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Kevin M. Abel

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# THE RIGHT OF SUCCESSION BY THE OKLAHOMA LIEUTENANT GOVERNOR TO THE OFFICE OF THE GOVERNOR AND THE APPOINTMENT OF A SUCCESSOR LIEUTENANT GOVERNOR

Kevin M. Abel\*

*"It was never intended that . . . there should be an interim during which the state would have no Governor."*

Oklahoma Supreme Court Justice John B. Harrison, 1926

## INTRODUCTION

For the past thirty-five years a constitutional question has existed within Oklahoma over the right of a Lieutenant Governor to succeed to the Office of the Governor when a Governor leaves office through resignation, death, or impeachment. This question in turn raises the issue of the "new" Governor appointing a successor Lieutenant Governor.

The origins of these issues arose when the author of this article was a freshman in high school; nevertheless, these questions continue to be debated within the State Capitol as this article goes to press. The source of the controversy can be traced to a 1965 Oklahoma Attorney General Opinion<sup>1</sup> which continues to confuse rather than to clarify, even though the Oklahoma Constitution and statutes, as construed and applied by the Oklahoma Supreme Court, resolve the referenced issues.

This article will attempt to dispel any continuing constitutional confusion concerning the right of succession of a Lieutenant Governor and the appointment of a replacement Lieutenant Governor.

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\* Kevin M. Abel has practiced in Tulsa for twenty-five years as a civil litigator. He is presently the General Counsel of the Oklahoma Department of Labor in the administration of State Labor Commissioner Brenda Reneau Wynn. He obtained his bachelor's degree in 1972 from Louisiana State University and his Juris Doctor degree in 1974 from the University of Tulsa, where he was appointed to the *Tulsa Law Journal* based on academic performance and was published. He holds an "A-V" rating from Martindale-Hubbell and is a Master Emeritus of the American Inns of Court. He was appointed in 1999 by Governor Frank Keating as a Commissioner of the Oklahoma Community Service Commission.

1. OKLA. Att'y Gen. Op. 65-235 (May 19, 1965).

## I. THE SUCCESSION OF THE LIEUTENANT GOVERNOR TO THE OFFICE OF THE GOVERNOR

### *The Controlling Constitutional Section*

Okla. Const. art. VI, § 16 provides:

In case of impeachment of the Governor, or of his death, failure to qualify, *resignation*, removal from the State, or inability to discharge the powers and duties of the office, the *said office*, with its compensation, *shall devolve upon the lieutenant governor* for the residue of the term or until the disability shall be removed.<sup>2</sup>

### *Issue I*

When the Office of the Governor *devolves* upon a Lieutenant Governor pursuant to Okla. Const. art. VI, § 16, and the Lieutenant Governor becomes the Governor in every literal and practical sense, does the Lieutenant Governor simultaneously hold the offices of the Governor and the Lieutenant Governor despite the provisions of Okla. Stat. tit. 51 § 6?

### *The Conflict*

There is a conflict between Okla. Stat. tit. 51 § 6, and 65 Okla. Att'y Gen. Op. 65-235 (May 19, 1965). Okla. Stat. tit. 51 § 6(A) provides in pertinent part:

Except as may be otherwise provided, *no person holding an office* under the laws of the state and no deputy of any officer so holding any office *shall*, during the person's term of office, *hold any other office* or be the deputy of any officer holding any office, under the laws of the state.<sup>3</sup>

This statute prevents one from simultaneously holding the two Offices of Lieutenant Governor and Governor.<sup>4</sup> However, in 1965, State Representative Robert L. Barr [H.D. 42, Harmon County] presented the following question to the Attorney General for a formal opinion: "If the Lieutenant Governor succeeds to the Governorship (due to death, resignation, or impeachment of the Governor), does the then Governor have the authority to appoint another person to the Lieutenant Governorship?"<sup>5</sup> The Attorney General Opinion answered this question by concluding, without even discussing Okla. Stat. tit. 51 § 6,<sup>6</sup> that the Office of Lieutenant Governor does not become vacant when a Lieutenant

2. OKLA CONST. art. VI, §16 (emphasis added).

3. OKLA STAT. tit. 51 § 6(A) (1986) (emphasis added). This statute was first enacted as R.L. 1910 § 4274, C.S. 1921 § 130.

