

SUCCESSION TO THE OFFICE OF GOVERNOR AND SEPARATION OF POWERS: THE UNFINISHED BUSINESS OF THE 1947 CONSTITUTION

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I. INTRODUCTION

Let us imagine for a moment that we have moved ahead in time to the night of the first Tuesday in November in some year that is divisible by four and that, for the first time since the election of Woodrow Wilson in 1912, the Governor of New Jersey has been elected President of the United States. This will necessarily mean that, within the next two and one-half months, the Governor will resign in order to take up his or her new office.

As the date of the Governor's resignation approaches, the thoughts of the people of New Jersey turn to the new leadership of the state. The Governor will be succeeded, as the newspapers have told them, by the Senate President. But who will succeed the Senate President, whether in that office or as senator from his or her district? To the surprise of most, the answer is "no one," because he or she will still continue to hold those offices. How can it possibly be that the 1947 Constitution, which created the most powerful office of Governor in the United States, would allow the person succeeding to the powers of the governorship to continue to exercise legislative powers as well?

Upon the Governor's resignation, the "functions, powers, duties and emoluments of the office shall," in accordance with article V, section 1, paragraph 6 of the 1947 Constitution, "devolve upon the President of the Senate, for the time being," until the next general election, when the new Governor will be elected, in accordance with article V, section 1, paragraph 9, which further provides that the new Governor "shall assume his office immediately upon his election."

The Senate President would not, however, actually become the Governor. Instead, he or she would exercise the powers and functions of the office of Governor while continuing to serve both as Senate President and representative of one of forty legislative districts. For a period of nine and one-half months, he or she would therefore be able to introduce legislation, post it in the Senate and, if it passed, sign it into law, thereby exercising more power than any elected governor could possibly exercise--in clear violation of the principle of separation of powers otherwise required by article III of the 1947 Constitution.

How did a succession procedure with this peculiar result ever come to be? Why was it not corrected in 1947? And, most importantly, what can and should be done about it now?

II. THE HISTORICAL BACKGROUND

Under New Jersey's first constitution, adopted in 1776, the Governor was elected for a one-year term by a joint meeting of the Senate (then called the Legislative Council) and the General Assembly. Under article VII of the 1776 Constitution, the Governor was made the "constant president of the council," with the right to break tie votes, and the Council was given the power to choose its Vice-President, who would preside in the Governor's absence. Under article VIII, the Governor, or, in his absence, the Vice-President of the Council, was given "supreme executive power," designated as "chancellor of the colony" and made "captain-general and commander-in-chief of the militia." Given the blending of executive, legislative and judicial powers under these articles, it was not unreasonable that a governor chosen by the Legislature, and presiding over one

house, be succeeded by an officer chosen by the members of that same house.

The 1776 Constitution, which also provided for its own nullification "if a reconciliation between Great Britain and these colonies should take place, and the latter be again taken under the protection and government of the crown of Great Britain,"¹ remained in effect until 1844. In that year, the voters of New Jersey, by a margin of 20,276 to 3526, with sixty-nine ballots rejected, approved a new constitution.²

The 1844 Constitution provided, for the first time, for separation of powers. Indeed, article III of the 1947 Constitution is substantively the same, with only minor stylistic differences, as the same article in the 1844 document. The Governor was now to be elected directly by the voters and to serve for a term of three years. However, article V, paragraph 12 preserved the principle of the "powers, duties and emoluments" of the office of Governor being assumed by the Senate President in the event of the Governor's death, resignation or removal, with the added proviso that they would pass to the Assembly Speaker in the event that the Senate President were also to die, resign or be removed.

On four occasions while the 1844 Constitution was in effect, a governor resigned in order to accept high federal office. As previously mentioned, Woodrow Wilson resigned on March 1, 1913, three days before his inauguration as President. The others were John W. Griggs, who resigned on February 1, 1898 to become United States Attorney-General, and Walter E. Edge and A. Harry Moore, who resigned on May 16, 1919 and January 3, 1935, respectively, to take seats in the United States Senate.³

Following the resignation of Governor Griggs on January 31, 1898, Senate President Foster M. Voorhees took, and filed in the office of the Secretary of State, an oath diligently and faithfully to administer the government of the state in conformity with the powers delegated to him. On October 18, 1898, however, Senate President/Acting Governor Voorhees submitted his resignation as a member of the Senate (to devote his time to his campaign for election as governor, which was successful) and, that same day, Assembly Speaker David O. Watkins took and filed the same oath and began his exercise of gubernatorial powers and duties.⁴

