

FRIDAY, MARCH 31, 2023

11:03 A.M.

ACTING SPEAKER AUBRY: The House will come to order.

In the absence of clergy, let us pause for a moment of silence.

(Whereupon, a moment of silence was observed.)

Visitors are invited to join the members in the Pledge of Allegiance.

(Whereupon, Acting Speaker Aubry led visitors and members in the Pledge of Allegiance.)

A quorum being present, the Clerk will read the Journal of Thursday, March the 30th.

Ms. Solages.

MS. SOLAGES: Mr. Speaker, I move to dispense

with the further reading of the Journal of Thursday, March 30th and that the same stands approved.

ACTING SPEAKER AUBRY: Without objection, so ordered.

Ms. Solages.

MS. SOLAGES: Well, good morning everyone.

Another beautiful day. I'm going to start off with a quote. *If your actions create a legacy that helps inspire others to dream more, learn more, do more, and become more, then you are an excellent leader.*

And that is from the great Dolly Parton, an American singer, songwriter, actress, philanthropist and businesswoman known primarily for her decade-long career in country music. And so we have a coat of many colors and a day of many colors.

But with that, Mr. Speaker, I want to have the members' attention so that we can announce the schedule for the day. Members on their desks have a main Calendar. After any housekeeping and introductions, we will start our floor work by taking up resolutions on page 3, and then we will take up a bill on debate, which is Rules Report No. 116 on page 4 by Mr. Lavine. I will announce any further action on the floor as the day proceeds. Majority members should be aware that there will be a need for a conference once we conclude our work on the floor, and as always, I will consult with the Minority on their needs, as well.

With that as a general outline, if there are any other housekeeping, now would be the appropriate time to do so.

ACTING SPEAKER AUBRY: Thank you, Ms. Solages. No housekeeping, but we do have introductions.

Mr. Pirozzolo for the purposes of a introduction.

MR. PIROZZOLO: Good morning, Mr. Speaker. In our jobs as members of the Assembly, we are ambassadors of our districts. Sometimes, Mr. Speaker, we are ambassadors to the world and this is one such occasion. While having breakfast in my hotel, I noticed a group of young men speaking a foreign language. After a few days, I decided to introduce myself. So now Mr. Speaker, on behalf of myself, Assemblyman John McDonald and our own Great Dane, Assemblyman Josh Jensen, I would like to introduce you to Mr. Stein. I'm not going to pronounce last names, because I'm afraid of breaking the coffee rule and I don't know if I can buy that much coffee. Mr. Stein is a teacher from Herningsholm Vocational College of School actually in Denmark. The school is a high school that like our schools, offer college credits. The gentlemen you see behind me will qualify with certification as carpenters upon their graduation. So if I may, Mr. Speaker, in the immortal words of Louis Armstrong - I almost want to sing this, but I will not - *The colors of the rainbow so pretty in the sky, also are the faces of people going by. I see friends shaking hands saying how do you do, really they're saying I love you.* So Mr. Speaker, it is with that great spirit of love and friendship, I ask you to please say hello and offer the cordialities of the house to my new family and friends from Denmark.

ACTING SPEAKER AUBRY: Certainly. On behalf

of Mr. Pirozzolo, Mr. McDonald, Mr. Jensen, the Speaker and all the members, we welcome you here to the New York State Assembly. We extend to you the privileges of the floor. We hope that your trip here in Albany will be pleasant, that you will learn a bit about our way of government, as well as our way of life. We hope that you know that you always have friends here. Please be successful young men, do what you need to do to protect your world and, Mr. Pirozzolo, you're --

MR. PIROZZOLO: If I may, please. I omitted something very, very important. The gentlemen here are with the cultural exchange program with the Hudson Valley Community College and that is very important. That's an initiative that we're working on through the Assembly. So, again, Mr. Speaker, please.

ACTING SPEAKER AUBRY: Certainly. And so again, thank you very much. And, Mr. Pirozzolo, Louis Armstrong lived in my district, we still have his house there so I'm moved by your remembrance of his song. Thank you so very much, pleased to have all of you.

(Applause)

For the purposes of a introduction, Ms. Seawright.

MS. SEAWRIGHT: Thank you, Mr. Speaker. I'm very honored and privileged today to have a very dear, dear friend in the House with us today. So on behalf of Assemblyman Fred Thiele, Assemblyman Chuck Lavine and myself, I'd like to introduce Victoria Schneps as the Chair of the People with Disabilities Committee, it's

particularly honorable and pleasing to have Ms. Schneps in the Chamber with us today. She founded Life's Work, the working organization for intellectual and developmental disability children. She advocated for her daughter who was diagnosed with severe brain damage. In 1971, Vicky picketed and fought for the rights of her daughter, Lara, and the 54 others at Willowbrook. No one heard their cries until the news media and Geraldo Rivera filmed and reported on the conditions at the school. That is when she knew the power of community activism. She has had a major, major impact on the intellectual and disability fields. In May, Governor Hochul will be cutting the ribbon on a new national model of an Autism center on Long Island named the Vicky Center, after her. Mr. Speaker, please give her the cordialities of the House. Thank you.

