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-
PEDRO ESPADA JR., New York State Senator,
Defendant.

Index No.: 09/_____

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION AND DECLARATORY RELIEF

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PRELIMINARY STATEMENT

This action for declaratory and injunctive relief seeks to redress a constitutional crisis in the State of New York. Plaintiff Malcolm A. Smith, a State Senator, was duly elected to the office of Temporary President of the New York State Senate for a fixed term of years, through the legislative biennium ending December 31, 2010. Because there is no Lieutenant Governor in this unique moment in New York history, Leader Smith is first in the order of succession to the Governor. If Governor David A. Paterson leaves the state or if the office of governor becomes vacant for any reason, the Constitution provides that Leader Smith becomes Acting Governor of New York. *See* N.Y. Const., art. IV, § 6.

In an attempted coup in the Senate Chamber on June 8, 2009, defendant Pedro Espada Jr., acting in concert with others, purported to usurp the office of Temporary President of the Senate, based on a secret resolution never properly introduced, never in order, never properly before the Senate, never adopted, insufficient to its stated purpose and patently illegal under applicable statutes. Senator Espada's claim of entitlement to the office of Temporary President is a nullity, undermining both the rule of law and the constitutional order of succession to the Executive. Senator Espada's attempted takeover of the Senate also fulminates chaos and confusion in the halls of government, calling into question any and all legislative acts purported to be undertaken in its wake -- effectively neutering the entire body and shutting down the legislative process of New York State. The voters, the Assembly, and the Executive do not know with certainty who controls the Senate. The irreparable harm to the people and government of the State of New York thus cannot be overstated.

While the Judiciary has a peculiar duty to uphold the rule of law in our constitutional system, so too does the Legislature, and each House thereof. The applicability of

the rule of law to legislative bodies is an ancient principle pre-dating this nation's founding. *See e.g. Briggs v. MacKeller*, 2 Abb. Pr. 30 (Sup. Ct. New York Co. 1855), *following R. v. Paty*, 2 Salk 503 (1704). "Were it otherwise, the course of legislative procedure . . . would be involved in the greatest uncertainty and lead to endless confusion." *Id.* Brazen violations of statute and legislative procedure, cloaked in secrecy, are inconsistent with these guiding principles of our democracy.

Accordingly, by this action, Senator Smith seeks a declaration pursuant to CPLR 3001 that the resolution by which he was elected Temporary President remains valid and operative, a declaration pursuant to CPLR 3001 that applicable provisions of the Public Officers Law were violated, and an injunction precluding Senator Espada from exercising any power of Temporary President pursuant to the Constitution or laws of the State of New York or the Rules of the New York State Senate, including the right of succession to the Executive. In thus seeking to vindicate the rule of law and the spirit of democratic governance itself, Leader Smith seeks to effectuate the words of Justice Frankfurter of the United States Supreme Court:

> "The historic phrase 'a government of laws and not of men' epitomized the distinguishing character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights, pt. 1, art. 30, he was not indulging in a rhetorical flourish. He was expressing the aim of those who, with him, framed the Declaration of Independence and founded the Republic. 'A government of laws and not of men' was the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power. Every act of government may be challenged by an appeal to law."[1]

[1] *United States v. United Mine Workers of America*, 330 U.S. 258, 307-08 (1947) (Frankfurter, J., concurring).

FACTS

Plaintiff Malcolm A. Smith was validly elected Temporary President and Majority Leader of the New York State Senate on January 7, 2009 to commence a fixed, two-year term covering the length of the 2009-10 legislative session, *i.e.*, calendar years 2009 and 2010. Senate Resolution 1 of 2009 resolved "That Senator Malcolm A. Smith be, and he hereby is, elected Temporary President of the Senate for the years 2009-2010." Affirmation of Keith C. St. John dated June 10, 2009 ("St. John Aff."), Para. 6**.** The resolution created no mechanism for removal of the Temporary President. *See id.*

The Senate Rules are silent regarding the removal of the Temporary President once elected. However, it is the Senate's long-established customary practice to follow Mason's Manual on Legislative Procedure in the absence of applicable provisions in Senate Rules, and this custom has force of law absent specific legislative rule. Mason's Manual on Legislative Procedure § 4(2)(c). Mason's Manual on Legislative Procedure § 581(1) states: "A presiding officer who has been elected by the house" remains the presiding officer unless and until "removed by the house upon a majority vote of all the members elected, and a new presiding officer pro tempore elected and qualified."

