SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

MALCOLM A. SMITH, Temporary President and Majority Leader of the New York State Senate,	:	
Plaintiff,	:	
-against-	:	**Index No.: 4912-09**
PEDRO ESPADA, Jr., New York State Senator,	:	
Defendant.	:	

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT PEDRO ESPADA, JR.'S MOTION TO DISMISS

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PRELIMINARY STATEMENT

Defendant Senator Pedro Espada Jr.'s motion under CPLR 3211 to dismiss the Complaint must fail. Unable to confront Plaintiff Senator Malcolm A. Smith's claims on the merits, as would be required in any *direct* response to the pending motion for a preliminary injunction under CPLR 6301 and 6311, or to the action for declaratory relief under CPLR 3001, Defendant seeks refuge in prudential doctrines that do not apply, case law that does not support dismissal, and numerous and obvious misstatements of about what occurred on the floor of the Senate. Even were Plaintiff not entitled in this posture to have all of his allegations "accepted as true . . . and [to] every possible favorable inference," *Maron v. Silver*, __ Misc. 3d __ , Index No. 4108-07 (Sup. Ct. Albany Co. 2007 [McNamara, J.] [collecting cases]), *aff'd* 58 A.D. 3d 102 (3d Dept. 2008),[1] Senator Smith still would prevail. What is clear from the Complaint, the case law and the Constitution is that this case is justiciable, and that Senator Smith is – by statute, Senate Rule and parliamentary law – the rightful and lawful occupant of the constitutional office of Temporary President of the Senate.

FACTS

Plaintiff adopts and hereby incorporates the facts set forth in Plaintiff's Memorandum of Law in Support of Order to Show Cause, dated June 11, 2009.

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[1] *See also Capital Funding Partners, L.P., v. State Street Bank & Trust Co.*, 5 N.Y.3d 582, 591 (2005); *511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 151-152 (2002) (for dismissal motion, "our task is to determine whether plaintiffs' pleadings state a cause of action. The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law. In furtherance of this task, we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion") (internal citations omitted).

Contrary to the terms of CPLR 3211 practice, Defendant has submitted with his dismissal motion factual materials, in the form of an affidavit of one John Casey. Accordingly, Plaintiff has no choice but to respond. Submitted herewith are affidavits of Michael Fallon, Legislative Counsel for the New York State Senate, and David Markus, Special Counsel to the New York State Senate Majority, which are incorporated herein by reference. The Fallon Affidavit describes events on the floor of the Senate on June 8, 2009, and demonstrates that neither Temporary President Smith, nor his designee, nor their staff ever was provided with advance notice of the Libous Resolution as Senate Rules require. The Markus Affidavit certifies proper service of the papers in this action to the Attorney General.

ARGUMENT

I. This Case is Justiciable

Defendant's first and principal ground for dismissal is the claim that, because this case involves the work of the Senate and the office of the Temporary President of the Senate, it is "non-justiciable." Def. Br., at 3-7, 11-12. Defendant is wrong, as the many inter- and intra-branch cases decided by New York courts over the years clearly attest.

To be sure, as Defendant points out, the Judiciary has approached cases involving other, co-equal branches of government with care – and appropriately so, as the principle of separation of powers is central to our system of government. But the doctrine of justiciability does not and cannot preclude courts from acting in matters involving the other branches – or even itself, as the recent judicial pay-raises cases demonstrate. *See e.g. Maron,* 58 A.D.3d at 102. Far from being a bar to action, "justiciability" and its closely-related cousin, the "political question" doctrine, merely require that, before acting, courts satisfy themselves that they are competent and equipped, in the particular case before them, to address and resolve disputes

involving the powers and status of co-equal actors in the governmental structure in a manner that does not usurp a uniquely political function assigned to another branch.

The quintessential cases in which courts act under these circumstances are ones in which constitutional issues – questions about the foundational documents of our democracy – are in play and where the acts of one branch affect the powers, personnel or affairs of another. In such cases, the Judiciary not only can and does intervene: it often *must* do so. One need look no further than *Marbury v. Madison,* 1 Cranch (5 U.S.) 137 (1803), for an example. Holding that "[i]t is emphatically the province and duty of the judicial department to say what the law is," the United States Supreme Court reviewed a legislative act for its constitutionality, established the principle of judicial review, and determined whether particular persons were the rightful holders of a particular office – in that case, judgeships. The fact that the case involved the decision-making of co-equal branches of government (Congress in enacting a statute creating the judgeships, and the President in making appointments to the post) did not preclude the Court from ruling in that case; if it had, our Nation's history would be very different indeed.[2]

New York's own jurisprudence is no different. *In re Davies*, 168 N.Y. 89 (1901), a case implicating the respective constitutional powers of the Legislature, Attorney General and the Judiciary, stands for the proposition that "[f]ree government consists of three departments, each with distinct and independent powers, *designed to operate as a check upon those of the other two co-ordinate branches.*" *Id.*, at 101 (emphasis added). As the Court of Appeals in *Davies* explained, courts must "exercise [] judgment," for "the judge is required to act judicially"

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[2] In modern times, the United States Supreme Court's decision in *Bush v. Gore*, 531 U.S. 98 (2000), stands as the most prominent example of a court resolving a constitutional issue that determined the outcome of an election. In rare cases raising questions of constitutional import that the "political sphere" alone cannot resolve, it becomes the "unsought responsibility" of the Judiciary, as an independent branch of government, to resolve those questions lest crisis and instability reign. *Bush*, 531 U.S., at 111 (per curiam).

and not play a "merely clerical" and subservient role to the other branches. *Id.* Cases in the judicial pay-raise context – including the Third Department's decision in *Maron,* affirming this very Court's finding of a justiciable controversy against the Senate and Assembly, and the First Department's decision much to the same effect less than two weeks ago in *Larabee v. Governor*, __ A.D.3d __, 2009 WL 1515882 (1st Dept., June 2, 2009), are the most recent examples of this settled view of judicial power.