This rapid succession of acting governors might have occurred without any constitutional questions being raised had it not been for a prisoner in Hudson County named Edward Clifford whose execution had been ordered by the Court of Oyer and Terminer for February 16, 1898. On February 14, Senate President Voorhees in the exercise of his power as acting governor, granted a stay of execution until March 16th. As a result of Clifford's appeal to the federal courts, the sentence was further stayed until November 25, 1898, when Speaker Watkins, who was then serving as acting governor, ordered that Clifford be executed on January 6, 1899.⁵

Clifford's attorneys appealed to the state supreme court on the grounds that Speaker Watkins' execution order was a nullity because he had no power to issue it. According to their theory, Foster M. Voorhees had become governor, and had ceased to be a member of the Senate, when he filed his oath following Governor Griggs' resignation. If that was the case, his later resignation from the Senate was a nullity and he did not thereby cease to be governor. Any execution order, to be valid, would therefore had to have been issued by him. Since none was, Clifford could not legally be executed.

In support of this argument, Clifford's attorneys contended that the offices of State Senator and Governor were incompatible and that, by operation of law, the acceptance of the second office "is a virtual surrender of and vacates the first."⁶ The supreme court, however, disagreed that Voorhees had accepted the office of Governor and explained its construction of article V, paragraph 12 as follows:

In construing this clause of the constitution, it must be borne in mind that it was carefully drawn by learned jurists, who knew how to express with exactness and precision the purpose they had in view.

The provision is that in case of the resignation of the governor, the powers, duties and emoluments of the office shall devolve upon the president of the senate, and not that the president of the senate shall thereby become governor, and hold the title and the office until another governor is elected.

If the framers of the fundamental law had intended to transfer the president of the senate to the executive chair, and thereby to vacate the office of senator, it is reasonable to believe that they would have said so in no uncertain language. The language used is not ambiguous. It declares that the powers, duties and emoluments of the office shall devolve on the president of the senate. It does not confer upon him the title of the office.

The president of the senate exercises the powers of the governor, the president of the senate performs the duties of the governor, the president of the senate receives the emoluments of that office.

He is still president of the senate, with the added duties required of the chief executive of the state imposed upon him.⁷

The court went on to show how the references in the constitution to the "governor or person administering the government" and to separation of powers applying "except as herein expressly provided" further demonstrated this intent on the part of the framers of the constitution.⁸ The court further cited parallel language in the following section, which dealt with the Governor's temporary absence from the state, saying that it could surely not be seriously contended that the Governor could, by absenting himself from the state, vacate the seat of the Senate President, thereby possibly depriving the opposition of a majority in the event that the Senate was then divided eleven to ten.⁹

II. THE 1947 CONVENTION

Gubernatorial succession was one of the many items on the agenda of the New Jersey Committee for Constitutional Revision, a coalition that had been instrumental in mobilizing public support for the holding of a convention. The Revision Committee was composed of the New Jersey State Federation of Labor, the New Jersey State Federation of Women's Clubs, the New Jersey Association of Real Estate Boards, the New Jersey Taxpayer's Association, the National Council of Jewish Women, the Council of Churches, the Consumers' League of New Jersey, the American Association of University Women, the New Jersey Association of Colored Women's Clubs, the New Jersey League of Women Voters, the Congress of Industrial Organizations, the New Jersey League of Women Shoppers, and various individuals not affiliated with any of these organizations.¹⁰

Among the proposals submitted by the Committee for Constitutional Revision for consideration at the Convention was the following "clause on acting governor and filling vacancy in the office of governor":

The Governor by executive order shall designate heads of departments, in the order of his choice, to serve as Acting Governor in the event of a vacancy in the office of Governor or of the Governor's temporary disqualification, disability, or absence from the State, but in the event of the death, resignation, impeachment, or removal of the Governor or in the event of his disability or absence from the State for more than 60 days, the Legislature by a majority vote of all the members in joint meeting, may elect a person to take the office of Acting Governor until a new Governor has been elected or until the disability, absence, or disqualification of the Governor has ceased.

