

Removing or Impeaching the New York State Comptroller Bennett Liebman

On December 22, 2006, New York State Comptroller Alan G. Hevesi resigned from office thus ending a nearly three month saga during which it was learned that he utilized State resources and State employees to provide regular assistance and transportation for his ill spouse.¹ On that day, the Comptroller pleaded guilty to one count of defrauding the government, before the Honorable Stephen W. Herrick in Albany County.² Defrauding the government is a Class E felony committed when a public servant or political party officer “a) engages in a scheme constituting a systematic ongoing course of conduct with intent to defraud the state or a political subdivision of the state or a governmental instrumentality within the state or to obtain property from the state or a political subdivision of the state or a governmental instrumentality within the state by false or fraudulent pretenses, representations or promises and (b) so obtains property with a value in excess of one thousand dollars from such state, political subdivision or governmental instrumentality.”³ Comptroller Hevesi “admitted that as public servant he directed state employees under his control to continuously provide transportation, aid, and other services to his wife Carol Hevesi, not a state employee, for unofficial purposes and with the intent to defraud the state.”⁴

Additionally, Comptroller Hevesi resigned immediately from his position as State Comptroller and agreed to resign from the term new term that he won at the November general effective 12:01AM January 1, 2007.⁵

Comptroller Hevesi’s conduct was initially brought to the public’s attention by his opponent in the November 2006 election for comptroller, J. Christopher Callaghan.⁶ After Callaghan publicized this information, there was an inquiry by the State Ethics Commission which determined that the Comptroller had violated the State’s code of ethics.⁷ Governor Pataki subsequently appointed an investigator, former United States Attorney David Kelley, to review the issue of whether to request the Senate to remove the Comptroller.⁸ Mr. Kelley initially found that based on the Ethics Commission report that

¹ This scandal became commonly known as “Chauffeurgate.” Rick Karlin, “Hevesi’s Ethics Assailed,” Albany Times Union, October 24, 2006 Pg. A1

² “Hevesi Pleads Guilty,” Press Release of District Attorney P. David Soares,” December 22, 2006 http://www.albanycountyda.com/press_releases/December_2006/press_releases/hevesi_plea.html last viewed January 8, 2007.

³ Penal Law, Section 195.20.

⁴ See note 2 supra.

⁵ Id.

⁶ Fredric U. Dicker, “Hevesi in Free \$\$ Ride - Chauffeur Misuse,” New York Post, September 22, 2006 Pg. 12.

⁷ See New York State Ethics Commission, In the Matter of Alan G. Hevesi, Comptroller of the State of New York, Notice of Reasonable Cause ,October 23, 2006 at <http://www.dos.state.ny.us/ethc/NORC/Hevesi.htm>

⁸ Tom Precious, “Pataki Hires Lawyer to Probe Whether to Oust Hevesi,” Buffalo News, October 28, 2006 Pg. A7.

there was a substantial basis to remove the Comptroller.⁹ Nonetheless, he did not recommend that the governor initiate action to remove the Comptroller, given the uncertainties involving witness testimony and a lack of procedural rules governing Senatorial removal.¹⁰ Governor Pataki subsequently granted Mr. Kelley broader investigatory and subpoena powers under the State's Moreland Act in order to determine whether to take action against Comptroller Hevesi.¹¹

Soon after news broke about the Comptroller's use of employees on behalf of his wife, the Comptroller paid \$82,688 to the State in late September as reimbursement for the expenses of one employee who had performed significant private transportation services for his wife.¹² A further review of the expenses conducted by Attorney General Eliot Spitzer's office found that this amount was insufficient, and Hevesi paid an additional amount of \$90,000 to the State before the general election.¹³ After the election, the Attorney General's office determined that Hevesi owed an additional \$33,605 to the State for a grand total of \$206,294.¹⁴ All told, Hevesi owed the State "\$195,000, including interest, for the services of one state worker -- Nicholas Acquafredda -- assigned to his wife and \$11,000 for three others who did various work for different lengths of time."¹⁵

Comptroller Hevesi easily won reelection on November 7, 2006.¹⁶ Finally, amidst the actions of the governor, the Ethics Commission, and the Attorney General, the district attorney in Albany County began his own separate criminal investigation of the Comptroller's actions.¹⁷ The Comptroller faced the possibility of criminal indictment involving his failure to reimburse the State on a timely basis for three years' worth of government employees being assigned to serve as drivers and companions for his ailing wife. After considerable negotiation, Comptroller Hevesi eventually "pleaded guilty to a single felony, agreed to pay a \$5,000 fine on top of the more than \$206,000 he has already reimbursed the state, and agreed to resign for the rest of his current term and for the term that begins Jan. 1. The agreement will spare him prison time."¹⁸ Comptroller

⁹ http://timesunion.com/capitol/graphics/Kelley_Report.pdf; James M. Odatto, "Report Faults Hevesi Actions," Albany Times Union, November 5, 2006 Pg. A1.

¹⁰ Id.

¹¹ Joe Mahoney And Ben Smith, "Gov Steps Closer to Legal Case Vs. Hevesi," New York Daily News, November 20, 2006 Pg. 24; "Pataki Said to Be Evoking 1907 Act to Investigate Hevesi," New York Sun, November 20, 2006.

¹² Jacob Gershman, "Saying He Has 'No Excuses,' Hevesi Will Pay State \$82,688," New York Sun, September 26, 2006 Pg. 3.

¹³ Michael Cooper, "Hevesi Repays \$90,000 More to State for Wife's Chauffeur," New York Times, November 4, 2006 Section B, pg. 1.

¹⁴ Tom Precious, "Hevesi agrees to reimburse state \$206,00," Buffalo News, December 13, 2006 Pg. A1.

¹⁵ Id.

¹⁶ David K. Li And Daniel Friedman, "Hevesi Back In Driver's Seat; Re-Elected Despite Chauffeur Scandal," New York Post, November 8, 2006 Pg. 9. Hevesi won by more than 700,000 votes and defeated his Republican opponent by a percentage of 59.3% to 40.7%. See http://www.elections.state.ny.us/NYSBOE/elections/2006/general/2006_comp.pdf last viewed January 8, 2006.

¹⁷ James M. Odatto, "Soares Launches Probe Into Hevesi Scandal," Albany Times Union, October 13, 2006 Pg. A1.