In this case, Senator Espada's claim to the office of Temporary President raises core issues of constitutional concern: (1) who will succeed the Governor in the event of a mid-term vacancy in the State's highest office; (2) who holds the Lieutenant Governor's other powers now that such office is vacant; and (3) most fundamentally, who may act as Temporary President of the New York State Senate. *See* N.Y. Const., art. IV, § 6. As Defendant well knows, these matters are hardly ones of "imaginary hypothetical." Def. Br., at 12. In the context of the noisy democracy that is New York government, these are live issues that have wide ramifications well outside the Senate chamber, as even a casual viewer of the nightly news can attest. Defendant admits as much in his brief when he concedes that there would be a constitutional crisis around the question of succession were the Governor to die in office. *Id.* But as more fully shown *infra*, the death of this State's chief executive is just one of many contexts in which the Temporary President must exercise power under our constitutional and statutory framework.

It also is well-settled that courts are empowered to act even in cases involving the internal matters of the Legislature, so as to ensure that legislative rules are not arbitrarily changed or blatantly abrogated. The New York Court of Appeals so held over 140 years ago:

> "There is no doubt that each house of the [L]egislature, by virtue of the constitutional provisions we have cited, and perhaps inherently, have power to determine for itself rules and orders to govern them in the various stages of legislation, and in relation to

> all matters relating to the exercise of their rights, powers and privileges. When such rules or laws have been established by them, as they were in this instance, they become the law of that body for such purpose, and are *binding upon them as the law to govern them in such proceedings*; and this is called parliamentary law. . . . And when they have established such rules, and they thus become the law for such purpose, *they cannot themselves arbitrarily depart from such law*, and conduct their proceedings by other rules not known to or adopted by such body."

People v. Devlin, 33 N.Y. 269, 278-279 (1865) (emphasis added). Given the Judiciary's purpose under the Constitution to enforce the law, this basic purpose and the rule of law itself would be meaningless if, as Defendant suggests, cases challenging precisely such illegal conduct in the Senate somehow were "non-justiciable." These issues, too, are implicated in the case at bar.

Here, Senator Smith's claim to the office of Temporary Presidents rests upon four modest propositions: *first*, that he was duly elected to the office of Temporary President for the "years 2009-2010" by Senate Resolution 1 (2009); *second*, that no majority of the Senate to date has passed a resolution *removing* him from that post; *third*, that, under Mason's Manual section 581(1), the presiding officer must be "removed" by a simple majority before a new presiding officer may be installed; and, *fourth*, that, not having lawfully been removed, Senator Smith continues in the office. This Court is being asked to validate these simple propositions so as to determine the rightful holder of the office of Temporary President and quell the chaos wrought by a second Senator pretending to the post. Such review and decision-making is precisely what the Judiciary does and is expected to do every day. Particularly where, as here, so-called "internal matters" of the Legislature have effects outside the Legislature, courts will intervene. *See, e.g., Board of Ed. of City School Dist. of City of New York v. City of New York*, 41 N.Y.2d 535, 538 (1977) ("the [J]udiciary has and may properly exercise authority to determine the effectiveness of the legislative action of the Senate"); *Anderson v. Krupsak*, 40 N.Y.2d 397,

403 (1976) (where case involves "significant question [of] whether . . . persons legally held and exercised the powers of [an] important [state] office," as well as "validity of actions taken by [such persons]," the Judiciary should review the case because "this is far more than a matter of internal administration within the Legislature"). In *Anderson*, the issue was the validity of the Legislature's appointment of the "important office" of Regent of the State University of New York. *Id.* at 403. Here, the issue involves a much *more* important office: the immediate successor to the Governor of the State of New York, a public officer who, in his role as Temporary President of the Senate, is himself a constitutional officer.

The practical import of this case extends even beyond accession to the Executive to affect the rest of state government. The Temporary President enjoys many constitutional and statutory powers of appointment to commissions and boards, both ones within the Executive[3] and