ACTING SPEAKER AUBRY: Certainly. On behalf of Ms. Seawright, Mr. Thiele, Mr. Lavine, welcome to the New York State Assembly. We give to you the privileges of the floor and our thanks and gratitude for the work that you do to help all those that are in your purview. Thank you so very much, keep that great work up and congratulations.

(Applause)

We will go to resolutions on page 3, the Clerk will read.

THE CLERK: Assembly No. 262, Ms. Seawright.
Legislative Resolution memorializing Governor
Kathy Hochul to proclaim March 25, 2023 as Cerebral Palsy

Awareness Day in the State of New York.

ACTING SPEAKER AUBRY: Ms. Seawright on the resolution.

MS. SEAWRIGHT: Thank you, Mr. Speaker. Cerebral Palsy Awareness Day, March 25th, nearly one million people have cerebral palsy in the United States and it gives me great pride as the Chair of the People with Disabilities Committee to introduce this resolution and thank my colleagues for supporting it. One in 345 children have cerebral palsy. It's not a genetic or contagious condition, rather it is caused due to brain damage or abnormal brain development during gestation, during birth or soon after. And so it's my honor and privilege to introduce this resolution recognizing Cerebral Palsy Day in the State of New York. Thank you.

ACTING SPEAKER AUBRY: Thank you.

On the resolution, all those in favor signify by saying aye; opposed, no. The resolution is adopted.

THE CLERK: Assembly No. 263, Ms. Joyner.

Legislative Resolution memorializing Governor Kathy Hochul to proclaim April 2023 as Oral Cancer Awareness Month in the State of New York.

ACTING SPEAKER AUBRY: On the resolution, all those in favor signify by saying aye; opposed, no. The resolution is adopted.

Ms. Seawright for the purposes of a introduction.

MS. SEAWRIGHT: Thank you, Mr. Speaker. I'm

pleased and honored today to have members of the Communication Workers of America graduate students employees in the Chamber today, recognizing and representing their hard work. They are working professionals across the SUNY system and they are graduate student instructors at SUNY Albany. One happens to be a PhD student, my son, Brad Hershenson, along with Shirley, Soph, Pete, Shareef, Keith and Chris. If you could please welcome them to the Chamber today. Thank you.

ACTING SPEAKER AUBRY: Certainly. On behalf of Ms. Seawright, the Speaker and all the members, we welcome you here to the New York State Assembly, extend to you the privileges of the floor. Brad, you're family so you are always extended those privileges. Please continue on with your work, know that you are important in the State of New York. Thank you so very much.

(Applause)

Page 4, Rules Report No. 116, the Clerk will read.

THE CLERK: Assembly No. A05983, Rules Report 116, Lavine. An act to amend the Judiciary Law, in relation to appointments to the office of associate judge of the court of appeals.

ACTING SPEAKER AUBRY: On a motion by Mr. Lavine, the Senate bill is before the House. The Senate bill is advanced. An explanation is requested, Mr. Lavine.

MR. LAVINE: Certainly. This proposed legislation amends our Judiciary Law in the extraordinarily limited situation where in nominating an Associate Judge of the Court of Appeals to

become the Chief Judge of the Court of Appeals, the Governor merely shifts the vacancy from one position to another on the Court. In this unique and limited circumstance, the Governor could make another appointment off the recently developed list of candidates prepared by the Commission on judicial nomination to fill the vacancy of the Chief Judge. The proposal would allow the use of the recently established existing list when in the specific instances -- instance of naming an Associate Judge to the Court of Appeals to be the Chief Judge to cover the shifts the existing vacancy on the court to another position on the bench. A vacancy on the Court existed before the Governor's nomination of a Chief Judge and a vacancy on the court continues to exist after the Governor's nomination and Senate confirmation of a new Chief Judge.

The bill does not change the process of selecting members of the Court of Appeals, it simply fills a gap in the statutory language implementing the process in the limited and unique circumstances where the Governor shifts a vacancy on the Court by picking a sitting judge who's an associate to then serve as the Chief Judge. The list was prepared for a vacancy on the court and if the Governor nominates and the Senate confirms an Associate Judge to be Chief Judge, that vacancy still exists. It simply amounts to a shifting, that's all.

Now, the Governor is not required, it's important for us to realize, the Governor is not required to use that currently existing list if she nominates an Associate Judge to serve as Chief Judge, she

can ask for a new list if she wants. The bill simply clarifies the flexibility of the Governor in this unique, limited circumstance where in making an appointment for Chief Judge, the Governor shifts the vacancy to elsewhere on the bench. That's what this is all about.

ACTING SPEAKER AUBRY: Mr. Tannousis.

MR. TANNOUSIS: Thank you, Mr. Speaker. Mr. Lavine, I just want to go over --

ACTING SPEAKER AUBRY: You're asking Mr. Lavine to yield?

MR. TANNOUSIS: Yes, yes, I apologize.

