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ATTORNEY GENERAL OPINION NO. 90-7

TO: The Honorable C. L. "Butch" Otter  
Lt. Governor of Idaho  
STATEHOUSE MAIL

Per Request for Attorney General's Opinion

**QUESTION PRESENTED:**

Is the Idaho Lieutenant Governor authorized to cast the tie-breaking vote in the Idaho Senate when the senate is evenly divided on organizational matters such as the election of the Idaho Senate President Pro Tem?

**CONCLUSION:**

The lieutenant governor is expressly authorized by art. 4, § 13, of the Idaho Constitution, to cast a vote when the senate is equally divided. This express power does not violate the separation of powers provisions of art. 2, § 1 of the Idaho Constitution; nor is there any other legal basis to limit the lieutenant governor's vote-casting authority.

**BACKGROUND:**

The general election of 1990 has resulted in an equal number of Democrats and Republicans being elected to the Idaho Senate. This is the first time in Idaho's history that the Idaho Senate has been evenly divided along party lines. With this equal division, the role of the Idaho Lieutenant Governor takes on a new perspective since he is empowered to cast a tie-breaking vote when the senate is equally divided. Art. 4, § 13, Idaho Constitution. The lieutenant governor's power to cast a tie-breaking vote in regard to legislative matters is not questioned. The scope of this Attorney General opinion is the lieutenant governor's ability to cast a tie-breaking vote in relation to organizational matters, specifically, the election of the president pro tem.

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## ANALYSIS:

### 1. Is This Matter Justiciable?

The suggestion has been made that if the Idaho Senate fails to resolve this issue internally and cannot organize itself without resorting to the lieutenant governor's "casting vote," the Idaho Supreme Court will abstain from ruling on the issue because the matter is non-justiciable or because it presents a political question. However, our research indicates that the judiciary does have the power to define the powers of the lieutenant governor as president of the senate.

As a general rule, it is true the judiciary will not intervene in the internal affairs of the legislature. In Beitelspacher v. Risch, 105 Idaho 605, 671 P.2d 1068 (1983), the Idaho Supreme Court was petitioned to review procedural questions from the Idaho Senate stemming from the adoption of a concurrent resolution. In a plurality opinion written by Justice Bakes, the court refused to interfere with or interpret senate rules governing parliamentary procedure:

Art. 3, § 9, of our Constitution gives each house of the legislature the power to determine its own rules of proceeding. Thus, this power is specifically reserved to the legislative branch by the Constitution, and we cannot interfere with that power. The interpretation of internal procedural rules of the Senate is for the Senate. Its leadership has spoken, and the Senate as a whole has not overruled it.

105 Idaho at 606. The present matter is distinguishable from Beitelspacher v. Risch on two scores. First, the matter is not purely internal to the Idaho Legislature. The issue involves the constitutional authority of the lieutenant governor to preside over the senate and the extent of this constitutional authority in organizing the senate. Second, the tie vote creates a deadlock, destroying the formation of senate "leadership" and preventing "the Senate as a whole" from functioning at all.

The justiciability of the lieutenant governor's constitutional authority within the legislature has been addressed in other jurisdictions. In State ex rel. Palmer v. Perpich, 182 N.W.2d 182 (1971), the Minnesota Supreme Court was called upon to determine the ability of the Minnesota lieutenant governor to cast a tie-breaking vote in the context of seating members and organizing the senate.. Before reaching the ultimate issue, the Minnesota Supreme Court defined its role:

The first question posed is the most difficult of solution. In the separation of powers between the three branches of government the thread that separates judicial power from legislative prerogative is an exceedingly thin one. Our Constitution provides that

each house of the legislature shall have the responsibility of judging the eligibility of its own members. It frequently requires much judicial restraint to refrain from treading on this legislative prerogative. However, when a question arises such as we now have before us, who is to decide whether a constitutional officer is attempting to usurp power not granted to him if we do not do so?

