

Indiana Election Commission

Minutes

July 17, 2018

Members Present: Bryce H. Bennett, Jr., Chairman of the Indiana Election Commission (“Commission”); Michael Claytor, Proxy for S. Anthony Long, Vice Chairman of the Commission; Zachary E. Klutz, member; Karen Celestino-Horseman, Proxy for Member Suzannah Wilson Overholt.

Members Absent: S. Anthony Long, Vice-Chairman of the Commission; Suzannah Wilson Overholt.

Staff Attending: Matthew R. Kochevar, Co-General Counsel of the Indiana Election Division of the Office of the Indiana Secretary of State (Election Division); Dale Simmons, Co-General Counsel of the Election Division.

Others Attending: Mr. William Barrett; Mr. Alan Horton.

1. Call to Order:

The Chair called the July 17, 2018 meeting of the Commission to order at 2:00 p.m. EDT in State House Room 125, 200 West Washington Street, Indianapolis, Indiana.

2. Transaction of Commission Business:

The Commission proceeded to transact the business set forth in the Transcript of Proceedings for this meeting prepared by Clarice H. Howard of Connor Reporting, which is incorporated by reference into these minutes.

The Commission corrects the following scrivener’s errors in these documents:

Page 2, line 13, replace “absence” with “absent”.

Page 5, line 15, replace “Abby” with “Abbey”.

Page 6, line 22, replace “394.420” with “IC 3-9-4-20”.

Page 6, line 23, replace “wavier” with “waiver”.

Page 9, line 13, replace “s” with “us”.

Page 13, line 2, replace “seats” with “seat”.

Page 14, line 5, replace “case” with “cases”/

Page 14, line 9, replace “tempora” with “tempore”.

Page 15, line 10, replace “louses” with “loses”.

Page 17, line 2, replace “tempora” with “tempore”.

Page 21, line 5, replace “tempora” with “tempore”.

Page 22, line 5, replace “314.304” with “IC 3-13-4-3”.

Page 22, line 17, replace “tempora” with “tempore”.


Page 22, line 21, replace “precedence” with “precedents”.

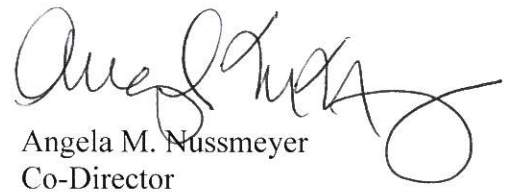
Page 23, line 17, replace “CAN1” with “CAN-1”.

Page 23, line 24, replace "IC3833" with "IC 3-8-8-3".
Page 24, line 2, replace "CAN1" with "CAN-1".
Page 24, line 15, replace "IC364.212" with "IC 3-6-4.2-12".
Page 24, line 15, replace "CAN1" with "CAN-1".
Page 25, line 11, replace "CAN1" with "CAN-1".
Page 28, line 12, replace "Dixon" with "Dickson".
Page 28, line 13, replace "IDX" with "IDP".
Page 28, line 16, replace "Dixon" with "Dickson".
Page 29, line 10, replace "Dixon" with "Dickson".

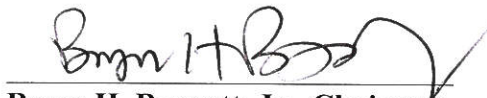
The Commission adjourned this meeting on July 17, 2018 at 2:35 p.m.

Respectfully submitted,


J. Bradley King
Co-Director


Angela M. Nussmeyer
Co-Director

APPROVED:


Bryce H. Bennett, Jr., Chairman

In the Matter Of:

Indiana Election Commission Committee Meeting

TRANSCRIPT OF PROCEEDINGS

July 17, 2018



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Transcript of Proceedings
July 17, 2018

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INDIANA ELECTION COMMISSION
COMMITTEE MEETING

Conducted on: July 17, 2018
2:00 P.M.