In the event of the death of the Governor-elect or of his failure to qualify into office, the newly elected Legislature, by a majority of all the members in joint meeting, shall elect a qualified person to take the office of Acting Governor until a new Governor has been elected and qualified or until the Governor-elect has

qualified. If the Legislature fails to elect an Acting Governor prior to the beginning of the term, the outgoing Governor or Acting Governor shall be Acting Governor until the vacancy is otherwise provided for.

In the event of a vacancy in the office of Governor, a Governor to fill the unexpired term shall be elected at the next general election held not less than 60 days after the vacancy occurs. A Governor elected to fill an unexpired term may assume his office as soon as his election has been determined.

In case there is no available person already designated to take the office of Acting Governor, the President of the Senate or, if he is unable to act, the Speaker of the Assembly shall assume the office of Acting Governor and shall forthwith call a special joint meeting of the two houses of the Legislature to be held within not more than one week for the purpose of selecting an Acting Governor.

The Legislature may provide by law for any contingency affecting the tenure of the office of Governor not fully provided for by this Constitution. ¹¹

In support of its proposal, the Revision Committee argued that, in the case of temporary absences, the Governor should be able to transfer his powers to a person who has his complete confidence while, in the case of protracted absence or vacancy, the person administering the office should be chosen either by the Governor or by the Legislature, since both the Governor and the Legislature are chosen by all of the voters of the state and this would therefore be "a more representative manner of choosing an Acting Governor than the present method of taking the person who happens, as a result of the custom of rotation, to be elected in a given year to preside over one house of the Legislature." ¹²

One of the component organizations of the Committee for Constitutional Revision, the Consumers' League of New Jersey, submitted its own statement to the Convention. It endorsed all of the Revision Committee's proposals except for the one on gubernatorial succession. Instead, the Consumers' League called for the election of a lieutenant governor, who would have the right to serve as governor in the case of the Governor's death, permanent disability, impeachment or absence from the state, but who would not, as is the case in other states, preside over the Senate. According to the Consumers' League, the Lieutenant Governor could take over many of the Governor's ceremonial duties, would be in a better position to exercise the duties of the Governor in the latter's absence because of his presumed "day-to-day knowledge of executive problems," and would represent the people of the entire state and, if elected on a single ticket with the Governor, the same party. ¹³

The League of Women Voters, another of the member organizations of the Revision Committee, submitted to the Convention a brochure entitled "Constitutional Changes." The League, endorsing the basic principles of both the Revision Committee's proposal and that of the Consumers' League, made the following alternative recommendations:

Provision shall be made for a temporary Acting Governor, and for succession in the event of the death, impeachment, or permanent disability of the Governor or Governor-elect.

Explanation--The present constitutional provision that the President of the Senate shall serve as temporary Acting Governor and shall succeed the Governor is unsatisfactory because this official is elected by a small minority of the people. Either of the two following provisions are recommended as preferable alternatives.

a. A person designated by the Governor or Governor-elect in a manner to be prescribed by law, but not a member of the Legislature or Judiciary of the State, shall be the temporary Acting Governor, and in the case of death, impeachment, or permanent disability of the Governor shall succeed him until the next general election, provided that the Legislature may elect a qualified person to replace such Acting Governor after 60 days.

Explanation--Gubernatorial appointment allows for a succession which will provide continuity in executive policies until a general election gives the people an opportunity to express their wishes.

b. A Lieutenant Governor shall be elected at the same time, for the same term, in the same manner, and subject to the same conditions of eligibility as the Governor. He shall preside over the Senate without vote.

Explanation--A Lieutenant Governor is elected by all the people of the State for the express purpose of providing for the succession. It is a method used by 36 states. It makes possible the filling of an unexpired term without resort to a special gubernatorial election, with the attendant confusion in state business.¹⁴

Support for the creation of an office of Lieutenant Governor also came from former Governor Charles Edison. In a memorandum submitted to the Convention, Governor Edison wrote as follows:

Our present constitutional provision making the President of the Senate the Acting Governor upon the death or inability to act of the real Governor is, to my way of thinking, indefensible. There is no logical reason why the duties and powers of the Chief Executive of our State should become vested, by reason of death, accident or other circumstances, in a Senator elected from a single county and selected for the post of President of the Senate by his colleagues of the majority party behind the closed doors of a party caucus.

There should be a Lieutenant Governor, elected from the State at large, in whom the full powers and duties of the Chief Executive would be vested in event death or other cause prevented the real Governor from serving.