\* \* \*

Clearly, under this provision [the Minnesota quo warranto statute] we have power to determine whether a constitutional officer is attempting to usurp power which is not granted to him by the Constitution or by the laws of this state. It has been held that quo warranto is a proper proceeding to determine whether a branch of the legislature has been organized according to the Constitution. State ex rel. Werts v. Rogers, 56 N.J.L. 480, 28 A. 726, 29 A. 173, 23 L.R.A. 354.

While there seems to be little authority on the subject, we find the following in 81 C.J.S. States § 30:

As between two bodies claiming to be the lawfully constituted senate or house of representatives, the courts have jurisdiction to decide which is the constitutionally organized body. Further, the courts have power to determine whether the organization of a branch of the legislature has been made in violation of the constitution.

182 N.W. 2d at 184, 185. The court then ruled that unlike the lieutenant governors of most other states, including Idaho, and the United States Vice-President, the Minnesota lieutenant governor was not authorized to cast a vote when the senate was equally divided either in its organization or on any other issue.

In Dye v. State ex rel. Hale, 507 S.2d 332 (1987), the Supreme Court of Mississippi was called upon to review the lieutenant governor's authority to assign senators to committee positions and refer bills to committee. The issue of justiciability--on the ground that the matter was "internal" to the senate--was squarely presented and squarely answered:

Without doubt we will as a general rule decline adjudication of controversies arising within the Legislative Department of government where those controversies relate solely to the internal affairs of that department. Barnes v. Ladner, 241 Miss. 606, 616, 131 So.2d 458, 461 (1961). On the other hand, legislators nor the bodies in which they serve are

above the law, and in those rare instances where a claim is presented that the actions of a legislative body contravene rights secured by the constitutions of the United States or of this state, it is the responsibility of the judiciary to act, notwithstanding that political considerations may motivate the assertion of the claims nor that our final judgment may have practical political consequences. [Citations omitted.] Where, as here, it is alleged that one arguably a member of the Executive Department of government is exercising powers properly belonging to the Legislative Department, we are of necessity called upon to decide whether the encroachment exists in fact and, if so, whether it contravenes the mandate of Sections 1 and 2 of our Constitution that the powers of government be separate. See Alexander v. State Ex Rel. Allain, 441 So.2d 1329, 1333 (Miss. 1983). We have authority to adjudicate the claims tendered this day.

Moreover, it is within our actual and judicial knowledge that the role, responsibility and authority of the office of the Lieutenant Governor have become matters of great public interest and no little controversy. There is a public need that the legal issues tendered be authoritatively resolved. Not only do we have the authority to decide today's questions; we have a public responsibility to do so.

507 So.2d at 338-339. The Mississippi Supreme Court likewise held that the issue was justiciable despite claims that it involved a "political question":

And with regard to the claim that today's case involves a political question in which the judiciary should not become enmeshed, it is much too late to reclaim our virginity. That great constitutional and legal questions may become topics of political and even partisan controversy should never be employed by this Court as an excuse to duck its responsibility to adjudicate the legal and constitutional rights of the parties.

Id. at 339.

Thus, it appears likely that the Idaho Supreme Court will resolve this controversy if called upon to do so. See also, State v. Cason, 507 S.W.2d 405 (Mo. 1973); Opinion of the Justices, 225 A.2d 481 (Del. 1966); State v. Highway Patrol Board, 372 P.2d 930 (Mont. 1962).

## 2. Separation of Powers.

The Idaho Lieutenant Governor's authority to cast a tie-breaking vote in the organizational session will be challenged as

contrary to the separation of powers clause of art. 2, § 1, of the Idaho Constitution, which states:

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted. (Emphasis added.)

This strict separation of powers provision must be read along with art. 4, § 13, of the Idaho Constitution, which states in relevant part:

The lieutenant governor shall be president of the senate, but shall vote only when the senate is equally divided.

Thus, while the lieutenant governor is a member of the executive branch of government, the Idaho Constitution expressly authorizes the lieutenant governor to function within the legislative branch. The office of the lieutenant governor has no major executive duties or powers beyond acting as governor when the governor is absent or incapable of performing his official duties. Art. 4, § 12, Idaho Constitution. The lieutenant governor's primary duty is to preside over the state senate.

