address "...vacancy in the office of lieutenant governor alone..." provided that "...the temporary president of the Senate shall perform all the duties of lieutenant governor during such vacancy or inability." (Article IV, §6[e]).

Some 17 years later the New York State Law Revision Commission in 1984 engaged in a study of gubernatorial inability and succession in new York prompted by the terminal illness of Governor Ella Grasso of Connecticut, and the more recent sudden illness of Governor O'Neill, her successor in office and Governor O'Neill's request that Lieutenant Governor Fauliso act as Governor during the duration of his inability to govern. ("Memorandum of the Law Revision Commission Relating to Gubernatorial Inability and Succession," Leg. Doc. [1984] No. 65 [A], p. 93). In the course of this study, the Commission reviewed New York's provision for a possible vacancy in the office of Lieutenant Governor. (*Id.* at 112-115). In doing so, the Commission observed that the provisions governing a vacancy as provided in the State Constitution for the office of Lieutenant Governor - when the office alone is vacant, the duties of the office shall devolve to

temporary president of the Senate; and when both that office and the office of the Governor are vacant, the temporary president shall act as Governor until a Governor and Lieutenant Governor are elected - was "adequate" and that there was "no need, at this time for a new system for filling the office of Lieutenant Governor should a vacancy exist in that office." (*Id.* at 115). Notably, the Commission in doing so commented that several states since the adoption of the 25th Amendment to the United States Constitution had specifically provided for the incumbent Governor to appoint a person to fill a vacant office of Lieutenant Governor subject to legislative confirmation. (*Id.* at 19-20). Unmistakably, the Commission concluded that, pursuant to either constitutional or statutory provision, the Governor possessed no unfettered power of appointment to fill a vacancy in the office of Lieutenant Governor.

In 1985, the Commission resubmitted its 1984 Recommendations to the Legislature, with one significant change. Now, the Commission, upon further discussions with legislative leaders, submitted a proposal for the filling of a vacancy in the office of Lieutenant Governor. ("Memorandum of the Law Revision Commission Relating to Gubernatorial Inability and Succession," Leg. Doc. [1985], No. 65 [A], pp. 52, 69-74, 92-94). In this proposal, the Commission suggested for legislative consideration a

constitutional amendment whereby the Governor be authorized to nominate a person of his/her choosing to fill a vacancy subject to confirmation by a majority vote in each house of the legislature. (*Id.* at 95).

Subsequent to the submission of the Law Revision Recommendations, Governor Cuomo conducted with his staff and the staff of then Lieutenant Governor Stan Lundine a thorough study of succession to the office of Lieutenant Governor. (*See*, Lundine, "Constitutional Amendment Needed for Gubernatorial Appointment," Rochester Democrat & Chronicle, July 26, 2009; Dicker, "Gov's Ravitch Bid 'Illegal,'" *New York Post*, July 20, 2009). This study commenced after Mr. Lundine was elected Lieutenant Governor in the November 1986 general election as Governor Cuomo's running mate; the election of Mr. Lundine followed the resignation of the Lieutenant Governor Alfred DelBello in 1984. (*Id.*). The conclusion of this study was that a constitutional amendment was necessary in order for the Governor to fill a vacancy in the office of Lieutenant Governor. (*See*, Lundine, *supra* ["You cannot lead this State without being vetted by the voters."]).

Following the succession of Lieutenant Governor Paterson to Governor upon the resignation of Governor Spitzer on March 12, 2008, the Committee on Election Law of the Association of the Bar of the city of New York (Jerry H. Goldfeder, Chair), conducted a study of the filling of a

vacancy in the office of Lieutenant Governor. (Letter, dated July 1, 2008, from Mr. Goldfeder to Charles O'Byrne, Secretary to the Governor). The Committee concluded that "New York has no constitutional or statutory provision to fill a vacancy in that office [Lieutenant Governor]." (*Id.* at p. 2). The Committee then recommended that New York follow the 26th Amendment to the United States Constitution as a model and authorize by constitutional amendment the appointment of a Lieutenant Governor by the Governor, subject to confirmation by both houses of the Legislature. (*Id.* at 3).