4. *See id.* The statute begins with the phrase: "Except as may be otherwise provided . . ." Oklahoma statutory and Constitutional law specifically require a Lieutenant Governor to hold other offices pursuant to this exception, *e.g.*, the Lieutenant Governor is a commissioner of the Land Office under OKLA. STAT. tit. 64 § 1 (1979), and OKLA. CONST. art. VI, § 32. However, there is no statutory or Constitutional provision permitting one person to be both Governor and Lieutenant Governor.

5. OKLA. Att'y Gen. Op. 65-235 (May 19, 1965).

6. *See supra* note 3.

Governor acquires the powers and duties of the Governor.<sup>7</sup> The Opinion reasoned that the powers and duties of the Governor *devolve* upon the Lieutenant Governor rather than the Lieutenant Governor *succeeding* to the *Office* of Governor.<sup>8</sup> According to the Attorney General Opinion, this line of reasoning was based on the wording of Okla. Const. art. VI, § 16 and the holding in *Fitzpatrick v. McAlister*.<sup>9</sup>

First of all, it should be noted that Okla. Const. art. VI, § 16, does not provide that the *powers and duties* devolve upon the Lieutenant Governor; rather, the “*said office*” devolves upon the Lieutenant Governor.<sup>10</sup> This was precisely the majority holding in *Fitzpatrick*.

In *Fitzpatrick*, the issue was whether M. E. Trapp could succeed himself as Governor in 1927 despite the prohibition of a Governor succeeding himself found in the pre-1966 version of Okla. Const. art. VI, § 4.<sup>11</sup> In 1922, Trapp had been elected as Lieutenant Governor and J. C. Walton as Governor; however, Walton was impeached on November 19, 1923.<sup>12</sup> He was succeeded by Trapp, who served from November 19, 1923, until January 10, 1927.<sup>13</sup>

No doubt cognizant of the prohibition against a Governor serving successive terms, Trapp never appointed a successor Lieutenant Governor but exercised the powers and duties of the Governor for more than three years.<sup>14</sup> Then, Trapp sought placement on the August 1926 gubernatorial primary ballot under the theory that he had only exercised the powers and duties of the Governor while remaining the Lieutenant Governor.<sup>15</sup>

The Oklahoma Supreme Court held that the Office of Governor devolved upon Trapp and that he was the Governor in fact and in law.<sup>16</sup> The *Fitzpatrick* court stated: “Mr. Trapp is just as much a Governor, in every literal and practical sense and effect, as though he had been elected to *the office*. . . . He is now filling *the office* which, upon the impeachment of Mr. Walton, devolved upon him . . . .”<sup>17</sup> Thus, the Oklahoma Supreme Court held on June 28, 1926, that Mr. Trapp was ineligible to run for Governor, because he had been the Governor.<sup>18</sup>

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7. OKLA. Att’y Gen. Op. 65-235 (May 19, 1965).

8. *See id.*

9. *See Fitzpatrick v. McAlister*, 248 P. 569 (Okla. 1926).

10. *See supra* note 2.

11. OKLA. CONST. art. VI, § 4 now provides:

The term of office of the Governor, Lieutenant Governor, State Auditor and Inspector, Attorney General, State Treasurer, Commissioner of Labor and Superintendent of Public Instruction shall be four (4) years from the second Monday of January next after their election. *The said officers shall be eligible to immediately succeed themselves.* No person shall be elected Governor more than two times in succession. (Emphasis added).

12. *See Fitzpatrick*, 248 P. at 570.

13. *See id.*

14. *See id.*

15. *See id.* at 571.

16. *See id.* at 577.

17. *Id.* (emphasis added).

18. *See Fitzpatrick*, 248 P. at 577.

### *Without Interruption*

The majority opinion in *Fitzpatrick* emphasized that Okla. Const. art. VI, § 16 does not create or contemplate a vacancy for any period of time in the Office of the Governor; rather, the Office automatically and immediately passes to the Lieutenant Governor:

By the judgment of impeachment, Mr. Walton's authority ceased; his term and tenure ended; his individual rights were foreclosed; "the said office, with its compensation," devolved automatically upon Mr. Trapp. There was no vacancy created, none intended, none contemplated. *It was never intended that, under the conditions provided for in section 16, there should be an interim during which the state would have no governor, and the functions of government be suspended, but, on the contrary, it is wisely provided in said section 16, that, when by operation of law, or by reason of other circumstances, the authority of the elected Governor is terminated, his tenure ended, and his individual rights foreclosed, the said office (the Governor's Office), with its compensation, shall devolve upon another, in order that the functions of government may continue without interruption, and the public rights be protected.*<sup>19</sup>