Conducted at: Indiana State House
200 West Washington Street
Room 125
Indianapolis, Indiana 46204

A Stenographic Record By:
Clarice H. Howard

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A P P E A R A N C E S

INDIANA ELECTION COMMISSION:

- Mr. Bryce Bennett - Chairman
- Mr. Michael Claytor - Proxy for
Vice Chairman Mr. S. Anthony Long
- Ms. Karen Celestino-Horseman - Proxy
- Member Suzanne Wilson Overholt
- Mr. Zachary Klutz - Member

INDIANA ELECTION DIVISION STAFF:

- Mr. Dale Simmons - Co-Legal Counsel
- Mr. Matthew Kochevar - Co-Legal Counsel

1 CHAIRMAN BENNETT: I'll call the Indiana
2 Election Commission public session meeting for July
3 17, 2018, at 2:00 p.m. to order. The following
4 members of the Commission are present: Myself,
5 Chairman Bryce Bennett, Jr. We have Michael
6 Claytor as proxy for Vice Chairman Anthony Long,
7 And Karen Celestino-Horseman is proxy for member
8 Suzanne Wilson Overholt, and member Zachary Klutz
9 is present.

10 The Indiana Election Division staff Co-General
11 Counsels, Matthew Kochevar and Dale Simmons are
12 present. Co-Directors Brad King and Angie
13 Nussmeyer are absence today because they are
14 attending a conference of the National Association
15 of State Election Directors in Philadelphia. Our
16 court reporter today is Clarice Howard of Connor
17 and Associates.

18 And before we begin, I want to remind everyone
19 on behalf of the court reporter to identify
20 yourself when beginning to speak, to spell your
21 name when identifying yourself, please speak
22 clearly and do not speak at the same time as
23 others.

24 The first item on our agenda is documentation
25 of compliance with open door laws and I would ask

Transcript of Proceedings
July 17, 2018

4

4

1 Mr. Simmons and Mr. Kochevar to report on that.

2 MR. SIMMONS: Mr. Chairman and members of the
3 Commission, today's meeting of the Election
4 Commission has been noticed in compliance with the
5 open door law.

6 CHAIRMAN BENNETT: Very well. Mr. Kochevar,
7 are you in agreement with that?

8 MR. KOCHEVAR: I am, yes, sir.

9 CHAIRMAN BENNETT: Next is the approval of the
10 February 23rd Commission minutes, and I would ask
11 that Mr. Simmons and Mr. Kochevar present that
12 issue.

13 MR. SIMMONS: Thank you. Mr. Chairman and
14 members of the Commission, Co-Director Brad King
15 and Angie Nussmeyer have reviewed the transcript of
16 the minutes of the February 23, 2018 Commission
17 meeting. They have both signed off on the cover
18 sheet and sort of an errata sheet, any corrections
19 to the transcript. And those are now ready for
20 your adoption.

21 CHAIRMAN BENNETT: Is there a motion to
22 approve the February 23rd minutes as presented?

23 MS. HORSEMAN: So move.

24 CHAIRMAN BENNETT: We have a motion. Is there
25 a second?

1 MR. KLUTZ: Second.

2 CHAIRMAN BENNETT: Motion and a second. Is
3 there any discussion? Hearing none, all in favor
4 say "aye."

5 THE COMMISSION: Aye.

6 CHAIRMAN BENNETT: All opposed say "nay." The
7 Ayes have it. The motion to approve the minutes is
8 adopted.

9 We next turn to the ratification of campaign
10 finance settlement agreements and ask for a
11 presentation by Mr. Simmons and Mr. Kochevar.

12 MR. SIMMONS: Mr. Chairman and members of the
13 Commission, under the yellow tab, CFA settlements,
14 you'll find a list prepared by Election Division
15 Campaign Finance staff, Abby Taylor and Michelle
16 Thompson. This list is a list of all campaign
17 finance settlement agreements that set forth
18 settlements between -- or with entities who have
19 entered in an agreement to settle by paying
20 campaign finance enforcement penalties, and it is
21 submitted for your ratification.