¹⁸ Michael Cooper, "Hevesi Pleads Guilty to a Felony and Resigns," New York Times, December 23, 2006 Section B Page 1. See also note 2 supra.

Hevesi's "swift and painful fall was almost certainly the final act of a long career for a talented politician who could not get out of the way of his own success."¹⁹

With this significant public focus on the allegations of ethical and criminal improprieties that were directed at the State Comptroller, there is a need to examine the procedures in New York State that would have been utilized had elected officials sought to remove the comptroller from office. Given the varied potential scenarios, there seems to be considerable public disinformation as to what processes might be available for removing and replacing a comptroller. For example, how would a comptroller be removed from office, what is the effect of the comptroller's convicted of a crime, who would select a successor to the comptroller, and how long would that successor hold office?

Senatorial Removal from Office

New York provides two vehicles for the expulsion from office of a comptroller or an attorney general. One is through the "removal" process. Article 13, section 5 of the State Constitution provides that the legislature shall provide "for the removal for misconduct or malversation in office of all officers, except judicial, whose powers and duties are not local or legislative and who shall be elected at general elections"²⁰ Pursuant to this authorization, the New York Public Officers Law grants the governor the authority to investigate whether to recommend removal of public officers.²¹ The governor is authorized to take proofs, for the purpose of determining whether such recommendation shall be made.²² The formal removal process begins when the governor recommends to the Senate that the comptroller be removed.²³ The governor appoints a person to conduct a trial before the Senate, where a two-thirds vote of the entire Senate would be required for removal of the comptroller.²⁴ The senate establishes its own rules to determine the procedures in effect during a removal proceeding.²⁵ There has not been a formal removal proceeding since 1908. Governor Pataki's appointment of former federal prosecutor David Kelley,²⁶ and Kelley's subsequent November 4 report²⁷ showed that the Governor was reviewing how to proceed against Comptroller Hevesi under the removal process prior to the Comptroller's resignation from office.

Impeachment

¹⁹ Michael Rothfeld, "After Hevesi; The Rise & Fall of Alan Hevesi," *Newsday*, December 23, 2006 Pg. A24. For Comptroller Hevesi his plea and resignation in Albany on December 22, 2006 must have been a painful reminder of the Lorenz Hart lyric from the musical "The Boys from Syracuse." "The shortest day of the year has the longest night of the year."

²⁰ State Constitution, Article 13, § 5.

²¹ Public Officers Law, §32.

²² *Id.*.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ See <http://www.ny.gov/governor/press/06/1104061.html>. last viewed Decmber 19, 2006. Governor Pataki's appointment of an individual to review the issues of whether to request the Senate to remove an individual differs little from the use by Governor Charles E. Hughes in 1908 to investigate charges against the Insurance Superintendent. See Public Papers of Charles E. Hughes, Governor 1908 Pp. 177 – 185.

²⁷ See notes 9 and 11 supra.

A second method for expelling the comptroller from public office is through the impeachment process.²⁸ The New York State Constitution has had a provision authorizing impeachment since its initial adoption in 1777.²⁹ While the Constitution is silent on exactly which officers are subject to impeachment, under the statutes governing this procedure, almost all civil officers of the state, except basically local justices of the peace, are subject to impeachment “for willful and corrupt misconduct in office.”³⁰ Impeachment is the only means to expel the governor and the lieutenant governor from office. Impeachment is initiated in the Assembly by majority vote of the full membership.³¹ The trial for impeachment is heard by the special court for the trial of impeachments, consisting of the lieutenant governor, the members of the Court of Appeals, and the members of the Senate.³² The lieutenant governor presides over the trial of a comptroller.³³ A two-thirds vote of all the members of the special court present is required for conviction.³⁴ Besides removing an officer from his or her current office, the court for the trial of impeachments may also disqualify the officer from further service in a “particular office or class of offices.”³⁵ In short, if the comptroller were to have been removed via impeachment in 2006, the penalty imposed could have extended to the term beginning on January 1, 2007.

If the comptroller had been expelled from office via the Senatorial removal process before December 31, 2006, only his 2003 -2006 term would have been affected; the comptroller would not have been barred from serving the term that commenced on January 1, 2007. Further, if an action to expel the comptroller had been taken after his term began on January 1, 2007, there is precedent in New York for using alleged misconduct that occurred before the office holder’s current term as the basis for an impeachment proceeding.³⁶ The State Senate in a removal proceeding involving Judge

²⁸ State Constitution, Article 6, §24. See generally VIII New York State Constitutional Convention Committee, “Problems Relating to Executive Administration and Powers,” (1938) Pp. 199-205.

²⁹ State Constitution 1777, Article XXXII.

³⁰ Judiciary Law, §240. These provisions were severely criticized for vagueness and lack of substance in Dunne and Balboni, “New York’s Impeachment Law and the Trial of Governor Sulzer: A Case for Reform,” 15 *Fordham Urban Law Journal* 567 (1986-1987).

³¹ See Note 28 supra.

³² *Id.*; Judiciary Law, §241

³³ Judiciary Law, §242. Where the lieutenant governor is the subject of the impeachment proceeding or is unable to preside, the chief judge of the court of appeals serves as the presiding judge.

³⁴ Judiciary Law, §422

³⁵ Judiciary Law, §425.

³⁶ “Judge Barnard was impeached in the state of New York during his second term, for acts committed in his previous term of office. His plea that he was not liable to impeachment for offenses occurring in the first term was overruled.” *State v. Hill*, 37 Nebraska 80, 88 (1893). See also *Territory v. Sanches*, 14 N.M. 493, 497 (N.M. 1908) overruled by *State v. Santillanes*, 99 N.M. 89, 91 (N.M. 1982). In the impeachment trial of Governor William Sulzer, the governor was removed based on action that had occurred before he held public office. See *People v. Berg*, 228 A.D. 433, 440 (2nd Dept 1930) aff’d 254 NY 544 (1930) Friedman, *The Impeachment of Governor William Sulzer*, Pp. 197 -198 and 233 (1939) In the impeachment trial of Governor Sulzer, Court of Appeals judge and future Governor Nathan Miller stated “There is strong internal evidence that it was not intended to limit impeachable offenses to misconduct in office,” Trial of William Sulzer at 1651 and “It may now be regarded as settled by precedent and the consensus of opinion that the causes of impeachment are not confined to official acts or indictable offenses.