Upon disclosure that Governor Patterson was considering the appointment of a Lieutenant Governor, Attorney General Cuomo on July 6, 2009 issued the following statement:

> The State Constitution explicitly prescribes what occurs when there is a vacancy in the office of Lieutenant Governor. In such circumstance, article 4, §6 states that "the temporary president of the senate shall perform all the duties of the lieutenant governor during such vacancy..."
>
> Article 4, §1 of the Constitution expressly provides that "the lieutenant governor shall be chosen at the same time, and for the same term" as the Governor. The Legislature did not authorize a Governor to bypass this provision of the Constitution and fill a vacancy in the office of Lieutenant Governor pursuant to Public Officers Law §43. That statute, which provides for Gubernatorial appointment to fill certain vacancies, applies only when there is "no provision of law for filling the same." With respect to the Lieutenant Governor, however, the Constitution leaves no gap concerning a vacancy

> in that office – article 4, §6 expressly addresses that circumstance.
>
> In sum, we understand the apparent political convenience of the proponents' theory due to the current Senate circumstances. In our view, however, it is not constitutional. In addition, contrary to the proponents' goal, we believe it would not provide long term political stability but rather the opposite, by involving the Governor in a political ploy that would wind through the courts for many months.

(Office of the Attorney General, www.oag.state.ny.us, at announcements).

Lastly, it must be noted that two "former state officials, former Chief Judge Sol Wachtler and former Attorney General Vacco, neither of whom are involved or have any present direct interest in the present litigation, have also expressed their views based on their knowledge of the pertinent constitutional provisions that Governor Paterson lacks the appointive power he claims he has. (*See*, Wachtler, "The Law Is Just That, Governor," *Albany Times Union*, July 16, 2009 ["[I]t is unthinkable to allow any governor to appoint anyone he pleases to the second highest elected office in the state with no checks whatsoever."]; Vacco, "Patterson's tactic would set a dangerous precedent," *Newsday*, July 15, 2009 ["Nowhere does the constitution authorize the governor to make an appointment to fill this vacancy."]).

In sum, over two hundred years of history and in all formal debates and study over this matter, appointment of a Lieutenant Governor by the

Governor was never adopted. Indeed, such a proposition was never even contemplated. Notably, no contrary view has been expressed until now.

POINT II

ARTICLE IV OF THE NEW YORK STATE CONSTITUTION PRECLUDES A GOVERNOR FROM FILLING A VACANCY IN THE OFFICE OF LIEUTENANT GOVERNOR BY APPOINTMENT OF A PERSON OF TO THAT OFFICE

A. Introduction

At this time it is appropriate to turn to the source and basis for the hitherto unanimous view that the Governor lacks the appointive power to fill a vacancy in the office of Lieutenant Governor as shown in Point I. In doing so, the arguments advanced by the defendants which attempt to shòw there is such an appointive power will be addressed and shown to be lacking.

B. The Pertinent Constitutional Provision Precludes The Recognition Of An Appointive Power

Two provisions of Article IV of the State Constitution are pertinent and form the basic framework for analysis. They are those which provide for the duties of the Lieutenant Governor and their devolution upon a vacancy in that office (Art. IV, §§5, 6); and those which provide for the "choosing" of a Lieutenant Governor, which is to be by election only and at an election in which the electorate choose both a Governor and Lieutenant Governor. (Art. IV, §§1, 4).