On June 8, 2009, the Deputy Minority Leader, Senator Libous, attempted to bring to the floor of the Senate what he called a "privileged resolution" (hereinafter the "Libous Resolution") purporting to nominate Senator Pedro Espada, Jr. as Temporary President of the Senate, and Senator Skelos as Majority Leader. (Tr. 7.)[2] The Libous Resolution, however, did not call for the removal of Temporary President Smith. *Id.* To date, the Senate has not entertained or voted on any resolution to remove Temporary President Smith. **St. John Aff. ¶ 6.**

[2] All references to "Tr." are to the unofficial transcript of the June 8, 2009 session of the New York State Senate, attached as Ex. __ to the St. John Aff.

The Libous Resolution was also not properly introduced under the Senate Rules. Under Senate Rule VI, section 9(a), "all 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." None of these requirements were met. In addition, "All resolutions, upon introduction, shall be referred to a standing or select committee by the Temporary President or an officer designated by the Temporary President." These requirements, too, were entirely ignored: the Libous Resolution was (i) not furnished to the Temporary President, Senator Smith, or any designee of the Leader, prior to attempted introduction, and (ii) not referred to a standing or select committee by the Temporary President or an officer designated by the Temporary President. **St. John Aff. ¶ 23-24.** Nor did Senator Libous provide notice or a copy of his resolution to at least 30 senators in the Democratic conference prior to his attempt to bring it to the floor. In short, Sen. Libous attempted to foist a secret resolution on the Senate, without notice to the public or to the presiding officers as to its contents or even its mere existence.

After Senator Libous announced his resolution, upon motion of Senator Klein, the Presiding Officer approved a motion for the Senate to stand at ease. (Tr. 7.) Senator Libous then sought to overrule the Presiding Officer, and "ask[ed] for an immediate vote . . . on those people who wish to stand at ease." (Tr. 8.) After further colloquy, the Presiding Officer ruled that the Libous Resolution was out of order, as it was not properly introduced under the Senate rules, nor deemed privileged by Temporary President Smith or his designee. (Tr. 9.)

Senator Libous moved to appeal again (although it arguably is unclear which ruling he was appealing). (Tr. 10) The Presiding Officer called for a vote (Tr. 10/15-17), and the Senate voted 32-30 to overrule the Presiding Officer (Tr. 13/8). Senator Klein then moved to

adjourn the session for the day (Tr. 13/15-16). The motion to adjourn was immediately granted and session was adjourned (Tr. 13/22-24). **Breslin Aff. ¶ 22.**

After the Senate stood adjourned, Senator Espada and others purported to take certain actions within the Senate chamber and thereafter claimed that Senator Espada was duly elected Temporary President of the Senate. **St. John. Aff.** [**video attachment]**. Since then, Senator Espada has repeatedly claimed in public to be the lawful holder of the constitutional office of Temporary President, and even has purported to file an oath of office.

ARGUMENT

Pursuant to CPLR 6301 *et seq*., a party is entitled to a preliminary injunction where there is: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the 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, 536 N.Y.S.2d 44, 45 (N.Y. 1988). Continued chaos in the Senate, the lack of a successor to the Governor, and a legislative shutdown will irreparably harm plaintiff, the Senate, and most importantly, the people of the State of New York. These factors also overwhelmingly tip the balance of equities in plaintiff's favor.

As to the merits, over 140 years ago, the New York Court of Appeals held:

> "There is no doubt that each house of the legislature, 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).[3]

The Court of Appeals might as well have been describing this very case. In a blatant and illegal grab for power, members of the Senate attempted to trample the Rules of the Senate and the statutes of this state. The attempt is illegal under well-settled New York law.

