SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU
----------x

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

Plaintiffs,

-against-

DAVID PATERSON, as Governor of the State of New York and RICHARD RAVITCH , as putative nominee for Lieutenant Governor of the State of New York and LORRAINE CORTES-VASQUEZ, as Secretary of State of the State of New York,

Defendants.

Index No. 13426/09

AFFIRMATION IN OPPOSITION TO CROSS MOTIONS AND MOTION AND SEEKING CHANGE OF VENUE

----------x

JOHN CIAMPOLI, ESQ., an attorney duly admitted to the practice of Law before the Courts of the State of New York, hereby affirms under the penalties of perjury:

1. 1. I am the attorney for State Senator Pedro Espada, Jr., the Majority Leader of the State Senate.

2. I make this affirmation in opposition to the cross motions of the defendants seeking various forms of relief and the motion to change the place of trial to Albany County alleging improper venue.

3. The gravamen of the instant complaint is that the Governor has acted outside his constitutional authority making an appointment where there is no vacant office and in the exercise of a power not granted to him.

FACTS

4. On June 8, 2009 David Paterson the Governor of the State of New York, made a surprise announcement that he was "appointing" Richard Ravitch as Lieutenant Governor of the State

of New York.

5. In his brief address he set out no legal authority for such appointment.

6. He contended that the "crisis" in Albany over the issue of who was the duly elected President Pro Tempore as well as the economic crisis of the state required such action.

7. The Press Office of the Governor announced that the swearing in of Mr. Ravitch would be the following day in the Red Room in the Capitol.

8. Within hours of the announcement, your affirmant received at home a robotic call from Paterson 2010 touting the announcement and the appointment of Richard Ravitch. Defendant Paterson's re-election campaign 2010 had begun.

9. The Red Room announcement was a ploy. The statement was an utter misrepresentation to the public and to anyone seeking to challenge the legality of the appointment in that it was designed to prevent any challenge by using false statements and misdirection so that anyone seeking to challenge the act would be met with a fait accompli.

10. In secret at a Brooklyn steakhouse, Mr. Ravitch was sworn in. At that time he signed a document that was to be his oath of office.

11. Upon information and belief the document, the oath of office was not filed with the Secretary of State that night. It is alleged that it was "handed" to a First Deputy Secretary of State that night.

12. Counsel for the defendants, in open court, represented that the document was filed in Albany that night.

13. Defendant's Exhibit A states that the Deputy Secretary of State accepted the document for filing at 11:47 PM.

14. That the Office of the Secretary of State is not

open for business and does not accept documents for filing at 11:47 PM from the general public or others is beyond question. Further acceptance for filing in the Office of the Secretary of State's office is not actual filing.

15. Thus, Mr. Ravitch's oath was not properly filed with the Office of the Secretary of State as required by law. Public Officers Law Section 10 requires that every officer shall take and file the oath of office required by law before he shall be entitled to enter upon the discharge of any of his official duties. There is no proof that the oath of office was ever properly filed.

16. On July 9, 2009 in the afternoon, Pedro Espada, Jr. rejoined the Democratic Conference and later that same day was elected by them to be their Majority Leader. He abandoned any and all claims to be the Temporary President.

17. By the evening of the 9th of July, Malcolm Smith was the sole occupant of the office of Temporary President. Senator Espada became Majority Leader. The Senate had begun the process of passing over one hundred bills. For all intents and purposes the "crisis" was over.

18. The Constitution provides for a line of succession denying the Governor any explicit power to appoint a Lieutenant Governor. Section 5 of Article IV of the New York Constitution.

19. Public Officers Law Section 43 enacted in 1909, only allows the governor to make an appointment of a person to "execute the duties" of a vacant office when there is no provision of law elsewhere that provides for the filling of the vacancy.

20. Nothing in the legislative history of Section 43 suggests that the Legislature wanted its provisions to be applicable to the vacant office of lieutenant governor. And, of course, even if such legislative intent could be found, the statute cannot trump the provisions of the Constitution.

21. The Governor has no statutory duty to appoint a Lieutenant Governor. If such were the case he has been in dereliction of that duty since he ascended to the position of Governor after the resignation of Elliot Spitzer and likewise other governors who served without a Lieutenant Governor were likewise in derogation of their statutory duty.

VENUE IN NASSAU IS PROPER SEEKING THIS PRELIMINARY INJUNCTION

22. CPLR 6311 (1) provides in effect that a preliminary injunction may not be obtained outside the County of Albany against the Governor when the Governor has acted pursuant to a statutory duty.

23. Thus, CPLR 6311 (1) is inapplicable to the action for a declaratory judgment and a preliminary injunction against the governor regarding the illegal appointment and against the putative Lieutenant Governor for seeking to take office and against the Secretary of State to prevent the filing of a document purporting to fill a non-existent vacancy.

24. The issue before the Court as postured by the Governor is that he has such a statutory duty and thus no injunction should issue in Nassau.

25. The verified pleading seeking relief makes it clear that the issue is not a statutory duty but an unconstitutional act.

VENUE UNDER CPLR 506b IS NOT THE APPROPRIATE STATUTE

26. Defendants similarly assert that the venue provisions mandate that the matter must be transferred to Albany County on the basis of CPLR 506 (b). The defendants are incorrect in two respects. First the action is not an action against a body or an officer as the statute is entitled. Indeed, the venue statute for Article 78 proceedings refers directly back to CPLR 506 (b). In short, where the action is an Article

78, then the matter must observed the venue rule cited by the defendants.

27. An action against a body or an officer is a term of art, specific to acts seeking relief under Article 78 CPLR. CPLR 103 (b) provides that all civil judicial proceedings shall be prosecuted in the form of an action, except where prosecution in the form of a special proceeding is authorized.

28. In the instant action, the Plaintiffs seek a declaratory judgment of unconstitutional action by the governor and other defendants. Such unconstitutional action voids all of the deeds *ab initio*.

29. As in the case of CPLR 6311, the actions of the defendants are not the performance of a "statutory duty".

30. Thus CPLR 506 (b) is inapplicable to the case at bar.

31. The Plaintiff's complaint guides the issue of venue. Defendants cannot use the venue motion as if t were summary judgment on the merits. For venue to be transferred this court has to resolve the threshold issue of whether or not the governor and the other defendants acted pursuant to a statutory duty.

32. Where the merits are so interwoven with the claims of venue, the matter should stay right where it is given that ordinary venue rules apply to the instant action.

33. Plaintiff Dean G. Skelos resides in the County of Nassau. Its placement for venue purposes is proper given that the residence of the plaintiff is a basis for venue. CPLR 503 (a). Senator Espada concurred in the decision to bring this action in Senator Skelos' county of residence.

34. The defendants have also suggested without pleading an issue of standing. One of the few duties of the Lieutenant Governor under the Constitution is to preside over the Senate.

Senator Espada as the Majority Leader, and as an individual Senator, has standing based upon the fact that he has the right as a Senator not to be presided over by an interloper. Just as no person can demand to fill an office that is not vacant, the Governor cannot impose upon a Senator a presiding officer that is illegally "appointed".

35. The motion to change venue should be rejected.

THE MOTION TO DISMISS SHOULD BE DENIED IN ALL RESPECTS

36. As fully set out in the memorandum of law, the defendant's motions to dismiss should be denied in all respects.

PLAINTIFFS ARE ENTITLED TO A DECLARATORY JUDGMENT

37. Plaintiffs have made a sufficient showing to justify the issuance of the declaratory judgment and made a proper showing to justify the imposition of a preliminary injunction by this Court.