### *The Dissent*

Nevertheless, the two-justice dissent in *Fitzpatrick* made the very argument which the majority had specifically rejected, that with a vacancy in the Office of the Governor, the Lieutenant Governor continues as Lieutenant Governor only exercising the "powers and duties" of the Governor; such that, no vacancy results in the office of the Lieutenant Governor.<sup>20</sup> The *Fitzpatrick* dissent attempted to ground this argument on Okla. Const. art. VI, § 15, which provides in part:

If, during a vacancy in the office of Governor, the Lieutenant Governor shall be impeached, displaced, resign, die or be absent from the State, or become incapable of performing the duties of the office, *the president, pro tempore, of the Senate, shall act as Governor until the vacancy be filled or the disability shall cease*; and if the president, pro tempore, of the Senate, for any of the above enumerated causes, shall become incapable of performing the duties pertaining to the office of the Governor, *the Speaker of the House of Representatives shall act as Governor until the vacancy be filled or the disability shall cease.*<sup>21</sup>

However, the majority in *Fitzpatrick* explained that section 15 has reference to temporary vacancies and deals only with temporary vacancies:

Section 15 anticipates vacancies such as may be caused by the Governor's absence from the state, and other circumstances which may cause a *temporary* absence of the Governor from his office, and refers to such occasions as vacancies, but these are occasions where, though the Governor may be absent from his office, though he may be sick or out of the state, and temporarily away from his office, yet he still retains his right to the office. . . . *Section 15 unquestionably has reference to*

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19. *Id.* at 573 (emphasis added).

20. *Id.* at 577-80.

21. OKLA. CONST. art. VI, § 15 (emphasis added).

*temporary vacancies*, and to temporary vacancies *only*, and deals with, and provides for, temporary vacancies only.<sup>22</sup>

Furthermore, the majority stated:

Now let it be observed that the words "shall act as Governor" are not applied to the Lieutenant Governor, but are applied only to the President of the Senate and Speaker of the House in cases where the Lieutenant Governor is under a disability. The words "shall act as Governor," or, as defendants in error put it, "the Acting Governor," are not anywhere in the Constitution applied to the Lieutenant Governor. They are applied nowhere else, nor to any one [*sic*] else, except to the President of the Senate and Speaker of the House, and to them only in cases where "the Lieutenant Governor becomes incapable of performing the duties of the office."<sup>23</sup>

Although the Attorney General Opinion quoted the *Fitzpatrick* majority concerning the definition of the word "devolve,"<sup>24</sup> the Opinion adopted the viewpoint from the *Fitzpatrick* dissent, particularly the portion concerning the Office of the Governor remaining vacant.<sup>25</sup> However, the Attorney General Opinion, like the dissent in *Fitzpatrick*, did not even discuss Okla. Stat. tit. 51 § 6, which has been the law since 1910.<sup>26</sup> Both the dissent in *Fitzpatrick* and the Attorney General Opinion had to presume that the Office of the Governor remained vacant while the Lieutenant Governor continued as the Lieutenant Governor who only "acted" as Governor in order to avoid the statutory prohibition of simultaneously holding two offices.

#### *The Majority's Analogy*

In *Fitzpatrick*, the majority opinion drew an analogy between Okla. Const. art. VI, § 16, wherein the Office of the Governor devolves upon the Lieutenant Governor and U.S. Const. art. II, § 1, wherein the Office of the President devolves upon the Vice President.<sup>27</sup> The Oklahoma Supreme Court observed in *Fitzpatrick* that both constitutions use the word "devolve" and that the construction of the Vice President actually becoming the President has stood without question and has been recognized as correct and acquiesced in by all the departments of the Federal Government, the States of the Union, and by every civilized government of the world.<sup>28</sup>

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22. *Fitzpatrick*, 248 P. at 573-74 (emphasis added).

23. *Id.* at 572.

