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MEMORANDUM

TO: **Members of the Virginia Senate and Senators-Elect**
FROM: **The Hon. William T. Bolling, Lieutenant Governor of Virginia**
DATE: **January 3, 2012**
RE: **Tie-breaking Powers of the Lieutenant Governor**

Given the results of the recently concluded elections, there has been much speculation in the press as to what authority the Lieutenant Governor has to break tie votes on certain matters that may come before the Senate, and what position I may take on these issues. In addition to press speculation, some members have inquired about my position on this issue.

In an effort to make certain that we can get to the business of the people of Virginia as quickly as possible when the Senate convenes on January 11, I have decided to issue this Memorandum, setting forth my conclusions about the Lieutenant Governor's tie-breaking authority. Accordingly, I will outline in this memorandum what I expect to rule as President of the Senate if these issues arise.

As it should be for almost every question about Virginia governmental authority, a review of this issue begins with the relevant provisions of the Constitution of Virginia. In reviewing these provisions, I have been mindful of the decisions of the Supreme Court of Virginia that stress that the provisions of the Constitution of Virginia are to be given their "ordinary meaning."

The powers and duties of the Office of the Lieutenant Governor are defined in Article V, § 14 of the Constitution of Virginia. Article V, § 14 provides as follows:

> The Lieutenant Governor shall be President of the Senate but shall have no vote except in case of an equal division. He shall receive for his services a compensation to be prescribed by law, which shall not be increased nor diminished during the period for which he shall have been elected.

Under these express terms the Lieutenant Governor is an integral part of the Senate in that he serves as the "President of the Senate" and is expressly granted the authority to cast a vote "in the case of an equal division." This is broad reaching authority, and applies to every matter that comes before the Senate unless another provision of the Constitution of Virginia has expressly imposed a limit on the Lieutenant Governor's authority to cast a vote.

Given these basic parameters, I will now address the Lieutenant Governor's ability to vote on organizational issues that come before the Senate.

The organization of the Senate is governed by Article IV, § 7 of the Constitution of Virginia. In pertinent part, Article IV, § 7 provides as follows:

> The House of Delegates shall choose its own Speaker; and, in the absence of the Lieutenant Governor, or when he shall exercise the office of Governor, the Senate shall choose from its own body a president pro tempore. Each house shall select its officers and settle its rules of procedure.

Nothing in Article IV, § 7 suggests that anything other than the normal procedures of the Senate, which, by definition, include the Lieutenant Governor's power to break ties pursuant to Article V, § 14, are to be employed regarding votes on organizational matters. Accordingly, it is my position that the Lieutenant Governor is fully empowered to cast a vote on organizational matters when there is an equal division in the Senate.

I would note that this conclusion is supported by the fact that in other places in the Constitution of Virginia the drafters and ratifiers of the Constitution expressly limited votes in the Senate on certain matters to "members elected" to the Senate. The choice to limit certain votes to only "members elected" evinces an intent that such a limitation does not apply to the portions of Article IV, § 7 dealing with the organization of the Senate because these provisions do not contain any similar words of limitation.

Given that I have answered the question as to whether I can cast a tie-breaking vote on organizational matters, I now turn to the question of whether I am empowered to cast a vote when there is a tie on the final passage of a matter which specifically requires a majority of the "members elected" to the Senate to pass.[1] There are numerous such provisions in the Constitution, including:

> *Article IV, § 6, which provides that a reconvened session shall not be extended "unless the session be extended, for a period not exceeding seven additional days, upon the vote of the majority of the members elected to each house.";
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> *Article IV, § 11, which provides that legislation regarding certain subject matters, largely dealing with financial issues, must be passed "by the affirmative vote of a majority of all the members elected to each house . . . .";

[1]There are multiple provisions of the Constitution that require a supermajority of the members elected to the Senate for the body to take a particular action. For example, Article IV, § 7 provides that expulsion of a Senator can only occur "with the concurrence of two-thirds of its elected membership . . . ." Because it is a mathematical impossibility for there to be both a supermajority and an equal division, the supermajority provisions do not implicate the tie-breaking power conferred by Article V, § 14. However, it is particularly telling that the drafters and ratifiers of Article IV, § 7 utilized the language limiting the voting to elected membership for expulsion and did not use similar language regarding the organizational matters also dealt with in Article IV, § 7. This should remove any doubt that normal voting procedures, including my ability to break ties in the case of equal division, are to be followed regarding organizational matters.