ACTING SPEAKER AUBRY: We'll ask Mr. Lavine if he wants to yield.

Mr. Lavine, will you yield.

MR. LAVINE: Mr. Tannousis, I may yield but I have rarely even been so offended.

(Laughter)

ACTING SPEAKER AUBRY: Mr. Lavine yields.

MR. TANNOUSIS: Thank you, thank you. Mr. Lavine, so just to be clear, this bill essentially expedites the Governor's ability to fill a future vacancy on the Court of Appeals if and only if that vacancy is created by the promotion of the current associate justice to the position of Chief Justice, correct?

MR. LAVINE: Yes, that's essentially correct, yes.

MR. TANNOUSIS: And would the Commission on Judicial Nomination then create a second list for the second and

separate vacancy or would the Governor be able to make her selection from the current list that was created prior to the occurrence of the vacancy?

MR. LAVINE: From that current list; however, the Governor could also ask the Commission to do further work in selecting candidates and they would have, in that case, 120 days to prepare that report.

MR. TANNOUSIS: Now, obviously in this situation, Mr. Lavine, you would obviously agree that the Commission has already submitted a list of candidates, correct?

MR. LAVINE: I not only agree, I admit, I confess that that's true.

MR. TANNOUSIS: So if a citizen of the State wished to submit their name to the Commission for a subsequent second vacancy, would they be afforded that consideration given that the Commission already had -- has a list of names?

MR. LAVINE: Only if the Governor decided that a new list was advisable.

MR. TANNOUSIS: So if, let's say, the Governor did not decide that a second list is necessary, then a citizen of the State would not be able to put their name forth for consideration for that position, correct?

MR. LAVINE: Yes.

MR. TANNOUSIS: Okay. And -- you know, a question for you, Mr. Lavine, you know, we went through this process

with the Senate, I understand that this Body does not have input in that regard, that is something that's brought up by the Senate. Of course, we've already gone through the process where a list was submitted. From that list, the Governor picked an individual, that individual went through the process, that individual was rejected. What is so urgent now in regards to passing this legislation today on March 31st of 2023, we are standing here today voting on this legislation. What has happened that has caused this urgency?

MR. LAVINE: Well, there's been a vacancy for a long time for Chief Judge, as you know. And in a way, I mean, your question would be very similar to the question of what happens during a jury trial and I know that you as a former prosecutor and as an attorney have had plenty of experience with jury trials. So our law provides on a serious trial, a felony, it's 12 people who sit in judgment. Now, what happens if you don't have the full 12. Well, there are alternates available who can be impaneled immediately, that's -- that's our system. And we do want to make sure that we have a maximum contingency of -- not contingency, maximum cohort of judges on our -- on our Court of Appeals. That's the way the system was established.

MR. TANNOUSIS: Based on your interpretation, Mr. Lavine, do you think that this bill raises any constitutional due process concerns for people that are not -- are not able to be considered for that second vacancy?

MR. LAVINE: No, I do not.

MR. TANNOUSIS: Okay.

On the bill, Mr. Speaker.

ACTING SPEAKER AUBRY: On the bill, Mr. Tannousis.

MR. TANNOUSIS: You know, in the situation in the State where the position of Chief Justice is vacant, the Commission has met, they have put together a list, a name was picked from that list by the Governor that went to the Senate, that individual was then rejected. A new list came out now with different individuals and all of a sudden now in this Body and in the Senate we are taking up a bill that would basically have -- give the Governor the ability to pick from two separate vacancies from the same list. If the people that are on the list to be considered for Chief Judge of the State of New York got put on the list and applied to be there and went through the process in order to fill that position, not the position of Associate Justice. That is a problem. That is a big problem in this legislation and we cannot, I cannot support it. I vote in the negative. Thank you.

ACTING SPEAKER AUBRY: Thank you, Mr. Tannousis.

Ms. Walsh.

MS. WALSH: Thank you, Mr. Speaker. Will the sponsor yield?

ACTING SPEAKER AUBRY: Mr. Lavine, will you yield?

MR. LAVINE: Of course.

ACTING SPEAKER AUBRY: Mr. Lavine yields, ma'am.

MS. WALSH: Okay. So -- and apologies if some of these questions may be repetitive, but what exactly are we trying to fix here? This process has been in place for decades. Wasn't this process created in like 1977?

MR. LAVINE: It's been around for a long time. I don't know the exact date when this process was incorporated, but the reasoning is that we've gone a long time without a -- a full complement of judges on the Court of Appeals and it's certainly in the best interest of everyone in the State and, in fact, nationally because our Court of Appeals does decide matters that are of national significance, that we have a full complement of -- of judges.

MS. WALSH: What -- what is the total number of judges on the Court of Appeals?

MR. LAVINE: It should be seven.

MS. WALSH: And how many do we have right now?

MR. LAVINE: Right now we have six.

MS. WALSH: And what's required for a quorum?

MR. LAVINE: Oh, less than six. I think it's four or five, I don't remember.

MS. WALSH: Right, so there's a quorum for the Court to act, so is the -- what is the concern?