As to the Lieutenant Governor's duties, the Constitution provides that (1) the Lieutenant Governor shall exercise the power and perform the duties of Governor when the Governor is impeached, absent from the State or otherwise unable to discharge the power and duties of that office until the inability shall cease or the term of the Governor expires (Art. IV, §5); and (2) the Lieutenant Governor shall preside over the Senate but has only a casting vote. (Art. IV, §6).[2] The constitution further provides for the performance of these duties by others when there is no Lieutenant Governor. Thus, when this office is vacant or the Lieutenant Governor is unable to carry out the functions of Governor, "the temporary president of the Senate shall act as governor"; and when the Governor is discharging his duties but the office of Lieutenant Governor is vacant or the Lieutenant Governor is "unable to discharge the duties of office, the temporary president of the Senate shall perform all the duties of Lieutenant Governor during such vacancy or inability. (Art. IV, §6)."

Thus, where, as here, there is a vacancy in the office of Lieutenant Governor, the duties of that office have been assumed by the temporary

[2] It is true that the Lieutenant Governor has been given additional duties by the Legislature over the years. (*See, e.g.*, L. 1909, c. 21, §1121; L. 1927, c. 153, §26. [serve as a Trustee of Cornell University and Syracuse University Forestry School]; County Law §101 [visitation of jails]). However, these are duties imposed or conferred by statute. Obviously, the conferring on the Lieutenant Governor of power in addition to those conferred by the constitution can have no effect upon the succession issue which the constitution prescribes.

president of the Senate. There is thus no necessity or occasion for the office to be filled prior to the next general election of Governor and Lieutenant Governor, and as stated by Attorney General Cuomo the constitution leaves "no gap concerning a vacancy in that office – Article IV, §6 expressly addresses that circumstance." (Attorney General stated, *supra.*)

Expressed differently, from the perspective of the drafters of this constitutional provision a decision was made not to fill the vacancy but rather to effect a devolution of the duties of the office to a specified person; the then temporary president of the Senate. Significantly the drafters designated a correctly elected state official, elected by the voters in his/her senate district and the members of the Senate, representative of all the voters of the state. Thus, it is surely evident that the drafters did not authorize and in fact precluded a gubernatorial appointment to be made to fill the vacancy or even for a person to merely perform the office's duties.

Consideration of the constitutionally specified electoral process for the "choosing" of a Lieutenant Governor confirms the absence of any appointive power on the part of the Governor to fill a vacancy in the office of Lieutenant Governor. In that regard, two constitutional amendments provide for this process, and show that only through an election is the office of Lieutenant Governor to be filled.

As approved by the people in 1945 (1944 Assem. Intro. 9, Print 9; 1945 Senate Info. 653, Print 660), Article IV, §6 was amended by the addition of the following provision: "No election of a Lieutenant Governor shall be had in any event except at the time of electing a Governor." Governor Dewey proposed this amendment in his Annual Message to the Legislature on January 5, 1944 to overturn a decision by the Court of Appeals in *Ward v. Curran* (291 N.Y. at 642, *supra*), which affirmed without opinion a Third Department decision which in construing Article IV, §6 as contained in the 1937 Constitution, amending the 1894 constitution, held that upon the vacancy in the office of Lieutenant Governor an election to fill that vacancy must be conducted. (Message of Governor Thomas E. Dewey to the Legislature, January 5, 1944, Leg. Doc. [1944] No. 1, at pp. 17-18). As Governor Dewey stated, there was no need for a special election as "[t]he person who succeeds to the office or the duties of the Lieutenant Governor should serve the unexpired term. (*Id.* at 18). The clear intent of this amendment was to assure that the selection of a Lieutenant Governor was to be made only at a general election at the same time as Governor was to be elected. (*Id.*).

The second amendment, as approved by the people in 1953 (1952 Senate Intro. 2900, Print 3404; 1953 Senate Intro. 13, Print 13), amended

Art. IV, §1 by adding the provision "They [Governor and Lieutenant Governor] shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices, and the legislature by law shall provide for making such choice in such manner." Prior to this amendment the Governor and Lieutenant Governor were not elected jointly. (*See*, Galie, *supra* at p. 272). This amendment, as endorsed by Governor Dewey in his Annual Message to the Legislature in 1953 (Leg. Doc. [1953], No. 1, p. 24) and in a separate message to the Legislature (Leg. Doc. [1953] No. 36), was designed to ensure not only the officers were filled by the electoral process but also that the offices be filled by members of the same political party.

