

OFFICE OF ELECTED ATTORNEY GENERAL:

PRELIMINARY REPORT

General Assembly of the Commonwealth of Pennsylvania
JOINT STATE GOVERNMENT COMMISSION
Harrisburg, Pennsylvania
March 1, 1978

The Joint State Government Commission was created by Act of 1937, July 1, P.L. 2460, as amended, as a continuing agency for the development of facts and recommendations on all phases of government for the use of the General Assembly.

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OFFICE OF ATTORNEY GENERAL

TASK FORCE

Senate Members

Michael A. O'Pake, <i>Chairman</i>	George W. Gekas
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R. Budd Dwyer	James R. Kelley

House Members

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Eugene R. Geesey	Ralph D. Pratt
William D. Hutchinson	John F. White, Jr.

ADVISORY COMMITTEE

Former Attorneys General Invited to Participate

Honorable Harrington Adams*	Honorable Israel Packel**
Honorable Anne X. Alpern*	Honorable William C. Sennett*
Honorable J. Shane Creamer**	Honorable Fred Speaker
Honorable Edward Friedman	Honorable Robert E. Woodside

Honorable Alexander F. Barbieri	Honorable Robert L. Jacobs
Honorable Kenneth G. Biehn	Professor Authur A. Murphy
Honorable James S. Bowman	Dean John E. Murray, Jr.
Professor Joy Conti	Professor W. Edward Sell
Harold Cramer, Esquire	F. Lee Shipman, Esquire
Professor Donald W. Dowd	Professor Ralph S. Spritzer
Professor Joseph D. Harbaugh	Honorable Leroy S. Zimmerman

* Did not participate.
** Declined to serve.



**GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA
JOINT STATE GOVERNMENT COMMISSION**

ROOM 450 - CAPITOL BUILDING
HARRISBURG 17120

March 1, 1978

TO THE MEMBERS OF THE GENERAL ASSEMBLY:

Pursuant to Senate Resolution 61, adopted on December 12, 1977, the Joint State Government Commission presents this preliminary report containing recommended legislation of the Task Force on Office of Attorney General.

In preparing this legislation the task force had the benefit of the assistance of an advisory committee composed of former attorneys general and representatives of the judiciary, the Pennsylvania Bar Association, the Commonwealth's law schools and district attorneys. The advice and experience of these individuals, together with the cooperation of the Attorney General and his staff, were most helpful in preparing the proposed legislation. The Commission wishes to express appreciation to all who participated.

Respectfully submitted,

A handwritten signature in cursive script that reads "Fred J. Shupnik".

Fred J. Shupnik
Chairman

CONTENTS

INTRODUCTION	1
SELECTION OF INTERIM ATTORNEYS GENERAL	5
POWERS AND DUTIES OF INTERIM AND ELECTED ATTORNEYS GENERAL	9
PROPOSED LEGISLATION	13

INTRODUCTION

Voters of the Commonwealth on May 16, 1978 will determine if an elected attorney general shall replace the appointed official as currently provided by the Pennsylvania Constitution.

In accordance with requirements in Article XI of the Constitution, a joint resolution proposing this constitutional amendment was passed in each House in two consecutive sessions of the General Assembly: Resolution No. 3 of 1976 (1976 Senate Bill 1273) and Resolution No. 4 of 1977 (1977 House Bill 84).

The constitutional amendment would add a new Section 4.1 to Article IV, with conforming amendments to Sections 5, 6, 8 and 17 of that article.

Proposed Section 4.1 provides:

An Attorney General shall be chosen by the qualified electors of the Commonwealth on the day the general election is held for the Auditor General and State Treasurer; he shall hold his office during four years from the third Tuesday of January next ensuing his election and shall not be eligible to serve continuously for more than two successive

terms; he shall be the chief law officer of the Commonwealth and shall exercise such powers and perform such duties as may be imposed by law.

Section 2 of the joint resolution states:

Upon approval of this amendment by the electors, there shall be a vacancy in the office of Attorney General which shall be filled as provided herein.

Recognizing the problems that might occur in the interim prior to assumption of office in January 1981 by the first elected attorney general as well as contemplating reappraisal of the functions of the office, the Senate adopted a resolution on December 12, 1977, directing the Joint State Government Commission to appoint a task force to study all questions arising from voter approval of an elected attorney general.

Senate Resolution No. 61 authorizes the appointment of an advisory committee of outstanding citizens having experience and expertise in the subject and directs that all former attorneys general be invited to serve.

The resolution specifically provides:

RESOLVED, That the task force shall issue a preliminary report to the General Assembly by March 1, 1978, which report shall include such recommended legislation as the task force deems necessary to provide for the selection and functions of Attorneys General during the interim; and be it further

RESOLVED, That a final report including recommended legislation for the permanent organization following the first election of the Attorney General shall be submitted by September 1, 1978; . . .