CPLR 3211 (C)

38. Pursuant to CPLR 3211(c), it is suggested that this matter be converted to a motion for summary judgment on the law.

WHEREFORE, it is respectfully prayed that the motions of the defendants be denied in all respects, that Nassau County be set as the proper venue for the action and that the Court consider converting the matter under CPLR 3211 (c) to a motion for summary judgment on the law.

AFFIRMED: New York, New York July 13, 2009

John Ciampoli, Esq.
677 Broadway, Suite 202 Albany, New York 12207 Cell: 518 522 3548

SUPREME COURT OF THE STATE OF NEW YORK
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19. Public Officers Law Section 43 enacted in 1909, only allows the governor to make an appointment of a person to "execute the duties" of a vacant office when there is no provision of law elsewhere that provides for the filling of the vacancy.

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defendants.

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is not vacant, the Governor cannot impose upon a Senator a presiding officer that is illegally "appointed".

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WHEREFORE, it is respectfully prayed that the motions of the defendants be denied in all respects, that Nassau County be set as the proper venue for the action and that the Court consider converting the matter under CPLR 3211 (c) to a motion for summary judgment on the law. AFFIRMED: New York, New York

July 13, 2009

_____
DAVID L. LEWIS 225 Broadway, Suite 3300 New York, New York 10007 212 285 2290

SUPREME COURT OF THE STATE OF NEW YORK
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Defendants.
----------x

MEMORADUM OF LAW IN OPPOSITION TO CROSS MOTION TO DISMISS AND MOTION SEEKING CHANGE OF VENUE

DAVID L. LEWIS, ESQUIRE
Attorney for Plaintiff Skelos
225 Broadway, Suite 3300 New York, New York 10007 (212) 285-2290

JOHN CIAMPOLI, ESQUIRE
Attorney for Plaintiff Espada
677 Broadway, Suite 202
Albany, New York 12210

PRELIMINARY STATEMENT

This case presents a matter of pure Constitutional law.

Judicial review concerns whether or not the State Constitution or the Legislature has empowered the Governor to act to fill the role of Lieutenant Governor. The act of the Governor "appointing" the second highest official in the state violates the core constitutional principle that the highest executive officers should be elected by the People or at least by the People's representatives, the Legislature, under a system of nomination and confirmation. In the absence of a required election or a nomination and confirmation process, the position of Lieutenant Governor is not to be filled. The Constitution envisions that the office is not to be filled, but rather that the duties devolve upon the Temporary President of the Senate. New York State Constitution, Article IV Section 6. As of July 9, 2009, Malcolm A Smith was the sole occupant of the office of Temporary President, Senator Pedro Espada, Jr. having withdrawn any claim to the office.

At the time of the bandying about of the idea that a Lieutenant Governor should be appointed, the State's highest law enforcement officer spoke out.

> "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 lieutenantgovernor 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 t 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."

STATEMENT OF FACTS

On July 8, 2009, Governor David Paterson claimed the right to appoint a Lieutenant Governor of the State of New York. He said "The state constitution gives me the explicit power of appointment in cases of vacancies of office; there is nothing in the Constitution nor in the law that says that I cannot fill the vacant post of lieutenant governor." For the first time an elected Executive defined his constitutional authority as unlimited in the absence of a specific limitation. The Governor stakes his entire claim of authority upon what they claim is constitutional silence and a general catch all statute, which has only been used for inferior executive offices on the local level.

David Paterson became Governor on March 17, 2008 upon the resignation of Elliot Spitzer. He became governor by operation of law under the authority of the line of succession under Article IV Section 5 of the New York State Constitution. Thereafter for over 400 days, the State of New York already in financial crisis functioned without a Lieutenant Governor.

On June 8, 2009, the Senate by a majority of 32 members adopted a resolution that replaced Malcolm A. Smith as the Temporary President and majority Leader with Pedro Espada, Jr. as the Temporary President and Dean G. Skelos as the Majority Leader. A recalcitrant new minority refused to recognize the vote. Senator Smith sued Senator Espada demanding a declaratory judgment that he was solely entitled to the office. A court properly refused to hear such a matter on the constitutional text that committed the selection of officers of the legislature exclusively to that body. Little business was conducted as the factions in the

Senate fought for control of the body.

After little or no action by the Governor, he issued proclamation after proclamation convening Extraordinary Sessions. After a court order requiring each Senator to convene as a body, the Senate, both republican and democrats each day laid aside the Governor's matters sent up by proclamation.

Finally on July 8, 2008 after announcing a major statement but denying to release the substance of the statement, David Paterson took the extraordinary step of "appointing" a Lieutenant Governor. The "appointment" was made without notice, advice or consent and was made in secret. The announcement was made between 5:01 and 5:06 PM. Within hours, the Governor's re election committee for 2011 had robotic calls announcing the "appointment" to voters through out the state. The reelection campaign of David Paterson for 2010 had begun. The putative nominee announced that he would not run for the office. He contended that the "crisis " in Albany over the issue of who was the duly elected President Pro Tempore as well as the economic crisis of the state required such action.

The Governor acted to conceal the appointment and the fact that he was making an appointment. The Governor misdirected the press and the public suggesting that the office would be filled the next day. The Governor's Press Office announced that the swearing in of Mr. Ravitch would be on July 9, 2009 in the Red Room in the Capitol. The statement was an utter misrepresentation to the public and clearly intended to deceive anyone seeking to challenge the legality of the appointment. Rather than displaying the openness of such an appointment that was contended to be lawful, the acts of the governor were designed to create a barrier to any legal challenge by using false statements and misdirection so that anyone seeking to challenge the act would be met with a fait accompli.

To that end, on the evening of the statement, in secret at a Brooklyn steakhouse, Mr. Ravitch was sworn in. At that time he signed a document that was to be his oath of office. The document, the oath of office was not filed with the Secretary of State that night. It was "handed" to a First Deputy Secretary of State that night. Counsel for the defendants in open court represented that the document was filed in Albany that night. Defendant's Exhibit A states that the Deputy Secretary of State accepted the document for filing at 11:47 PM. That the office of the Secretary of State is not open for business and does not accept documents for filing at 11:47 PM from the general public or others is beyond question.

Further, acceptance for filing in the office of the Secretary of State's office is not actual filing. The stealth methodology suggests that the Governor and his advisors were aware that the act was of questionable validity. Thus, Mr. Ravitch's oath was not properly filed with the Office of the Secretary of State as required by law.[1] By the time that the oath of office was actually filed, the next business day, the temporary restraining order was still in place. It was not lifted by Justice Austin until in the afternoon of July 9, 2009.

At or about the time that the T.R.O. was lifted, Pedro Espada, Jr. rejoined his Democratic colleagues and withdrew any claim to the office of Temporary President. Thus, within twenty four hours after the "appointment", the crisis upon which defendants so heavily rely has dissipated. Malcolm A. Smith on the evening of July 9, 2009 was the sole occupant of the office of Temporary President of the Senate. Any crisis mandating the

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[1] Public Officers Law Section 10 requires that every officer shall take and file the oath of office required by law before he shall be entitled to enter upon the discharge of any of his official duties. There is no proof that the oath of office was filed.

appointment of a Lieutenant Governor to preside over the Senate was over. Despite the change in circumstances, the Governor has refused to withdraw the appointment.

POINT I

THE GOVERNOR HAS ACTED CONTARY TO THE STATE CONSTITUTION AND CONTRARY TO THE BASIC ORGANIC STRUCTURE OF GOVERNMENT IN THE STATE BY "APPOINTING" A LIEUTENANT GOVERNOR AND THUS VIOLATING THE ELECTIVE PRINICPLE EMBODIED THEREIN

The Constitution of the State is a grant of power to the branches of government directly from the People of the State by the process of ratification. The powers of the Governor are set out in Article IV. For the first time in the history of the state where there have been previous deaths and resignations of the lieutenant Governor even in the time of war, this Governor has claimed that his right to appoint a Lieutenant Governor has lurked within a section of the Public officers Law and no one ever noticed it. Under his assertion of power, every governor, every governor's counsel and everyone else has failed to find it. Indeed, for more than a year since he has ascended from the office of Lieutenant Governor upon the resignation of Elliot Spitzer he and his legal team had failed to find such authority.