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[3] The Temporary President makes appointments to dozens of Executive-branch policy-making panels. *See, e.g.,* Agric. & Markets Law § 258-ll(a) (Interstate Compact Cmsn.); Arts & Cultural Affairs Law §§ 4.05 (Empire State Plaza Art Cmsn.); 9.09(2) (N.Y. Theatre Inst. Corp.); Banking Law § 213 (Business Dev't Corp.); Canal Law § 138 (Recreationway Cmsn.); Civil Service Law § 7-a (Cmsn. on Increasing Diversity in the State Govt. Workforce); County Law § 327 (911 Board); Economic Development Law §§ 120 (Minority and Women-Owned Business Enterprise Advisory Bd.); 133 (Small Business Advisory Bd.); 170 (Tourism Advisory Council); Educ. Law §§ 107 (Interstate Compact for Education); 233-b (Freedom Trail Cmsn.); 235-a (Biodiversity Research Inst.); 6274 (Trustees of the City Univ. Constr. Fund); Elder Law §§ 244 (Elderly Pharmaceutical Ins. Coverage Panel); 301 (Mature Worker Task Force); Election Law § 7-201 (Election Modernization Advisory Cmte.); Energy Law § 18-105 (Bd. on Temp. Nuclear Waste Repository Siting); E.C.L. § 11-0327 (Conservation Fund Bd.); Public Authorities Law § 2403 (State of N.Y. Mortgage Agency); P.H.L. § 14 (Public Housing Advisory Cmte.); Public Officers Law § 89 (Cmte. on Open Govt.); Racing and Pari-Mutuel Law §§ 207 (Franchised Racing Corp.); 208-b (Non-Profit Racing Assn. Oversight Bd.); 212 (Franchise Oversight Bd.); 603 (NYC Off-Track Betting Corp.); R.P.L. §§ 442-i (Real Estate Bd.); 444-c (Home Inspection Council); S.S.L. § 364-jj (Review Panel on Medicaid Managed Care); S.F.L. §§ 97-v (Interest on Lawyers Account Fund); 97-pp (Emergency Services Loan Bd.); 161 (Procurement Council); State Law § 74-a (Collectible Series Panel); State Technology Law §§ 104 (Advisory Council for Technology); 401 (Statewide Wireless Network Advisory Council); Tax Law § 1173 (Delegates to Sales & Use Tax Agreement); Transportation Law §§ 216 (Public Transp. Safety Bd.); 401 (Stewart Airport Cmsn.); Workers Compensation Law § 50-b (Task Force On Group Self-Insurance).

others affecting the Judiciary.[4] The Temporary President of the Senate also performs a range of duties relating to government administration affecting the Executive branch.[5] Moreover, because New York now lacks a Lieutenant Governor, Article IV, section 6, of the New York Constitution requires that the Temporary President discharge the powers of Lieutenant Governor, including statutory duties of that office unrelated to ascent to the Executive.[6] The impact of such functions far beyond the Senate conclusively establishes that this case relates to "far more than a matter of internal administration within the Legislature," and therefore this case is justiciable. *Anderson,* 40 N.Y.2d at 403.

Even in far more modest constitutional cases, courts have rejected claims that legislative actions are non-justiciable.[7] *See, e.g., Ohrenstein v. Thompson*, 82 A.D.2d 670 (3d

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[4] *See, e.g.,* N.Y. Const., art. VI, §§ 2(d)(1) (Cmsn. on Judicial Nomination); 22(b)(1) (Cmsn. on Judicial Conduct); Judiciary Law § 35-b (Capital Defender Office); Public Authorities Law § 1680-c (Court Facilities Capital Review Board).

[5] Even beyond receiving countless reports from Executive and Judicial agencies in relation to their duties, the Temporary President enjoys numerous extra-legislative powers in relation to government administration and budgeting. *See, e.g.,* S.F.L. §§ 22(15) (consultation with Division of the Budget on content and format of information on state finances and budget); 23(5) (reports on estimated state receipts and state disbursements); 53(8) (approval of Temporary President for certain emergency appropriations). The Temporary President also serves directly on numerous boards. *See e.g.* Education Law § 5703 (*ex officio* trustee of Cornell University); M.H.L. § 19.06 Advisory Council on Underage Alcohol Consumption).

[6] *See, e.g.,* Education Law § 6003 (Lieutenant Governor serves on board of trustees of State University of New York College of Environmental Science and Forestry); Public Officers Law § 89 (Lieutenant Governor serves on Committee on Open Government); Unconsolidated Laws § 9111 (Lieutenant Governor serves on State Defense Council).

[7] The other cases cited by Defendants simply have no bearing here. This is not an action to itemize the state budget, *Saxton v. Carey*, 44 N.Y.2d 545 (1978), nor an inquiry into the constitutional status of a defunct judicial position, *Settle v. Van Evrea*, 49 N.Y. 280 (1872), nor a suit concerning the authority of the Mayor of the City of New York or the Governor to enact executive orders, *Under 21 v. City of New York*, 65 N.Y.2d 344 (1985), *Rapp v. Carey*, 44 N.Y.2d 157 (1978), nor an effort to prohibit criminal prosecution of state Senators. *People v. Ohrenstein*, 153 A.D.2d 342 (1st Dept. 1989). Defendant's reliance on such cases is misplaced.

Dept. 1981) (direct attack on accuracy of Senate Journal is justiciable); *New York State Bankers Ass'n, Inc. v. Wetzler*, 81 N.Y.2d 98 (1993) (declaratory action to challenge legislative authority to enact statute). To be sure, courts have declined to intervene in minor legislative affairs with little effect outside the Legislature, such as the use of state funds for certain Assembly mailings, *see Gottlieb v. Duryea*, 38 A.D.2d 634 (3d Dept. 1971); the provision of supplementary budgetary allowances, *see New York Public Interest Research Group v. Steingut*, 40 N.Y.2d 250 (1976); whether a roll call was properly taken, *see Heimbach v. State*, 59 N.Y.2d 891 (1983) (declining judicial review on grounds that a particular statute precluded it); and the allocation of "member item" funds, *see Urban Justice Center v. Pataki*, 38 A.D.3d 20 (1st Dept. 2006). But these matters were internal to the Legislature: Defendant cites no case to support his claim that the Judiciary cannot enforce the law where the constitutional *structure* of New York government is at stake, or where legislative conduct affects the Executive and/or Judiciary, or where the holder of statutory powers is unclear. Indeed, there are no such cases.