24. The holdings in two of the four cases cited from other jurisdictions in OKLA. Att'y Gen. Op. 65-235 (May 19, 1965) did not focus on the issue of a Lieutenant Governor occupying the Office of the Governor. In both *State v. Ekern*, 280 N.W. 393 (Wis. 1938) and *People v. Budd*, 45 P. 1060 (Cal. 1896), the holdings resolved the issue of filling the Office of the Lieutenant Governor through a gubernatorial appointment under a provision similar to OKLA. CONST. art. VI, § 13 (quoted *infra*). In both the Wisconsin and California cases, the gubernatorial appointment to fill the Office of Lieutenant Governor was sustained.

25. *See Fitzpatrick*, 248 P. at 581.

26. *See supra* note 3.

27. *Fitzpatrick*, 248 P. at 576.

28. *See id.*

The federal analogy suggested by the Oklahoma Supreme Court can be further extended to refute the 1965 conclusion set forth in the Opinion issued by the Attorney General that it is an "erroneous assumption" that "the office of Lieutenant Governor becomes vacant when the Lieutenant Governor acquires the powers and duties of the Governorship."<sup>29</sup> Effective August 9, 1974, President Richard Nixon resigned the Office of the Presidency. Pursuant to U.S. Const. art. II, § 1 (which is the federal equivalent of Okla. Const. art. VI, § 16), the Office of the President "devolved" upon Vice President Gerald Ford on August 9, 1974. Then, President Ford appointed Nelson A. Rockefeller to fill the Office of the Vice President pursuant to U.S. Const. amend. XXV, § 2, which is the federal equivalent of Okla. Const. art. VI, § 13, quoted *infra*.

### *Legislative Concurrence*

It would appear that the 1985 Oklahoma Legislature was in agreement with the *Fitzpatrick* holding that the Office of Governor devolves upon the Lieutenant Governor who becomes the Governor both in fact and in law. In 1985, the Legislature passed Okla. Stat. tit. 74 § 8(F),<sup>30</sup> concerning the incapacity of the Governor and the devolution of her powers and duties. Section 8(F) provides: "When the *Office* [of Governor] has devolved upon the Lieutenant Governor or other successor, the provisions of this act shall also apply to the person holding the *Office*."<sup>31</sup>

### *The Arkansas Analogy*

In November of 1990, William Jefferson Clinton was elected to a four-year term as Governor of Arkansas and Jim Guy Tucker as Lieutenant Governor for a like term. On November 3, 1992, Clinton was elected President of the United States. On December 4, 1992, the Arkansas Supreme Court decided the case of *Bryant v. English*,<sup>32</sup> and the issue of whether Jim Guy Tucker merely exercised the powers and duties of the Governor or whether the Office of Governor itself devolved upon the Lieutenant Governor.

Ark. Const. amend. VI, § 4 provides: "In case of the [resignation] of the Governor . . . the powers and duties of the said office, shall devolve upon the Lieutenant Governor for the residue of the term . . ."<sup>33</sup> The Arkansas Supreme Court distinguished this section from the next section in the Arkansas Constitution dealing with the President Pro Tempore of the Senate or the Speaker of the House acting as the Governor when there is a vacancy in the offices of both the Governor and Lieutenant Governor versus the Lieutenant Governor becoming the Governor.<sup>34</sup>

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29. OKLA. Att'y Gen. Op. 65-235 (May 19, 1965).

30. OKLA. STAT. tit. 74 § 8(F) (1985).

31. *Id.* (emphasis added).

32. *Bryant v. English*, 843 S.W.2d 308 (Ark. 1992).

33. ARK. CONST. amend. VI, § 4 (1914).

34. *See Bryant*, 843 S.W.2d at 312; *see also Fitzpatrick*, 248 P. at 572, where the Oklahoma Supreme

The holding of the Arkansas Supreme Court was stated in *Bryant*:

On direct appeal, we affirm the trial court's judgment and hold that upon the resignation of a Governor, the powers and duties of the Office of Governor devolve upon the Lieutenant Governor for the remainder of the four-year term, and on cross-appeal, we reverse and hold that the *office* of Governor *itself devolves* upon the Lieutenant Governor.<sup>35</sup>

The court emphasized in *Bryant* that the Lieutenant Governor's succession to the Office of the Governor eliminated the dual office problem which would be created by the Lieutenant Governor remaining as the Lieutenant Governor who only "acts" as the Governor.<sup>36</sup>

### *The Answer To Issue I*

The Oklahoma Supreme Court's holding in *Fitzpatrick* combined with the judicial policy of *stare decisis*, the federal analogy, and the relatively recent result from Arkansas, should be determinative of an Oklahoma Lieutenant Governor's succession to the Office of the Governor.