Such a claim is belied by the wealth of material raising and dismissing the possibility even with regard to the Public Officers law. Every entity who has considered the matter in the last 100 years as not found the right to appoint a lieutenant governor in any provision. The exercise of a power for the first time may be called upon to justify itself. Howard v. Ill Cent RR, 207 U.S. 463, 522 (1908).

The Governor has tortured the very premises of a government that is created by a written constitution ratified by the people. In response to the action for declaratory judgment and a preliminary injunction, the defendants have sought and expended great effort and public resources to force the trial of this

matter to the County of Albany and moved to dismiss the action on a variety of grounds. Each and every one of their motions should fail and their plea for relief should be denied in all respects.

A. The Constitution Mandates That The Office Of Lieutenant Governor Is To Remain Empty Upon Death, Resignation, Or Removal Of The Occupant.

The Constitution provides for a line of succession. This explicit provision denies the Governor any power to appoint a Lieutenant Governor. Under Section 5 of Article IV of the New York Constitution, the Lieutenant Governor becomes the Governor upon a vacancy in that office, whether by death, removal or resignation. He serves for the remainder of the Governor's elected term. Article IV Section 6 in relevant portion reads as follows:

> In case of vacancy in the office of lieutenantgovernor alone, or if the lieutenant-governor shall be impeached, absent from the state or otherwise 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.

Article IV Section 6 also provides with regard to the situation where both the Governor and Lieutenant Governor are not able to serve, then the Temporary President of the Senate shall serve as Governor until the inability shall cease or a new Governor is elected. Id.

Public Officers Law, Section 43, enacted in 1909, only allows the governor to make an appointment of a person to "execute the duties" of a vacant office when no other provision of law provides for the filling of the vacancy. The Public Officers Law section relied upon by the defendants is not availing. It further demonstrates the wrongfulness of the Governor's action. It provides:

§ 43. Filling other vacancies. 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. But if the term of such officer shall expire with the calendar year in which the appointment shall be made, or if the office be appointive, the appointee shall hold for the residue of the term.

Nothing in the legislative history of the 1909 enactment of Section 43 prior to Ward v. Curran suggests that the Legislature wanted the provisions to be applicable when there was no sitting Lieutenant Governor. Even if such legislative intent could be found, the statute cannot trump the provisions of the Constitution which dictate what is to occur when there is no sitting Lieutenant Governor. The Constitution provides for both a line of succession and a limitation of power to the person exercising the functions of the Lieutenant Governor. The Constitution nowhere accords the power to the Governor to "appoint" a Lieutenant Governor.

The Governor has no statutory power and, therefore, no duty to appoint a Lieutenant Governor. If this were the case he has been in dereliction of that duty since he ascended to the position of Governor after the resignation of Elliot Spitzer. Likewise, all other governors who served without a Lieutenant Governor were in derogation of their statutory duty.

B. The Fact That Prior Governors Did Not Assert This Power Of Appointment Points Up That The Novel Interpretation Has Been Considered And Rejected.

The issue of filling the office of Lieutenant Governor did not begin and end with Governor Paterson's "appointment" of Richard Ravitch. Contrary to the impression sought to be left by

the defendants, the matter has repeatedly been the subject of study and scholarship. Not a single person or entity that has examined the issue in the entire time has found in Public Officers Law § 43 that which Paterson and counsel have found. To the extreme contrary, the possibility of gubernatorial appointment of the lieutenant governor has been uniformly rejected.

There is a certain frequency with which the State of New York is faced with the resignation of Governors seeking or successfully obtaining higher office. Governor Spitzer's resignation in 2008 was preceded in 1973 by Governor Rockefeller's resignation to assume the office of Vice President under Gerald Ford pursuant to appointment and confirmation standards under the XXV Amendment to the United States Constitution. Malcolm Wilson became the Governor and the office of Lieutenant Governor remained unfilled for the remainder of his term. Governor Lehman resigned in 1942 and was succeeded by his Lieutenant Governor. In each instance, NO vacancy was sought to be declared or filled. Other resignations did not prompt appointment of a lieutenant Governor.

Temporary President's of the Senate have filled the office of Lieutenant Governor without any move to create a right of appointment as many as fourteen times beginning in 1811 and as recently as the past two years. (See complaint paragraph 13 footnote 1, 14, 15). Fundamentally, the office sat empty and the Temporary President performed all the duties of lieutenant governor Article IV Sec 6. This is in distinction to the role of the temporary president when both executive officers are unavailable, in that case the temporary president shall act as governor.

The Office of the Lieutenant Governor was established in the Constitution of 1777 for the purpose of exercising the authority of the Governor if the Governor were impeached, died resigned, or was absent from the state. The Lieutenant Governors'

authority is no longer needed when another governor was chosen or the absent governor returned or the impeached governor was acquitted. The Constitution further provided that at every election of a governor, lieutenant governor be elected in the same manner as the Governor and continue in office. The provision was read to require a special election of Lieutenant Governor whenever there was a vacancy in the office. In 1811, DeWitt Clinton was elected Lieutenant Governor upon the death of Lieutenant Governor John Broome.

The Constitution of 1821 eliminated the provision for special election. Instead it provided that the senate shall choose a temporary president when the lieutenant governor shall not attend as president or shall act as governor. Article I Sec 3. The 1821 Constitution also provided that if during the vacancy in the office of the governor, the lieutenant governor shall be impeached, displaced, resign, die, or be absent from the state, the temporary president of the Senate shall act as Governor until the vacancy shall be filled or the disability cease. Article III Sec 7 1821 Constitution.

In 1846 the State held a Constitutional Convention. An attempt to abolish the office of lieutenant governor was defeated, 11 Lincoln 135. It continued the office and the provisions related to it, it added gubernatorial inability to serve as a basis for the lieutenant governor to serve and it provided in Article X sec 5 that the legislature shall provide for the filling of vacancies in office. Tested in 1847 when Lieutenant Governor 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. At the time the view was that the Temporary President of the Senate did not succeed to the office of Lieutenant Governor and thus an election was required under the 1846 Constitution. In 1894 the Constitution added the Speaker of

the Assembly to the line of succession after the Temporary President.

New York held another constitutional convention in 1915. Two proposals were made of significance and neither was adopted. The first provided that if a vacancy in the office of Lieutenant Governor occurred three months or more before a general election, the office would be filed at the general election. The second proposal provided that if the lieutenant governor becomes the governor then the temporary president becomes the lieutenant governor for the residue of the term. If the lieutenant governor be impeached or unable to perform his duties or be acting governor then the temporary president shall act as lieutenant governor during such impeachment or inability while the lieutenant governor acts as governor, Revised Record of 1915 Convention p. 3736. Twenty three years later, at the Constitutional Convention in1938, after unsuccessful attempts to abolish the office were made, the convention proposed that the president of the senate would be first in the line of succession and would act as governor until the new governor took office.

For the first time the hypothetical occurred. In the middle of the time of war, the Lieutenant Governor Thomas Wallace died. The governor, Thomas Dewey, was considering his run against former New York Governor Franklin Delano Roosevelt. The issue was not so much succession. It never occurred to Dewey or his advisors to "appoint" a lieutenant Governor. The issue was whether an election for just the post of lieutenant Governor was required to fill the vacancy. It was of particular concern because of the possibility of the election of Democratic Lieutenant Governor to serve with a Republican Governor. Had Dewey been elected president, then he would have to vacate his office to a member of the opposite party. The Attorney General of New York ruled that no election need be held.