With these constitutional amendments read together, it can readily be discerned that the intent of their drafters was "to require that the person who succeeded to the office of Lieutenant Governor, as well as Governor, was an *elected* official." (Wachtler, "The Law Is Just That Governor," *Newsday*, July 16, 2009). And, when coupled with the provisions regarding the succession of the duties of the Lieutenant Governor upon a vacancy in that office, it demonstrates that the drafters did not want to give any power to the Governor to appoint a person to succeed to the office of Lieutenant Governor. Expressed differently, the drafters sought to avoid the situation prevalent in other countries whereby a country's leader could designate to

whomever he/she wanted to succeed him/her as leader. A person who succeeds by divine right is appointed by the Deity, not by his or her predecessor.

Notably, New York is not alone among the states in not recognizing an appointive power on the part of a Governor to designate a person of his/her choosing to a position from which the person would succeed the Governor upon a vacancy in that office. Research shows that only Florida gives such appointive power for the office of Lieutenant Governor. (*See, Advisory Opinion to the Governor*, 217 So.2d 289 [Fla. 1968]). Significantly, the Florida Constitution, Art. V, is silent regarding a vacancy in the office of Lieutenant Governor, unlike New York's Article IV.

While defendants below sought to show that the appointive power they claim to exist is somewhat common among the states, that effort is based on incomplete research. Thus, in Wisconsin, a 1979 amendment to its constitution (Art. 13, §10) allows the Governor to appoint a person to fill a vacancy in the office of Lieutenant Governor, but the appointment was to be confirmed by both houses of the Legislature (1977 JR 321; 1979 JR 3), thereby overruling *State ex rel Martin v. Ekern* (228 Wis. 645 [1938]). Likewise in Ohio, the state constitution was amended to provide that the Governor's appointive power was subject to confirmation by both houses of

the Legislature (Art. III, §17a), thereby overruling *State ex rel Trauger v. Nash*, 64 N.E. 558, 619-621 [Ohio 1902]). The same result occurred in California which by constitutional amendment (Art. 45, §10) overruled *People ex rel Lynch v. Budd* (45 P. 1060 [Cal. 1896]). Lastly in Rhode Island the appointive powers of the Governor were drastically reduced by legislation that provided that any gubernatorial appointment would be temporary and would cease upon the selecting of a Lieutenant Governor by the State General Assembly. (*In re Advisory Opinion to the Governor*, 696 A.D.2d 277 [1997]).

Furthermore, the decisions cited by defendants wherein a sister state court up0held a Governor's appointment to fill a vacancy in the office of Lieutenant Governor are of questionable precedential value to support defendants' claim here under New York's constitution as the constitutional provisions those courts were construing are either not contained in New York's constitution or are substantially different from New York's.

As an apparent argument of last resort, defendants seem to suggest that one should not fear the claimed gubernatorial appointing power and that it will be used wisely due to political pressures. This is hardly a reason to uphold defendants' claim. In that regard, defendants' argument is not of any comfort when a Governor appoints someone of questionable character, and

then the Governor resigns from office leaving that person to be Governor for the rest of the Governor's elected term. Such a result appears unthinkable, but is certainly possible. Consider the reported recent attempt by the Governor of Illinois to "sell" a seat in the U.S. Senate. In any event, the mere risk of abuse is sufficient to reject the suggestion, and is hardly a justification for an unconstitutional act.

In sum, the Governor has no constitutional power to appoint a person to fill the office of Lieutenant Governor. That office may be filled only by election.