There is another reason for needing a Lieutenant Governor. While this reason is not as basic as that heretofore pointed out, from a practical standpoint it is nevertheless important. Any man elected Governor is deluged with demands upon his time. This group wants him to speak. That group wants him to lay a cornerstone. Another wants him to hand out diplomas. Each group is deserving of consideration, but with only 24 hours in the day a Governor cannot possibly fulfill even a small portion of such engagements. These people have a right to expect--within the bounds of reason--a Governor to cooperate with them and appear before groups. They feel let down if a 'Secretary' or an 'Executive Assistant' is offered as a substitute, but they would gladly accept the Lieutenant Governor.¹⁵

The issue of succession in the event of a vacancy, like all other issues concerning the office of Governor, was referred by the Convention to its Committee on the Executive, Militia and Civil Officers ("EMCO Committee"). The chairman of this Committee was Senator David Van Alstyne, Jr. of Bergen County. Also on the EMCO Committee was Spencer Miller, Jr., a former State Highway Commissioner who also happened to be the President of the New Jersey Constitution Foundation, the former Chairman of the New Jersey Committee for a Constitutional Convention, and a member of the Executive Committee of the New Jersey Committee for Constitutional Revision. The other EMCO Committee members were Senate President Charles K. Barton of Passaic County, Mayor Frank Eggers of Jersey City, Senator Frank Farley of Atlantic County, Senator David Young of Morris County, Associate Governor's Counsel George H. Walton, Interstate Sanitation Commission Chairman J. Spencer Smith, District Court Judge and law professor Milton A. Feller, and League of Women Voters official Jane E. Barus.¹⁶

At its public sessions on June 24th, the EMCO Committee heard presentation by former Governor Morgan Larson and current Governor Alfred Driscoll. Governor Larson acknowledged the validity of the argument that it would be more appropriate to have the Governor succeeded by an officer chosen in a statewide election, rather than by the voters of one county; however, he still opposed having a lieutenant-governor because of the lack of anything for him to do while the Governor was in office.¹⁷

Governor Driscoll began his remarks by turning to article III, the separation of powers clause. He indicated his belief that separation of powers should be complete, as it is in the Federal Constitution, and he therefore objected to the phrase "except as otherwise provided." Later in the same remarks, however, he stated that, while there might be some benefits to having a lieutenant governor, "the present arrangement has worked out reasonably satisfactorily, and I personally would be content if this Convention chose to follow precedent in that respect."¹⁸ Thus, at one and the same time, Governor Driscoll both denounced the breach of the separation of powers in principle and endorsed the continuation of its most egregious manifestation!

At its meetings later that day and the next day, the EMCO Committee heard testimony from former Governors A. Harry Moore and Harold Hoffman, both of whom were asked by Senator Farley to comment on the idea of having a lieutenant governor. Neither of them viewed this as a significant issue. Governor Hoffman's comment was as follows:

I haven't given too much thought to it. It seems to me we have gotten by pretty well without creating that new job in the State of New Jersey. I don't think it is essential, unless the purpose would be to bring us in line with possibly a majority of the states that have a Lieutenant-Governor. The Lieutenant-Governor is generally supposed to share the responsibility and the work of the Governor. I think you will find that in practice he generally turns out to be a social adjunct to the Executive Department.¹⁹

Governor Moore appeared to be supportive of the idea--at least until his last sentence:

Well, of course, there is much to be said for and against a Lieutenant- Governor. Some may say it is only an extra position. On the other hand, he could be of value to the Governor in many ways. He could be the presiding officer of the Senate. The Lieutenant-Governor, of course, would be elected at the same time as the Governor. He would represent all the people, whereas the President of the Senate only represents one county and moves along usually by seniority, without regard, perhaps, to his ability. As representative of one county, he probably would not be in the same position as a man who had been elected by all of the people of the State. I don't think it is a too important question.²⁰

On the morning of June 26th, the EMCO Committee heard the recommendations of the Committee for Constitutional Revision on the subject of succession to the office of Governor, as presented by Princeton Borough Mayor Charles Erdman, Jr. and Professor Bennett Rich of Rutgers,²¹ as well as those of the League of Women Voters, as presented by Mrs. Charles Kellers.²² Thomas Parsonnet, counsel to the State Federation of Labor, did not refer to gubernatorial succession in his prepared remarks, but did state, in response to a question from Senator Van Alstyne concerning a lieutenant governor, that he presumed the Federation would still support the idea, as it had when constitutional revision was proposed in 1944.²³

On the afternoon of June 26th, the EMCO Committee held a business session at which the members voted on various recommendations to be made to the Convention. Discussion concerning gubernatorial succession was limited to a proposal for a lieutenant governor. The entire text of the portion of the minutes dealing with that discussion is as follows:

Discussion of the succession to office in the event of the disability of the Governor, and the functions of the Lieutenant-Governor and of the proposed Administrative Assistant.

