

COMMONWEALTH OF MASSACHUSETTS

Suffolk, s.s.

Superior Court C.A. 12-2821G

TWENTY-FOUR TAXPAYERS  
AND OTHERS,<sup>1</sup>

Plaintiffs

v.

MARILY M. PETITTO DEVANEY,  
AND OTHERS, IN THEIR  
OFFICIAL CAPACITY,

Defendants

v.

HIS EXCELLENCY, DEVAL L. PATRICK,  
as he is Governor of Massachusetts and  
President of the Governor's Council

Defendant

TAXPAYERS' COMPLAINT  
AGAINST THE GOVERNOR'S  
COUNCIL FOR AN UNLAWFUL  
EXERCISE OF THEIR  
CONSTITUTIONAL POWER AND  
THE GOVERNOR OF THE  
COMMONWEALTH FOR FAILING  
TO EXERCISE HIS  
CONSTITUTIONAL MANDATE



JURISDICTION

Jurisdiction for this complaint is conferred under the provisions of Gen. Laws, Ch. 29, § 63.

PARTIES

(1) The plaintiffs comprise taxable inhabitants of the Commonwealth and are identified with their corresponding county residences as shown on p. 9-10 infra.

<sup>1</sup>Signature page attached

Their signatures comport to the conditional requisites of C. 29, § 63, G.L.

The defendants are: Marilyn M. Petitto Devaney, Charles O. Cipollini, Terrence W. Kennedy, Jessie L. Caissie, Thomas T. Merrigan, Mary-Ellen Manning and Timothy P. Murray (Lt. Governor), as they comprise the Governor's Council. (one vacancy by suggestion of death)

To promote clarity, references to Marilyn Petitto Devaney (Devaney), her acts and omission of acts binds all defendants *in pari-materia*. Not named as a defendant, but subject to being named as a necessary party is Kenneth W. Salinger, a judicial nominee.

### CONSTITUTIONAL MANDATES

(2) The authority of the Governor to nominate and appoint judicial officers is conferred under the Commonwealth's Constitution, Art. IX, §1, Cl2, Pt. II, which provides '... All judicial officers shall be nominated and appointed by the Governor, by and with the advice and consent of the Council; and every such nomination shall be made at least seven days prior to such appointment...' by this Article the Governor must nominate and appoint all judicial officers.

The Governor's Council, as part of the executive branch of the Commonwealth was created under the Commonwealth's Constitution, Ch. 11, Sec. III, Art. 1, and provides in part: '... There shall be a council for advising the Governor in the executive part of the government to consist of nine persons besides the Lieutenant Governor...' <sup>2</sup> The Lt. Governor remains part of the Council, but does not vote except in the case of a tie.

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<sup>2</sup> Council number changed to eight See: Amendments, Art. XVI

In the absence of the Governor, the Lt. Governor may act for the Governor and preside over the Council as its president. Part 2, Art. II § 71, 72.

In convening the Council, at least five councillors must be present to constitute a forum. Ch. II, Sec. III, Art. 1.

### FACTS

(3) On June 13, 2012, acting pursuant to Pt. II, Ch. 2 of the Constitution, the Governor submitted the name of Kenneth W. Salinger (Salinger/nominee for nomination to the Superior Court.) (copy attached as "A")

On July 18, 2012 at 1:00 PM, the Council convened pursuant to Ch. II, Art. IX of the Constitution (of the Commonwealth) and met in the Council Chambers, State House, Boston, MA, to give their advice and consent to the nomination of Salinger.

The Council lacked a quorum with only Devaney and Cipollini present. The Governor and the Lt. Governor were not present. (EX B attached)

Devaney appointed herself, Ex Cathedra, as the President of the Council, and preempted the Governor's mandate.<sup>3</sup>

Undeterred by constitutional mandates, Devaney presumed to administer an 'oath' to swear 'to tell the truth' to her fellow councilor Cipollini, who objected.

Devaney administered an 'oath' to the nominee and those in support or in opposition to his nomination. As the proceeding progressed, councilors Kennedy, Ianella and Caissie arrived late, then left and returned to the Council chamber from time to time. Devaney sat in the chair usually reserved for the Governor (or the Lt. Governor) and made no reference to a quorum being present or not.

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<sup>3</sup> On the misplaced concept that the nominee lived in Devaney's Councilor district she would preside over the meetings. There is no constitutional authority for such a self-appointment.

Devaney acted as De Facto president of the Council. By her own admission, Devaney had met privately with the nominee for three or four hours on an earlier occasion. The nominee answered questions from the Council relative to his qualifications. Members of the public commented in their support and opposition to the nominee. The hearing concluded at or about 4:20 PM. During the entire proceeding neither the Governor nor the Lt. Governor were present at any time.

### RELIEF SOUGHT

(4) The Plaintiffs seek to enjoin the Council from giving their advice and consent on July 25<sup>th</sup>, 2012 to the judicial appointment of Kenneth W. Salinger for the following reasons:

Without the presence of the Governor or Lt. Governor, acting in his place as President of the Council relative to Salinger's nomination on July 18, 2012; the event was not competent and stands constitutionally infirm.

Art. IX, § 1, C.L. 2, Pt. ii, of the Constitution of the Commonwealth provides as follows: '...All judicial officers shall be nominated and appointed by the Governor, by and with the advice and consent of the Council; and every such nomination shall be made by the Governor and shall be made at least seven days prior to such appointment...'. By this article the Governor must nominate and appoint all judicial officers personally. See: Opinion of the Justices to the Council, 368 Mass. 866, (Sept. 9, 1975).