The Secretary of the Democratic Party Albert Ward brought suit against the Secretary of State, Thomas J. Curran. The Courts ruled that an election was required to "A Vacancy in such an elective office should be filled at a general election as soon as possible. No other view is thoroughly consistent wit the Democratic process". Curran v. Ward, unreported. aff'd 266 A.D. 524, 44 N.Y.S.2d 240; aff'd 291 N.Y. 642, 50 N.E.2d 1023 (1943).

As a result of the election, the Temporary President of the Senate, a Republican, Joe R. Hanley was chosen as the new Lieutenant Governor. At this time the officers were separately selected. Each ran for the elective office. However, with the election of a Republican, the Constitution was changed to eliminate any special election to fill a vacancy in the office of Governor or Lieutenant Governor alone. The Constitution was changed to provide that the Governor and the Lieutenant Governor shall be chosen jointly, by the casting vote or each voter of a single vote applicable to both offices. The purpose was to eliminate the possibility of two members of different parties serving in the state's two highest offices.

In February of 1953, Governor Dewey in his annual message to the Legislature urged the joint election of Governor and Lieutenant Governor.

In the Constitutional Convention of 1967 various proposals were advanced including an appointment procedure. It was specifically rejected in favor of the procedure currently embodied in Article IV of the Constitution.

Scholarship, legislative documents, history and prior practices all demonstrate that the claim of the Governor to the power of appointment of the Lieutenant Governor is an unconstitutional seizure of power.

The Constitutional text destroys the defendant's argument that he has the authority to appoint an officer. At the

time of the absence of a lieutenant governor the temporary president "shall perform all the duties of the lieutenant Governor during such vacancy or inability. " It makes no provision for when the vacancy or the inability shall cease as it does in the prior paragraph i.e. "until a governor shall be elected".

The 1938 Constitutional Convention examined the succession issue and modified the Constitution so that if both offices were vacant then the temporary president or if none then the speaker of the assembly would become governor until the next election. In 1943 barely six months after inauguration, Lieutenant Governor Thomas Wallace died. Powers Officers Law § 43 in an earlier incarnation existed. Governor Dewey did not seek to appoint a successor.

In Ordered Liberty, A Constitutional History of New York, by Peter J. Galie, Fordham U Press 1996 at 271-2, Galie traced the history of the provision and what became Ward v. Curran. After Wallace died, a dispute arose as to whether the election of his successor was required at the next election. The Court of Appeals affirmed without comment the Appellate Division's decision in Ward v. Curran. "Reaction was immediate and negative, Governor Thomas Dewey criticized the decision as incompatible with the 1937 amendment which set the term of office for the four state wide elected officers at four years. ' With the administration less than one year old , with the nation at war, and there being no other major contested candidacies or state issues, it became necessary for the people of the state to choose a successor to their Lieutenant Governor' ".

Governor Dewey then recommended to the Legislature that the Constitution be amended to remove the ambiguity. He recommended in his annual message that the public officers law be amended to dispense with an election prior to the expiration of the term in the event of as vacancy in the office of Lieutenant

Governor between the quadrennial state wide election. "18 Message of Governor Thomas E. Dewey to the Legislature January 5 ,1944 pp17-18, at 18. Dewey did not claim and did not call for a right to appoint a Lieutenant Governor but recognized that the office is to remain vacant and the duties to be performed by the Temporary President of the Senate. The Constitutional Amendment prohibited any election for lieutenant governor being held in any event except at the time of the electing of a governor Article IV Sec 6. Clearly the amendment, rejecting Ward v. Curran contemplated that the temporary president would perform the duties of the lieutenant governor between the time of the vacancy and the next election of a governor.

In 1953, the Constitution was again amended to provide that the governor and the lieutenant governor were to be elected jointly. The amendment bracketed the two so that a vote for one gubernatorial candidate was automatically a vote for his running mate. Galie, supra. at 272.

The last modification to the succession provision occurred in 1963. It set the line of succession for the governor from the lieutenant governor to the temporary president of the Senate to the speaker. The legislature was authorized to set further devolutions but has not done so.

Repeated attempts to amend this provision have been unsuccessful.

1. The Law Revision Commission

The Law Revision Commission was created by Chapter 597 of the Laws of 1934 which enacted Article 4-A of the Legislative Law. The Commission is charged by statute with the following duties:

To examine the common law and statutes of the State and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms.

To receive and consider proposed changes in the law recommended by the American Law Institute, the commissioners for the promotion of uniformity of legislation in the United States, any bar association or other learned bodies.

To receive and consider suggestions from judges, justices, public officials, lawyers and the public generally as to defects and anachronisms in the law.

To recommend, from time to time, such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state, civil and criminal, into harmony with modern conditions.

Beginning in 1984, the Commission attempted to resolve the issue of what to do about a vacancy in the office of Lieutenant Governor, none of the lawmakers, law school deans or scholars and practitioners were able to finds a right of the governor to appoint a lieutenant governor in the statutes or the Constitution it be assures that they examined the statute relied upon by defendants since it was routinely included in the collection of material that they studied. The 1984 Commission report concluded that there was no need for a new system for filling the office of the Lieutenant Governor given that the Temporary President was adequate for the needs of the state, p 18-26.

The issue of succession to the office of Governor and the ensuing issues created by the absence of a Lieutenant Governor was the subject of Law Revision Commission work beginning in 1985 . In the first year it made no recommendation because more time was needed to study the issue and time was needed to consult with the legislative and executive members Beginning in 1986 and continuing in 1987 the Commission recommended that Section 6 of Article IV be amended to establish a procedure for filing a vacancy in the Office of Lieutenant Governor following the procedure of Article XXV of the federal constitution i.e. nomination with legislative confirmation.

The Commission recommended that a person be nominated by

the Governor and confirmed by concurrent resolutions of both houses of the legislature The proposal along with others passed the Assembly in 1986 and advanced to third reading in the Senate. The bill stalled there where it was amended to require only Senate confirmation. In 1987 the Commission resubmitted the proposals but again the bills stalled, see, Recommendation of the Law Revision Commission to the 1987 Legislature, published in 4 (July 1987) McKinney's Session Law News of New York, p. A-250.

The Law Revision Commission has recognized that the procedure calling for an appointed Lieutenant Governor would violate the elective principle. It is interesting to note that the Law Revision Commission singled out as demonstrative of the appointive principal offices other than that of the lieutenant Governor. The commission stated that if the vacancy is to be filled by a nominee of the governor then the referable methods is to involve both houses of the legislature and to require each house to vote by concurrent resolution.

The Law Revision Commission also recognized that if the governor were to have a nominating power it requires a constitutional amendment. Equally of note, the Law Revision Commission examined Section 43 of the Public Officers Law, relied upon by the defendants, and rejected any contention that the governor had appointive power for other than Office of Lieutenant Governor, see, report of the Law Revision Commission p. 115. To that end the Senate and Assembly introduced Bill Nos.
8114 and 10552 respectively for the session 1987- 88 for the purpose of filing a vacancy in the office of lieutenant governor See Leg. Doc. (1988) No 65 B.

In 1989 and 1990 The Law Revision Commission made recommendations concerning inability of the Governor to serve. It proposed a constitutional amendment that left the line of succession with the Temporary President as undertaking the duties

of the lieutenant Governor intact.