This case also is justiciable because it seeks to redress a violation of *statute*: Public Officers Law article 3. It is the undisputed role of courts to interpret and enforce statutes enacted by the Legislature, and Defendant cites no case to the contrary. (It is no doubt for this reason that Point I of Defendant's motion to dismiss, on justiciability grounds, makes no mention whatsoever of plaintiff's statutory claims.) There is simply no argument that this Court cannot enforce the explicit requirements of Public Officers Law sections 30 and 35: courts do so all the time. *See, e.g.*, *Duffy v. Ward*, 81 N.Y.2d 127 (1993) (enforcing § 30) (collecting cases). For this reason *alone*, the instant case is justiciable and Point I of Defendant's motion is wrong.

Indeed, just last month and in the very posture of the instant case, on a challenge to Senate compliance with the Public Officers Law, the Third Department had no difficulty in

construing Senate Rules, passing on their "necessity" and "reasonable[ness]," and then rejecting the Senate's effort to apply its Rules in a way that would have evaded the anti-secrecy mandates of Public Officers Law article 6, the Freedom of Information Law ("FOIL"). *Polokoff-Zakarin v. Boggess, as Secretary of the Senate, et al.*, __ A.D.3d __, 2009 WL 1324027 (3d Dept., May 14, 2009), at *2. Just as compliance with Public Officers Law article 6 was a justiciable matter in *Polokoff-Zakarin*, so too is the instant case justiciable to challenge compliance with Public Officers Law article 3, governing public offices including Temporary President of the Senate. As important as FOIL and its transparency goals are to our democracy, ensuring compliance with statutes governing the selection of a constitutional officer is even *more* important to our democracy, and thus plainly a justiciable matter within this Court's power to determine.

* * *

Defendant's desire to avoid judicial scrutiny is understandable. Having no defense on the merits, Defendant's hope is to have this Court stay its own hand. But Defendant cannot hide behind an inapplicable prudential doctrine to validate illegal conduct that has thrown State government into chaos. Echoing a sentiment recently expressed by the Third Department in *Maron*, a court may "regret that it falls [to its] lot to decide" a particular case, but Plaintiff is "entitled to have [his] case heard and decided by a court . . . and, under the law, there is no other court to which [he] could go." *Atkins v. United States*, 556 F.2d 1028, 1040 (Ct. Cl. 1997), *cert. denied,* 434 U.S. 1009 (1978), *quoted with approval in Maron*, 58 A.D.3d, at 106.

For the foregoing reasons, this case is justiciable and Defendant's motion to the contrary must be denied.

II. There Was No Vote to Remove the Temporary President; Therefore Senator Smith Remains the Temporary President

Defendant plainly loses on the merits. First, on January 7, 2009, the Senate passed Senate Resolution 1, resolving "That Senator Malcolm A. Smith be, and he hereby is, elected Temporary President of the Senate for the years 2009-2010." Faced with this undisputed fact, Defendant strains to describe this two-year term of office as anything but a term of office – even though the Legislature itself repeatedly provided that the Temporary President of the Senate, like the Speaker of the Assembly, serves in this constitutional leadership role for a "term[] of office." *See e.g.* Education Law § 5703(a); Legislative Law § 6(7). Defendant then labels as "ambiguous" the Senate Resolution's language electing Plaintiff to this two-year term, Def. Br. 9, but the Senate's language is plain: Plaintiff was elected "for the years 2009-2010."

The parties agree that Senate Rules do not address how to remove a Temporary President and that Mason's Manual on Legislative Procedure applies when the Senate Rules do not speak to an issue of parliamentary procedure.[8] But Mason's section 581(1) (nowhere to be found in Defendant's brief) provides that the *only* way to remove an elected "presiding officer" (such as a Temporary President) with a fixed term is to "remove[]" the officer "upon a majority vote of all the members elected."

This is a fundamental problem for Defendant. The Senate did not vote to remove Temporary President Smith. Defendant does not even *claim* there was such a vote. Instead, and in an admission that the Senate never voted to remove Temporary President Smith, Defendant is reduced to citing the obscure and inapplicable doctrine of "implied repeal" – the general rule of statutory construction that "a statute may not be repealed by implication." *Gould v. Bennett*, 153 Misc. 818, 819 (Sup. Ct. New York Co. 1934). First, "implied repeal" is a doctrine of statutory

[8] Defendant's Memorandum of Law repeatedly cites to Mason's.

interpretation that has never been applied in the context of Senate Rules or procedure. Second, Mason's controls here, and Mason's states that a Temporary President must be "remove[d]": it says nothing about so-called "implied repeal." Finally, even in a statutory context and under Defendant's own cited case, Defendant got it backwards: "implied repeal" is a highly disfavored and narrow doctrine generally holding that "a statute may *not* be repealed by implication." *Gould*, 153 Misc. at 819 (emphasis added).