The Mississippi Supreme Court addressed the separation of powers clause of the Mississippi Constitution in relation to the powers of the lieutenant governor in Dye v. State ex rel. Hale, supra. Pursuant to the Mississippi Constitution, the Mississippi lieutenant governor is the presiding officer over the state senate. Pursuant to senate rules, the Mississippi lieutenant governor has been granted extensive additional powers. These powers were challenged by certain members of the state senate as being contrary to the separation of powers clause of the state constitution. The court held that the powers were not inherent to the office but that the senate had the authority to delegate these legislative functions and that the lieutenant governor was an "eligible receiver" of these delegated powers. At the core of this conclusion was the court's analysis of the separation of powers clause.

The Circuit Court held that the Lieutenant Governor is a member of the Executive Department and that, by virtue of the separation of powers doctrine, he is ineligible to receive the powers so delegated nor to exercise them if delegated. The point loses force when we recognize that there is no natural law of separation of powers. Rather, the powers of government are separate only insofar as the Constitution makes them separate. The Lieutenant Governor is unusual in that

he is made an officer of -- and given powers in -- two branches of government.

\* \* \*

By virtue of his being President of the Senate, the Lieutenant Governor is enough of a member of the Senate that he is eligible to have conferred upon him the legislative powers granted by the rules here at issue. The Lieutenant Governor does not possess these powers by reason of any authority inherent in the office of President of the Senate. His office merely serves to place him in the Senate, on the Senate side of the separation of powers barrier. As such Lt. Gov. Dye enjoys the powers at issue by virtue of the Senate's action taken in accordance with its inherent delegatory authority.

507 So.2d at 346-47. (emphasis added.) Thus, lieutenant governor does not violate the separation of powers clause of the Idaho Constitution by presiding over the Idaho Senate, or, in the case of a deadlock in the senate, casting the deciding vote.

### 3. The "Casting Vote."

The history and concept of a lieutenant governor's "casting vote" is set forth at length by the Montana Supreme Court in State v. Highway Patrol Board, 372 P.2d 930 (1962). Its origin is found in the New York Constitution of 1777, which provided that the lieutenant governor would, by virtue of this office:

be president of the senate, and, upon an equal division, have a casting voice in their decisions, but not vote on any other question.

This provision for a casting vote was incorporated into art. I, § 3 of the United States Constitution a decade later:

The vice-president of the United States shall be president of the senate, but shall have no vote, unless they be equally divided.

In essence, then, a "casting vote" is one that is cast only to break a tie. It cannot be cast to create a tie. Nor can it be cast to create a quorum of the body. See Opinion of the Justices, 225 A.2d 481, 483 (1966).

The policy reason for the existence of the casting vote in the senior branch of the legislature is set forth by the Michigan Supreme Court:

it is generally an unfortunate thing from the standpoint of the people watching the legislative process to find the legislature deadlock on an issue by

an absolutely even vote, and that it is desirable from the standpoint of having the people feel that the legislative process does and can move forward at all times to have it possible for a tie vote to be broken.

Advisory Opinion on Constitutionality of 1978 PA 426, 272 N.W. 2d 495-99 (Mich. 1978).

A. Idaho Law.

No legal authority has been found by this office that would preclude the lieutenant governor from using his casting vote to select senate officers in the event of an equally divided vote of the senators in attendance. The election of the officers occurs during the first regular session of the legislature or during an organizational session, as provided by Idaho Code § 67-404(c). The lieutenant governor as president of the senate presides over these sessions. Rules of the Senate, Rule 1.