22 MR. KLUTZ: Mr. Chairman, I'm not sure when
23 this list was originally provided to us. I do have
24 a conflict with one of these committees listed. So
25 I guess we can either -- I can recuse myself from

1 the entire list for the vote or we can separate it
2 into whatever your desire is.

3 CHAIRMAN BENNETT: Can you disclose the nature
4 of your conflict?

5 MR. KLUTZ: Yes. It would be the Taft
6 Stettinius & Hollister Better Government Fund.

7 CHAIRMAN BENNETT: And the nature of the
8 conflict is --

9 MR. KLUTZ: I'm currently an attorney with
10 that firm.

11 MS. HORSEMAN: I'm going to take it you didn't
12 advise them on campaign finance.

13 MR. KLUTZ: I just now saw this. It's a \$50
14 fine and not a \$5,000 fine.

15 MR. CLAYTOR: Mr. Chairman, I thought these
16 needed to be unanimous. So should we strike that
17 one and do the rest of the list? I don't remember
18 if --

19 CHAIRMAN BENNETT: We'll ask for a legal
20 opinion on that; is that right?

21 MR. SIMMONS: I'll take a look at that. It's
22 394.420. I do not think -- typically those are
23 unanimous on campaign finance waiver fines. These
24 committees actually pay the full fine, proposed
25 fine. I don't see it in there. Matthew, are you

1 seeing anything requiring --

2 MR. KOICHEVAR: No.

3 MR. SIMMONS: So you could sustain it on a
4 vote of three votes.

5 CHAIRMAN BENNETT: So you'll recuse yourself
6 then.

7 MR. KLUTZ: From the entire list.

8 MR. CLAYTOR: Mr. Chairman, I moved we approve
9 the settlement agreements as set out.

10 CHAIRMAN BENNETT: All right. We have a
11 motion and a second. Is there any discussion?
12 Well, I guess I'm seconding your motion. Any
13 discussion?

14 And you understand that you're recusing
15 yourself from the entire list?

16 MR. KLUTZ: Correct.

17 CHAIRMAN BENNETT: With that understanding,
18 all in favor say "aye."

19 THE COMMISSION: Aye.

20 CHAIRMAN BENNETT: All opposed same. We have
21 a three and one vote with the ayes having it, and
22 the campaign finance settlement agreements are
23 hereby ratified.

24 We now turn to the adoption of campaign
25 finance enforcement orders and again ask for a

1 presentation by Mr. Simmons and Mr. Kochevar.

2 MR. SIMMONS: Mr. Chairman and members of the
3 Commission, Orders No. 2018-5 through 2018-23 have
4 been prepared to reflect the action taken by the
5 Commission at its February 23, 2018 meeting, which
6 we just approved the minutes for. And these orders
7 are ready for adoption, and they involve campaign
8 finance matters.

9 CHAIRMAN BENNETT: Thank you. Is there a
10 motion to adopt campaign finance orders 2018-5
11 through 2018-23 as presented?

12 MR. CLAYTOR: So move.

13 CHAIRMAN BENNETT: I have a motion. Is there
14 a second?

15 MR. KLUTZ: Second.

16 CHAIRMAN BENNETT: We have a motion and a
17 second. Any discussion? Hearing none, all in
18 favor say "aye."

19 THE COMMISSION: Aye.

20 CHAIRMAN BENNETT: All opposed say "nay."
21 Ayes have it and the motion to ratify the agreement
22 is adopted. Well, I think what we're doing here is
23 adopting the campaign finance orders.

24 MR. SIMMONS: Right.

25 CHAIRMAN BENNETT: Motion to adopt campaign

1 finance orders is approved.

2 We now turn to the adoption of candidate
3 challenge hearing procedures. This Commission has
4 historically followed certain procedures to conduct
5 candidate challenge hearings. And I move that the
6 Commission use the following procedures today.

7 After the candidate challenge is called, a
8 hearing will begin by recognizing election division
9 staff to provide information about the documents
10 provided to Commission members, including candidate
11 challenge forms and the notice given to the
12 candidate and challenger. Unless there is an
13 objection, the documents provided s to the
14 Commission by the election division will be entered
15 into the record of this meeting.