MR. LAVINE: Well, the concern is very similar,

again, to the -- our -- one of the foundations of our jury system. On a serious case, we have 12 jurors. Now, there is one philosophy, one philosophical analysis that says why did they settle on 12 jurors for criminal cases, serious criminal cases. And some people advanced the theory that 12 represented one for each -- each sign, each astronomical sign. And that's so you that you get the benefit of the most number of people, and that's the best way for us to make decisions. As we have learned in democracy, more people involved, the better the decision-making process. So it's important to have a -- a full complement.

MS. WALSH: A full complement I would agree is -- is what we would prefer; however, the Court can act with the number of judges that are on the Court right now. Could you -- can you -- do you know how many cases have been heard since Judge DiFiore left that have come down to three-three decisions?

MR. LAVINE: No, but I bet you do, Ms. Walsh.

MS. WALSH: No, I actually don't. I didn't have enough time to prepare and try to dig that out. I was hoping that you would because I could understand if there were a significant number of three-three decisions that might support your argument that we need that full complement of judges in order for the court to be, you know, effective in the State, but without that information I -- you know, I didn't know and you don't either, so... and, yet, here we are overturning largely a statute that has been in place since 1977, I believe it amended in 1983 to address, as you say, a very rare circumstance, but it's one that we're presented with right now. So --

MR. LAVINE: I didn't mean to interrupt, I apologize.

MS. WALSH: No, I didn't really have a question pending. Maybe I can ask you another question and we can -- we can continue our debate.

MR. LAVINE: Can I just share with you an idea?

MS. WALSH: No, maybe we should just debate.

MR. LAVINE: I am sure there are more than --

MS. WALSH: Or not.

MR. LAVINE: -- a sufficient number of cases for consideration by the Court of Appeals, and we know that the Court of Appeals itself has the Constitutional authority to use other judges to help when there are caseloads that are appreciable. So I understand -- I understand, I respect your -- I respect your point.

MS. WALSH: Do you happen to know of the judges that are currently on the Court of Appeals, who is going to be up for reappointment any time soon? Do you happen to know, like, what their terms are and who's coming off and who's coming on?

MR. LAVINE: I don't, but those are all statutorily prescribed.

MS. WALSH: Would -- would you be surprised to know that effectively, the Court of Appeals, if this legislation were to pass, would have no vacancies, absent retirement, resignation, or death for the next decade. So, many lawyers and judges would be foreclosed from applying for Associate Judge should this legislation

pass, not only this year, but for more than a decade. Would you be surprised to know that?

MR. LAVINE: Well, I take your word for it and am I surprised? Not particularly.

MS. WALSH: Okay. So one thing that I brought up yesterday when we took up this bill in the Judiciary Committee was the -- the idea of fairness and the idea really that we've got an existing list of individuals who said that they were interested in becoming the Chief Judge. So it's my understanding it was reported earlier today that one of my law school classmates, Elizabeth Garry who is the Presiding Judge of the Appellate Division Third Department, she is on that short list for Chief Judge and she has made it clear that she is not interested in becoming an Associate Judge, she wants to only be the Chief Judge. So the existing list contains -- clearly contains individuals who are interested in the Chief Judge position, but I know that -- I'm trying to remember who it is, I think it's Attorney General Letitia James is fascinated with Venn diagrams, so I feel a little bit like we're having a Venn diagram discussion here. But there are going to be individuals on that list that are interested in the Chief Judge position, we know that. There may be individuals on the short list who would also be interested in Associate Judge, but we also, it is widely rumored that there are individuals would have been interested in the attorney judge position -- Associate Judge position rather I mean to say, who -- who did not put their name up for Chief Judge because they don't want that position, they would want an Associate

Judge position. So can you understand that using the short list to have the -- the Associate Judge position filled is going to include people who don't want it and it's not going to include people who would want it. Is that fair, that analysis?

MR. LAVINE: I think it's fair for you to say that.

MS. WALSH: Okay, but you disagree with that?

MR. LAVINE: I don't agree or disagree. I mean, it's an editorial comment and I respect it.

MS. WALSH: Okay, very good. That's fine. All right. So another issue that has been raised is that it has to do with the constitutionality of this proposed legislation. And I know you did answer some questions from the previous speaker about that, the Ranker on the Judiciary Committee. And it's -- there are some -- there are some questions that have been raised about it. I will leave that to my esteemed colleague to my right who we know favors constitutional arguments. Don't look behind you, I mean you. But what I wanted to just kind of talk about is what do we do with people who will say, I would've liked to have been considered for Associate Judge, and if there had been a separate list created, I would've raised my hand and tried to get on that list. I may have been Asian-American, as there's nobody on the short list that's remaining who I believe is Asian-American. I'm a Hispanic individual, excellent judge, I would like to be considered. There's nobody. And so if we're really trying to create that diverse Court that you talked about earlier that's essential for the effective representation of the concerns of New Yorkers coming

before the Court of Appeals, wouldn't it be better to have that second list created for Associate Judge so we actually have that diversity and equity that we so often talk about in this Chamber?