In a variety of years starting in 1986 and again in1989,1990, 1993, the Assembly approved a concurrent resolution providing for a succession amendment that permitted naming of someone to the vacancy in the office of Lieutenant Governor but required advise and consent of both houses. The Senate balked on the basis that they believed that only the Senate should have the right of advise and consent.

In no cases did anyone assert that the power of appointment existed on its own without input from the Legislature.

OTHER STATES

The line of succession to the Governor includes the Lieutenant Governor in six states. In four states, Colorado, Maryland, South Dakota and Wisconsin, if a vacancy exists in the office of the lieutenant Governor the incumbent Governor may appoint a new Lieutenant Governor who must be confirmed by the legislature. In two states, Indiana and Rhode Island, a new Lieutenant Governor is elected by the state legislature to fill the vacancy. By statute, in Alaska and California, the incumbent governor appoints a new Lieutenant Governor who is confirmed by the Legislature. In Texas the Legislature selects the new Lieutenant Governor.

No state appears to use the method selected by Defendant since it obviously violates the elective principle that is the basis of government in our nation.

C. Read In Context, Ward v. Curran Provides No Legitimate Basis For The Actions Of The Governor And Is Wholly Misplaced As Authority When Properly Read And Understood.

The Constitution of the State of New York historically has been read to uphold the elective principle. That principle provides that offices are to be filled when vacant by election in

preference to appointment even by confirmation. Acquiescence in or silence under unauthorized power can never give legality to its exercise under representative form of government n a democratic model that relies upon the people exercising their right of franchise.

Under the form of government embodied in the State Constitution, vacancies in elective office should be filled by an elected officer. People ex rel Weller v. Townsend, 102 N.Y. 430, 439 (1886); Matter of Wing v. Ryan, 225 APP Div 163 aff'd 278 N.Y. 710 (1938) and Ward v. Curran, 266 App Div 524 aff'd 291 N.Y. 642 (1943) Power to fill vacancies by appointment is an emergency power authorized because of the necessity for providing uninterrupted governmental service. Mtr of Mitchell v. Boyle, 219 N.Y. 242 (1916).

However, where there is no interrupted governmental service, by virtue of the constitutional provision as to succession Article IV sec ____, then there is no emergency at law and no basis to make an appointment, In point of fact the Constitutional provisions for succession, make it clear that there is no vacancy. The acts of the Governor are contrary to the state constitution and to the law.

Ward v. Curran, supra, mandates that the vacancy in the office of the Lieutenant Governor can at the time of the case be filled only by an election. Since that time the Constitution was amended to specifically overrule. Ward v. Curran, supra. As a consequence despite the claim of its authority by the defendants it is of no significance.

Ward, supra, to the extent that it survives stands solely for the proposition that in order to fill the office of the Lieutenant Governor, a state wide election has to be held under Public Officers Law § 42 and what is now Art 13 sec 3 and was then sec 8. It has no other presidential value. Defendants have seized

upon certain dicta in the case upon which to build their argument which is not borne out by the text of the case and the matters raised by the briefs. In so doing they ignore the very ruling that states that a single Senator cannot hold state wide office as Lieutenant Governor because he has only been elected by those voters in his District. Ward v. Curran, supra, would never tolerate the ascendance of state wide office to a position that is not appointive by appointment. Unlike a Senator, a private citizen such as Richard Ravitch is wholly unelected. Thus Ward v. Curran would reject appointment of a lieutenant Governor by its own terms. Defendant's reliance upon it stands only as a monument to the lengths a case can be contorted.

While the Court of Appeals affirmed with no opinion the Appellate Division decision majority does support the legal argument for filling the office – by election. The Appellate Division, in the majority opinion, made it clear that the Constitution embodies a preference for filling of state wide positions by state wide election. It made no mention of and did not consider the issue of appointment as a viable answer to the vacancy in the office of Lieutenant Governor. The majority in the Appellate Division wrote that it is a fundamental principle that offices should be filled by election as soon as possible. The significance is that the court ruled that the state constitution requires an elective principle for the determination of vacancies. The Court rejected *sub silentio* any right to make appointment to the office.

The defendants claim that now Public Officer Law 43 governs the matter is belied by the fact that in the briefs to the courts, the Attorney General raised the issue of the prior rendition of POL 43 (i.e POL 42) with regard to the issue of appointment. In the briefs the Attorney General specifically raised the issue and stated that no Governor had the right under

POL to appoint a Lieutenant Governor.

Thus, the statute sought to be used as the entirely of the authority to justify the action has been considered by the courts. No court has even suggested that there is a power to appoint the second highest officer in the state without advice or consent or confirmation by the Legislature or input from the electorate.

In the aftermath of Ward v. Curran, supra, and in light of the historical experience that the office has remained vacant when there is no one elected to the position, this Governor's unconstitutional seizure of power is demonstrated by the historical record to be unprecedented, and more significantly rejected by a long line of Governors, Governor's counsels, scholars and others.

D. Public Officers Law 43 Does Not Apply Because The Office Of The Lieutenant Governor Is Not An Elective Office.

The construction of Public Officers Law § 43 by the defendants is one which is not to be favored, given the consequences that ensue when an unelected Governor selects an unelected Lieutenant Governor, without advice or consent of the Senate. The "appointment" of a Lieutenant Governor is a contingency which history demonstrates was not contemplated by the framers of the Constitution or the drafters of the section of law. Contrary to the defendant's claim that the Constitution is not specific and therefore they may resort to the Public Officers Law § 43 interpretation, against the text of non specificity sits the constitutional succession provision that devolves the powers but not the office of Lieutenant Governor upon the Temporary President of the Senate, currently Malcolm A. Smith.

Beginning with the Constitutional amendment in 1945, as sought by Governor Dewey in the aftermath of Ward v. Curran, supra, the office of the Lieutenant Governor has no independent

elective status. Article IV section 6 provides that "No election of a lieutenant governor shall be had in any event except at the time the electing of a governor. Where the office cannot be separately elected, in this unique context, the Lieutenant Governor is not actually elected but having been chosen by the Governor as his running mate, voters are faced with a take it or leave it proposition. This is not an elective office. But rather it is a hybrid phenomenon designed to prevent opposition parties from holding the two highest positions in the government.

As is the case with every other appointment under Public Officers Law § 43, the specific office to be filled due to the vacancy was the result of the direct election of the prior office holder. In the case at bar, the accidental governor has now appointed an unelected person to take office. Framers of POL 43 did not envision that the provision for the least of offices would be applicable to the second highest office in the state.

Whatever the clever lawyers for this Governor have found has managed to eluded every other lawyer for every other Governor faced with a similar loss of the lieutenant Governor, the statutory provision cannot prevail against the command of the Constitution that places the powers in the hands of the Temporary President, see e. g. Matter of Mitchell v. Boyle, 219 N.Y. 242, 249 as cited in Roher v. Dinkins, 32 N.Y.2d 180.

Defendants seek to read the provisions of the Public Officers Law that exempt the position of Governor and Lieutenant Governor from the provisions of succession of office or the need for a special election, as affirmative proof that the catch all of Public Officer 43 applies uniquely to the office of the Lieutenant Governor. In the face of a long line of historical precedent to the contrary, the defendants insist that the combined readings of Section 40, 41, 42, and 43 dictate the appointing authority to a Governor to select his own Lieutenant Governor.

The Office of Governor and Lieutenant governor are excepted by statute because the Constitution and only the Constitution provides for the line of succession ad the devolution of power. To that end Public Officers Law § 43 does not and cannot trump the Constitution. Unlike any of the other offices that are covered by Public Officers Law §43, the office of Governor and Lieutenant Governor are dealt with exclusively by the Constitutional Provision. With the constitution providing that the duties of the lieutenant Governor fall to the Temporary President of the Senate, then the office is not vacant in that there is representation and continuity of government by the terms of the constitutional text. Because the duties of the office are never interrupted and are maintained by the Temporary President then there cannot be a vacancy as is meant by law. It is only where the office's work is not continuous and is otherwise broken.