16 After the election division staff completes
17 its presentation, the challenger will be recognized
18 first. The challenger or the challenger's
19 representative may present their case for no more
20 than ten minutes, unless the Commission votes to
21 allow additional time for the presenter.

22 Commission members may ask questions during
23 the presentation, but the time spent answering
24 these questions will not be counted against the
25 presenter. The election division may signal the

1 chair when the presenter's time is up.

2 If the presenter offers additional documents
3 or other physical evidence not previously received
4 by the Commission, then the originals must be
5 provided to the election division staff, which is
6 Dale, to preserve for the record.

7 The candidate or the candidate's authorized
8 representative will be recognized following the
9 presentation by a challenger. The candidate may
10 present their case for no more than ten minutes,
11 unless the Commission votes to allow additional
12 time for the presenter.

13 Following presentation by a challenger, a
14 candidate may cross-examine the challenger.
15 Following any testimony by the candidate or any
16 witness testifying on behalf of the candidate, a
17 challenger may cross-examine. The
18 cross-examination in all cases is limited to two
19 minutes, unless the Commission votes to allow
20 additional time. The cross-examination must be
21 limited to questions regarding statements made by
22 the presenter. Following presentation by the
23 candidate the challenger may present a rebuttal of
24 no more than two minutes.

25 The Commission may dismiss the cause of any

1 challenger who has failed to appear or testify
2 before the Commission.

3 Is there a second to my motion for the
4 Commission to adopt these procedures for today's
5 candidate challenge hearings?

6 MR. KLUTZ: Second.

7 CHAIRMAN BENNETT: We have a motion.

8 MS. HORSEMAN: You asked for a second.

9 CHAIRMAN BENNETT: I did make a motion and you
10 seconded it. Thank you. We have a motion and a
11 second. Is there any discussion? Hearing none,
12 all in favor say "aye."

13 THE COMMISSION: Aye.

14 CHAIRMAN BENNETT: All opposed say "nay." The
15 ayes have it. The motion carries.

16 Before the administration of oath, I want to
17 disclose what I don't think is a conflict and I
18 don't believe this Commission has considered it to
19 be a conflict in the past. But I have made a
20 campaign donation to the Secretary of State's
21 campaign in the past on a few occasions. So I want
22 to raise that issue and see if there's an issue
23 that would cause a motion for my recusal.

24 Hearing none, we will proceed with that
25 disclosure. Thank you.

1 Everyone present who plans to testify before
2 the Indiana Election Commission regarding any
3 matter today, please stand for the administration
4 of oath. I recognize Dale Simmons to administer
5 the oath.

6 (Oath administered.)

7 CHAIRMAN BENNETT: We'll now begin
8 consideration of the candidate challenge. And I
9 remind everyone to identify yourself before you
10 begin -- or when you begin speaking.

11 The hearing on Cause No. 2018-12 in the matter
12 of the challenge to Connie Lawson, Candidate for
13 the Republican Party for Secretary of State is now
14 open. The election division has provided a copy of
15 the candidate challenge filing form and a copy of
16 the notice given to the parties in this matter.

17 At this time I recognize the challenger or a
18 representative of the challenger for presentation.

19 MR. HORTON: Alan Horton, spelled A-l-a-n
20 H-o-r-t-o-n, and I'm here for Andy Horning on this
21 particular issue or cause number. So good
22 afternoon.

23 CHAIRMAN BENNETT: Afternoon.

24 MR. HORTON: So what we're trying to present
25 here is something from a constitutional standpoint

1 of Article 6, Section 1, where it talks about the
2 eligibility of the seats held by the Secretary of
3 State in this case. And it expressly states in
4 here about eligibility and has nothing to do
5 with -- well, other than the fact that the time
6 served places the current officeholder beyond the
7 eligibility limits.