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

Mr. Smith was elected Temporary President for a fixed term of two years on January 7, 2009 coincident with the legislative biennium; that is undisputed. The resolution electing Mr. Smith provided no mechanism for his removal; that is undisputed. The Senate Rules do not address how to remove a Temporary President; that is undisputed. Mason's Manual on Legislative Procedure applies when the Senate Rules not speak to a procedural issues; that is also undisputed. *See* Mason's § 4(2). Mason's § 581(1) 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."[4]

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[3] Courts will intervene in appropriate cases in the internal matters of the Legislature, especially where, as here, the case has effects outside the Legislature, and indeed, determines the right of succession to the highest (non-legislative) office in the State: the governorship. *See Board of Ed. of City School Dist. of City of New York v. City of New York*, 41 N.Y.2d 535, 538 (1977) (recognizing that in appropriate cases "the judiciary 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 question was the validity of the Legislature's appointment of the "important office" of Regent of the University of the State of New York. *Id.* at 403. Here the question involves a much *more* important office: the immediate successor to the Governor of the State of New York.

[4] Subdivision 2 of section 581 of Mason's, recognizes one exception, which only applies where (unlike here) there is no "fixed term" of office: "2. When there is *no fixed term* of office, an officer holds office at the pleasure of the organization or until a successor is elected and

Here, there was no vote to remove Temporary President Smith. *See* Tr. *passim*. No motion or resolution has ever been introduced by any Senator to remove Senator Smith as Temporary President, at any time. *See id.* Consequently, there was and is no vacancy in the office of Temporary President to which any other person could be elected.

Absent such a vote to remove Senator Smith, he remains, and is currently, the Temporary President. Any contrary claim or action usurping onto his office thus is a blatant violation of the Rules of the Senate, and under *People v. Devlin*, is illegal. Plaintiff therefore is entitled to a declaration from this Court, pursuant to CPLR 3001, that he remains the Temporary President, and to an order enjoining Senator Espada from purporting to act as Temporary President.

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

The Libous Resolution fails for a second reason: it was not properly introduced on the floor under the Senate Rules. Senators are not free to introduce resolutions on the floor at will. Rather, under Senate Rule VI, section 9(a), "all 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, "All 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 not furnished to the Temporary President, Senator Smith, or referred to a standing or select committee by the Temporary President or an officer designated by the Temporary President (or, for that matter, provided in quadruplicate – or

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qualified." (Emphasis added). Senator Smith's term, however, was fixed, for two years: the 2009-2010 term. Where, as here, a presiding officer is elected to a fixed term, he cannot be removed absent a vote to remove him. *See* Mason's § 581(1).

even provided at all). Nor did Senator Libous give proper notice of his Resolution, again contravening not only basic principles of transparency and fairness, but longstanding Senate custom and practice. His resolution was altogether secreted from the public and from the institutional Senate.

Recognizing this fundamental failing, Senator Libous claimed that his resolution was "privileged" under Senate Rule VI, section 9(e), which provides: "all resolutions … reported to the committee of reference designated by the Temporary President shall be placed on the calendar… this subdivision shall not apply to any resolution … regarded as privileged." While neither Senate Rules nor Mason's defines "privilege," other than to require that a resolution to recall a bill or resolution from the Assembly "shall be regarded as privileged," Senate Rule V, section 9(a), longstanding and well-settled Senate customary practice – both under Leader Smith and previous Republican Temporary Presidents – is that only the Temporary President or his or her designee deems whether resolutions are privileged. **St. John Aff. ¶ 20.** This process has been recognized, followed and accepted without dispute during this legislative session and countless prior ones. All previous resolutions taken up outside the usual course of the resolution calendar also are considered on prior approval of the Temporary President or his or her designee. *Id.* Naturally, there can be no such consideration and approval without proper notice.

These provisions are no mere technicalities. If every senator could simply deem for himself or herself what is and is not privileged, or what is and is not in order, at any time and for any reason, then any senator could at any time bring any resolution to the floor – a result that would yield chaos and render Senate Rule VI, section 9(a), impermissibly nugatory and meaningless. *See 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 essential reason, the Temporary President has *always* been the gatekeeper for privileged resolutions, whether the Senate was controlled by Democrats *or* Republicans.