MR. LAVINE: That is a decision to be left to the Governor because the Governor can certainly request the preparation of a -- of a new list of potential appointees. But I do appreciate how important diversity, equity and inclusion are to each and every one of us in this Chamber.

MS. WALSH: Thank you very much, Chair Lavine.

Mr. Speaker, on the bill.

ACTING SPEAKER AUBRY: On the bill, Ms. Walsh.

MS. WALSH: So I think that it's always a problem when legislation tries to reverse and alter a longstanding historical process, as is the case here. We have had this plan in place for many decades and it has worked. And we know now politically and we know just from reading the news and from watching the Senate and their works down the hallway, that this has been very controversial in filling the Chief Judge position. And of course it would be best if we had a seven-member full complement of -- on the Court of Appeals. But I think that we run -- we run a risk when we create legislation to solve an immediate problem, which we will then have to live with going forward. And I think it's fundamentally unfair to those judges who would wish to be considered to be an Associate Judge, to be essentially through this legislation foreclosed. In my humble opinion,

I think that a deal has been struck and this legislation is there to effectuate it. But I think on the merits of the -- of the legislation itself and the bill, I think that its constitutionality is questionable. I think it will be questioned should this bill pass today. I will not be in favor of this legislation, probably not surprisingly, because I don't think it's fair. I think that it -- using the existing list both overrepresents and underrepresents individuals who could be very highly qualified to serve on the Court of Appeals as an Associate Justice, and I would prefer to keep the rules as we have them, and this process could move along fairly quickly and I think that that would be the best way to go rather than to change a very longstanding process. So with that, I will be voting in the negative, and thank you very much, Mr. Speaker.

ACTING SPEAKER AUBRY: Thank you.

Mr. Ra.

MR. RA: Thank you, Mr. Speaker. Will the sponsor yield?

ACTING SPEAKER AUBRY: Mr. Lavine, will you yield?

MR. LAVINE: Of course.

ACTING SPEAKER AUBRY: Mr. Lavine yields.

MR. RA: Thank you, Mr. Lavine. So in the current process, is that number of seven applicants fixed in law or the State Constitution?

MR. LAVINE: I believe so, yes.

MR. RA: Do you know which one, is it --

MR. LAVINE: The panel recommends seven -- seven people.

MR. RA: And that's statutory or constitutional?

MR. LAVINE: It may be both, I don't remember exactly.

MR. RA: So one of my concerns with this, you know, in addition and I'll get to that in a few minutes, the fact that we're in the middle of this process, but the State Constitution, and I was trying to glance and all of a sudden -- thank you for that because I couldn't find that particular piece, and by the way, you had an exchange earlier, it does say in the State Constitution that five is a quorum so...

MR. LAVINE: Yes.

MR. RA: I think you had that -- but it says in -- this is in Article 6, Section 2, and it's sub e, The Governor shall appoint with the advice and consent of the Senate from among those recommended by the judicial nominee a person to fill, as the case may be, whenever a vacancy occurs in the Court of Appeals.

MR. LAVINE: Mr. Ra, may I just --

MR. RA: Yes.

MR. LAVINE: -- ask you, did you say B as in baseball or D as in David?

MR. RA: E.

MR. LAVINE: E.

MR. RA: As in Ed.

(Laughter)

MR. LAVINE: Thank you.

MR. RA: So I'm just concerned with how that language, this is under subsection 4e, how that language interplays with this in that it says, "whenever a vacancy occurs," and whether this language would be in conflict with that.

MR. LAVINE: I -- I don't believe so because a vacancy has occurred.

MR. RA: But a vacancy has occurred, a list has been generated, and then upon this appointment, should the Governor choose one of the three individuals that's on the current list that's currently Associate Judge, a new vacancy will have occurred that wasn't there when this list was generated.

MR. LAVINE: It's a -- it's a simple shift of vacancy.

MR. RA: But it's not the same vacancy, would you disagree?

MR. LAVINE: It's still a vacancy of a justice, of a judge.

MR. RA: Okay. I think we'll agree to disagree on that. I am concerned with that. The other thing is so we have seven, right, and I'm correct, right, there's three on this current list that are current associate members?

MR. LAVINE: I think so.

MR. RA: Okay. So essentially for the second vacancy, we're not even talking about a list of six because one was --

we're really talking about a list of four.

MR. LAVINE: That may be the case.

MR. RA: Now, and that's obviously specific to this situation which is one of my concerns with this because we're doing this as something is currently happening and perhaps in the future the Commission decides, you know, we're only going to put one current member on because we don't want to shortchange people or to Ms. Walsh's point, people that aren't interested in an associate spot maybe are less likely to put themselves forward because they know that this list can kind of be double used. So I -- I do have that concern that we're -- they're -- theoretically, if we were not to adopt this, right, they would have to -- they would appoint somebody, assuming the Governor appoints a current associate member, they'd have to come out with a new list of seven. So somewhere there are three individuals that could have been on that list for consideration as an Associate Judge that will not have that opportunity if this is adopted, correct?