The procedure in organizing the senate is described in Barton, Idaho Legislative Manual 6-7 (1984):

Members-elect of the Legislature (both Senators and Representatives) meet on the first Thursday of December following each general election for a maximum of three days to elect officers, appoint committees and organize for the First Regular Session. Prior to undertaking major tasks, the members-elect of the Legislature must be certified and sworn in. For this purpose, the Senate and House are called to order by their presiding officers--the Lieutenant Governor and the Speaker from the preceding session. Following the call to order, the Secretary of the Senate and the Chief Clerk of the House of Representatives, both from the preceding session, read the Certificate of Election prepared by the Secretary of State to certify the names of those persons elected to the Legislature in the last general election. The Certificate of Election may be read by the newly-appointed Secretary and Chief Clerk, if those from the preceding session are not present. After the members-elect are certified, the roll is called and the members-elect are administered the oath of office as outlined in Article III, Section 25 of the State Constitution. Beyond certification and swearing in, organizational procedures in the Senate and the House of Representatives differ somewhat.

In the Senate, the swearing in ceremony is followed by a prayer that is offered by the Chaplain. The Senate then moves to elect its President Pro Tempore, since the Lieutenant Governor is by constitutional mandate the President of the Senate. A candidate that has previously been agreed upon in the majority party caucus is nominated and a motion is made to close the

nominations. After both motions are seconded by a member from the minority party, a vote is taken, the results are tabulated, and the President Pro Tempore is declared to be elected. The Lieutenant Governor administers the oath of office to the President Pro Tempore.

Having installed the President Pro Tempore, the Senate, by a two-thirds vote of its membership, adopts the temporary rules of the Senate as the rules of the Organizational Session. The Senate then moves to inform the Governor and the House of Representatives that the Senate has been organized and to install the attaches of the upcoming regular session.

In short, the organizational session is a formal legislative session over which the lieutenant governor officially presides. Thus, there is no sound basis to deny the lieutenant governor the authority to cast his constitutionally authorized tie-breaking vote during the organizational session.

Furthermore, Rule 48 of the Rules of the Senate provides that the "general rules of parliamentary practice and procedure as set forth in *Mason's Manual of Legislative Procedure* shall govern the proceedings of the senate." Section 514 of *Mason's Manual of Legislative Procedure*, in relation to the lieutenant governor's power to cast a tie-breaking vote, states:

A casting vote is in order only when there is a tie vote as when the votes are equally divided between two candidates or when there is an equal number for and against a proposition. (Emphasis added.)

Finally, the Idaho Constitution is almost identical to the United States Constitution in regard to the president of the senate's ability to cast a tie-breaking vote. Art. 1, § 3 of the United States Constitution expressly authorizes the Vice-President of the United States to cast a vote when the Senate is equally divided. In the past, the Vice-President of the United States has cast a tie-breaking vote on organizational matters. It is reported in § 5976, Vol. V of *Hinds' Precedents* (1907): "the Vice-President votes on all questions wherein the Senate is equally divided, even on a question relating to the right of a Senator to his seat." The right of a senator to a seat is obviously an organizational matter.

#### B. Case Law From Other Jurisdictions.

Research conducted by this office has not found any case where the precise issue presented here has ever been adjudicated. Case law regarding the general powers of the lieutenant governor as president of a state senate is scant. The Montana Supreme Court in State v. Highway Patrol Board, 372 P.2d 930 (1962),

discussed the power of the lieutenant governor to cast a tie-breaking vote on legislation generally:

The question of law involved in this appeal is whether or not the Lieutenant Governor of the State of Montana, while presiding as President of the Senate, possessed the requisite power to enable or entitle him to cast the deciding vote on the third reading of House Bill No. 342, as amended, at a time when the Senators, then present and voting, were equally divided.

The people of Montana have specifically supplied the answer to the above question in their Constitution wherein they have "expressly directed or permitted" and conferred various special powers on the Lieutenant Governor, not the least of which, is the power, right and high privilege of presiding over the sessions and meetings of the State Senate as its President with the express direction that, while so presiding, he "shall vote only when the senate is equally divided." Section 15, Article VII, Constitution of Montana.

"This is a wise recognition of the parliamentary principle which allows a presiding officer the authority of holding a balance of power between equally divided votes of a deliberative body, in order to facilitate, but not to block, legislation; or \* \* \* for breaking, but not for making, a tie vote." Brown v. Foster (1895), 88 Me. 49, at p. 54, 33 A. 662, at p. 664, 31 L.R.A. 116, at p. 118.