Here, neither Temporary President Smith nor his designee deemed the Libous Resolution privileged; therefore it was not privileged and not properly before the floor. The Libous Resolution was therefore invalid on its face, and Senator Espada is not and cannot be the Temporary President pursuant thereto.

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

Even if it were not the Temporary President's prerogative to determine what is and is not privileged, the Libous Resolution fails for a third, independent reason: the Senate never ruled that it was properly on the Senate floor.

The Presiding Officer made two rulings: first, he approved Senator Klein's motion to stand at ease (Tr. 7/23-24), a ruling from which Senator Libous appealed (Tr. 8/4-7). Then, he ruled the Libous Resolution out of order. (Tr. 9/23-24.) The Senate passed on the first ruling, but never the second. Because the Senate never overruled the Presiding Officer's decision that the Libous Resolution was out of order, that resolution was never properly on the floor, and the Senate (by it own Rules) could not as a matter of law consider it. For this reason, again, the Libous Resolution is without effect and Senator Espada is not the Temporary President.

This request to stand at ease is similar to a parliamentary inquiry or challenge to determine what is being presented and whether proper procedure is being followed. When the Presiding Officer ruled that the Senate stood at ease, Senator Libous immediately requested "an immediate vote on the motion to stand at ease," (Tr. 8/1-2), and repeated the request several

times. Senator Klein agreed to ring the bell and "get everybody in here." (Tr. 8/14-15.) Senator Libous then insisted again that there be a vote on the motion on the floor ("You cannot move to be at ease. Let's take the motion to an immediate vote.") (Tr. 8/19-20). Before there was an opportunity to vote on the motion to stand at ease, a vote Senator Libous specifically requested multiple times, the Presiding Officer ruled the allegedly privileged motion (the Libous Resolution) "out of order." Senator Libous then appealed, from one of the rulings (Tr. 10/3-4), but neither the transcript nor the video makes clear which ruling was being appealed from. Given Senator Libous' repeated requests to appeal the "at ease" ruling, the better view is that the "at ease" ruling, which was the first ruling, was the ruling appealed from.

After the vote, the session was adjourned, but even the Senators who remained after the adjournment *never voted* on whether the Libous Resolution was properly ruled out of order. Because the Presiding Officer ruled the Libous Resolution out of order, and because the Senate never expressly overruled that ruling, the Senate could not, as a matter of Senate procedure, proceed to vote on the Libous Resolution.

In addition, as a matter of parliamentary procedure, the Senate *could* not rule on the Presiding Officer's second ruling (that the Libous Resolution was out of order) until it had already ruled on his first (that the Senate was at ease). Under Senate Rule V, section 8(a), "[w]hen a question is before the Senate, *only* the following motions shall be made by a Senator": "(1) For an adjournment. (2) For a call of the Senate. (3) For the previous question. (4) To lay on the table. (5) To postpone to a certain day. (6) To commit to a standing committee. (7) To commit to a select committee. (8) To change calendar arrangement. (9) To amend." Here, the "question before the Senate" was the appeal of the Presiding Officer's decision that the Senate stand at ease. Accordingly, until this question was decided, no other question, except those in

section 8(a)(1)-(9), lawfully could be considered under Senate Rules. Senator Libous' appeal plainly did not fall within section 8(a). **St. John Aff. ¶ 28, 31.** Therefore, even if an appeal of the "out of order" ruling were considered, it *could not* be considered as a matter of Senate procedure, and the Libous Resolution was again never properly on the Senate floor.

IV. The Senate Adjourned Before Any Vote on the Libous Resolution

Before some senators even purported to vote on the non-privileged, out-of-order Libous Resolution, the Senate had already adjourned (Tr. 13.); **St. John Aff. ¶ 40.** Under Senate Rule V, section 8(a), a motion to adjourn takes precedence over all other motions when a question is before the Senate. 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 apply here. **St. John Aff. ¶ 39.** The Presiding Officer announced that the house was adjourned and gaveled the Senate out of session. ***Id.* ¶ 40**; (Tr. 13/22-24).