MR. LAVINE: To fill an Associate Judge position, the Commission recommends at least three and up to seven. So three, seven, five, six, it's still the same selection process. And this is up to the Governor, the discretion of the Governor.

MR. RA: Okay, thank you for that clarification because that's what I was asking in the beginning was whether the number was fixed at seven or -- where is that --

MR. LAVINE: It's seven -- seven for a Chief Judge.

MR. RA: It's seven for a Chief Judge.

MR. LAVINE: Yeah. And for an Associate Judge, it's at least three.

MR. RA: Okay. Thank you, thank you for that. The one other question I have is given that we're doing this in the middle of a process, and look, generally speaking there's nothing wrong with seeing something going on and saying, hey, this situation really hasn't presented itself before, maybe this is something we need to change. But one of the things that really came up as this was going on was this question as to whether or not the prior nominee that was put forward by the Governor was entitled to a vote on the floor of the Senate, right, but this was -- and it was litigated, one of our former colleagues here, down the hall actually, went into court and the Senate decided to bring that nomination to the floor and -- and it was defeated. But that was a -- a -- I would say still somewhat of an outstanding question, although I think despite that the lawsuit was successful in clarifying that. So why aren't we along with this clarifying that question that came up just recently?

MR. LAVINE: We're acting on a proposed piece of legislation sent to us by the Governor. Now, Mr. Ra, if you -- if you want to engage in a separate legislative pursuit to clarify that issue that occurred with Judge LaSalle, I'd be happy to work with you on that.

MR. RA: That would be great, all right. Thank you very much, Mr. Lavine.

MR. LAVINE: We'll -- we'll see what the Senate has to say about that, but I think you and I are in agreement.

MR. RA: Thank you, Mr. Lavine.

Mr. Speaker, on the bill.

ACTING SPEAKER AUBRY: On the bill, Mr. Ra.

MR. RA: So, again, I -- this is kind of one of those things, and what came to mind to me looking at it the other day was the situation we had last year with the Lieutenant Governor. You know, I thought that generally speaking the idea of a person being able to get off the ballot was -- was fine, it made sense. But the fact was we were in the middle of a process and making that change in the middle of the game, and I feel the same way about this. These individuals that were put on this list that applied to be on this list, the members of the Commission that put this list together did not contemplate this possibility when putting that list together. So I don't -- I think that is fundamentally unfair to people that could have been considered for the vacancy that will occur if the Governor chooses a member of the Court of Appeals. And -- and I do have that concern my colleague mentioned earlier that there's even more to it that there is some type of, you know, I mean, I shudder to say this on March 31st in Albany, but that there could be some backroom conversation that has happened regarding these two vacancies, that maybe it's a, you know, I'll pick one, you pick one type of situation, but that is a real concern. So, I think I would actually be voting for this if we said the effective date was, you know, 120 days from now once this vacancy is taken care of, but -- but I can't support it not knowing that there -- there may be something else at play here, and especially knowing that

the Commission and the applicants did not contemplate this possibility as this list was being generated. So thank you, Mr. Speaker.

ACTING SPEAKER AUBRY: Thank you, Mr. Ra.

Mr. Keith Brown.

Mr. K. BROWN: Mr. Speaker.

ACTING SPEAKER AUBRY: Sir.

MR. K. BROWN: On the bill.

ACTING SPEAKER AUBRY: On the bill, Mr.

Brown.

MR. K. BROWN: So Mr. Speaker, why creating this fast track process for filling this vacancy, seems to me it should raise the suspicion, raise my eyebrow when I first saw it and I concur with the statements of my colleagues who have asked that question, particularly given the date of the calendar and the negotiations that are going on, what backroom deal was potentially drawn up? So I ask myself, because of constitutional constraints, this Body was not allowed and permitted to discuss the former candidate who was put forth but ironically, we're dealing with this situation and I'm sure in the history of this State we've come across the situation where we've had six justices on the Court of Appeals and had the need to fill the vacancy of Chief Justice and Associate Justice. So I'm not willing to throw out 200 years of history because it's convenient. There is no exigent situation that's happening now that we need to do this today. But I do want to take an opportunity and talk about the irony that if the former candidate had been passed in the Senate we wouldn't be

even in this situation. Justice Hector LaSalle was an impeccably qualified candidate. And the way he was treated across the hall was an embarrassment to everyone in this State. The gentleman had a lifetime as a prosecutor, he had an impeccable career as a jurist and sits on the Second Department, and there's no reason why he is not the Chief Justice today except for one thing, politics. I'm offended by the way that was treated, I'm offended by this particular rule and why we're dealing with it as a Governor's program bill. And for those reasons, I'm voting against this. Thank you, Mr. Speaker.

ACTING SPEAKER AUBRY: Thank you, sir.
Mr. Thiele.

MR. THIELE: Thank you, Mr. Speaker.

On the bill.

ACTING SPEAKER AUBRY: On the bill, sir.

