

NEW YORK
CITY BAR

COMMITTEE ON ELECTION LAW

JERRY H. GOLDFEDER
CHAIR
120 BROADWAY
FLOOR 25
NEW YORK, NY 10271
Phone: (212) 416-8492
Fax: (212) 416-8068
jerry.goldfeder@oag.state.ny.us

July 1, 2008

JENNIFER E. SPAIN
SECRETARY
919 THIRD AVENUE
FLOOR 30
NEW YORK, NY 10022
Phone: (212) 909-6602
Fax: (212) 521-7702
jespain@debevoise.com

Charles O'Byrne
Secretary to the Governor
The Executive Chamber
The State Capitol
Albany, New York 12224

Dear Mr. O'Byrne:

The Committee on Election Law of the Association of the Bar of the City of New York has reflected upon the recent extraordinary vacancies in the offices of New York State Comptroller and New York State Governor, and urges you to consider the following reforms as subjects for proposed amendments to the New York State Constitution and the Public Officers Law. I write on behalf of the Committee.¹

Background

On the first of January, 2007, Comptroller Alan Hevesi, who had been re-elected the previous November to a new four-year term to commence that day, offered his resignation rather than assume office. As a result, on February 7, 2007, pursuant to Article V, §1 of the New York State Constitution and §41 of the Public Officers Law, the Legislature selected then-Assemblyman Thomas DiNapoli to fill out the remainder of Mr. Hevesi's term.²

¹ The within letter of course reflects the views of the members *qua* members, and does not reflect our views as practicing lawyers, members of the judiciary or as government employees. The letter was drafted by Subcommittee members Cynthia Kouril, Jerry H. Goldfeder and Michael Stallman. After revision, it was adopted unanimously at our meeting on April 29, 2008.

² The timing of the Hevesi "resignation" itself raised complicating questions implicating § 43 of the Public Officers Law, which requires the Governor to fill the vacancy. Since Hevesi pled guilty to a felony on December 22, 2006, his status automatically created a vacancy in the office of the Comptroller for the remainder of the term ending December 31, 2006. N.Y. Pub. Officers Law § 30. As such, his resignation that day was not necessary. It appears that no one considered filling the Comptroller's position for the remaining nine days of the term. On January 1, 2007, Hevesi's felony status continued to bar him from assuming office, and, again, no resignation was required. Nevertheless, Hevesi "resigned" from his new term on January 1st. In that the new Legislature had not yet been gavelled into session, then-Governor Spitzer could have appointed the new Comptroller. There is no evidence that the Executive Chamber considered this, or even interpreted the law as such. Accordingly, after the new Legislature was sworn in, it began the process to fill the vacancy.

On March 12, 2008, Governor Spitzer resigned, effective the following Monday, March 17, 2008. On that same day, of course, pursuant to Article IV, § 5 of the New York State Constitution, Lt. Governor David A. Paterson was sworn in as Governor to fill the remainder of the term. The office of Lt. Governor became vacant, and, as you know, New York has no constitutional or statutory provision to fill a vacancy in that office. The New York State Constitution does, however, permit the “duties of the Lt. Governor” to be performed by the temporary president of the State Senate. N.Y.Const. art. IV, § 6.

Each of these circumstances underscored problems with our existing constitutional and statutory framework, which we believe ought to be corrected. We offer our suggestions.

The Problems

When there is a vacancy in the offices of Governor, Lt. Governor, Attorney General or Comptroller, there is no special election to fill the vacancy. Attorney General and Comptroller vacancies are filled either by gubernatorial appointment or by the Legislature. The sitting Lt. Governor, who was the gubernatorial candidate’s running mate and elected together with the Governor,³ fills a gubernatorial vacancy.⁴ No special election for a new Governor would be held in this circumstance. Thus, a new Attorney General, Comptroller or Governor may serve for several months or as much as a full four year term without the voters’ direct choice in the matter.⁵

In fact, Comptroller DiNapoli will have served for a month shy of a full four-year term without the voters participating in his selection. Similarly, Governor Paterson will serve for almost three full years by virtue of succeeding to the position. Thus, in both of these situations, the voters have been deprived of any role in choosing a replacement through a special election -- and this is unlike the way we fill vacancies in most public offices in New York.

Additional problems occur as a result of the temporary president of the State Senate fulfilling the duties of the Lt. Governor during a vacancy. First of all, the temporary president may or may not be of the same political party as the new Governor. As such, when the temporary president assumes the duties of the Lt. Governor, the reciprocal philosophical loyalties enjoyed by the Governor/Lt. Governor running mates may not exist in this circumstance. Second, the temporary president obviously casts a vote as a sitting senator. If she then has to break a tie, it is problematic as to whether the temporary president can do so by casting a “second” vote. Third, if the extraordinary event occurs that there is a vacancy in the new Governor’s office, the temporary president becomes Acting Governor.⁶ This raises the issue of a person from a different party ascending to the governorship. But, more importantly, the law is unclear as to whether the temporary president must resign her State Senate seat to become Acting Governor until a special election is held. If not, then we are faced with obvious separation of powers issues.⁷

³ N.Y. Const. art. IV, § 1.

⁴ In the absence of a sitting Lt. Governor, the temporary president of the State Senate becomes Acting Governor. If this occurs earlier than three months prior to the General Election, a special election for Governor is held on the day of the General Election to fill the remainder of the term; if it occurs afterward, the special election is held the following November. N.Y. Const. art. IV, § 6.