Because Senators cannot vote after the Senate is adjourned, any purported vote thereafter is ineffective and illegal. Accordingly, the purported vote to elect Senator Espada Temporary President was a legal nullity.

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

Senate Rule II, section 1, states "the Senate shall choose a Temporary President who shall be the Majority Leader." In violation of this rule, Senator Libous attempted to divide this office and nominate 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: in the Senate, the powers of the office of "Majority Leader" are subsumed in the office of Temporary President and the two cannot exist independent of each other. 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, under the Rules of the Senate, the resolution proposed a de facto Rules change, in clear violation of the applicable Rules, which require extensive notice to the Senate for any change to the Senate Rules. See Senate Rule XI, section 1. Absent such notice and in the context of the careful secrecy of this resolution, the purported election again violates Senate Rules, and is therefore a nullity.

VI. The Libous Resolution Violates the Public Officers Law

The Libous Resolution is also a blatant violation of a New York statute: the Public Officers Law.

The Legislature directed that "[e]very office shall be vacant upon the happening of" an enumerated and brief list of conditions, including "death," "resignation" and "removal." Public Officers Law § 30(1)(a)-(c). The Temporary President of the Senate unquestionably is a state officer, and such constitutional position is an "office." *See* Public Officers Law § 2 ("state officer" includes every "member of the legislature" and "every officer, appointed by one or more state officers, or by the legislature, 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).

As demonstrated *supra*, the Senate never voted to "remov[e]" Temporary President Smith, as required by Public Officers Law § 30. Nor did Leader Smith resign or die. Accordingly, under the plain language of the statute, there never was a vacancy in the office of Temporary President, and therefore such vacancy could not be filled. Thus, Leader Smith remains Temporary President, and the Libous Resolution was a nullity that could not lawfully have achieved its stated purpose.

Moreover, even assuming *arguendo* that the Libous Resolution could have achieved a vacancy in the office of Temporary President without saying so, the Legislature by statute established a specific, mandatory process for removing public officers. Section 35 of the Public Officers Law requires that:

> "Every removal of an officer by one or more state officers, shall be in written duplicate orders, signed by the officer, or by all or a majority of the officers, making the removal, or if made by a body or board of state officers may be evidenced by duplicate certified copies of the resolution or order of removal, signed either by all or by a majority of the officers making the removal, or by the president and clerk of such body or board. Both such duplicate orders or certified copies shall be delivered to the secretary of state, who shall record in his office one of such duplicates, and shall, if the officer removed is a state officer, deliver the other to such officer by messenger, if required by the governor, and otherwise by mail or as the secretary of state shall deem advisable, and shall, if directed by the governor, cause a copy thereof to be published in the state paper."

As demonstrated above, the Temporary President is a "state officer," and it cannot be disputed that the Senate is a "body" whose members must vote an order of removal and execute it in the manner specified by this section. Accordingly, assuming that the Senate is competent to interrupt the two-year term of a Temporary President, section 35 requires five steps to effective removal:

(1) the Senate must enact a specific order of removal – a result fully consistent with Mason's legislative procedure on point;

(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 and executed in duplicate;

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

(5) a signed order must be served on the Temporary President.

None of these requirements was satisfied -- not one. That is undisputed. Having failed to meet any of the requirements of Public Officer Law section 35, the Libous Resolution is null and void, and Senator Smith remains the Temporary President.

The Court has an unquestioned duty to enforce and uphold the law of New York State, and to declare pursuant to CPLR 3001 that the foregoing statutory requirements were violated. Accordingly, Senator Smith was not removed and remains Temporary President of the Senate.

CONCLUSION

For these reasons, Temporary President Smith respectfully requests that the Court (1) temporarily restrain and preliminary enjoin Defendant or any other person acting in concert with him from exercising any of the powers accorded to the Temporary President of the New York Senate by the New York State Constitution, the laws of the State of New York or the Rules of the Senate; (2) declare that Plaintiff remains the duly elected Temporary President of the New York State Senate; (3) declare a violation of Public Officers Law sections 30 and 35; and (4) grant all other relief as this Court may deem just and proper.

Dated: June 10, 2009
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