Horace G. Prindle in 1872 determined that misconduct that occurred in previous terms was a proper subject for a removal proceeding.³⁷ New York courts have additionally upheld “removals” (as contrasted with impeachments) of local public officers based on conduct that occurred before their current term commenced.³⁸

Reelection after Disclosure of Misconduct

On occasion, the issue has arisen as to whether the reelection of an official – after full disclosure of their misconduct during a prior term – will provide immunity for official from removal. The basic answer is that reelection, even with full disclosure of the misconduct, does not provide a safe harbor for the official from removal proceedings.³⁹ Thus, had there been a proceeding undertaken against Comptroller Hevesi in 2007, his electoral victory would not have shielded from removal.

This issue was addressed most succinctly in the case of *Phillips v. Dally*.⁴⁰ In that case, Dally was the commissioner of highways for the town of Monroe in Orange County. He was convicted of a federal crime. After he was convicted of the crime, he won reelection. In arguing against his removal, Dally contended “that the voters were fully informed of his criminal conviction when they reelected him and that his removal would thwart the free and informed will of the electorate.”⁴¹ The court simply stated, “Similar arguments have been repeatedly rejected by this and other New York courts.”⁴²

Of these similar cases, the most significant is the Court of Appeals decision in *Matter of Bailey*.⁴³ Bailey was a Justice of the Keeseville Village Court in Essex County. He had engaged in misconduct when he served as a Justice of the Chesterfield Town Court, in Essex County. He argued that his election to his new position with the electorate being

The Barnard case in this State is authority for the proposition that they are not limited as to the time of their commission by a particular term of office. We may start then with the premise that the act or offense need not be official and that the taking of the oath of office does not in point of time separate nonimpeachable from impeachable offenses. The principle is to be deduced from the nature and object of impeachment that the cause must be some grave misconduct evidencing particular disqualification to hold the given office or any office.” Pg. 1653. But see “Report of the Judiciary Committee Relative to Power of Impeachment,” N.Y. Ass. Doc. No. 123 76th Sess. 1 (1853).

³⁷ IV Lincoln’s Constitutional History of New York (1906) Pg. 584; Proceedings in the Senate on the Investigation of the Charges Preferred against Horace G. Prindle, County Judge and Surrogate of Chenango County, vol. I, pp. 56, 57, 61, 63 cited in Newman v. Strobel, 236 A.D. 371, 407. (4th Dept. 1932)

³⁸ Newman v. Strobel, 236 A.D. 371 (4th Dept. 1932). See generally 42 ALR 3d 691 §9 b (1972) updated 2001. See also note 36 supra at pp. 22- 23 for a listing of cases authorizing removal based on misconduct committed prior to a public officer’s current term.

³⁹ Arguably, in the Hevesi situation, while there was significant public knowledge of the misconduct, there had been no disclosure of the actual monetary amount owed to the State by the Comptroller and no disclosure of whether the Comptroller’s conduct had been criminal in nature before the election.

⁴⁰ 143 A.D. 2d 273 (2nd Dept 1988).

⁴¹ Id.

⁴² Id.

⁴³ 67 NY2d 61 (1986)

fully aware of his misconduct shielded him from removal. A unanimous Court of Appeals disagreed.⁴⁴

The Court stated:

True it is that in some of those decisions the court noted that the judge's misconduct was unknown to the public (but see, Matter of Abare v Hatch, 21 AD2d 84, 86). In our view, however, knowledge of the voters can no more immunize a judge from removal for misconduct in a prior judicial office than election of a person without the number of years practice of law required by article VI, § 20 (a) of the Constitution can authorize such a person to hold office (cf. Maresca v Cuomo, 64 NY2d 242). Petitioner points to nothing in the Constitution or in statute vesting the voters with the power to pardon (cf. NY Const, art IV, § 4; People v Broncado, 188 NY 150, 155). To conclude that misconduct which the Legislature has expressly provided shall forever disqualify from judicial office can be absolved by election to a new judicial office (or reelection to the same office) after the misconduct became known would be a perversion of both logic and legislative intent.⁴⁵

The holding in the Bailey and Dally cases case was also applied to a local public officer in West v. Grant.⁴⁶ The respondent in that case was town supervisor who had been convicted of a crime before he was reelected. He argued that his conviction had been well publicized before his reelection.⁴⁷ The court rejected this argument finding that “it is well settled that a public official may be removed from office for acts of malfeasance committed during a prior term of office.”⁴⁸

Some commentators have suggested that “there seems to be considerable support for the proposition that under New York law, a public official may not be charged or removed for misconduct if he is re-elected after the alleged offense was made public.”⁴⁹ Yet, the actual support for this proposition may be extremely limited.

There are no cases where a removal was precluded where the public officer had been reelected after full disclosure of the misconduct. The case most often cited for this proposition is the Nassau County Court case of Carlisle v. Burke.⁵⁰ Mr. Burke was the

⁴⁴ Id. at 63.

⁴⁵ Id. at 64.

⁴⁶ 243 A.D. 2d 815 (3rd Dept. 1997)

⁴⁷ Id. at 817.

⁴⁸ Id.

⁴⁹ Bennett L. Gershman, “Cleansing a Candidate's Sins . . . by Re-electing Him,” Journal-News, November 23, 2006. See also Erik Kriss, “Will He Stay or Will He Go? Hevesi's Future Could Be One for Law Books,” Syracuse Post-Standard, November 16, 2006 suggesting that reelection after full disclosure of wrongdoing could be viewed as exoneration of the public official. Cf. Dunne and Balboni supra note 30 at 585-586. Steve Fishman, “The Penitent; Eliot Spitzer May Have a Large Say in Alan Hevesi's Political Future, But the State Comptroller Has a More Formidable Tormentor: Himself,” New York Magazine, December 18, 2006.