*Article VI, § 7, which provides that justices of the Supreme Court of Virginia and the judges of the Commonwealth's inferior courts "shall be chosen by the vote of a majority of the members elected to each house of the General Assembly . . . .";

Article X, § 9(b), which provides, related to general obligation debt and sinking fund, that the "General Assembly may, upon the affirmative vote of a majority of the members elected to each house, authorize the creation of debt to which the full faith and credit of the Commonwealth is pledged, for capital projects to be distinctly specified in the law authorizing the same; provided that any such law shall specify capital projects constituting a single purpose and shall not take effect until it shall have been submitted to the people at an election and a majority of those voting on the question shall have approved such debt."; and

*Article XII, § 1, which provides that constitutional amendments must "be agreed to by a majority of the members elected to each of the two houses . . . .".

After a careful reading of the Constitution, consideration of prior Attorney General's opinions on this issue, a review of the legal opinion provided to the Senate in 1996 by A.E. "Dick" Howard, and consultation with numerous other legal sources, it is my belief that the plain meaning of the phrase "members elected to each house" excludes the Lieutenant Governor.

As noted above, the Lieutenant Governor is an integral part of the Senate as its President, and he does have broad authority to vote on most matters coming before the Senate that result in an equal division, but the Lieutenant Governor is not an elected member of the Senate. Therefore, the plain meaning of this phrase would appear to limit the Lieutenant Governor's ability to vote on the final passage of the narrow category of bills that require the vote of a "majority of the members elected to each house" to pass.

While application of the plain meaning of these provisions is sufficient to answer the question, other portions of the Constitution of Virginia, as well as prior opinions of the Attorney General, support this conclusion as well.

Article IV, § 2 of the Constitution of Virginia describes the composition of the membership of the Senate. In pertinent part, it provides that the "Senate shall consist of not more than forty and not less than thirty-three members, who shall be elected quadrennially by the voters of the several senatorial districts on the Tuesday succeeding the first Monday in November." Clearly, the Lieutenant Governor does not fall within this description.

First, the Lieutenant Governor is not elected from a "senatorial district," but rather, in a statewide election. Further, given that the Senate's membership is explicitly capped at "not more than forty . . . members" and there are 40 senatorial districts pursuant to Va. Code § 24.2-303(A), the Lieutenant Governor cannot be a "member" of the Senate. To find otherwise would be to conclude that there are forty-one elected members of the Senate in contravention of both the Constitution and statute.

In addition, Article IV, § 4 provides, in pertinent part, that "[n]o person holding a salaried office under the government of the Commonwealth . . . shall be a member of either house of the General Assembly during his continuance in office . . . ." Because the Office of Lieutenant Governor is clearly a "salaried office of the Commonwealth," the Lieutenant Governor cannot simultaneously serve as Lieutenant Governor and as a member of the Senate.

Prior opinions of the Attorney General have reached similar conclusions. A 1996 opinion concluded that the Lieutenant Governor's attempt to cast a tie-breaking vote on a resolution that sought to amend the Constitution pursuant to Article XII, § 1 was improper because the Lieutenant Governor is not a member of the Senate. The 1996 opinion relied upon a 1980 opinion that had concluded that the "Lieutenant Governor is not a member of the Senate for the purposes of Art. IV, § 11."

In sum, consistent with the plain language of the Constitution of Virginia and prior opinions of the Attorney General, it is my belief that the Lieutenant Governor is not a "member elected to the Senate," and therefore may not cast a vote, even in the case of an equal division, on the final passage of matters where the Constitution of Virginia specifically requires a majority of the "members elected" to the Senate to pass.

I recognize that Senators on both sides of the aisle may be disappointed with my conclusions, albeit for entirely different reasons. However, throughout my service as Lieutenant Governor I have tried to preside over the Senate in a fair and impartial manner, and I will continue to do so.

In addition, I have taken a solemn oath to uphold the Constitution of Virginia, which allows us to faithfully serve the people who elected us to our offices. I believe that what I have outlined above is a correct and impartial interpretation and application of the Constitution of Virginia, and therefore, I will act accordingly on any matters that come before the Senate.

WTB/