The task force, chaired by Senator Michael A. O'Pake, and advisory committee initiated their work at a meeting held February 8. The recommendations made at that time were drafted into legislation and approved by the task force on February 22 for introduction into the General Assembly.

The further work of the task force and advisory committee depends upon the decision of the electorate in May. If the constitutional amendment is approved, the task force and advisory committee will convene to consider the more complex and long-range issues associated with an elected office of attorney general.

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SELECTION OF INTERIM ATTORNEYS GENERAL

After reviewing the possible alternatives and considering the legislative history, members of the task force and advisory committee agreed that legislation was necessary to clarify the selection process of attorneys general during the more than two- and one-half-year interim period and assure continuity of operations of the Department of Justice during that time.¹

The task force accordingly recommends that the language of Section 2 of Resolution No. 4 of 1977 (1977 House Bill 84) be clarified by specifying in the proposed legislation the exact date when the vacancy would be deemed to occur. This is necessary since, in the case of a close vote on the referendum, confusion and possible collateral legal attacks

1. The selection process of the attorneys general who will serve during the interim period between approval of the referendum and assumption of office by the elected attorney general was addressed on the floor of the House of Representatives by the prime sponsor of 1977 House Bill 84: see Legislative Journal, House of Representatives, June 1, 1977, pp. 902, 903. Representative Joseph Ted Doyle, on the floor of the House of Representatives, cited the act of May 15, 1874, P.L. 205, No. 132, which directs a result consistent with the legislation herein recommended by the task force.

upon the authority of the incumbent awaiting the final resolution of the election results must be prevented.

The task force further recommends that this statutory clarification reflect existing law relating to the official proclamation of the adoption or rejection of constitutional amendments as set forth in 1 Pa.C.S. § 903.²

That section provides:

The officer of this Commonwealth to whom election returns are required by law to be certified shall, whenever a proposed amendment to the Constitution of Pennsylvania has been on the ballot at any election, certify the result of the election thereon to the Governor immediately upon receiving the official returns from all counties of the Commonwealth, and the Governor shall thereupon issue his proclamation indicating whether or not the proposed amendment has been adopted by a majority of the electors voting thereon. The proclamation shall be published in the next available volume of the Laws of Pennsylvania.

The task force recommends that the vacancy in office be deemed to occur upon the Governor's proclamation. At that time the Governor shall nominate a person to fill the office of attorney general. However, it is recommended that, in order to provide continuity in the functions and duties of the office, the present Governor be authorized to appoint an interim acting attorney general to serve until confirmation is completed. It was also determined that the incumbent Governor should not be limited to the appointment of a

2. Added December 6, 1972, P.L. 1339, No. 290.

deputy attorney general as acting department head, as provided in Section 213 of The Administrative Code of 1929;³ and further, that the interim acting attorney general should continue to exercise all of the office's present functions and duties without regard to the restrictions of Section 213.

The foregoing recommendations were premised upon the probable time periods involved for the mechanics of officially obtaining the election results, gubernatorial submission of a nominee and the senatorial confirmation process. Certification of the official election results of the constitutional referendum of November 1975 was obtained by the Secretary of the Commonwealth, transmitted to the Governor and proclaimed by him three months and one day later.⁴ The Governor under existing law and constitutional authority has 90 days to make an appointment to fill a vacancy in offices such as the attorney general; the Senate has 25 legislative days to act upon the nomination. (See Pennsylvania Constitution, Article III, Section 8.) It was considered possible that because of the time periods involved, an attorney general might not be confirmed during the balance of the incumbent Governor's term.

In view of the determination that the interim attorneys general should continue all of the functions and duties of

3. Amended November 8, 1976, P.L. 1109, No. 227.

4. The constitutional referendum of May 1975 was proclaimed four months and two days later.

the present attorney general until the General Assembly considers and enacts appropriate legislation, it was agreed that the confirmation of the interim attorneys general should be by vote of a majority of the members elected to the Senate--the requirement for appointed cabinet officers--rather than by two-thirds vote--the requirement for appointments to vacancies in statewide elected offices.⁵

The task force also recommends that the appointee's term of office expire concurrently with the term of the incumbent Governor on the third Tuesday of January 1979,⁶ and that the incoming Governor have the power to appoint a second interim attorney general to serve at his pleasure until the attorney general elected in November 1980 assumes office on the third Tuesday of January 1981.