Feller moved for a Lieutenant-Governor, elected by the people, but not to preside over the Senate. Motion seconded.

Farley opposed the motion; he prefers present method.

Feller: 36 states now have lieutenant-governors. New Jersey is the most populous of the remaining 12.

Miller: Read section on the lieutenant-governor from the New York Constitution. In New York the lieutenant-governor has succeeded six times, so one seems to be needed.

Smith: Opposed to lieutenant-governor; feels people would disregard him in voting, and he would be picked for political reasons only.

Eggers: Cannot see that the lieutenant-governor would have any useful function.

Motion lost, 6 to 3.

Feller moved that we adopt the present system. Motion seconded.

Walton moved to amend to provide for a third succession, to be determined by the Legislature in the event of the death or disability of both the President of the Senate and the Speaker of the House. Amendment seconded. Motion carried.

Farley made the point that the succession should go to the office and not to the man.²⁴

Thus, in short order, the Committee on the Executive, Militia and Civil Officers, with the Senate quite well represented in its membership, voted to dispose of the idea of having a lieutenant governor to displace the Senate President in the line of succession. It should be noted that there was no discussion by the EMCO Committee of any other alternatives, nor was there any discussion, even by the proponents of change, of the appropriateness of continuing to permit a single individual to exercise the powers of the governorship and the Senate presidency at the same time.

On July 7th, apparently undeterred by this EMCO Committee vote, Spencer Miller formally introduced the proposal of the Committee for Constitutional Revision for consideration by the Convention.²⁵ It was designated as Proposal No. 35, and, on July 15th, it was referred to the Committee on the Executive, Militia and Civil Officers.²⁶ On July 30th, however, the EMCO Committee reported as follows "for the record": "Proposal No. 38 by Spencer Miller, Jr., on the succession to the office of Governor in the case of a vacancy--rejected."²⁷ Not only was there no reported discussion of the proposal, but they even got its number wrong!

The issue of the Senate President adding the duties of the Governor to those of his own office did not, however, pass completely unnoted by the Convention. On July 16th, the Legislative Committee voted to recommend to the EMCO Committee that it "insert a provision in the Executive Article prohibiting a legislative officer who becomes Acting Governor from exercising his legislative function while so acting."²⁸ On July 31, the EMCO Committee recorded this recommendation in its minutes.²⁹ No further action in response to this recommendation was taken by either the EMCO Committee or the Convention at large.³⁰

IV. THE SUCCESSION ISSUE AFTER 1947

In the 1969 case of *Ackerman Dairy, Inc. v. Kandle*, the plaintiffs challenged the validity of the Milk Dating Law, codified at Section 24:1057.23 of the New Jersey Statutes Annotated, on the grounds that, when the legislation was before the Senate, the deciding vote was cast by Senate President Sido L. Ridolfi, who was then serving as acting governor in Governor Richard Hughes' absence, and that this action by Senator Ridolfi was invalid both because it contravened the doctrine of separation of powers guaranteed by article III of the state constitution and because it violated the common law doctrine prohibiting the holding of

incompatible offices.³¹

The New Jersey Supreme Court, however, reaffirmed the holding of *Clifford v. Heller*, finding it applicable to the pertinent sections of the 1947 Constitution to the same extent as it was to the comparable sections of the Constitution of 1844. The court noted the recommendation of the Legislative Committee and concluded that the Convention's failure to act on that recommendation amounted to an acceptance of Clifford.³²

The issue of gubernatorial succession was raised again in another context when Governor Thomas Kean included the following paragraph in his Fourth Annual Message:

We have been blessed with a string of healthy governors who have served out their terms. Some day--I hope far in the future--that will not be the case. The state would be well served to have an experienced man or woman, elected by all the people, to be the natural successor. For that reason, I suggest that it is the time New Jersey had an elected lieutenant governor.³³