⁵⁰ 82 Misc. 282 (County Court, Nassau County, 1913).

superintendent of highways for the town of Oyster Bay. He was first elected in the spring of 1911 for a two year term that began on November 1, 1911. He was then reelected in the spring of 1913 for a term that began on November 1, 1913. “It was well known to the public prior to respondent's re-election that his accounts and acts as highway superintendent were under investigation by the state auditors and that these matters and charges of malfeasance were made public in the local press and discussed by the electors. After a full discussion and consideration of these very charges against the respondent, the electorate of the town returned the respondent to office.”⁵¹

Burke argued that because of his spring 1913 reelection he could not be removed from his term that was due to expire on November 1, 1913. Under existing court decisions in New York, the court believed that a public officer could not be removed for wrongdoing in his prior term.⁵² The court, however, ruled that the reelection did not shield Burke from being removed in his 1911-1913 term.

The court stated:

The respondent's re-election, however, cannot, as a matter of law have any controlling influence or effect upon the determination of this matter. The fact that the people have the right to nominate and re-elect a man to an office from which he has been removed does not affect the binding force of the express provision enacted by the people themselves that an official who has violated the mandate of a statute which has been expressly enacted to govern and control his official acts shall be removed from office and prevented from continuing to exercise the trusts, powers and duties of the office during the term in which he has been found guilty of official misconduct. Any other construction would completely nullify the act of the legislature and would in effect repeal the statute or at least make it inoperative in a special case.⁵³

In short, the reelection of Mr. Burke did not shield him from a removal proceeding brought during his current term. The courts believed, at the time, that a public officer could not be removed for actions that took place other than during the official's current term. In any event, this case did not involve an attempt to remove Mr. Burke from office during the term that commenced after his reelection.

The concept that the Burke case stands for the proposition that reelection with full disclosure of wrongdoing exempts a public officer from removal may owe much of its force to the manner in which the case was distinguished in *Newman v. Strobel*.⁵⁴ Mr. Strobel was the supervisor of the town of Ohio in Herkimer County. The appellate Division authorized his removal from office based on misconduct which occurred during his prior term of office. In distinguishing Burke, the Appellate Division wrote,

⁵¹ Id. at 289.

⁵² Id.

⁵³ Id.

⁵⁴ See note 38 supra.

Carlisle v. Burke (82 Misc. 282) is a County Court decision, in which it appears that the defendant had been re-elected to the office of town superintendent of highways after his acts and accounts had been under investigation by the State auditors, and after his alleged shortcomings had been thoroughly aired in the public press, and had been made an issue in the election. With full knowledge of the situation, the people of his town returned him to office by a majority vote of the electorate -- a far different situation from that which exists here.⁵⁵

Nonetheless, the Strobel court seemed to miss the fact that no attempt was made to remove Burke during a term subsequent to the one during which his misconduct had taken place. Moreover, the fact of his reelection did not shield Burns from a removal proceeding that took place before his new term commenced.

Carlisle v. Burke, in no manner, stands for the proposition that reelection with full disclosure of wrongdoing shields a public officer from removal. Even if it did stand for this proposition, the subsequent opinions by higher courts authorizing removal of public officers who had been reelected after full disclosure of their wrongdoing – such as Bailey,⁵⁶ Dally⁵⁷ and Grant⁵⁸ – would effectively repudiate that position.

History of Impeachment and Removal Proceedings

It should be emphasized that both impeachment and Senatorial removal are extremely rare events in New York. There has not been a proceeding of this kind since the controversial impeachment, trial and removal of Governor William Sulzer in 1913.⁵⁹ Even in the 19th century, impeachments and senatorial removals were uncommon.⁶⁰

There were, in fact, no impeachment proceedings in New York State prior to 1853,⁶¹ and there have only been four in total. In 1853, the Assembly voted to impeach canal commissioner John C. Mather.⁶² Mr. Mather was eventually acquitted by the court for the trial of impeachments⁶³. The Assembly similarly in 1868 voted to impeach canal

⁵⁵ Id. at 377.

⁵⁶ See note 43 supra.

⁵⁷ See note 40 supra.

⁵⁸ See note 46 supra.

⁵⁹ Legislative Committee on Review of the Constitutional Process of Impeachment and Inquiry on the Impeachment of Governor William Sulzer (April 28, 1983). See also notes 30 and 39 supra. Other than the Sulzer impeachment, the most noted impeachment case would likely have involved Albert Cardozo, the father of United States Supreme Court Justice Benjamin Cardozo. Albert Cardozo resigned from the bench on the eve of his impeachment in 1872. See Andrew L. Kaufman, Cardozo 9-20 (1998). Kaufman notes, “There is no doubt that Cardozo would have been convicted as well.” Pg. 19

⁶⁰ See IV Lincoln’s Constitutional History of New York (1906) Pp. 577 – 606.

⁶¹ Id. at 606. See also “Court of Impeachment,” New York Times, July 28, 1853 Pg. 1.

⁶² New York Assembly Journal 1853, Pp. 1531 -1540; “New York Legislature –Extra Session,” New York Times, June 23, 1853, Pg. 1.

⁶³ “The Acquittal of Mr. Mather,” New York Times, September 23, 1853, Pg 1.

commissioner Robert C. Dorn,⁶⁴ and Dorn was similarly found innocent by the court for the trial of impeachments.⁶⁵ The one impeachment trial – before Governor Sulzer – where an officer was removed from office involved Supreme Court judge George G. Barnard. Judge Barnard was convicted after a trial of 36 days. His removal was unanimous, and he was further ordered disqualified from holding any further office with only two dissenting votes.⁶⁶ With the Sulzer conviction, there have been a total of four trials of impeachment cases. In two cases, the public official was found guilty, and in two other cases, the officials were found innocent.

There have been slightly more removal hearings before the Senate, but there have been, in fact, no removal proceedings in close to one hundred years. The first person subject to a Senatorial removal proceeding was Judge George W. Smith who in 1866 was acquitted of charges of official corruption. The first successful removal proceeding involved John H. McCunn, a justice of the Superior Court of the City of New York. Judge McCunn in 1872 was removed from the bench by the Senate. Removal proceedings were also brought in 1872 against Judge George M. Curtis, a judge of the Marine Court of New York City, and Judge Horace G. Prindle a County Judge and Surrogate of Chenango County. Both removal efforts were unsuccessful.