5. See § 207.1(c)(1) of The Administrative Code of 1929, added November 8, 1976, P.L. 1109, No. 227.

6. The provisions of § 207.1(f) of The Administrative Code provide that, absent his resignation, the appointee could continue to serve until his successor is confirmed by the Senate. Section 213 of the code would authorize the appointment of a deputy attorney general as an acting department head in the event of his resignation prior to confirmation of the successor.

POWERS AND DUTIES
OF INTERIM AND ELECTED ATTORNEYS GENERAL

The determination of the powers and duties of the future attorneys general resides with the General Assembly.

Proposed Section 4.1 of Article IV of the Constitution provides that the elected attorney general "shall be the chief law officer of the Commonwealth and shall exercise such powers and perform such duties as may be imposed by law."

Senate Resolution No. 61, stating that "the changeover may suggest the need for a reappraisal of the present organization and functions of the Office of Attorney General," directs the task force to make recommendations regarding not only the powers and duties of the elected office but the interim office as well.

Following review of the powers and duties of the Pennsylvania attorney general and a summary of the functions of those elected in 42 other states, the advisory committee recommended, and the task force concurred, that prior to the May 1978 primary election it would be impractical, if not

misleading to the electorate, to attempt a statutory implementation of the powers and duties to be assigned to an elected attorney general. Nevertheless, it was unanimously agreed that the necessity of assuring continuance of the functions and duties of the Department of Justice requires clarification in the proposed legislation: It is recommended that the interim attorneys general shall continue to exercise all the powers and perform all the duties provided by existing law.

The task force resolved to address the complex issue of the assignment of functions of the elected attorney general after the electorate has passed upon the constitutional proposition. Advisory committee meetings and public hearings, if appropriate, will be scheduled during the summer to formulate the recommendations required by Senate Resolution No. 61, which directs the task force to submit by September 1, 1978 "a final report including recommended legislation for the permanent organization following the first election of the Attorney General."

The legislation recommended herein also provides that the interim attorney general appointed in January 1979 be directed to report to the General Assembly recommendations for an orderly and efficient transition of the powers and duties from the appointed office to the elected office. The difficulty of awaiting the assumption of office of an

elected attorney general in January 1981 to transfer functions and duties was expressly acknowledged by the task force and advisory committee.

Finally, if the constitutional amendment providing for the elected attorney general is rejected by the electorate, the recommended legislation--which would then be unnecessary--provides in Section 2 for its own expiration.

It must be emphasized that the task force and advisory committee have taken no position on the merits of the proposed constitutional amendment. Senator O'Pake, chairman of the task force, while noting that some participants have expressed opinions on the issue, has stressed that the subject of approval or rejection of the proposed amendment is not within the jurisdictional mandate of the task force and advisory committee.

PROPOSED LEGISLATION

AN ACT

Implementing the provision of section 4.1 and related sections of Article IV of the Constitution of Pennsylvania as added or amended to provide for the election of the Attorney General; providing for the continuation of the powers and duties of the Attorney General through interim gubernatorial appointments to ensure an orderly and efficient transition in the office of Attorney General and the Department of Justice.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. (a) Upon the adoption of the constitutional amendment adding section 4.1 and amending related sections of Article IV of the Constitution of Pennsylvania which shall be deemed to be the date of the proclamation by the Governor of the approval by the electorate of the amendment as provided for in 1 Pa.C.S. § 903 (relating to Governor to proclaim result of election), there shall be a vacancy in the office of Attorney General. The Governor shall nominate, in accordance with the provisions of the Constitution of Pennsylvania, and, by and with the advice and consent of a majority of the members elected to the Senate, appoint a person to the office of Attorney General.

The Attorney General shall serve during the pleasure of the Governor for a term ending on the third Tuesday of January 1979 and shall continue to exercise all the powers and perform all the duties as provided by law for the office of the Attorney General. In the event of a vacancy prior to the proclamation by the Governor of the adoption of the constitutional amendment or during the interim between the proclamation and the confirmation by the Senate of the Attorney General, the Governor shall designate in writing an interim acting Attorney General.

(b) The vacancy occurring in the office of Attorney General upon the expiration of his term on the third Tuesday of January 1979 shall be filled by the Governor who shall nominate, in accordance with the provisions of the Constitution of Pennsylvania, and, by and with the advice and consent of a majority of the members elected to the Senate, appoint an Attorney General. The Attorney General shall serve during the pleasure of the Governor for a term ending on the third Tuesday of January 1981 and shall, until otherwise provided by law, continue to exercise all the powers and perform all the duties as provided by law for the office of the Attorney General. He shall in addition, from time to time, report to the General Assembly recommendations for an orderly and efficient transition of the powers and duties to the Attorney General to be elected.

Section 2. This act shall expire if the constitutional amendment providing for the election of the Attorney General is defeated by the electorate.

Section 3. This act shall take effect immediately.