That Mason's provides for a removal process is no mere technicality or talisman to be overlooked as excessive formalism. Especially in the legislative context, the bedrock notion of due process requires clear, express and timely notice of legislation, resolutions and motions in service of a legislature's purpose to be a deliberative body. Inherent in this purpose are safeguards against undue rush to judgment, rights of lawmakers to speak on matters properly before them, and rights of lawmakers to hear and consider those views. Notice and opportunity to be heard thus are values no less important in a legislative body than for a judicial tribunal, and these values only rise in prominence when the underlying matter rises to a level of constitutional import. Especially when those constitutional matters include the leadership of the legislative body itself, accession to the Executive and the countless powers that attend those offices, it is utterly vital that well-settled parliamentary procedures be followed.

Here, it is undisputed there was no vote to remove Temporary President Smith. Absent a vote to remove Senator Smith, he remains and is currently Temporary President of the Senate.

III. The Public Officers Law Was Violated

As alleged in the Complaint, the Libous Resolution purporting to name Defendant as Temporary President also violates the Public Officers Law.

The Legislature directed that "*[e]very* office shall be vacant upon the happening of" an enumerated but brief list of conditions, including the incumbent's "death," "resignation" or "removal." Public Officers Law § 30(1)(a)-(c) (emphasis added). The Temporary President of the Senate unquestionably is an office. *See* Public Officers Law § 2 ("state officer" includes every "member of the [L]egislature" and "every officer, appointed by one or more state officers, or by the [L]egislature, and authorized to exercise his [or her] official functions throughout the entire state, or without limitation to any political subdivision of the state"); *see also* 1909 Op. Atty. Gen. 267 (members of Legislature are "state officers" for purposes of Public Officers Law); 1907 Op. Atty. Gen 482 (same). Thus, section 30 unquestionably applied to the Libous Resolution.

Under Public Officers Law section 35, the Legislature established a specific and mandatory process for removing officers under section 30: if this process is not followed, then there can be no removal lest section 35 be meaningless. Section 35 requires that to remove a public officer:

(1) the "body" effectuating the removal (here, the Senate) must enact a specific "order" of removal;

(2) such order must be signed by either "a majority of the officers making the removal" or the president and clerk (in this case, the Secretary of the Senate);

(3) such order must be signed in duplicate;

(4) the duplicate signed orders must be delivered to the Secretary of State; and

(5) a signed order must be served on the officer to be removed (here, the Temporary President of the Senate).

These section 35 requirements plainly governed the Libous Resolution and the related "proceedings" of the Senate for the same reasons that section 30 applies: the Temporary President is a "state officer" appointed by other "state officers," including members of the Legislature or the Legislature itself. *See* Public Officers Law §§ 2, 35. Defendant even concedes that "section 35 relates to the removal of a public officer from office with regard to officers who are appointed or elected," Def. Br. 11, but then claims (absurdly) that the selection of the Temporary President "is not an appointment or an election." *Id.* This assertion is flatly wrong on the terms of Senate Resolution 1 (providing for the "election" of Malcolm A. Smith as Temporary President), and in any event Defendant's claim makes no sense (if the Temporary President is neither an appointive nor an elective office, then what is it?). Moreover, this Court cannot construe section 35 to govern "every" removal, but not in the case of the Temporary President of the Senate, without reading the word "every" out of the statute and impermissibly adding to it a laser-focused exemption that the Legislature plainly did not intend. This Court cannot rewrite the Public Officers Law or any other statute in the creative way Defendant seeks. *See* McKinney's Cons. Laws of N.Y., Book 1, Statutes, § 231.

Nor can it be disputed – indeed, Defendant does not dispute – that the Senate "proceedings" of June 8 violated these section 35 requirements in every respect. The Libous Resolution was silent as to removal, was not signed by a majority of the Senate or by its president and clerk, was not signed in duplicate, was not delivered to the Secretary of State and was not served on Plaintiff. The Libous Resolution thus is null and void, and the Senate therefore never removed Temporary President Smith. Because Plaintiff was not removed and did not resign, die or trigger any other section 30 condition to create a vacancy in his office, Senator Smith remains Temporary President of the Senate under the plain language of the law.

Like the Mason's requirement of a removal process, these statutes have important purposes that cannot be dismissed as mere formalities. In addition to providing clear and explicit notice to every member of the body effectuating a removal, the statutes impose procedures, such as a signature requirement, that require the body's members to slow down and carefully consider their steps. The statutes also require notice and limited involvement of the Secretary of State because, as shown *infra* in the case of the Temporary President, some public offices enjoy broad powers that affect the operation of government or even the Executive itself, and the Secretary of State's administrative support of government requires that the Secretary of State be notified properly of removals from public office – especially in relation to constitutional officers.

Rather than even attempt to deal with these statutes and the important interests they vindicate, Defendant tries to hide behind the Senate's unquestioned duty to select its own officers and then cites Public Officers Law section 32 for the proposition that there can be no statute governing the process for selection. Defendant's attempts misconstrue the Constitution and laws of this state.

As to Public Officers Law section 32, this statute is irrelevant to this case. By its own terms, section 32 governs only Senate removal of certain officers on "recommendation of the [G]overnor." Section 32 thus cannot be read for Defendant's absurd proposition that there can be no statutory process for the Senate to remove other officers: that result would moot not only section 35 but also many other provisions of the Public Officers Law.