### COUNT I

(5) The Governor of the Commonwealth is the President of the Council.

(6) The Lt. Governor of the Commonwealth is a member of the Council without a vote, but may vote in the event of a tie vote by the Council.

(7) In the Governor's absence from the Commonwealth, or his disability, the Lt. Governor may act as President of the Council.

(8) The Commonwealth's constitution Art. IX, Par. § 1, CL 2, Pt. II vests sole authority to nominate and appoint judicial officers in the Governor with the advice and consent of the Council.

(9) In nominating and appointing a judicial nominee, the Governor, in meeting with the Council for their advice and consent, must be present and personally nominate the individual.

(10) In convening the Council, at least five Councillors must be present to constitute a quorum and at least seven days later, appoint, in person the nominee; except where circumstances constitutionally permit the Lt. Governor to Act for the Governor.

## COUNT II

The plaintiffs re-allege paragraphs one through ten inclusive and say that:

(11) On June 13, 2012, the Governor nominated Kenneth W. Salinger to be a judge of the Superior Court, and submitted the nomination to the Governor's Council for their advice and consent.

- (12) a. The Governor's Council convened on July 18<sup>th</sup>, 2012 at 1:00 PM in the State House, Boston, MA to give their advice and consent to Salinger's nomination.
- b. Only two councilors were present, Devaney and Cipollini.
- c. Devaney, without authority, acted De Facto as President of the Council and without authority purported to administer an oath to 'tell the truth' to Cipollini, to the nominee and those in attendance to speaking in support or in opposition to the nominee.
- d. The Council is a constitutional body and those appearing before it speaking for or against a judicial nominee are not witnesses, they do not give testimony (absent being subpoenaed), but, as members of the public they are not required to submit to an oath of any kind.
- (13) a. Kennedy, Iannella and Caissie arrived unreasonably late (at least one-half hour) to the Council meeting on July 18, 2012. Kennedy and Iannella repeated a pattern of leaving and re-entering the Council chamber, without the presence of one or the other. At any given time, a quorum did not exist.
- b. At no time during the meeting did Devaney refer to a Quorum or make any attempt during the proceedings to declare a quorum existed.
- c. The hearing ended at or about 4:20 PM with only Devaney and Cipilloni present.

### COUNT III

The plaintiffs re-allege paragraphs one through thirteen inclusive and say that:

14. a. The Council meeting of July 18<sup>th</sup>, 2012, was posted (electronically); by the Council's staff, at least 48 hours before the meeting to the Secretary of Administration and Finance and the Secretary of State.
- b. Devaney announced during the hearing on July 18, 2012, that she had met privately with Salinger, the prior week with only the two of them present.
- c. Devaney in meeting with Salinger meeting clandestinely prior to July 18, 2012, in violation of the spirit of the open meeting law, formed an in validating bias toward any person opposing Salinger's nomination.

### COUNT IV

The plaintiffs re-allege paragraphs one through fourteen inclusive and say that:

15. a. In recent years and at least the past five years, a precedent has evolved in the Council, without constitutional authority, where a councillor, in whose district the judicial nominee lives, will conduct the nomination and appointment process, and compel the Governor or Lt. Governor to defer to a councilor conducting and controlling the meeting, Ex. Cathedra.
- b. Devaney followed this insidious precedent in an ethereal way on July 18<sup>th</sup>, 2012, she transcended her narrow constitutional limitations and presumed to be the President of the Council. By occupying the chair of

the Governor, administering oaths, attempting to impose time limitations on fellow councilors and manifesting a clear and sycophantic favoritism to the nominee that tainted her constitutional mandate to give her advice and consent.

### COUNT V

The plaintiffs re-allege paragraph one through fifteen inclusive and say that:

16. The Governor's judicial nomination of Kenneth E. Salinger fails in not being constitutionally competent inasmuch as Deval L. Patrick as the Governor of Massachusetts and President of the Council, was not present on July 18, 2012 at the Council chambers to nominate Kenneth E. Salinger, as he was mandated to do in person under XI, §1, Cl. 2, Pt. 11 of the Constitution of the Commonwealth.

Wherefore, on behalf of the Inhabitants of the Commonwealth, the plaintiffs demand:

1. A short order of notice issue.
2. A temporary restraining order issue against the members of the Council jointly and severally enjoining them from voting on July 25<sup>th</sup>, 2012 on the appointment of Kenneth W. Salinger, to the Superior Court.
3. An order enter that the Council meeting on July 18, 2012 as to that portion of the meeting that relates to the nomination of Kenneth W. Salinger to the Superior Court is constitutionally infirm.
4. The plaintiffs are awarded their filing fee, constable fees and photocopying costs and mileage for court attendance.
5. The Governor's Council, exclusive of the Lt. Governor, jointly and severally be assessed court costs, payable to the Commonwealth in the

amount of forty thousand dollars (\$40,000.00) for the expenditure of judicial time, use of court facilities and court personnel; for causing unnecessary expense and inconvenience to the taxpayers of the Commonwealth, necessitated by the defendants and their willful and unilateral abuse of constitutional power, in breach of their fiduciary duty of the articles of the constitution.

By the plaintiffs signed as a verified complaint this 24<sup>th</sup> day of July, 2012.