Governor Lucius Robinson, during his tenure as governor from 1877 -1880, recommended that two public officials be removed. Banking Department superintendent DeWitt C. Ellis was removed in 1877 from his position for culpable negligence rather than for intentional wrongdoing.⁶⁷ Superintendent John F. Smyth of the Insurance Department was acquitted of charges by the Senate in 1878.⁶⁸

Since the attempted removal of Superintendent Smyth, only one person has been the subject of a Senatorial removal proceeding. That individual was Insurance Superintendent Otto D. Kelsey,⁶⁹ and Governor Charles E. Hughes on two occasions requested that the Senate remove Superintendent Kelsey. The first occasion was in 1907. Governor Hughes actually called in Superintendent Kelsey and personally interrogated him⁷⁰ before submitting his request to the Senate for removal.⁷¹ Despite the recommendation, the Senate voted to acquit Mr. Kelsey by a vote of 27 -24.⁷²

⁶⁴ New York Assembly Journal, 1868 Volume 1, Pg. 382.

⁶⁵ “The Dorn Impeachment Trial at Albany,” New York Times, June 13, 1868 Pg. 5.

⁶⁶ “Exit Barnard,” New York Times, August 20, 1872 Pg. 5. by contrast, Governor Sulzer was removed from office, but his conviction did not extend to future offices.

⁶⁷ 3 Testimony and Proceedings of the Senate against DeWitt C. Ellis, Superintendent of the Banking Department of the State of New York (1877) PP. 2046 – 2047. See also “Superintendent Ellis Removed,” New York Times, August 18, 1877 Pg. 1. The superintendent of the Banking Department served a three year fixed term under L. 1851 Ch. 164.

⁶⁸ Matter of John F. Smyth, Superintendent of Insurance Department (1878). See also “A Disgraceful Verdict,” New York Times, March 28, 1878 Pg. 4. The superintendent of the Insurance Department served a three year fixed term under L. 1859, Ch. 366 §2.

⁶⁹ Kelsey had previously served as State Comptroller. The superintendent of the Insurance Department continued to serve for a three year fixed term under L. 1906, Ch. 326 § 2. See Id. L. 1859 Ch. 366, §2.

⁷⁰ Public Papers of Charles E. Hughes 1907, Pp. 315 - 359.

⁷¹ Id. at Pp. 245 -256.

⁷² “Kelsey Wins; Vote 27 -24,” New York Times, May 3, 1907 Pg. 1.

Subsequent to the 1907 acquittal, Governor Hughes appointed attorney Matthew Fleming as a commissioner under the recently enacted Moreland Act⁷³ to investigate the Insurance Department.”⁷⁴ Fleming’s subsequent report on the Insurance Department found Kelsey to be unfit,⁷⁵ and, based on this report, Governor Hughes again recommended that the Senate remove Kelsey.⁷⁶ Nevertheless, the Senate again acquitted Kelsey.⁷⁷

Thus, there have been a total of eight removal proceedings heard by the Senate (counting the proceedings against Kelsey twice). On six occasions, the respondent was found innocent, and only on two occasions (McCunn and Ellis) was the respondent public official found guilty.

Criminal Conviction and Indictment

The comptroller’s office, and every public office in New York is deemed automatically vacant if the comptroller/public officer were to be convicted of a felony or “or a crime involving a violation of his oath of office.”⁷⁸ Thus, when Comptroller Hevesi pleaded guilty to a felony, his office immediately became vacant whether or not Comptroller Hevesi resigned from office. Again, under the wording of the law, the timing of the conviction is most significant. Where as here the comptroller was found guilty of such a crime before December 31, 2006, the vacancy would only affect his 2003 – 2006 term. A post December 31, 2006 conviction would have de facto removed him from the term that began on January 1, 2007. The notice of reasonable cause issued by the State Ethics Commission⁷⁹ involved potential violations of Section 74 of the Public Officers Law which constitutes the state code of ethics. Violation of the code of ethics is not a crime and hence would not automatically disqualify the Comptroller from holding office.⁸⁰

State Comptroller James A. Wendell served in office during a time period where he was under indictment for larceny involving bidding on a state bond contract. Wendell had been the Deputy Comptroller while Eugene Travis was the State Comptroller. He and Travis along were charged on December 29, 1920 (just before Wendell was to take office) with grand larceny and wrongful conversion in the course of selling bonds to bond broker Albert Judson at a price above market value. Travis was similarly charged with

⁷³ L. 1907, Ch. 539.

⁷⁴ “Hughes Orders New Insurance Inquiry,” New York Times, August 21, 1907 Pg. 5.

⁷⁵ “Otto Kelsey Unfit, Fleming Declares,” New York Times, February 3, 1908 Pg. 6.

⁷⁶ Public Papers of Charles E. Hughes 1908 pp. 177 -185.

⁷⁷ Id. at 185 -186.

⁷⁸ Public Officers Law, §30.1.(e). The oath of office is prescribed by Article XIII, Section 1 of the State Constitution. The only permissible oath or affirmation of office in New York is “I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of, according to the best of my ability.”

⁷⁹ See note 7 supra.

⁸⁰ The penalty for an officer who violates §74 of the Public Officers Law is that the officer “may be fined, suspended or removed from office or employment in the manner provided by law.” See §74.4.

larceny.⁸¹ Wendell took the oath of office and served as Comptroller after receiving informal advice from the Attorney General that he could not delegate his position to a non-elective deputy.⁸² The indictments against all three defendants were dismissed before trial in September of 1921.⁸³ The court found that the fact that the sale to the state of bonds in excess of their fair market value was insufficient to establish that Travis or Wendell committed the crime of larceny.⁸⁴ Judson similarly could not be convicted “for a larcenous taking because of securing a profit in excess of the market.”⁸⁵

Had Comptroller Hevesi been convicted of a misdemeanor rather than a felony, it would have been necessary to look at the particular crime involved to determine whether it violated his oath of office. The Court of Appeals, while finding that the misdemeanor of “criminal trespass” is not on its face a crime that violates the oath of office,⁸⁶ has established standards to determine whether conviction of a misdemeanor violates the oath of office. A misdemeanor violates a public officer’s oath of office when it demonstrates “a lack of moral integrity.”⁸⁷ Similarly, the automatic vacancy applies to crimes that “arise from knowing or intentional conduct indicative of a lack of moral integrity.”⁸⁸ In interpreting the Court of Appeals decision, the attorney general has found that individuals who commit the misdemeanors of attempted grand larceny in the fourth degree⁸⁹ and petit larceny⁹⁰ have committed crimes that violate their oath of office.