## II. THE APPOINTMENT OF A SUCCESSOR LIEUTENANT GOVERNOR

### *Issue II*

When an Oklahoma Lieutenant Governor becomes the Governor, can the vacancy in the Office of the Lieutenant Governor be filled through a gubernatorial appointment, and who qualifies for the appointment?

### *The Controlling Constitutional Section And Statute*

Okla. Const. art. VI, § 13 provides:

The Governor shall commission all officers not otherwise commissioned by law. All commissions shall run in the name and by the authority of the "State of Oklahoma," be signed by the Governor, sealed with the Great Seal of the State of Oklahoma, and attested by the Secretary of State. *When any office shall become vacant, he shall, unless otherwise provided by law, appoint a person to fill such vacancy, who shall continue in office until a successor shall have been duly elected or appointed, and qualified according to law.*<sup>37</sup>

The first sentence of Okla. Stat. tit. 51 § 10, provides:

All vacancies in *state* offices, except in offices of the members of the Legislature, members of the House of Representatives from Oklahoma in the Congress of the United States of America and members of the Senate<sup>38</sup> of the United States of

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Court drew the same distinction.

35. *Bryant*, 843 S.W.2d at 309 (emphasis added).

36. *See id.* at 312.

37. OKLA. CONST. art. VI, § 13 (emphasis added).

38. On January 6, 1963, Governor J. Howard Edmondson resigned and was succeeded by Lieutenant Governor George Nigh who served as Governor for eight (8) days until January 14, 1963, when Henry Bellmon took the oath of office, having won the November 1962 election. During his

*America, shall be filled by appointment by the Governor.*<sup>39</sup>

## II(A). OVERVIEW OF THE GOVERNOR'S APPOINTMENT POWERS

### *LEGISLATIVE CONFIRMATION*

Appointments to fill vacancies made pursuant to the above-quoted provisions of Okla. Const. art. VI, § 13 and Okla. Stat. tit. 51 § 10, do not require the advice and consent of the Oklahoma Senate *unless* the offices were originally filled by appointment upon legislative confirmation. The authority for this rule of law is Okla. Stat. tit. 74 § 2.2, which provides:

A. When a vacancy occurs in any position in state government and appointment to the position for a full term is subject to confirmation by one or both houses of the Legislature, such confirmation shall be required for the appointment to fill the vacancy for the unexpired term.

B. A person whose nomination has been submitted to the Legislature may be appointed to hold such office on an acting or interim basis and may assume the duties of the office and receive any compensation or travel reimbursement allowed by law for the position pending confirmation by one or both houses of the Legislature. No person whose nomination has been withdrawn by the Governor or other appointing authority after the effective date of this act or rejected by one or both houses of the Legislature after the effective date of this act shall be eligible to hold such office on an acting or interim basis. Provided, such person shall be eligible for acting or interim appointment if requested by the appropriate house or houses of the Legislature.<sup>40</sup>

For example, the Governor appoints members of the Oklahoma Horse Racing Commission with the advice and consent of the Senate.<sup>41</sup>

### *Appointed For The Duration*

Okla. Stat. tit. 51 § 15, provides: "Every appointed officer shall hold his office until the end of the term for which the officer whom he succeeds was elected or appointed, and until his successor is elected and qualified."<sup>42</sup> This statute guarantees that an appointed officer shall hold the office for the balance of the term of the immediate predecessor and shall serve until the appointed officer's

eight (8) day tenure, Governor Nigh appointed ex-Governor Edmondson to the U.S. Senate due to the death of Senator Robert S. Kerr on January 1, 1963. In the spring of 1963, the Legislature attempted to amend OKLA. STAT. tit. 51, § 10 (1985), by repealing the authority of the Governor to appoint U.S. Senators. Governor Bellmon vetoed the bill on May 22, 1963, but the amendment was passed over his veto on the same day. The measure was submitted to the People in 1964 as Referendum Petition 17, State Question 420, and it was defeated on November 3, 1964. The Legislature responded in 1965 by amending OKLA. STAT. tit. 51, § 10 (1985), as quoted above.