MR. THIELE: I just briefly wanted to speak to one of the rationales that was given by Member Lavine with regard to this bill, and that is the impact of a prolonged vacancy on the Court of Appeals and the impact that that has on justice. And I can't answer Member Walsh's question about statistics, but I can give you an anecdotal story in this regard. And that it just so happened that there was a major environmental case involving the Town of South Hampton that I happened to be supporting the town on and happened to be a petitioner on that was before the Court of Appeals just this past January. And given the way the Court has been divided in -- in recent months and years, it was the fear that with this major environmental

case that it would divide three to three. As it turned out, another member of the Court had to recuse themselves because of the identity of one of the attorneys that was in the case. We ended up with only five judges. And but because of that case, it caused me to pay attention to -- because you were looking for the decision, right, your case gets argued, you're waiting for the decision. There were like seven or eight cases that were on the docket that day for the Court of Appeals. And as we're, you know, we're looking for our case, of those eight cases, there were I think three that got sent back for a reargument because there wasn't a majority to decide the particular case.

So, you know, this is having an impact and as far as, you know, the rationale for -- for having this because of this prolonged vacancy, I think there's merit to the argument that it is denying justice for petitioners and respondents that are before the -- before the Court. And I would just conclude in saying that the particular case that I was involved in, the vote was five-nothing and the good guys won, so it didn't impact my particular case, but we were able to see that there were number of cases before the Court that just simply couldn't get decided and still haven't been decided because of only having six justices available. Thank you, Mr. Speaker.

ACTING SPEAKER AUBRY: Thank you, Mr. Thiele.

Mr. Smith.

MR. SMITH: Thank you, Mr. Speaker.

On the bill.

ACTING SPEAKER AUBRY: On the bill, sir.

MR. SMITH: Thank you. As I listened to the debate in this Chamber on this bill that the Governor sent to us, as a non-attorney speaking here, yet, having the same single vote that every other member of this Chamber has, many of you are attorneys and I respect that and I appreciate that, but what really has me incensed over this proposal is I feel like we're definitely changing the rules to benefit a certain situation. And all too often it feels like, you know, it feels like this is *Whose Line is it Anyway* where the rules are made up and the points don't matter. But I don't really appreciate that it would appear to a non-attorney of someone who is confined to listening to this debate that clearly the Governor has in mind perhaps two people on this current list so it would throw out the opportunity for a second list to be generated with two unique positions being either the Chief Judge or perhaps an Associate Justice, which I know, you know, maybe even people in this Chamber, but certainly a lot of qualified judges back home on Long Island in my district, I'm sure they would probably be interested in being considered not for the top spot, but for an associate position. So I just feel as the Judiciary being a separately elect or a separate branch of government and us as the Legislature having our responsibilities and the Executive having theirs, I really, it really gets under my skin when we take it upon ourselves to either weaken the Judiciary or to try to control the Judiciary more than it should be. It should be a separate branch of

government and it should be treated that way. I think that this is completely unnecessary. A second list could be generated with highly-qualified individuals to be considered and for us to take this action now, as my colleague, Mr. Ra, said, if this were to be considered or taken effect next year or a different time where we don't have this contentious situation, I'd probably be interested in hearing more about it, but under this situation I do feel like we're trying to pull a fast one, I don't appreciate that. I don't know if there's a case that's pending that perhaps two people on this single list would have an opinion one way or another, but that, you know, again, as a non-attorney, I don't really like this. I think this is dangerous and a bad bill at this time. Thank you, Mr. Speaker.

ACTING SPEAKER AUBRY: Mr. Jacobson.

MR. JACOBSON: Thank you, Mr. Speaker. Would the sponsor yield?

ACTING SPEAKER AUBRY: Mr. Lavine, will you yield?

MR. LAVINE: Of course.

ACTING SPEAKER AUBRY: Mr. Lavine yields, sir.

MR. JACOBSON: Thank you. There's been a lot of things thrown out here and I need a -- I'd like you to give a clarification to this Body. If the situation occurs where -- where -- that we're -- that this bill applies to, does the Governor have to appoint somebody from the -- from the list that are remaining on the list?

MR. LAVINE: The answer to that is no.

MR. JACOBSON: So this is permissive, right?

MR. LAVINE: Yes.

MR. JACOBSON: And -- and if the Governor does not appoint from that list, within 15 days, am I correct, then the Governor tells the Commission and then they would supply more names, correct?

MR. LAVINE: It could be less than 15 days if the Governor determines that she does not want to select someone from that list. The Governor need simply communicate in writing with the (inaudible) -- with the Court, rather, excuse me.

MR. JACOBSON: So it doesn't require it and the sky is not falling, correct?

MR. LAVINE: I don't think the sky is falling.

MR. JACOBSON: All right. Thank you.

ACTING SPEAKER AUBRY: Mr. Goodell.

MR. GOODELL: Thank you, Mr. Speaker.

On the bill.

ACTING SPEAKER AUBRY: On the bill, Mr. Goodell.