Under these standards, conviction of the crime of “official misconduct”⁹¹ would also likely violate an official’s oath of office. While “official misconduct is a misdemeanor, it involves a public servant “with intent to obtain a benefit or deprive another person of a benefit”⁹² either committing “an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized”⁹³ or refraining knowingly “from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.”⁹⁴ The combination of both intent and knowing conduct would likely demonstrate “knowing or intentional conduct indicative of a lack of moral integrity.”⁹⁵ Public officers who have been convicted of these crimes forfeit their position by operation of law. Thus if Comptroller Hevesi had simply pleaded guilty to the

⁸¹ “Travis ,Judson, and Wendell Indicted in State Bond Deals,” New York Times, December 30, 1920 Pg.

1.

⁸² “Wendell Takes Oath Despite Indictments,” New York Times, January 2, 1921 Pg. 3.

⁸³ People v. Travis, 116 Misc. 537 (Sup Ct. Extraordinary Trial Term New York County 1921)

⁸⁴ Id. at 538.

⁸⁵ Id. at 540.

⁸⁶ Duffy v. Ward, 81 N.Y.2d 127 (N.Y. 1993).

⁸⁷ Id. at 134.

⁸⁸ Id. at 135.

⁸⁹ 1997 N.Y. Op. Att’y Gen. 26 (N.Y. AG 1997).

⁹⁰ 1999 N.Y. Op. (Inf.) Att’y Gen. 1004 (N.Y. AG 1999).

⁹¹ Penal Law, §195.00. “Official misconduct” would likely have been the catchall crime that would have applied to the conduct of Comptroller Hevesi.

⁹² Id.

⁹³ Id. at §195.00.1.

⁹⁴ Id. at §195.00.2.

⁹⁵ See note 87 supra.

misdemeanor of official misconduct, that conviction, standing by itself, would also have resulted in creating a vacancy in his office.

Who Would Appoint A New Comptroller?

The Public Officers Law contains the provisions determining who appoints the comptroller when there is a vacancy in the office. If there is a vacancy caused, other than by Senatorial removal, while the legislature is in session,⁹⁶ then the full legislature by a joint ballot determines the next comptroller.⁹⁷ Section 41 of the Public Officers Law specifies:

“When a vacancy occurs or exists, other than by removal, in the office of comptroller or attorney-general, or a resignation of either such officer to take effect at any future day shall have been made while the legislature is in session, the two houses thereof, by joint ballot, shall appoint a person to fill such actual or prospective vacancy.”⁹⁸

This occurred in 1993 when the legislature appointed H. Carl McCall as the incoming comptroller when Comptroller Edward V. Regan resigned.⁹⁹ While the State Senate refused to participate in the joint ballot authorizing Mr. McCall’s appointment,¹⁰⁰ the courts upheld the McCall appointment based on the vote of a joint session called only by the Speaker of the Assembly.¹⁰¹

⁹⁶ A vacancy caused by a criminal conviction would not be considered a vacancy caused by a removal proceeding. Thus, if the vacancy arose due to a criminal conviction which occurred when the legislature was in session, the legislature would make the appointment.

⁹⁷ Public Officers Law, §41. This has basically been the law since L. 1849 Ch. 28.

⁹⁸ *Id.* “It establishes the intent over many years that, if the Governor and the Legislature were equally available, the Legislature and not the Governor should have the right to fill a vacancy in the Attorney General’s office.” “Filling the Javits Vacancy,” *New York Times*, November 26, 1956 Pg. 26.

⁹⁹ *New York Assembly Journal*, 216th Session 1993 Vol. 2 Appendix No. 5 at 1930. The legislature again appointed a new attorney general after the resignation of Robert Abrams on December 16, 1993. *New York Assembly Journal*, 216th Session 1993 Vol. 2 Appendix No. 6 at 1931. Abrams filed his resignation on December 2, 1993 effective on December 29, 1993. The legislature voted to name G. Oliver Koppell as the replacement for Abrams. In 1957 after the resignation of Jacob K. Javits and in 1917 after the resignation of Egbert E. Woodbury, the legislature filled vacancies in the office of the attorney general. See “Legislature Last Filled Elective Office in 1917,” *New York Times*, January 10, 1957 Pg. 18. Louis J. Lefkowitz replaced Javits, and Merton E. Lewis replaced Woodbury. Before the McCall appointment, the last time that the legislature filled a vacancy in the office of Comptroller was in 1849 when the legislature named Washington Hunt to replace Millard Fillmore who had been elected Vice President. *New York Assembly Journal* 1849 (Volume 1) Pg. 507. Before the reorganization of the state departments in 1926, the vacancies in the former statewide elected officers of State Treasurer and State Engineer and Surveyor were filled in a similar manner. See *The New York Red Book* Pp. 530 -531 and Pg. 533 (1929). See also “Choose Homer Call as State Treasurer,” *New York Times*, February 26, 1914 Pg. 2 (showing legislative appointment of Treasurer); “Minor Places on Ticket,” *New York Times*, September 13, 1904 Pg. 2 (showing gubernatorial appointment of State Engineer and Surveyor).

¹⁰⁰ *Id.* at 788-790.

¹⁰¹ *Marino v. Weprin*, 192 A.D.2d 174 (3rd Dept. 1993).