As to the Constitution, Defendant is flatly wrong that the Senate's Article III power to determine the qualifications and returns of its members, and choose its own officers, means that the Legislature cannot regulate by statute the procedure by which the Senate uses these powers. Indeed, the Legislature enacted many laws governing accession to and departure

from public office, some of which were ignored on June 8 and Defendant exhorts this Court to continue ignoring. Beyond Public Officers Law section 35, section 31(3) requires members of the Senate and Assembly to resign their seats by letter delivered to the Secretary of State, and the Secretary of State "forthwith communicate[s] the fact of such resignation to the [L]egislature or to such house, if in session, or if not, at its first meeting thereafter." Public Officers Law § 31(3). Similarly, failure to file oaths of office within 30 days after a term commences causes a vacancy in any public office, *see* Public Officers Law § 30(1)(h), as does conviction on a felony or other crime involving a violation of such oath of office, *see* Public Officers Law § 30(1)(e). So too does imprisonment on an indeterminate sentence effectuate a forfeiture of public office. Civil Rights Law § 79(1). Because the Constitution is silent on all of these matters in relation to legislative offices, Defendant's novel claim that the Senate's duty to select its officers allows no statutory constraint on accession to, resignation from, or removal from legislative offices would render infirm all of the foregoing statutes. This is an absurd result that even Defendant does not and cannot support.

To the contrary, these statutes and others like them effectuate a codification of each House's constitutional power in relation to the qualifications, service and removal of its members. For instance, in *Ruiz v. Regan*, 143 Misc. 2d 773 (Sup. Ct. Albany Co. 1989), a Senator whose office was vacated by operation of law on felony conviction pursuant to Public Officers Law section 30 sued to force the Comptroller to continue paying the Senator's salary, arguing that the Senate's constitutional power of self-governance superseded the statutory ban on continuing to hold office after felony conviction. The court expressly rejected the Senator's claim, finding that the Senate's enactment of section 30 was fully consistent with the Senate's constitutional rights of self-government:

> "[T]he Comptroller's removing petitioner from the payroll did not impermissibly interfere with the Senate's control over its own members, nor did it diminish the separation of powers principle which underlies Article III, section 9, of the State Constitution. The State Legislature itself declared petitioner's office vacant when it enacted Section 30 [of the] Public Officers Law and, because vacatur occurs by operation of law, it requires no further action to take effect. The Comptroller did not impermissibly remove petitioner from office; rather, by the time the Comptroller acted, the Legislature had already deemed petitioner's seat vacant upon his felony conviction."

Ruiz, 143 Misc. 2d at 773. So too here: just as Public Officers Law section 30 codified certain circumstances under which removal would be automatic, so too does section 35 codify certain procedures for removal. Likewise, just as *Ruiz* upheld the Comptroller's power to effectuate a vacancy under the Public Officers Law and effectuated the Judiciary's power to hear a challenge to it, so too is there no separation-of-powers barrier to the Judiciary hearing the instant case to enforce that same statute.

Finally, Defendant asserts that "[b]ecause the Constitution provides only that the Temporary President is selected, it must be the rule of law that such an officer may be de-selected by a similar will of the majority." Def. Br., at 11. Obviously Plaintiff agrees with the proposition that a majority of the Senate may remove the Temporary President, but Mason's and the Public Officers Law provide the specific process by which the majority must exercise this authority. Lest the rule of law and the important purposes underlying these statutes and rules all amount to nothing, these statutes and rules must be followed and enforced.

Accordingly, because the Public Officers Law was violated, Plaintiff is the Temporary President of the Senate and Defendant's motion must be denied.

IV. There Is No Failure to Join Necessary Parties

Contrary to Defendant's suggestion, there is no failure to join necessary parties. Only two parties are necessary to this case, Plaintiff and Defendant, and both are parties.

Citing no case, Defendant makes the throwaway argument that certain, unnamed Senators should be joined because they are "stake holders in the outcome of this case." Surely they are, as are all Senators, as are other governmental actors and other "stake holders" whose powers and affairs directly are affected by who is Temporary President, as is every resident of the State of New York whose public business remains to be done, but Defendant does not claim they all should be joined as well. Defendant also advances no case law to support this novel "stakeholder" approach to the joinder rules, and Plaintiff is aware of none. Point VI of Defendant's brief therefore is frivolous.

On the merits, CPLR 1001 only requires joinder of parties necessary to the relief sought. *See e.g. Figari v. New York Tel. Co.*, 32 A.D.2d 434 (2d Dept. 1969). Here, the relief Plaintiff seeks relates only to Defendant – to declare that Plaintiff and not Defendant is the Temporary President of the Senate, declare that the proceedings by which Defendant declares himself to be Temporary President violated the Public Officers Law, and enjoin Defendant from assuming or delegating to others the powers and duties of Temporary President. Accordingly, there is no failure of joinder and thus no CPLR 1001 basis for dismissal.

V. Notice Need Not Be Given to the Attorney General

CPLR 1012 and Executive Law section 71(3) require that a party give notice of a complaint to the Attorney General where the constitutionality of a statute, rule or regulation is at stake. Because Plaintiff is not challenging the constitutionality of a statute, rule or regulation,

Plaintiff need not give notice to the Attorney General. Thus, Point VII of Defendant's brief also is frivolous.