342 P.2d at 935. The Montana Supreme court listed Idaho as a state where the lieutenant governor has similar powers. Id. at 937.

The Supreme Court of Delaware in Opinion of the Justices, 225 A.2d 481 (1966), confronted an apparent conflict in provisions of the Delaware Constitution. Pursuant to the Delaware Constitution, certain legislative functions required a "majority of all of the members elected" to the state senate. The question before the Delaware Supreme Court was whether the lieutenant governor was excluded from casting a tie-breaking vote (as provided by art. 3, § 19, of the Delaware Constitution) since he was not an "elected member" of the state senate.

The Delaware Supreme Court concluded that the lieutenant governor was not a "member" of the Delaware Senate for purposes of establishing a quorum. However, the court held that the lieutenant governor possessed an express constitutional grant of authority to cast a tie-breaking vote in all matters considered.

It is more reasonable to assume, in our opinion, that the casting vote of the Lieutenant Governor was intended to break ties in the more important matters

before the Senate, as well as the less important ones. It is in the public interest that there be a proper method to break deadlocks and to avoid impasse in the Senate. This was the rationale for vesting in the Vice President the casting vote in the United States Senate: "to secure at all times the possibility of a definitive resolution of the body." The Federalist Papers, No. 68: Hamilton. The more important the matter pending for decision, the more essential such tie-breaking device is to the public welfare.

By application of the rules of constitutional interpretation hereinabove set forth, we conclude that the casting vote provision of Art. 3, § 19 has not been modified, restricted or limited by the constitutional provisions which require action by a majority of the members of the Senate. That which is implied is as much a part of the Constitution as that which is expressed. Implicit in Art. 3, § 19, we think, is the unqualified power of the Lieutenant Governor to vote on any question--large or small--whenever the Senate is equally divided.

225 A.2d at 485.

Attention has been called to unpublished peremptory writs of quo warranto and mandamus issued by the Supreme Court of New Mexico (1987), file No. 16842. These writs nullified the votes cast by the New Mexico Lieutenant Governor in the senate's election of its president pro tem and the adoption of the rules of procedure for the New Mexico Senate. Unfortunately, the writs establish no precedent. The writs do not specifically state the constitutional basis for the supreme court's action; nor do they provide any legal analysis to the facts presented.

Any precedential value of the New Mexico decision is further weakened by the fact that the lieutenant governor there voted to make two members of the senate presidents pro tem. Such an outcome clearly violated constitutional, statutory and regulatory provisions in New Mexico law which impliedly required a single occupant of the office of president pro tem.

#### CONCLUSION:

The lieutenant governor of Idaho was given the casting vote to secure an orderly resolution of the senate's business. This power is expressly granted in the Idaho Constitution and has no apparent limitation. Based upon this express authority and the lack of any articulated limitations placed thereon, it is the conclusion of this office that the lieutenant governor may cast the tie-breaking vote during the organizational session of the Idaho Senate if the members present are equally divided in their choice of a president pro tem.

**AUTHORITIES CONSIDERED:**

1. Constitutions

Idaho Constitution, art. 2, § 1  
Idaho Constitution, art. 3, § 9  
Idaho Constitution, art. 4, § 12  
Idaho Constitution, art. 4, § 13

2. Cases

Advisory Opinion on Constitutionality of 1978 PA 426,  
272 N.W.2d 495 (Mich. 1978)

Dye v. State ex rel. Hale, 507 S.2d 332 (1987)

Opinion of the Justices, 225 A.2d 481, 483 (1966)

State ex rel. Palmer v. Perpich, 182 N.W.2d 182 (1971)

State v. Highway Patrol Board, 372 P.2d 930 (1962)

3. Other Authorities

Barton, Idaho Legislative Manual (1984)  
Rules of the Senate, Rule 1  
Rules of the Senate, Rule 48

DATED this 27th day of November, 1990.

  
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JIM JONES  
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ANALYSIS BY:

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