All Congressional vacancies, both in the United States House and the Senate, now must be filled pursuant to the provisions of OKLA. STAT. tit. 26, § 12-101 (1994).

39. OKLA. STAT. tit. 51 § 10(a) (1985) (emphasis added).

40. OKLA. STAT. tit. 74 § 2.2 (1988).

41. OKLA. STAT. tit. 3A § 201(A) (1992).

42. OKLA. STAT. tit. 51 § 15 (1910).

successor is elected and qualified. In *Abitbol v. Priore*,<sup>43</sup> the Oklahoma Supreme Court relied on this statute, and held that the Governor's power to fill a vacancy does not include the power to limit the appointee's term, and once appointed, the appointee serves the balance of the term's remainder.<sup>44</sup>

## II(B). QUALIFYING FOR THE APPOINTMENT AS THE NEW LIEUTENANT GOVERNOR

### *Art. 6, § 3 Eligibility*

Okla. Const. art. VI, § 3 prescribes the qualifications for various state offices. For example, to be eligible for appointment to the Office of Lieutenant Governor, one must be a citizen of the United States, at least thirty-one years old, and a qualified Oklahoma elector for ten years preceding the appointment,<sup>45</sup> but there are other prohibitions as well.

### *The Constitutional Prohibition*

Okla. Const. art. V, § 23 provides:

*No member of the Legislature shall, during the term for which he was elected, be appointed or elected to any office or commission in the State, which shall have been created, or the emoluments of which shall have been increased, during his term of office, nor shall any member receive any appointment from the Governor, the Governor and Senate, or from the Legislature, during the term for which he shall have been elected, nor shall any member, during the term for which he shall have been elected, or within two years thereafter, be interested, directly or indirectly, in any contract with the State, or any county or other subdivision thereof, authorized by law passed during the term for which he shall have been elected.*<sup>46</sup>

Obviously, this section consists of three (3) clauses.

The first clause consists of two elements: (a) no member of the Legislature may be appointed or elected during the term for which he was elected to any office, (b) the emoluments of which were increased during his tenure in the Legislature. For example, in *Fair v. State Election Bd.*,<sup>47</sup> a midterm State Senator was precluded from seeking election to an office because the emoluments of that office were increased during his legislative term. In contrast, a "lame duck" Legislator was permitted in *Gragg v. Dudley*<sup>48</sup> to seek election as Lieutenant Governor because neither element was present. The legislator in question would not be elected to the new office during the legislative term for which he was elected, because his term ended fifteen days after the election.<sup>49</sup> The new Lieutenant Governor would

43. *Abitbol v. Priore*, 797 P.2d 335 (Okla. 1990).

44. *See id.* at 337.

45. *See* OKLA. CONST. art. VI, § 3.

46. OKLA. CONST. art. V, § 23 (emphasis added).

47. *Fair v. State Election Bd.*, 879 P.2d 1223 (Okla. 1994).

48. *Gragg v. Dudley*, 289 P. 254 (Okla. 1930).

49. State Senators' terms run from the fifteenth day succeeding the general election of their

not be "elected" until the election results were "declared" pursuant to Okla. Const. art. VI, § 5 by the Legislature meeting on the first Tuesday after the first Monday in January pursuant to Okla. Const. art. V, § 26. Thus, he could not be "elected" as Lieutenant Governor during the term for which he was elected to the Legislature, and the emoluments of the Office of Lieutenant Governor had not been increased.<sup>50</sup>

The second clause of Okla. Const. art. V, § 23 prohibits a gubernatorial *appointment* (but not the election) of any legislator *during his term notwithstanding his resignation*, and the prohibition applies to the entire legislative term of two or four years. In *Baskin v. State*,<sup>51</sup> the Oklahoma Supreme Court held that the second clause of section 23 prohibits the appointment of a legislator anytime during the term for which he was elected *even if he resigned from the Legislature*, and that his removal from the appointed office through an Attorney General action could be accomplished later based on the facts as they existed at the time of the invalid appointment.<sup>52</sup> In *Oklahoma State Election Bd. v. Coats*,<sup>53</sup> the Oklahoma Supreme Court explained that the *Baskin* holding is limited to those who are *appointed* rather than those seeking *election*. The *Baskin* holding is also supported by a 1970 Oklahoma Attorney General Opinion, in which the Attorney General construed Okla. Const. art. V, § 23 and opined that a midterm state senator could seek *election* to another state office, so long as the emoluments thereof were not increased during the first part of his four-year term as a senator.<sup>54</sup>