Nevertheless, to avoid any issue whatsoever, Plaintiff gave timely notice and a full set of Plaintiff's papers in this lawsuit to the Attorney General. *See* Markus Aff., ¶¶ 6-7.

VI. Defendant Failed to Adequately Address Important Factual Allegations Supporting Plaintiff's Claims

Plaintiff made at least six important factual allegations in making his case against Defendant. *See* Complaint ¶¶ 17-22. Defendant only responded to two of them. *See* Complaint ¶¶ 17, 22.

Defendant failed to adequately address the following important factual allegations in Plaintiff's Complaint and Memorandum of Law: (1) the Libous Resolution illegally purported to appoint a Temporary President and Majority Leader; (2) the Libous Resolution was not properly on the Senate floor; (3) the Libous Resolution was out of order and such, the Senate could not properly vote on it; and (4) the Senate adjourned before anyone voted on the Libous Resolution. See Complaint ¶¶ 18-21.

1. The Libous Resolution Illegally Purported to Appoint a Temporary President *and* Majority Leader

Paragraph 21 of the Complaint alleges that "the Libous Resolution improperly purported to divide the duties of Temporary President and Majority Leader, in violation of Senate Rule II, section 1," which states: "the Senate shall choose a Temporary President who shall be the Majority Leader." Defendant did not address this allegation.

In violation of Senate Rule II, section 1, Senator Libous attempted to divide the office of Temporary President and Majority Leader, by nominating two different people to fill the component offices. The Libous Resolution provided "for the election of Pedro Espada Jr. as Temporary President of the Senate and Dean G. Skelos as Vice President Pro Tem and Majority Leader." (Tr. 7.)

Under the Senate Rules, the Temporary President and Majority Leader constitute a unified position. By purportedly nominating and electing one person (Senator Espada) to hold one office of this unified position and a different person (Senator Skelos) to hold the other office of this unified position, the Libous Resolution proposed a *de facto* Rules change, in clear violation of applicable Senate Rules that require extensive notice to the Senate for any amendment to the Senate Rules. *See* Senate Rule XI, § 1. The purported resolution further failed to unambiguously identify the person who was purportedly nominated to the unified position of Temporary President and Majority Leader. Without a clear and unambiguous nomination, the purported election of Senator Espada was illegal and a nullity.

2. The Libous Resolution Was Not Properly on the Senate Floor

Paragraph 18 of the Complaint alleges that the Libous Resolution fails for another reason: it was not properly introduced on the floor under the Senate Rules. Defendant does not adequately address this allegation, either.

Senators are not free to introduce resolutions on the floor at will. Rather, under Senate Rule VI, section 9(a), "[a]ll original resolutions shall be in the quadruplicate, and no original resolution may be introduced unless copies thereof first shall have been furnished the Temporary President and Minority Leader." In addition, "[a]ll resolutions, upon introduction,

shall be referred to a standing or select committee by the Temporary President or an officer designated by the Temporary President."

The Libous Resolution, however, was (i) not furnished to the Temporary President, Senator Smith, and (ii) not referred to a standing or select committee by the Temporary President or an officer designated by the Temporary President. Recognizing this fundamental failing and ostensibly attempting to excuse it, Senator Libous claimed that his resolution was "privileged" under Senate Rule VI, section 9(e).

Neither the Senate Rules nor Mason's defines "privilege," nor do they state expressly the procedure for determining what is "privilege[d]." However, Mason's section 4(2) provides that rules of legislative procedure are derived from several sources and take precedence in the following order: (a) constitutional provision and judicial decision thereon; (b) adopted rules; (c) custom, usage and precedent; (d) statutory provisions; (e) adopted parliamentary authority; and (f) parliamentary law.

Here, there being no constitutional provision, judicial decision or adopted Rules on the matter, Senate customs and precedents govern and they are longstanding and well-settled. Under Temporary President Smith as well as under previous Republican Temporary Presidents, it is the Temporary President or his or her designee who determines whether resolutions are privileged. St. John Aff. ¶¶ 20-21. As befits longstanding Senate procedure, this practice has been recognized and this process followed by *Republican* Senators, both in the current legislative session and in past legislative sessions controlled by the Republican Party under different Temporary Presidents of the Senate. St. John Aff. ¶¶ 21-22.

Absent these well-settled and reasonable procedures, if any Senator could simply deem for himself or herself what is and is not privileged, then any Senator could at any time

bring any resolution to the floor of the Senate and claim privilege, a process that would lead to chaos and impermissibly render Senate Rule VI, section 9(a), nugatory and meaningless. *Cf., e.g., Sanders v. Winship*, 57 N.Y.2d 391, 396 (1982) ("it is . . . [a] rule of statutory construction that effect and meaning must, if possible, be given to the entire statute and every part and word thereof") (internal quotations and citations omitted). For this reason, the Temporary President *always* has been the gatekeeper for privileged resolutions, whether the Senate was controlled by Democrats *or* Republicans.

Here, because neither Temporary President Smith nor his designee deemed the Libous Resolution privileged, it was not privileged and not properly before the Senate. The Libous Resolution thus was invalid on its face, and Defendant cannot be Temporary President.