Gubernatorial appointment to fill vacancies applies to certain officers specially provided for by statute or capable of inclusion in the catch all of 43 Public Officers Law. This statute enacted in 1909, only allows the governor to make an appointment of a person to "execute the duties" of a vacant office when there is no provision of law elsewhere that provides for the filling of the vacancy. Nothing in the legislative history of Section 43 suggests that the Legislature wanted its provisions to be applicable to the vacant office of lieutenant governor. And, of course, even if such legislative intent could be found, the statute cannot trump the provisions of the Constitution. The Governor has no statutory duty to appoint a Lieutenant Governor. If such were the case he has been in dereliction of that duty since he ascended to the position of Governor after the resignation of Elliot Spitzer and likewise other governors who served without a Lieutenant Governor were likewise in derogation o f their statutory duty.

The authors of the Constitution and the people who ratified it did not want the right of appointment to go to a Governor, who could in effect appoint anyone and resign leaving them an unelected governor. It is contrary to the organization of government to create a means by which office can be passed from hand to hand without election. The key holding in Ward v. Curran is that the Constitution requires elections in preference to appointment of vacancy.

Article IV section 6 is therefore the exclusive method of filling the office of Lieutenant Governor. By the terms of the constitution, the temporary president succeeds to the powers of the office by operation of law. Amendments to the Constitution since Ward v. Curran indicate no change in this practice and cast down on the vitality of the dicta relied upon by the defendants. The Constitution provides for a line of succession, thus denying the Governor any explicit power to appoint a Lieutenant Governor.

The text of the Constitution is unqualified preemptory language and it is not accompanied by or surrounded by words supportive of a permissive or contrary interpretation, see Mtr of State of New York, 207 N.Y. 582.

POINT II

DEAN G. SKELOS HAS STANDING TO BRING THE ACTION

Defendants have suggested without moving for relief that Senator Skelos and Senator Espada are without standing even though they are members of the State Senate, Silver v. Pataki, 96 N.Y.2d 532 (2001). One of the few duties of the Lieutenant Governor under the Constitution is to preside over the Senate, New York State Constitution, Article IV Section 7.

Dean G. Skelos as Minority Leader has standing based upon the fact that he has the right as a Senator not to be presided over by an interloper. Just as no person can demand to

fill an office that is not vacant, the Governor cannot impose upon a Senator a presiding officer that is illegally "appointed".

Arguably, under Silver, supra, each Senator has standing only as an individual member and not as Minority Leader of the house. As the leader of the minority it is Senator Skelos or his designate that interacts most directly with the presiding officer of the Senate. As a member, Senator Skelos must either recognize the person improperly put at the rostrum by an unconstitutional act of the Governor or forgo the representation of his constituents and his Conference. This applies to Senator Espada as Majority Leader as well.

Senator Skelos has a direct interest in who presides over the house of which he is a member and representative for 30 members of the house. Skelos has a direct interest as effective representative of his constituency and his Conference in the discharge of his responsibilities. He has an immediate stake in the outcome of the case in that he has a right not to be subject to the rulings or acts of a presiding officer who is not legally or constitutionally entitled to that role, or to the exercise of power over him as a sitting Senator. See Coleman v. Miller, 307 U.S. 433. In Coleman, supra, the Supreme Court held that the Kansas state legislators had standing to challenge the deciding vote of the lieutenant governor which amounted to nullification of their individual votes. In the case at bar Governor Paterson stated that he was appointing Ravitch for the purpose of breaking tie votes.

Should there be a tie vote, Senator Skelos faces the real possibility that the appointment of the putative Lieutenant Governor is designed to nullify his vote. At the time of the "appointment" Governor Paterson stated that it was in part to vote to break ties in the Senate. As a member and as Minority Leader, acting on behalf of 29 other colleagues he has standing

to bring the instant action.

Senator Skelos has a sufficiently cognizable stake in the outcome to as to cast the dispute in a form traditionally capable of judicial resolution. As a Member of the Senate, plaintiff is entrusted by the Constitution to exercise legislative power. N.Y. Const, art III, §§ 1, 2 Plaintiff has the broad power and functional responsibility to consider and vote on legislation. That responsibility necessarily includes continuing concern for protecting the integrity of one's votes and implies the power to challenge in court the effectiveness of a vote that may be or is sought by the Governor to be unconstitutionally nullified. Such an appointment and the purpose therein exercises a chilling effect on a member aware that the existence of a tie vote on any issue could bring out the unelected and improperly designated putative Lieutenant Governor to nullify Senator Skelos' and every member of his conference's vote. Senator Skelos standing is enhanced by the fact that private persons have a far lesser stake in the outcome of disputes between and by the executive and legislative branches of government.

While Senator Espada now occupies the position of Majority Leader, he, like Senator Skelos shares the right to protect the effectiveness of his vote and avoid the negation of any vote by a tie breaker action of an interloper.

POINT III

THE MOTON TO CHANGE VENUE SHOULD BE REJECTED BECAUSE VENUE IS PROPER IN NASSAU COUNTY

Defendants in their moving papers urge dismissal on the basis that this declaratory judgment action has been commenced in Nassau County, see p. 7 Defendants' Memorandum of Law. In order to reach this conclusion Defendants ignore the applicable case law and attempt to miscast this declaratory judgment action as a CPLR Article 78 Proceeding. The defendants rely upon a reading of CPLR

6311 (1) and an attempt to claim that an action for a declaratory judgment is the same as an Article 78 proceeding. In both respects, defendants' arguments fail. This Court should determine that venue is proper in Nassau County.

The central issues in the matter before this Court are set forth in the Complaint, which asserts that "[t]he Governor may not fill the office of Lieutenant Governor", Complaint, par. 8, and, "The Governor is precluded by the Constitution, Article IV, § 6 from filling a vacancy in the office, as the Constitution clearly provides that the Temporary President of the Senate becomes the acting Lieutenant Governor by operation of law. Therefore, it is not a situation as described in Public Officer's Law § 43 "with no provision of law for filling the same," except rather than a statutory framework, there is a Constitutional framework", Complaint, par. 18.

A. Venue Is Based On The Residence Of The Plaintiff Dean G. Skelos

It is undisputed that Senator Dean G. Skelos represents a major portion of the County of Nassau, the 9th Senate District. He maintains his Senate Office in Rockville Centre. Senator Skelos, as is required by the Constitution, is a resident of Nassau County in the 9th Senate District. Pursuant to CPLR 503 he is entitled to set venue in the County of his residence.

Under these facts placement of venue in Nassau County is entirely proper under the provisions of CPLR 503 which states: "(a) Generally. Except where otherwise prescribed by law, the place of trial shall be in the county in which one of the parties resided when it was commenced; or, if none of the parties then resided in the state, in any county designated by the plaintiff. A party resident in more than one county shall be deemed a

resident of each such county." CPLR 503(a). [2]

Common sense dictates that the sections of the CPLR cited by the defendants are not applicable. For venue to be transferred, this court has to resolve the threshold issue of whether or not the governor and the other defendants acted pursuant to a statutory duty. Where the merits are so interwoven with the claims of venue, the matter should stay right where it is given that ordinary venue rules apply to the instant action. It must be remembered that a lieutenant governor was purportedly appointed for the entire state – including Nassau County.