⁵ It could be fairly argued, however, that when a voter casts a ballot for the Governor/Lt. Governor ticket, she knows that the Lt. Governor will succeed to the Governorship should a vacancy occur.

⁶ N.Y. Const. art. IV, Sec. 6.

⁷ In the federal scheme, when a Speaker of the House of Representatives becomes Acting President, she must first resign from Congress. 3 U.S.C.A. § 19.

All of these issues are compounded by the further complication that these succession rules come into play not just when there is a vacancy, but also when the Governor or Lt. Governor suffers an "inability."⁸

Proposed Solutions: Governor and Lt. Governor

The Election Law Committee discussed various alternatives and determined that the most practical and fair solution would be to adopt the model relied upon by the federal government with respect to vacancies in the office of President and Vice-President of the United States.⁹

This change would permit a new Governor who has succeeded to the post from the Lt. Governorship to select a new Lt. Governor whose nomination would be confirmed by the Legislature. There are several advantages to following this model. It has been used successfully in the early 1970s to great benefit, resulting in stability and continuity in government. Moreover, in that the public is familiar with the federal model, importing it to New York would undoubtedly be readily accepted.¹⁰

Furthermore, insofar as a vacancy in the Lt. Governorship can be expected to be of short duration, the problems of the current system identified above --a temporary president of the senate simultaneously acting in both executive and legislative roles; and the question as to whether a temporary president can cast a vote as a sitting senator *and* as a tie-breaking presiding officer-- would be practically eliminated. Most importantly, the public would be reassured that the line of succession was clear and unambiguous, and that the new Governor --who had, after all, been elected as a running mate of the previous Governor-- would select a new Lt. Governor who would continue the philosophy and policies voted upon at the last election.

We offer one procedural improvement upon the federal model. The twenty-fifth amendment provides that the Vice President-designate "shall take office upon confirmation *by a majority vote of both Houses of Congress.*" (Emphasis supplied.) This has been interpreted to mean that both houses sit and vote as one body. Nevertheless, we should avoid ambiguity by including language that requires "confirmation by a majority vote of the two houses of the legislature by joint ballot."¹¹

⁸ See N.Y. Const. art. IV, §§ 5 (Par. 3), 6 (Par. 4). "Inability" is the term used in federal and state law connoting some kind of temporary or permanent status that renders an office holder unable to discharge her duties. The federal system has procedures in place to govern this contingency. New York does not. Indeed, when Governor Paterson was recently hospitalized and treated for glaucoma and cataract, it would not have been far-fetched for someone to suggest that an inability temporarily existed.

⁹ See U.S. Const. amend. XXV, which provides in pertinent part:

"b....§ 2 Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress."

This provision has been invoked only twice. After Vice President Spiro Agnew resigned, President Nixon selected Rep. Gerald Ford (R-Mich.) to be Vice President. The Congress confirmed him. Upon President Nixon's resignation, Vice President Ford assumed the presidency, and, in turn, selected Nelson Rockefeller as his new Vice President. The Congress approved this appointment as well.

¹⁰ We have learned anecdotally that many voters were surprised that New York did not already follow this model.

¹¹ This language is derived from § 41 of the New York Public Officers Law.

Proposed Solutions: Attorney General and Comptroller

We further urge that the filling of a vacancy in either of these offices should be effected by a "replacement" election at the next regularly scheduled General Election.¹² Currently filled by appointment by the Governor or selection by the Legislature, a replacement election would allow the voters to participate.

Specifically, this Committee suggests that a vacancy in either office be filled for the remainder of the term at a replacement election at the next scheduled General Election, provided that the vacancy occurs prior to September 20th. If the vacancy occurs on or after September 20th, the replacement election would be held at the following year's regularly scheduled General Election. This framework conforms to the existing time lines set out in the Public Officers Law.¹³ The new attorney general or comptroller would take office as soon as the votes of the replacement election are certified.

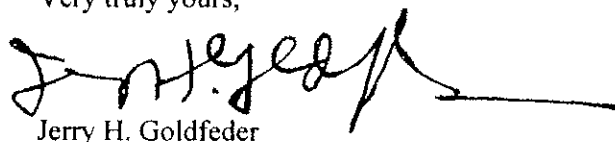
This reform would require a revision of the constitutional provision that currently bars an attorney general or comptroller from being elected at a time other than at the same time as the gubernatorial election.¹⁴

In that a replacement election and the certification of a new attorney general or comptroller might very well be months after the vacancy occurred, it is the view of the Committee that the Legislature, if in session, or the Governor if the Legislature were not in session, should name an interim office holder until certification of the replacement. Thus, an interim attorney general or comptroller would be selected pursuant to current procedures, allowing the important work of the office to continue until the replacement election.

* * *

Our recommendations are designed to allow continuity in government and maximum voter participation. We look forward to discussing them with you.

Very truly yours,


Jerry H. Goldfeder

¹² We are calling it a "replacement" election rather than a special election because the latter is a term of art in the Election Law. Under the current law, nominations in a special election are filled by the rules of the political parties. N.Y. Elec. Law § 6-114. It is the Committee's view that replacement elections for attorney general or comptroller would be held as any other statewide election, and thus should include party primaries when the petitioning schedule permits. N.Y. Elec. Law § 6-158 (Of course, state conventions could place candidates' names on the ballot as well. N.Y. Elec. Law § 6-126.) When the vacancy occurs too late in the year for a traditional primary election to be held, the replacement election would be conducted as a garden-variety special election.

¹³ N.Y. Pub. Off. Law § 42.

¹⁴ N.Y. Const. art V, § 1.