The third clause prohibits a legislator from having an interest in any contract with the government during the term for which the legislator was elected or for

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respective terms. (OKLA. STAT. tit. 14 § 80.21 (1991)). Likewise, State Representatives' terms run from the fifteenth day succeeding the general election of their respective terms. (OKLA. STAT. tit. 14 § 125 (1991)). See also: *Fair*, 879 P.2d at 1224 and OKLA. Att'y Gen. Op. 90-37 (May 28, 1991) regarding legislators' terms running from the fifteenth day after the November election. The inception date of the terms of legislators is different from other state officers whose terms begin on the second Monday of January following their election pursuant to OKLA. CONST. art. VI, § 4 (quoted in fn. 11, *supra*) or OKLA. STAT. tit. 51 § 1 (1910), which provides:

Except when otherwise specially provided, the regular term of all officers elected under the laws of the state, when elected to a full term, shall commence on the second Monday of January next succeeding their election, and any officer so elected shall qualify and enter upon the duties of his office on said date or within ten (10) days thereafter; but if the office to which any person is elected be vacant at the time of his election or becomes vacant before his time for qualifying, even if he were not elected to fill the vacancy, he shall forthwith qualify and enter upon the duties of his office.

50. Even though the emoluments of the Governor had been increased during the Legislator's term and even though all candidates for Lieutenant Governor must possess the same qualifications as candidates for Governor, the court stated in dictum that the emoluments of the Lieutenant Governor had not been increased; therefore, the Legislator could be a candidate for election in 1930 to the Office of Lieutenant Governor.

51. *Baskin v. State*, 232 P. 388 (Okla. 1925).

52. See *id.* at 390-91. See also OKLA. Att'y Gen. Op. 87-43 (June 23, 1988) (stating that when the Governor appoints an ineligible person to a state office, such an appointment is invalid and can be attacked by the Attorney General on behalf of the State in a *quo warranto* action under OKLA. STAT. tit. 12 § 1531, *et seq.*, which is not subject to the thirty day statute of limitations for such suits, and there is no requirement that another claimant with *de jure* right to the office be present and ready to assume the office.

53. *Oklahoma State Election Bd. v. Coats*, 610 P.2d 776 (Okla. 1980).

54. See OKLA. Att'y Gen. Op. 70-212 (June 15, 1970).

two years thereafter, which contract was authorized by legislation passed during the legislator's term. However, being appointed after the legislative term to a state office is not "contracting" with the state according to the Oklahoma Attorney General.<sup>55</sup> The Attorney General construed the third clause of Okla. Const. art. V, § 23 and concluded that appointing a former legislator as a state officer<sup>56</sup> (for example, as an Oklahoma Tax Commissioner<sup>57</sup>) was not "contracting" with the state.<sup>58</sup>

#### *Appointed Not Hired: The State Senator Example*

The second clause of Okla. Const. art. V, § 23 consists of two elements: (a) no member of the Legislature may receive *any appointment from the Governor*, (b) during the term for which he was elected. In analyzing this clause, the threshold question is whether the position will be filled by a gubernatorial appointment. If not, this provision will not prevent a member of the Legislature from being hired rather than being appointed for the position in question.

For example, an Oklahoma State Senator was reelected to the State Senate in 1994 for a four-year term. He resigned from the Senate in the summer of 1998 with several months remaining on the term for which he was elected, and he was *hired* by a state agency as its statutorily authorized director. Thus, he was *not appointed* by a Governor to be the director; consequently, the second clause of Okla. Const. art. V, § 23 did not prohibit his employment as a state officer.<sup>59</sup>

#### *The Answer To Issue II*

The "new" Governor can appoint a "new" Lieutenant Governor through a gubernatorial appointment; however, Okla. Const. art. V, § 23 prohibits her from appointing a member of the Legislature during the term for which the legislator was elected.<sup>60</sup> For example, should a Governor resign the Office of the Governor in the first quarter of 2001, and the Lieutenant Governor becomes Governor, the vacancy in the Office of Lieutenant Governor could *not* be filled by any legislator elected in November of 1998 to a four-year term *or* by any legislator elected in November of 2000 to either a two-year or a four-year term—irrespective of any

55. See OKLA. Att'y Gen. Op. 85-22 (March 18, 1985).

56. OKLA. Att'y Gen. Op. 91-22 (September 24, 1991) relied upon *Oklahoma City v. Century Indem. Co.*, 62 P.2d 94 (Okla. 1936), in defining a state "office" as a position created or authorized by law, as distinguished from an internally created, administrative position.