The applicable law is clear, venue properly lies in the county in which an elected legislator, suing in that capacity for declaratory judgment on Constitutional grounds, resides. In Silver v. Pataki, 179 Misc. 2d 315 (Sup. Ct., N.Y. Co., 1999), rev., 274 A.D.2d 57 (1st Dept., 2000); modified, 96 N.Y.2d 532 (2001), the Speaker of the Assembly in his capacity as a member of the Assembly, and as Speaker, brought a challenge to the Governor's use of line item vetoes seeking a declaratory judgment of unconstitutionality. The Supreme Court held, "Finally, defendant fails to set forth a valid basis to transfer venue to Albany County. It is undisputed that the action was appropriately commenced in New York County as the County in which plaintiff resides. Furthermore, at oral argument, the parties agreed that the request for a change of venue did not involve the convenience of any witnesses …", continuing on to note that "…there is no specific CPLR venue provision applicable to the Governor…". Silver, supra., at p. 322. The Supreme Court in Silver, supra., also distinguished Matter of Posner v Rockefeller, 33 A.D.2d 683

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[2] It must be noted that there is no claim made by the Defendants that there would be any inconvenience to any necessary witnesses or problems with producing any of the relevant documents, an accepted basis for change of venue.

(1st Dept., 1969), aff'd, 25 N.Y.2d 720 (1969), observing that "… the action against the Governor and others was transferred to Albany County only because the State Comptroller was a party defendant and any action against that official is required, under CPLR 506 (b) (2), to be commenced in that County.", Posner, supra. Determination on venue was not altered on appeal.

The relevant facts are "on all fours" with the relevant facts in Silver v. Pataki, supra, Senator Skelos suing in his capacity as a legislator, has brought a constitutional challenge to an act of the Governor in the county in which he – and all the citizens he represents – resides. There is no CPLR provision compelling the action to be brought in Albany County. There is no claim of witness inconvenience. Accordingly, there is no reason to change venue in this action.

B. Plaintiffs Do Not Seek To Restrain The Governor In Exercise Of Statutory Duty But To Enjoin an Unconstitutional And Illegal Act, Thus Venue Rule Of CPLR 6311 (1) Is Inapplicable.

Defendants claim that plaintiffs seek to enjoin the Governor in the performance of "executive function" which they equated to be the performance of a statutory duty. Defendants' Memorandum of Law, p. 7. Misconceiving the plaintiff's complaint, the issues and the case at bar, they assert that venue can only be in Albany County, citing the court to CPLR 6311. Defendants are wrong in that they misread the statute albeit to their benefit.

CPLR 6311 (1) is inapplicable to an action for declaratory judgment and a preliminary injunction when it seeks relief based upon the Governor's illegal and unconstitutional action. CPLR 6311 (1) provides in effect that a preliminary injunction may not be obtained outside the county of Albany against the Governor when the Governor has acted pursuant to a statutory duty. It reads in pertinent part:

> A preliminary injunction to restrain a public

> officer, board or municipal corporation of the state **from performing a statutory duty** may be granted only by the supreme court at a term in the department in which the officer or board is located or in which the duty is required to be performed. (Emphasis added)

CPLR 6311 (1) requires that the injunction be directed at preventing a statutory duty. Although the defendants claim that they are acting under statute, it is the gravamen of the plaintiffs' complaint that the Governor has acted outside of his constitutional authority in making an appointment where no office is vacant and the Constitution sets out how the responsibilities of the Lieutenant governor are to be discharged when there is no one in that office.

Defendants claim the issue is that of "Executive Function" to be enjoined. The statute however refers not to function but to the performance of a statutory duty. The Governor has no statutory duty to appoint a Lieutenant Governor. Indeed, the evidence is to the contrary. If he did, for over four hundred days, under his interpretation he was in dereliction of this duty.

Where the actions complained of are in clear violation of the Constitution and find no support in law, the plaintiffs seek judicial review not of a lawful discretionary determination, but whether or not the Governor is empowered to act at all to "appoint " a Lieutenant Governor. If he is not so empowered then he has violated the Constitution and no statutory duty is implicated.

Should the Court conclude, on the merits, that there is in duty imposed upon the Governor to engage in the particular unconstitutional acts complained of herein, then there is no possibility of the Plaintiffs transgressing upon the terms of CPLR 6311.

C. CPLR 506 (b) Provides No Basis For Change Of Venue.

Defendants similarly assert that the venue provisions mandate that the matter must be transferred to Albany County on the basis of CPLR 506 (b) CPLR 506 (b) provides in pertinent part as follows:

> (b) Proceeding against body or officer. A proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located

Defendants are incorrect in two respects. First the action is not an action against a body or an officer as the statute is entitled. The venue provision cited relates solely to a CPLR Article 78 proceeding. Plaintiffs brought an action for a declaratory judgment and not an Article 78 proceeding. Thus the venue statute relied upon by defendants is not applicable to the instant action. Had the plaintiffs sought Article 78 relief exclusively then they would have set venue in Albany County.

So clear is the limitation of CPLR 506 (b) to Article 78 proceedings that CPLR 7804(b), the venue statute for Article 78 proceedings refers directly back to CPLR 506 (b) :

> 7804. Procedure. (a) Special proceeding. A proceeding under this article is a special proceeding.
> (b) Where proceeding brought. A proceeding under this article shall be
> brought in the supreme court in the county specified in subdivision (b)
> of section 506 except as that subdivision otherwise provides

Plaintiffs did not bring a special proceeding. They brought an action for a declaratory judgment. CPLR 103 (b). CPLR 103 (b) provides that all civil judicial proceedings shall be

prosecuted in the form of an action, except where prosecution in the form of a special proceeding is authorized. In the instant action, the plaintiffs seek a declaratory judgment of unconstitutional action by the governor and other defendants.

Special proceedings have a special venue provision. They should not be confused with plenary actions such as an action for a declaratory judgment. Only then must a petitioner as opposed to a plaintiff must observe the venue rule cited by the defendants. An action against a body or an officer is a term of art, specific to acts seeking relief under Article 78 Only when the matter brought is a special proceeding under Article 78, does CPLR 506 (b) apply. As was the case regarding a venue claim under CPLR 6311, the actions of the defendants are not the performance of a "statutory duty". Thus CPLR 506 (b) is inapplicable to the case at bar.

D. Venue Is Not Jurisdictional and Thus The Remedy Is Transfer, Not Dismissal.

Even if the Court should adopt the Defendants' theory, here is no basis for dismissal of this proceeding as asserted by Defendants. When an action is improperly venued in the wrong Supreme Court, the remedy is transfer under CPLR 511 and not dismissal. See McKinney's Practice Commentary Main Volume C 501:1. Because the defendant's motion for change of venue does not involve subject matter jurisdiction, the matter cannot be dismissed. See Matter of Nolan v. Lungen, 61 NY 2d 788 (1984).

It is therefore respectfully requested that this Court deny the motion for dismissal or change of venue.

POINT IV

THE MOOTNESS DOCTRINE IS NOT APPLICABLE TO THE DECLARATORY JUDGMENT ACTION

The matter is not moot. Defendant Paterson claims that

he appointed Defendant Ravitch the Lieutenant Governor. Both claim that the action is valid. As long as they pursue such claims the matter is a live controversy requiring a court decision. Indeed even Paterson himself in public remarks has acknowledged that the matter will likely be resolved in court.

The matter before the Court is not moot. The complaint seeking a declaratory judgment and injunction seeks to prohibit the Governor and his putative appointee from assuming the office and powers attendant to that office. Such a cause of action is not moot. Mootness occurs when the passage of time or change in circumstances occur. But where the rights of the parties will be directly affected by the determination of the appeal and the interest of the parties is an immediate consequence of the judgment, the matter is not moot. A mere change in circumstances as occurred in the Senate does not moot the action.