Legislation to implement Governor Kean's recommendation passed the Assembly easily. However, the Senate, not surprisingly, was less receptive. After expressing their satisfaction that one of their own would be perfectly competent to lead the state government and denouncing the wastefulness of establishing a well-paid office with no duties other than to wait for the Governor to either leave the state or vacate the office, the Senate voted the proposal down.³⁴ That the Assembly was controlled by the Governor's party, the Senate was controlled by the opposition and Governor Kean was being mentioned as a candidate for high federal office may have been of some relevance to this outcome, although the opposition of the Senate members who served on the EMCO Committee strongly suggests an institutional bias, regardless of party, against any change that would remove the right of succession from the Senate President.

V. WHAT IS TO BE DONE?

One of the most significant changes brought about by the adoption of the 1947 Constitution was the great expansion of the power of the Governor. Under the 1844 Constitution, the Governor was elected for three years and could not be re-elected to a second consecutive term,³⁵ was subject to veto override by a simple majority in each house,³⁶ did not have authority to appoint the Treasurer or the Comptroller,³⁷ and could only appoint the Attorney-General, Secretary of State and several other officials if their five- year terms happened to expire while he was in office.³⁸ After 1947, however, these limitations on the power of the Governor no longer existed.

Over the years since the 1947 New Jersey Constitution was adopted, the Legislature has also seen its role increase. In the eras of Governor Griggs and Governor Wilson, its annual sessions were usually concluded by April, with special sessions lasting until June at the latest. An acting governor therefore had no legislative duties for most of the year, so the need to represent a single district as a legislator while serving the whole state was limited from a time standpoint. Now the Legislature convenes throughout the year; the inherent conflict is therefore continuous.

For those who find this situation acceptable, there is presumably nothing that needs to be done. However, it has been my experience that most thoughtful people, once the problem is pointed out to them, quickly agree that it should be corrected, preferably before a governor vacates the office by one means or another.

What, then, are the alternatives? I would suggest, for starters, that the original proposal of the Committee for Constitutional Revision be resurrected and given the fair hearing that it was denied in 1947. As long as we are going to retain the requirement that the Governor relinquish her powers when she crosses the state line, itself an anachronism in an age of rapid travel and instantaneous communication, then she should at

least have the assurance that her powers will be held temporarily by a person who is part of her team. New Jersey Senate Presidents have traditionally cooperated with the Governor in cases of temporary relinquishment, but they are under no legal obligation to do so. If there were a permanent vacancy in the office of Governor, the proposal of the Committee for Constitutional Revision would allow the Legislature to choose a successor who would not be, or not continue to be, a senate or assembly member.

The League of Women Voters and the Consumers League proposed the alternative of a Lieutenant Governor. Discussion of this solution, both by the Committee on the Executive and by the Kean-era Legislature, appears to have taken the place of any discussion of the underlying problem. It is certainly reasonable to oppose creation of a new office, undoubtedly well-paid, with no defined functions. Therefore, if the Legislature is willing to revisit this alternative, I would suggest, as an alternative, that no new office be created and that, rather, the power of succession be given to the existing and constitutionally-protected office of Secretary of State--itself an office that enjoys a constitutional protection against removal³⁹ that is inexplicable in terms of current functions and that has been in search of duties since its judicial and auditing functions⁴⁰ were lost in 1947.

The fact remains, however, that neither of these alternatives, no matter how reasonable they may be as a matter of public policy, can get anywhere without approval by the Senate. Both in the 1940s and the 1980s, and probably in the 1840s as well, the Senate was resolute in protecting its prerogatives. I would therefore propose to eliminate the conflict in a way that even the Senate might accept--by providing that, in the event of any permanent vacancy, the Senate President becomes governor--not acting governor--and vacates his seat in the Senate. He would then have the choice, at the next general election, of running either for governor or for his old senate seat, which would be held in the interim by a person appointed by his party committee under the 1988 amendment to article IV, section 4, paragraph 1.

Most people with even the most basic knowledge of the American system of government understand the centrality of the doctrine of separation of powers. Indeed, the highest court of one state has held that "separation of powers is an inherent and integral element of the republican form of government" and "as an element of the republican form of government, [it] is expressly guaranteed to the states by Article IV, Section 4 of the Constitution of the United States."⁴¹ We may reasonably expect that any person aggrieved by any action taken by a senate president acting as governor will seek to persuade New Jersey or federal courts to follow that holding.