If the legislature is out of session, or if the Senate removes the comptroller, the governor selects the new comptroller. This section is governed by the catchall language of Section 43 of the Public Officers Law which states “If a vacancy shall occur, otherwise than by expiration of term, with no provision of law for filling the same, if the office be elective, the governor shall appoint a person to execute the duties thereof until the vacancy shall be filled by an election.”¹⁰²

This most recently occurred in 1941 when Comptroller Morris Tremaine died on October 12¹⁰³ while the legislature was out of session. Governor Herbert Lehman appointed Joseph V. O’Leary to the position on October 17, 1941.¹⁰⁴ Similarly Governor Glynn appointed James A. Parsons to replace Thomas Carmody who had resigned in 1913 as Attorney General,¹⁰⁵ and Governor Seymour named Gardner Stow to replace Levi S. Chatfield as Attorney General in 1853.¹⁰⁶ A number of vacancies in the office of Comptroller have been filled by governors since these vacancies occurred when the legislature was out of session. Thus, Governor Fish appointed Philo C. Fuller for three months to replace Washington Hunt who had just been elected governor,¹⁰⁷ and Governor Hoffman appointed Asher P. Nichols to replace Comptroller William F. Allen in 1870.¹⁰⁸ Lieutenant Governor Woodruff, serving as Acting Governor, appointed Theodore Gilman to the vacancy created by the death of William J. Morgan in 1900.¹⁰⁹

Vacancies in the office of the State Comptroller seemed to crop up with some frequency over the subsequent two decades, and the governors regularly filled the vacancies. Governor Benjamin B. Odell replaced Erastus C. Knight with Nathan L. Miller in 1902,¹¹⁰ and when Comptroller Miller resigned the next year, Governor Odell replaced him with Otto Kelsey.¹¹¹ When Governor Frank W. Higgins named Mr. Kelsey to serve as Insurance Commissioner, he replaced, Mr. Kelsey with William C. Williams.¹¹² Governor Charles Evans Hughes named Clark Williams to the position upon the death of

¹⁰² Public Officers Law § 43; Annual Report of Attorney-General for 1941 Pg. 250. The language has basically remained the same since the codification of the Public Officers Law by L. 1892, Ch. 681, §31. Prior to the 1892 law, under L.1875, Ch. 397 §5, after a successful removal proceeding, the governor nominated the replacement official “by and with the advice and consent of the Senate.”

¹⁰³ “Tremaine Dies, 70; State Controller,” New York Times, October 13, 1941 Pg. 1.

¹⁰⁴ Public Papers of Governor Herbert H. Lehman 1941 Pg. 359 and Pp. 576 – 578. Mr. O’Leary ended up serving until January 1, 1943 when the Court of Appeals ruled that holding a vote to replace Comptroller Tremaine at the regularly scheduled general election in November of 1941 would improperly violate the rights of independent groups to nominate candidates to fill vacancies. Moore v. Walsh, 286 N.Y. 552 (1941).

¹⁰⁵ “Glynn Names Parsons,” New York Times, September 3, 1914 Pg. 6; Public Papers of Governor M.H. Glynn 1913 – 1914 Pg. 1083.

¹⁰⁶ “Carmody Will Quit State’s Law Office,” New York Times, July 21, 1914 Pg. 1.

¹⁰⁷ New York Legislative Manual 1941 Pp. 506 – 507.

¹⁰⁸ “The Successor to Controller Allen – Ex-Senator Nichols Appointed – Gratification in Buffalo at the Appointment,” New York Times, June 15, 1870 Pg. 5.

¹⁰⁹ “T.B. Gilman Controller,” New York Times, September 11, 1900 Pg. 10. Governor Theodore Roosevelt was outside the state apparently as part of his campaign for the vice presidency on the McKinley ticket.

¹¹⁰ “Nathan L. Miller, State Controller,” New York Times, December 31, 1901 Pg. 2.

¹¹¹ “Succeeds Judge Mattice,” New York Times, November 11, 1903 Pg. 8.

¹¹² See “William C. Wilson, Bench Dean Here,” New York Times, November 30, 1943 Pg. 27.

Charles H. Gaus in 1909,¹¹³ and Governor Nathan L. Miller appointed William J. Maier upon the death of Comptroller James A. Wendell in 1922.¹¹⁴

Under current practice, the legislature is almost always in session once it convenes on the first Wednesday after the first Monday in January.¹¹⁵ Arguably, were the comptroller to resign between January 1, 2007 and January 3, 2007, the date when the legislative session convened pursuant to the Constitution, the legislature would not be in session, thereby entitling the new governor to appoint the comptroller. This apparently occurred with Comptroller Hevesi resigning from his new term on January 1, 2007 before the legislature began its new session.¹¹⁶ A somewhat similar scenario occurred in January of 1957. Republican Attorney General Javits was elected to the United States Senate in November of 1956. At that time, both houses of the legislature were controlled by the Republican Party. The governor was Democrat Averell Harriman. If the Attorney General's office fell vacant before the legislature convened, then Harriman would select Javits' successor. If the vacancy occurred after the legislature convened, then the legislature would determine the next Attorney General. In order to avoid the possibility that Harriman would make the appointment, Javits delayed taking his federal oath of office and delayed filing his State resignation until January 9, 1957 after the legislature had convened.¹¹⁷

The timing of Comptroller Hevesi's resignation had the potential to create a controversy over how his successor would be appointed. Could newly elected Governor Spitzer have appointed a new Comptroller on January 1 or January 2 of 2007? With the governor failing to name a successor during that limited time period, did the legislature have the authority, after it entered session on January 3 2007, to name Comptroller Hevesi's replacement, or did Comptroller Hevesi's date of resignation govern the issue under Section 41 of the Public Officers Law thereby precluding the legislature from filling a vacancy in the office of Comptroller?¹¹⁸

The issue did, in fact, arise during the replacement of Comptroller Hevesi. The legislature on February 7, 2007 chose Long Island Assemblyman Thomas Di Napoli to be the new Comptroller.¹¹⁹ This vote of the legislature in joint session came after a process had apparently been agreed upon by the legislative leaders and Governor Spitzer under which a three – member screening panel was to recommend the candidates who would then be selected by the legislature.¹²⁰ The screening panel interviewed 18 candidates for the

¹¹³ "Hughes Hits Bosses by Naming Williams," New York Times, November 12, 1909 Pg. 3.

¹¹⁴ "Names Maier Controller," New York Times, May 22, 1922, Pg. 15.

¹¹⁵ See State Constitution Article 13, §4. See also Matthew Cox, "Political Theater Three-Man Show Keeps Assembly Open For Business," Syracuse Post-Standard, October 23, 1989 Pg. A1; Benjamin, "Reform In New York: The Budget, The Legislature, and the Governance Process," 67 Alb. L. Rev. 1021,1061 (2004)

¹¹⁶ See note 5 supra.

¹¹⁷ Richard Amper, "G.O.P. Here Favors Lefkowitz To Succeed Javits in State Post," New York Times, January 8, 1957 Pg. 1. "Harriman to Bar Javits Court Test," New York Times, December 28, 1956 Pg. 20.