C. Public Officers Law §43 Cannot Be Used As The Basis To Recognize A Power On The Part Of The Governor To Appoint A Lieutenant Governor

Paying lipservice, if not outright ignoring the provision of Article IV, defendants rely upon Art. XIII, §3 of the State Constitution, together with Public Officers Law §43 as the basis for a gubernatorial appointive power. This argument lacks merit as Supreme Court conceded.

Art. XIII, §3 states that "[t]he legislature shall provide for filling vacancies in office, and in case of elective officers, no person appointed to fill a vacancy shall hold his or her office by virtue of such appointment longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy..." Defendants then

claim that the Legislature pursuant to this grant of power enacted Public Officers Law §43, which allows, defendants further contend, for the filling of a vacancy in the office of Lieutenant Governor by gubernatorial appointment. §43 provides "[i]f 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." Defendants argue that §43 applies to the office of Lieutenant Governor because the office is "elective" and there is no provision for filling the office.

As Supreme Court noted in response to this argument (Order, p.17), "the simple answer to defendants' argument is that Article XIII, §3 cannot apply to the office of Lieutenant Governor. By providing that "a person appointed to fill a vacancy in an elective office cannot serve longer than the commencement of the next 'political year' Article XIII, §3 in effect requires that the appointee must run at the next election. However, Article 4, §6 expressly provides that there shall be no separate election for Lieutenant governor." As the Lieutenant Governor is elected only at the same time as the Governor, the office of Lieutenant Governor cannot therefore be an "elective office" within the meaning of §43.

Assuming *arguendo* that somehow the office of Lieutenant Governor is an elective office within the meaning of Public Officers Law §43, this section is itself inapplicable by its own terms which states it becomes operative only "with no provision of law for filling the same." But as noted in Point II (B), provision is made when there is a vacancy in that office, namely, it was not to be filled but rather the duties of the office upon a vacancy devolved to the temporary president of the Senate. Any gap that existed by the vacancy is filled.

Such conclusion is fully consistent with the language of Public Officers Law §43, which allows appointment of a person to "execute the duties" of that office. The section does not say the appointment is for "filling a vacancy." As the duties of the Lieutenant Governor devolve to the temporary president of the Senate, Section 43 is rendered inapplicable.

In sum, Public Officers Law §43 cannot be used as the basis to recognize a power on the part of the Governor to appoint a Lieutenant Governor.

POINT III

A PURPORTED POLITICAL CRISIS DOES NOT CREATE A POWER ON THE PART OF THE GOVERNOR TO FILL A VACANCY IN OFFICE OF LIEUTENANT GOVERNOR

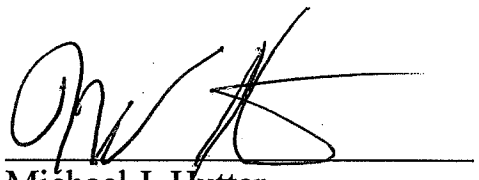
Much is made by defendant of the need for the Governor to have a Lieutenant Governor to resolve a claimed political "crisis." Suffice it to say, to the extent there is such a crisis, this does not allow a Governor to ignore the state constitution and make *ad hoc* determination as to how to address that crisis when those determinations are barred by the constitution. While such a course/conduct may be acceptable in totalitarian regimes, it is a truism that it is not acceptable in New York. "Crises do not create constitutional power." (Galie, "Naming of Lieutenant Governor Defies Constitution.", *The Buffalo News*, July 15, 2009.)

CONCLUSION

For the above reasons, it is respectfully submitted that this Court should affirm the Order of Supreme Court and hold that Governor Paterson lacks the power, constitutional or statutory, to appoint someone of his choosing to fill the vacancy in the office of Lieutenant Governor.

Dated: August 6, 2009

MICHAEL J. HUTTER, ESQ.
On Behalf of Amicus Curiae



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APPELLATE DIVISION – SECOND DEPARTMENT
CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR §670.10.3(f) that the foregoing Brief was prepared on a computer using Microsoft Word.

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Dated: August 6, 2009

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