Defendant's strained argument to the contrary, based on the Casey Affidavit annexed to Defendant's motion to dismiss, is disingenuous and wrong. The Libous Resolution was not offered by a Senator for adoption with the consent of the Temporary President or his designee at any time, nor was proper notice of the resolution provided to the relevant parties. Fallon Aff. ¶¶ 15, 21. Neither the Temporary President nor the Deputy Majority Leader, Presiding Officer, Parliamentarian or Majority Floor Counsel were given copies of the Libous Resolution at any time prior to the start of session. *Id.* In fact, it was not until the Journal Clerk began reading the Libous Resolution that the Majority Floor Counsel, Michael Fallon, was handed a copy of the resolution. *Id.* Handing the resolution to the Majority Floor Counsel, simultaneous to the resolution being read, in no way constitutes proper notice under the Senate Rules, and Casey's self-serving claims to the contrary are flatly wrong.

3. The Senate Never Voted That the Libous Resolution Was Privileged

Paragraph 20 of the Complaint alleges that "there was never a vote to overturn the Presiding Officer's ruling that the Libous Resolution was out of order; therefore, the Senate did not and could not properly vote on the Libous Resolution." Defendant's Memorandum of Law fails to address this allegation. As set forth more fully in Plaintiff's brief in support of the Order to Show Cause, the Senate never ruled the Libous resolution in order. Plaintiff incorporates by reference Point III from the Order to Show Cause brief.

4. The Senate Adjourned Before Anyone Voted on the Libous Resolution

Paragraph 19 of the Complaint alleges that "the Libous Resolution was never duly passed by a majority of the [S]enators elected, because the Senate adjourned at the conclusion of the motion deeming the Libous Resolution out of order."

Defendant simply does not deal with the fact that the gavel came down; that under Senate Rule V, section 8(a), a motion to adjourn takes precedence over all other motions when a question is before the Senate; and that under Senate Rule V, section 8(b), a motion to adjourn "shall be decided without debate, and shall always be in order" except under limited circumstances set forth in Senate Rules V, VII and IX – none of which were present here. St. John Aff., ¶ 39. When the Presiding Officer announced that the House was adjourned and gaveled the Senate out of session, the Senate was adjourned and whatever followed was null and void. *Id.*; Tr. 13/22-24.

As Senators cannot vote after the Senate is adjourned, any purported vote after adjournment was illegal, including the purported vote to elect Defendant Temporary President.

VII. Defendant's Majoritarian Appeals Are Off the Mark

Finally, Defendant suggests that Plaintiff would prevent a majority from ever deposing him as Temporary President. *See* Def. Br., Point II. This suggestion is baseless. The Senate could have removed Plaintiff by proper majority vote: it didn't. The Senate could have voted on a truly privileged motion: it didn't. The Senate could have voted prior to adjournment: it didn't. Such steps could have complied with Senate Rules and the Public Officers Law: they didn't.

Plaintiff's case is about challenging unlawful conduct, not a "majority vote." This Court exists to enforce the rule of law. Under the law, for the many reasons described above, there can be no question that Senator Smith is Temporary President of the Senate until a majority of the Senate properly determines otherwise in accordance with the Constitution, the Public Officers Law and the Rules of the New York State Senate.

Plaintiff's case also is about challenging secrecy inconsistent with democracy and the effective operation of the legislative process. As shown *supra*, the Libous Resolution, cloaked in secrecy, lacked for any notice to the institutional Senate. Senate Rules and the Public Officers Law require such notice not as some procedural gimmick but to vindicate democratic principles that Senators must have access to information about what they are asked to vote on, and that Senate leaders must know the matters coming before the House so they can apply Senate Rules and thereby ensure the rule of law and the Senate's effective operation. These bedrock values of notice and transparency are the same ones that require each bill without exception to be on the desks of every Senator at the time of the vote, *see* N.Y. Const., art. III, § 14, and that entitle members of the public to information about the Senate, *see* Public Officers Law § 88(2)-(3); *Polokoff-Zakarin,* __ A.D.3d __, 2009 WL 1324027.

Thus, quite the opposite of upholding democratic principles like the rule of law, notice and transparency, Defendant and his position in this case would undermine them.

VIII. Plaintiff's Preliminary Injunction Motion Should Be Granted

In Plaintiff's opening papers, Plaintiff moved pursuant to CPLR 6301 and 6311 for a preliminary injunction on the grounds that (1) Plaintiff is likely to ultimately succeed on the merits; (2) there would be irreparable injury if provisional relief is withheld; and (3) the balance of equities tips in his favor. *See, e.g.*, *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988). Defendant contests only the first of these three points in his motion to dismiss and effectively concedes the others. Defendant has not and cannot deny that continued chaos in the Senate, the lack of a successor to the Governor, the ongoing lack of clarity as to who wields a multitude of executive and legislative powers inhering in the office of Temporary President, and a general legislative shutdown all irreparably harm Plaintiff, the Senate, and most importantly, the people of the State of New York. These factors overwhelmingly tip the balance of equities in Plaintiff's favor.

Accordingly, Plaintiff's motion for preliminary injunction should be granted.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss should be denied, Plaintiff's motion for a preliminary injunction should be granted, and the Court should grant all other relief as is just and proper.

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