¹¹⁸ Had a legal challenge arisen, arguably the governor would simply reappoint the selection of the legislature.

¹¹⁹ See John Riley, "Change in Albany," Newsday, February 8, 2007, Pg. A03.

¹²⁰ "Panel to Help Fill Hevesi Vacancy," Newsday, January 10, 2007 Pg. A18; Jay Gallagher, "Independent Panel to Screen Comptroller Candidates," Journal News, January 10, 2007 Pg. 1B.

Comptroller's vacancy and recommended three candidates.¹²¹ The three candidates recommended were William Mulrow, Director of Citigroup Capital Markets Inc., Martha Stark, New York City Finance Commissioner, and Howard S. Weitzman, Nassau County Comptroller.¹²² The legislature, however, rejected the recommendations of the selection panel. The legislature chose Assemblyman DiNapoli as the new comptroller despite the fact that he had not been recommended by the screening panel.¹²³

In arguing against the selection of Assemblyman DiNapoli, Governor Spitzer's office claimed that the Public Officers Law had given him authority to select Comptroller Hevesi's successor on the days before the legislative session started.¹²⁴ Instead of utilizing that power, the governor reached an accommodation with the legislature under which the legislature would select the Comptroller based on a recommendation from an independent screening board.¹²⁵ The question that remains unanswered, since nobody challenged the appointment of Assemblyman DiNapoli, is whether the legislature ever had the power to appoint a comptroller when the previous comptroller had vacated his office at a time when the legislature was not in session.

If the Senate removes the comptroller, then the governor would also appoint the comptroller.¹²⁶ When there is a temporary vacancy in the office of the comptroller that has yet to be filled by the governor or the legislature, then the deputy designated by the comptroller to act in his absence would be empowered to act as comptroller.¹²⁷

How Long Does the Appointee Hold Office?

Under a Constitutional provision that was ratified by the voters in 1953,¹²⁸ an election for comptroller or attorney general can occur only when a governor is elected.¹²⁹ Thus, any comptroller appointed after January 1, 2007 would serve the full term of the comptroller

¹²¹ Elizabeth Benjamin, "Panel Vote Sets Stage for Conflict," Albany Times Union, January 26, 2007 Pg. A1.

¹²² Id.

¹²³ See note 119 supra; Tom Precious, "Legislature Repudiates Spitzer on Comptroller," Buffalo News, February 8, 2007 Pg. A1; Michael Cooper, "Legislators Pick a Comptroller, Defying Spitzer," New York Times, February 8, 2007, Section A, Pg. 1.

¹²⁴ "Advantage Spitzer," Albany Times Union, February 19, 2007, Pg. A8.

¹²⁵ Id.

¹²⁶ Public Officers Law, §§ 41 and 43.

¹²⁷ Public Officers Law, § 9.

¹²⁸ State Constitution, Article 5, §1.

¹²⁹ See Report of Attorney-General for 1952 Pg. 244 and Report of Attorney-General for 1953 Pg. 217. See also Douglas Dales, "Joint Ticket Plan Passed in Albany," New York Times, February 11, 1953 Pg. 24. "One other provision of the amendment would bar interim elections in the event of a vacancy in the office of Attorney General and Controller." The intent of the authors of this amendment was apparently to avoid the situation where an election for a minor statewide office would occur at the same time as the mayoralty election in New York City. The results of the statewide election could be significantly influenced by the possibility of a far higher voter turnout in New York City than in the rest of the state. The political maneuvering at the time of Comptroller Tremaine's death also showed both parties trying to utilize the Comptroller's election as a vehicle to assist their respective mayoral candidates. See note 104 supra and "Controller Vote in State Barred by Appeal Court," New York Times, October 28, 1941 Pg. 1.

until December 31, 2010.¹³⁰ An appointee to the office of comptroller in November or December of 2006 would only have served until the end of the 2006 calendar year.

Conclusion

Removing or impeaching an elected statewide officer in New York is an extremely infrequent event, and the procedures that are currently in place have been neglected and corroded. They do provide a roadmap for what might have unfolded if Comptroller Hevesi had fought against efforts to oust him from his elected position. Actions to reform the vagueness and obscurity of these provisions are certainly in order to avoid many of the uncertainties that have surrounded the Chauffeurgate scandals of 2006. Perhaps Chauffeurgate can guide New Yorkers to update and clarify the provisions governing the removal of public officials and the procedures governing the filling of vacancies in these provisions.

¹³⁰ In the wake of the McCall appointment in 1993, efforts were made by the Republican leadership in the legislature to limit the terms of an appointed comptroller or attorney general. Both Senate majority leader Ralph Marino (S. 4595) and Assembly minority leader Clarence Rappleyea (A. 7010) sponsored measures to provide for a special election in the event of a vacancy in the office of the comptroller or attorney general. While S. 4595 did pass the Senate, the resolution was not acted on by the Assembly. In the wake of the DiNapoli appointment, a number of proposals to change the manner in which vacancies in the office of attorney general and comptroller were to be filled were introduced in 2007. The Republican minority leadership in the State Assembly sponsored a constitutional amendment which would have authorized the governor to appoint an individual to fill a vacancy in the office of comptroller or attorney general. The appointee would serve only until the time of the next general election when an election would be held for the office. Whoever won that election would serve the remainder of the unexpired term of the comptroller or attorney general. (A. 4846) No action was taken by the Assembly on this proposal in 2007. Members of both the Senate Republican majority and the Assembly Democratic majority submitted their own legislation to authorize special elections whenever there was a vacancy in the office of attorney general or comptroller. These bills (S. 2727-A; A. 6893) also were not acted upon in 2007. The Senate Republican majority submitted a constitutional amendment which would have authorized a special election whenever there was a vacancy in the office of the comptroller or attorney general. That proposal passed the Senate by a vote of 42 -19 in 2007. It was not acted upon by the Assembly. Democratic Senator Martin Connor and Democratic Assemblywoman Joan Millman submitted their own proposals under which under which the first deputy comptroller and the solicitor general would initially fill the vacancies in respectively the comptroller's and the attorney general's office. They would serve until the next general election when an election would be held for the office. (S. 5900; S. 5901; A. 7202; A. 7234). These proposals were not acted upon by the legislature in 2007.