57. Pursuant to OKLA. STAT. tit. 68 § 102 (1987), the Governor appoints the Tax Commissioners.

58. See OKLA. Att'y Gen. Op. 85-22 (March 18, 1985).

59. With regard to a State agency *employing* a former legislator in a government position within two years of the end of the Legislator's term, see two unpublished Attorney General Opinions authored by Susan Loving, OKLA. Att'y Gen. Op. 90-688 (August 29, 1990) and OKLA. Att'y Gen. Op. 90-522 (May 4, 1990), concerning the third clause of OKLA. CONST. art. V, § 23 and:

(a) the position having been funded by an appropriation during the Legislator's term, or

(b) the funding for the position coming from funds separate from those obtained from the State.

60. See OKLA. CONST. art. V, § 23.

resignation from the Legislature.

## II(C). THE UNANSWERED QUESTION

May the Legislature give itself the power to make Executive Branch appointments pursuant to the "unless otherwise provided by law" clause in Okla. Const. art VI, § 13?<sup>61</sup> The Oklahoma Attorney General answered this question in the negative due to the separation of powers clause set forth in Okla. Const. art IV, § 1.<sup>62</sup> Nevertheless, the Attorney General conceded that the Oklahoma Legislature may statutorily provide for appointments by a person other than the Governor;<sup>63</sup> however, the Oklahoma Supreme Court has never answered the question.

In *Keating v. Johnson*,<sup>64</sup> the Oklahoma Supreme Court had the opportunity to answer the question but held by a five to four margin not to assume original jurisdiction of the case, which would have decided whether the Legislature can pass legislation empowering itself to make Executive Branch appointments.<sup>65</sup> Three Justices criticized the reasoning of the Attorney General Opinion,<sup>66</sup> but the question remains unanswered by a majority of the court. Consequently, the question lingers whether the Legislature could validly pass legislation empowering itself to make Executive Branch appointments, for example, to fill a vacancy in the Office of the Lieutenant Governor.

While this question remains unanswered in Oklahoma, it was answered in the affirmative in the very instructive 1997 Rhode Island case of *In re Request of the Senate for an Adv. Opinion*.<sup>67</sup> On January 7, 1997, the Rhode Island Lieutenant Governor assumed office as a United States Congressman.<sup>68</sup> On January 29, 1997, the Rhode Island Governor appointed a new Lieutenant Governor pursuant to R.I. Const. art. IX, § 5, which authorized the Governor to "fill vacancies in office *not otherwise provided for* by this Constitution or by law" (much like Okla. Const. art. VI, § 13, quoted *supra*).<sup>69</sup> Two days later the new Lieutenant Governor took his oath of office.<sup>70</sup> Then on February 4, 1997, the Rhode Island General Assembly initiated legislation providing: "If the office of lieutenant governor shall become vacant . . . the general assembly in grand committee shall elect some person to fill the said vacancy."<sup>71</sup> The Rhode Island Supreme Court held that the legislation was constitutional prospectively but not retroactively; consequently, the Lieutenant Governor appointed in January of

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61. See OKLA. CONST. art. VI, § 13 (quoted *supra*).

62. See OKLA. Att'y Gen. Op. 90-31 (September 4, 1990).

63. See *id.*

64. *Keating v. Johnson*, 918 P.2d 51 (Okla. 1996).

65. See *id.* at 52.

66. See *id.* at 66 (criticizing OKLA. Att'y Gen. Op. 90-31 (September 4, 1990)).

67. *In re Request of the Senate for an Adv. Opinion*, 696 A.2d 277 (R.I. 1997).

68. See *id.* at 278.

69. See *id.*

70. See *id.*

71. *Id.*

1997 could complete the term.<sup>72</sup> However, should a vacancy occur thereafter in the office of the Lieutenant Governor, the “Grand Committee” could select the new Lieutenant Governor.<sup>73</sup>

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72. See *In re Request of the Senate*, 696 A.2d at 280.

73. See *id.*