When the time comes, as Governor Kean has predicted, that a governor dies in office, or when a governor resigns either to accept higher office or for some less pleasant reason, the anomaly of having an acting governor with far more power than an elected governor will become front-page news. There will, I am sure, be universal amazement in the press and among the public that so fundamental an error could have gone uncorrected for so long. But this will not happen if only our legislators, of both houses, would take a careful look at the problem, agree on a solution and submit it to an informed electorate.

Footnotes

a1. Michel L. Ticktin has been a member of the New Jersey bar since 1975. A graduate of Columbia Law School and the Woodrow Wilson School of Princeton University, he has served in both state and local governments.

1. N.J. CONST. of 1776, final paragraph.

2. N.J. CONST. of 1844, introductory notes.

3. MANUAL OF THE NEW JERSEY LEGISLATURE 464-65 (1997) [hereinafter MANUAL].

4. Clifford v. Heller, 63 N.J.L. 105, 107, 42 A. 155, 156 (1899).

5. Id. at 106, 42 A. at 155.

6. Id. at 108, 42 A. at 156.

7. Id. at 110-11, 42 A. at 157.

8. Id. at 111-12, 42 A. at 157.

9. Id. at 114, 42 A. at 158.

10. V STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION 340 (1947) [hereinafter V CONSTITUTIONAL CONVENTION].

11. Id. at 513.

12. Id. at 510-12.

13. Id. at 445-46.

14. Id. at 475-76.

15. Id. at 460.

16. Id. at 138. Biographies of delegates are found at II STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION 947-82 (1947) [hereinafter II CONSTITUTIONAL CONVENTION].

17. V. CONSTITUTIONAL CONVENTION, supra note 10, at 5.

18. Id. at 29-32.

19. Id. at 51.

20. Id. at 70-71.

21. Id. at 103, 105-09.

22. Id. at 134.

23. Id. at 132.

24. Id. at 139.

25. II STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION 1016-17 (1947).

26. I STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION 99 (1947).
27. V CONSTITUTIONAL CONVENTION, *supra* note 10, at 410.
28. III STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION 654-55 (1947).
29. V CONSTITUTIONAL CONVENTION, *supra* note 10, at 410.
30. *Ackerman Dairy, Inc. v. Kandle*, 54 N.J. 71, 75, 253 A.2d 466, 468-69 (1969).
31. *Id.* at 73, 253 A.2d at 467-68 (considering the validity of N.J. Stat. Ann. § 24:1057.23 (West 1997)).
32. *Id.* at 75, 253 A.2d at 468-69 (reaffirming *Clifford v. Heller*, 63 N.J.L. 105, 42 A. 155 (Sup. Ct. 1899)).
33. MANUAL, *supra* note 3, at 497.
34. ACR-16, which would have implemented Governor Kean's proposal for a Lieutenant Governor, passed the Assembly by a vote of 63 to 12 but was defeated in the Senate on October 20, 1986, by a vote of 11 to 24. As one who was present at that Senate debate, I can attest to the fact that the discussion was quite brief and was limited to assertions that the present system was just fine and that having a Lieutenant Governor would be a waste of money.
35. N.J. Const. of 1844, art. V, § 3.
36. N.J. Const. of 1844, art. V, § 7.
37. N.J. Const. of 1844, art. VII, § 2, § 2.
38. N.J. Const. of 1844, art. VII, § 2, § 3.
39. N.J. Const. art. V, § 4, § 3 (1947).
40. N.J. Const. of 1844, art. IV, § 2, § 4; *id.* art. IV, § 3, § 4; *id.* art IV, § 4, § 4; *id.* art. VIII, § 1.
41. *Vansickle v. Shanahan*, 511 P.2d 223, 241 (Kan. 1973). It should be noted that abrogation of the republican form of government is not an insignificant technicality. As President Lincoln stated in his July 4, 1861 message to Congress concerning the use of the war power to suppress the Rebellion, "if a State may lawfully go out of the Union, having done so, it may also discard the republican form of Government; so that to prevent its going out is an indispensable means to the end of maintaining the guarantee mentioned; and when an end is lawful and obligatory, the indispensable means to it are also lawful and obligatory."