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Governor David Paterson
Executive Chamber
Capitol Building
Albany, NY 12224

Dear Governor Paterson:

The current crisis in state government has us all searching for ways to resolve the impasse and get our state moving in the right direction once again. We, like so many others, are anxious to see a resolution in accordance with our State Constitution and statutes and have been researching possible solutions.

In that regard, we believe that the current provisions of the Public Officers Law, in conjunction with the State Constitution, provide you with a road map out of the gridlock that has paralyzed our government.

It has become accepted conventional wisdom in New York that a vacancy in the office of Lieutenant Governor remains unfilled until the following statewide election, yet the plain language of the Constitution and the Public Officers Law indicate that you have the power to appoint a Lieutenant Governor who can serve until next year's elections.

The Constitution states that “[t]he legislature shall provide for filling vacancies in office,” N.Y. Const., Art. XIII, §3. Although the legislature has not adopted a law specifically addressing a vacancy in the office of Lieutenant Governor, Section 43 of the Public Officers Law, entitled “[f]illing other vacancies,” covers that office. Section 43 states:

“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...” N.Y. Public Officers Law, §43.

The office of Lieutenant Governor is an elective office, and a vacancy has occurred otherwise than by expiration of term, so under Section 43, the Governor has the power to fill the vacancy. Nothing in section 43 indicates that it does not apply to the office of

Lieutenant Governor. This is in sharp contrast to Section 42 of the Public Officers Law which provides for special elections in certain circumstances and expressly excludes the “offices of governor or lieutenant governor.” N.Y. Public Officers Law § 42(1). There is no comparable exclusion of the office of Lieutenant Governor from Section 43. The plain and unambiguous language of this section must be read to authorize the filling of a Lieutenant Governor vacancy by gubernatorial appointment.

This is entirely consistent with Article IV, Section 6 of the State Constitution, which provides:

“In case of vacancy in the office of lieutenant-governor alone ... the temporary president of the senate shall perform all the duties of lieutenant-governor during such vacancy ...” N.Y. Const., Art. IV, §6.

Read together, these two passages lead to the conclusion that the Constitution provides for the Temporary President of the Senate to assume the duties of Lieutenant Governor immediately upon a vacancy in order to ensure the orderly functioning of government until the vacancy is filled by appointment of the Governor pursuant to the Public Officers Law.

Indeed, in the very same section of the Constitution, when discussing the possibility that both the offices of Governor and Lieutenant Governor are vacant simultaneously, it is provided that “the temporary president of the senate shall act as governor ... until a governor shall be elected.” N.Y. Const., Art. IV, §6 (emphasis added).

The drafters of this section did not hesitate to make clear when they intended for the Temporary President of the Senate to act in a certain capacity until the next election, yet this language is conspicuously missing from the paragraph that provides that “the temporary president of the senate shall perform the duties of lieutenant-governor during such vacancy.” *Id.* (emphasis added).

This only can be read to mean that the Temporary President of the Senate is not intended to act as Lieutenant Governor until the next election, but only until the vacancy is filled through other means, as provided in the Public Officers Law.

Gubernatorial appointment under Section 43 is also entirely consistent with the decision in *Ward v. Curran*, 266 A.D. 524, 44 N.Y.S.2d 240, (3d Dept 1943), *aff'd* 291 N.Y. 642, 50 N.E.2d 1023 (1943), which rejected the claim that the constitutional provision that the Temporary President of the Senate acts as Lieutenant Governor during a vacancy bars the legislature from adopting legislation to fill a vacancy in the office of Lieutenant Governor. Notably, a provision of the Public Officers Law that dealt with filling vacancies in elective offices generally was held to apply to the office of Lieutenant Governor even though it did not specifically refer to the office of Lieutenant Governor.

Though the section of law at issue in the *Ward* case was since amended and no longer applies to this situation, the decision is directly comparable to the question at hand, which is that a section of the Public Officers Law that addresses filling vacancies in elective offices generally does, in fact, apply to vacancies in the office of Lieutenant Governor, and is consistent with the provisions of Article IV, Section 6 of the State Constitution.

Gubernatorial appointment of a Lieutenant Governor is also consistent with the constitutional amendment requiring the Governor and Lieutenant Governor to be elected together. (N.Y. Const., Art. IV §6). That amendment establishes the principle that the Governor and a Lieutenant Governor are to be chosen as a team. Filling a vacancy in the office of Lieutenant Governor by gubernatorial appointment maintains this principle.

As Section 43 has not been previously used to fill a vacancy in the office of Lieutenant Governor, we cannot say for certain how a court would react to such an action. Other states' courts, however, can be instructive when analyzing similar situations.

Most analogous is a decision from the state of Wisconsin, State ex rel. Martin v. Ekern, 280 N.W. 393 (Wis. 1938). Wisconsin, like New York, had a constitutional provision generally enabling the legislature to devise procedures for filling vacancies, no specific constitutional or statutory procedure for filling Lieutenant Governor vacancies, and a statutory provision authorizing the Governor to fill vacancies when no other law applied. See id. at 398.

Faced with this identical legal landscape, the court concluded that Wisconsin's Governor had the authority to fill the Lieutenant Governor vacancy. The court reasoned that the statute providing for "appointment by the governor" "where no other provision is made for filling the [vacancy]" was "clear and unambiguous," "all-inclusive," and clearly applicable. Id. at 399. "Its plain provisions are broad enough to include an appointment to the office of lieutenant governor when a vacancy exists in that office. We cannot give to it a construction which would except from its provisions a vacancy in the office of lieutenant governor." Id.

Other courts have reached the same conclusion based either on state constitutional or statutory grounds. See In re Advisory Opinion to the Governor, 688 A.2d 288 (R.I. 1997); Advisory Opinion to Governor, 217 So.2d 289 (Fla. 1968); State ex rel. Trauger v. Nash, 64 N.E. 558 (Ohio 1902); People v. Budd, 45 P. 1060 (Cal. 1896).

We acknowledge that vacancies in the office of Lieutenant Governor have occurred in the past and that previous Governors have not sought to use the Section 43 power to fill them, but the current situation is extraordinary and requires a deeper look at the relevant legal authority. The stalemate in the State Senate has ground to a halt the resolution of numerous important issues that impact the 19 million people of our state. According to our analysis of the law, you have the power to resolve the ongoing dispute by appointing a Lieutenant Governor to preside over the Senate. We urge you to do so as quickly as possible.

Thank you for your consideration.

Sincerely yours,

Michael Gianaris
Member
NYS Assembly

Dick Dadey
Executive Director
Citizens Union

Susan Lerner
Executive Director
Common Cause/NY