MR. GOODELL: Thank you, sir. Since 1977 we've had a process with filling vacancies in the Court of Appeals, and that process is spelled out carefully in the Judiciary Law, and it clearly contemplates situations where you have a vacancy in the Chief Judge or a vacancy in an Appellate -- the Associate Judge; it even spells out

how you handle situations where you have a vacancy in both. It spells out what happens when the Governor makes a recommendation while the Senate is in Session, and it spells out the process that occurs when the Senate is not in Session. It even spells out the process that occurs when the Governor makes an appointment of a Chief Judge or an Associate Judge while the Senate is Session or when the Senate is not in Session. So it's all carefully spelled out. And that's been the law, the last time it was amended was in 1983. And in 1983, the amendment was to increase the time period that the Judicial Commission, nominating commission, had to evaluate candidates from 60 to 120 days, because 40 years ago this Legislature recognized that with such an important appointment it is critical that you have a very thorough review and evaluation, and that can take time.

So what this bill does is it eliminates the role of a judicial nominating commission in coming up with a separate list for an Associate Judge when a prior Associate Judge is applying as Chief Judge. That's what it does, it takes that requirement out, it eliminates it and says that the Governor in her discretion can simply appoint off from the first list without going through that second process. That, in a nutshell, is what this does. Is that a good idea or not? Well, for sure the list for the Chief Judge are capable, qualified people. I don't think any of us in this House challenge that, although obviously the Senate just rejected one of those nominees that had been carefully screened by that Commission and recommended and the Senate rejected. But that doesn't mean the positions are the same. In fact, the Judiciary

Law actually acknowledges the distinction. It says, for example in Section 63 of the Judiciary Law, it recognizes, quote, "the unique responsibilities of the Chief Judge of the Court of Appeals," and that's why they have separate language about the Chief Judge. I might add there's separate responsibilities for an Associate Judge, they are different. And when we look back at history, we see there are situations where an Associate Judge has been appointed as Chief Judge off from the list and that vacancy has been filled by someone who wasn't even on the list for Chief Judge. And you can look back to 1985, for example, when Chief Judge Walker replaced Chief Judge Cooke and Judge Titone was selected to replace Mr. Walker and he even wasn't even on the original list. And we know because we've been advised by people that there are some people on that list today for Chief Judge who don't want to be an Associate Judge because there's different responsibilities and different obligations and a number of other factors. And as history has shown us there are also likely to be a lot of judges who are interested in being an Associate Judge who weren't on this list. And you can pull up on the internet, which we all have here, all those histories of all those judges and you can see over and over and over again that the Commission on Judicial Nominations has different people when they're filling a vacancy caused by the promotion of an Associate Judge to the Court of App -- to the Chief Judge. There's different people. And this allows the Governor to shortchange that process eliminating some qualified candidates and reducing the opportunity to have the best candidate step forward. And

for that reason, I won't be supporting it. I think it makes sense from a judicial point of view and from a public policy point of view to have a separate list with the separate positions reflecting their unique characteristics, qualifications and a unique list of people who are interested. And we should expect our Governor to do the process fully, thoughtfully, carefully for each vacancies, and we should not authorize our Governor to shortchange that process for the sake of expediency. And for that reason, I will not be supporting this. Thank you, sir.

ACTING SPEAKER AUBRY: Read the last section.

THE CLERK: The act shall take effect immediately.

ACTING SPEAKER AUBRY: A Party vote has been requested.

Mr. Goodell.

MR. GOODELL: Thank you, sir. The Republican Conference is generally opposed. Certainly those who support this proposed process can vote in favor of it here on the floor of the Assembly. Thank you, sir.

ACTING SPEAKER AUBRY: Certainly.

Ms. Solages.

MS. SOLAGES: The Majority Conference will be in the affirmative. Thank you.

ACTING SPEAKER AUBRY: Thank you, Ms. Solages.

The Clerk will record the vote.

(The Clerk recorded the vote.)

Are there any other votes? Announce the results.

(The Clerk announced the results.)

The bill is passed.

Ms. Solages.

MS. SOLAGES: Can we please, what do you call it, recognize, that's the word, Mr. Jacobson for an announcement?

ACTING SPEAKER AUBRY: Mr. Jacobson for the purposes of a announcement.

MR. JACOBSON: Yes, thank you, Mr. Speaker.

Yesterday I know some of my colleagues in the Majority were disappointed that we didn't have conference. But I want everybody to know that the Majority will be having conference immediately following this Session in Hearing Room B. Thank you.

ACTING SPEAKER AUBRY: Majority Conference, Hearing Room B, and there is joy in Mudville.

Ms. Solages.

MS. SOLAGES: Mr. Speaker, do we have any further housekeeping or resolutions?

ACTING SPEAKER AUBRY: No housekeeping and no resolutions, Ms. Solages, a gift to you.

MS. SOLAGES: Well, I now move that the Assembly stands adjourned and reconvene at the call of the Speaker.

ACTING SPEAKER AUBRY: The Assembly stands adjourned at the call of the Speaker.

(Whereupon, at 12:04 p.m., the Assembly stood
adjourned until the call of the Speaker.)