While it is claimed that the oath of office was signed there is no proof that the oath was ever signed. But assuming that the defendant's can show that the oath was signed and properly filed on July 9, 2009, the matter is still not moot. The Governor's act is outside the powers conferred on him by the Constitution. When an executive officer acts outside or in derogation of his powers under the Constitution, the matter is not only justiciable but remains so until it is resolved.

Assuming, arguendo, that there is a mootness issue raised by the change in circumstances. The three general exceptions to mootness dictate that the controversy is a live dispute requiring the court's intervention. Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714-715 (1980) lists three common factors: (1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel

issues. All three exceptions apply to the matter at bar.

First if the appointment were allowed to stand then the Governor would be in the position to assert that any silence that can be found in the organic document of the state can be filled by his assertion of power without a specific grant of such power by the people. Under the posture demanded by the defendants, the matter is not subject to review on the principle that the appointment ends all litigation. In reality because of the fact that this matter is one of substantial and novel issues and is a singularly important question that has not been previously passed upon, it is not subject to the dismissal under the mootness doctrine.

POINT V

***QUO WARRANTO* IS NOT THE EXCLUSDIVE REMEDYWHEN THE MATTER IS SOLELY ONE OF LAW**

Contrary to the defendants' contention, under New York law, *Quo Warranto* is not the exclusive remedy to try Mr. Ravitch's title to his office as defendants claim. Judicial review in this case is limited to whether the State Constitution or the Legislature has empowered the governor to act to fill the role of Lieutenant Governor, Mtr of Johnson v. Pataki, 91 N.Y. 2d 214, 223 (1997). Thus there would be no questions of fact but only those of law.

Quo Warranto is the historic and traditional remedy to try title to a public office in this state. People ex rel. McLaughlin v. Board of Police Comrs. of City of Yonkers, 174 N.Y. 450; Greene v. Knox, 175 N.Y. 432, 437-438; Matter of Ahern v Board of Supervisors of County of Suffolk, 7 A.D.2d 538, 543544, affd 6 N.Y.2d 376; Matter of Wier v. Board of Trustees of Vil. Of Irvington, 259 App. Div. 839, 840; Brush v. City of Mount Vernon, 20 N.Y.S.2d 455, 456-457, aff'd 260 App. Div. 1048;.

This remedy is now provided by statute in the Executive Law which permits the Attorney-General to bring a direct action either upon his own information or upon the complaint of a private person against one who unlawfully holds a public office within the State. The statute also permits him, in his discretion, to set forth the name of the person rightfully entitled to the office, including the facts supporting that right (Executive Law, § 63-b, subd 1).

Quo Warranto is not the exclusive remedy. There is a long-recognized exception which permits title to a public office to be tested by mandamus in an article 78 proceeding where the issue is solely one of law and questions of fact need not be determined (Matter of Dykeman v. Symonds, 54 A.D.2d 159, 161; Matter of Cullum v. O'Mara, 43 A.D.2d 140, 145; Matter of Felice v. Swezey, 278 App. Div. 958; Matter of Sylvester v. Mescall, 277 App. Div. 961, 962; Matter of Schlobohm v. Municipal Housing Auth. for City of Yonkers, 270 App. Div. 1022, affd 297 N.Y. 911; Mtr of Dekdebrun v. Hardt, 68 A.D.2d 241, 246-7 (4th Dept. 1979) (Cardemone, J. dissenting).

In LaPolla v. De Salvatore, 112 A.D.2d 6 (4th Dept 1985) the court wrote title to public office may be tried either through a *quo warranto* proceeding or, where questions of fact need not be determined, in an Article 78 proceeding in the nature of mandamus. Matter of Dykeman v. Symonds, 54 A.D.2d 159; *see also,* Matter of City of Mount Vernon v. State of New York Bd. of Equalization & Assessment, 92 A.D.2d 985, *lv denied* 59 N.Y.2d 606). Plaintiffs seek under the defendant's interpretation the determination of an issue of law which could properly be raised in an article 78 proceeding. jurisdiction to determine title to public office belongs exclusively to the courts, and is exercised either through a *quo warranto*

proceeding or an article 78 proceeding, according to the circumstances of the case. Further to the point there is no basis for there to be a trial as to title to the office between Senator Smith and Mr. Ravitch regarding who may hold the office as between two contending parties. The issue is solely the legal question as to whether executive power goes so far as to permit appointment without a vote of the legislature of a state wide officer..

In the instant case the plaintiffs have brought a declaratory judgment. The LaPolla Court stated that such is enough so long as the declaratory judgment action is limited to resolving a question of law, it is an appropriate alternative to an article 78 proceeding, and does not thwart the policies underlying the restriction of the remedy of *quo warranto* to actions brought by the Attorney-General.

The instant action for a declaratory judgment and preliminary injunction application do not thwart policies underlying the restriction of the remedy of *quo warranto* to the Attorney General.

Should the defendants prevail in their quest for procedural delay in the change of venue, then the matter should be converted to an Article 78 action as an alternative means of proceeding so as not to require or relegate Senator Skelos and Senator Espada to seeking *quo warranto* action from the Attorney General. CPLR 1103 permits conversion of an action to an Article 78 proceeding if it is properly brought but mislabeled.

POINT VI

THE MOTION TO DISMISS SHOULD BE DENIED IN ALL RESPECTS

In light of the foregoing the motion to dismiss should be denied in all respects. Plaintiffs have stated a cause of action for declaratory judgment relief and have made a showing sufficient for the entering of a preliminary injunction against the defendants.

The plaintiffs are entitled to a preliminary injunction. The plaintiffs realize that preliminary injunctive relief is a drastic remedy, which will be granted only if it is established that there is a clear right to the relief under the law and facts County of Orange v. Lockey, 111 A.D.2d 896 (2d Dept.). The purpose of the preliminary injunction ids to preserve the status quo pending trial of the matter. See. Schlosser v. United Presbyt. Home at Syosett, 56 A.D.2d 615 (2d Dept.). To obtain a preliminary injunction the movant must demonstrate first a likelihood of success on the merits; second irreparable injury absent the granting of the injunction; and third a balancing of the equities which favors the issuance of injunctive relief, see Montauk Star Is. Reality Group v. Deep Sea Yacht and Racquet Club, 111 A.D.2d 909. When the denial of final injunctive relief would render the final judgment ineffectual, the degree of proof required to establish the element of likelihood of success on the merits should be reduced, see, Schlosser, supra.

Plaintiffs have demonstrated irreparable harm occasioned by an unconstitutional and illegal officer presiding over the Senate of which they are members. As demonstrated in Point I, Plaintiffs can demonstrate a likelihood of success on the merits With regard to the balancing of the equities, the fact that there is now a Temporary President in place and no contest coupled with the fact that the Senate passed over one hundred bills on the night of July 9, 2009 without Richard Ravitch presiding, the balance of equities weigh against the defendants.

For all the allegations of the harm to the people of this state claimed by the defendants on the morning of July 9th it was all resolved by the re defection of Pedro Espada, Jr. to the democrats and the passage of 100s of bills Whatever equities

asserted by the defendants in their papers have been washed away by events leaving nothing more than the governor's unconstitutional seizure of power.

CONCLUSION

Defendant's motions for various relief including change of venue and dismissal should in all respects be denied.

New York, New York Dated:
July 13, 2009

Respectfully submitted,

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DAVID L. LEWIS, ESQUIRE Attorney for Plaintiff Skelos 225 Broadway, Suite 3300 New York, New York 10007
(212) 285-2290

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JOHN CIAMPOLI, ESQUIRE Attorney for Plaintiff, Espada 677 Broadway, Suite 202 Albany, New York 12210
(518) 527-1217