8 So the only contesting -- we're contesting the
9 fact, I guess, that the Secretary of the State
10 would no longer be constitutionally eligible for
11 this office. So the current office is held to a
12 four-year mandatory term, and if the current office
13 holder is constitutionally ineligible to complete
14 that a term, then is there going to be a precedent
15 that we set that every two years we have to appoint
16 someone and then we subvert, I guess, the primary
17 process? I guess that's the question I'm asking
18 today.

19 CHAIRMAN BENNETT: Thank you. Is there any
20 cross-examination?

21 MS. HORSEMAN: I have questions, or do we
22 wait?

23 CHAIRMAN BENNETT: Yes, questions,
24 cross-examine, either one.

25 MS. HORSEMAN: Mr. Horton, are you familiar

1 with Article 2, Section 11 of the Indiana
2 constitution?

3 MR. HORTON: Can you share that with me,
4 please?

5 MS. HORSEMAN: Sure. It says in all case in
6 which it is provided that an office shall not be
7 filled by the same person more than a certain
8 number of years continuously, an appointment pro
9 tempora shall not be reckoned a part of that term.

10 So in other words, if you're appointed into
11 the office, the time that you serve, however many
12 years, and in the case of Ms. Lawson, I guess it
13 was close to two and a half, that would not count
14 toward the time limits that are imposed by the
15 provision of the constitution that you were citing.

16 MR. HORTON: But this doesn't speak -- Article
17 2, Section 11 does speak to eligibility, doesn't
18 it?

19 MS. HORSEMAN: No. What eligibility is, and I
20 understand it, and please, that's why I would like
21 to know, is that eligibility says that you are
22 to -- you cannot hold that office more than eight
23 years in any period of 12 years.

24 MR. HORTON: Twelve, correct.

25 MS. HORSEMAN: But what Article 2, Section 11

1 appears to me to say is that if you are appointed
2 and not elected into the office to fulfill the
3 remainder of a term for someone else, you don't
4 count those years when you're calculating the
5 number of eight years, what constitutes the eight
6 years.

7 So I'm asking you how do you reconcile the two
8 provisions?

9 MR. HORTON: So the term pro tempore, of
10 course, means temporary. And the term louses
11 meaning when appointments are used instead of
12 special elections spanned through the years and
13 became a technique to leverage incumbency and party
14 power.

15 MS. HORSEMAN: Pro tempore, I agree with you,
16 means temporary. And I went and looked it up in
17 Black's Law Dictionary and looked it up in the
18 English Oxford Dictionary, the big one. And it
19 means for the time or temporarily. But none of
20 those definitions attach a time period.

21 So there is nothing that's to say it's a
22 temporary appointment --

23 MR. HORTON: But the eligibility specifically
24 says no more than an eight-year timeframe within a
25 12-year period. And Ms. Lawson has already, I

1 guess, held the office for six years.

2 MS. HORSEMAN: Okay. But this says -- Article
3 2, Section 11, says that -- you have Article 6,
4 Section 1 that says no more than eight years.
5 Article 2, Section 11 says however, and you know
6 lawyers drafted this and we never leave anything
7 just plain like this. However, if you are
8 appointed temporarily, the temporary appointment
9 does not count toward the eight years. And I guess
10 your response to that --

11 MR. HORTON: Is the eligibility portion of
12 Article 6, Section 1.

13 MS. HORSEMAN: Okay.

14 MR. HORTON: Strictly the eligibility because
15 the six years places the current officeholder
16 beyond -- outside of the realm of where they can
17 hold the office constitutionally for more than two
18 more years.

19 MS. HORSEMAN: So if I'm understanding what
20 you're saying is that we should not look at Article
21 2, Section 11 because it doesn't apply to this
22 situation?

23 MR. HORTON: Not as far as eligibility spoken
24 to in Article 6, Section 1. This is about term of
25 office, is it not? That it shouldn't -- if there's

1 no other constraints in the constitution, right,
2 then the pro tempora could serve an additional
3 eight years in addition to the two-year temporary
4 position they've already held, if there's another
5 constraint in the constitution.

6 But Article 6, Section 1 clearly defines a
7 constraint on eligibility for that same timeframe.

8 MS. HORSEMAN: I see what you're saying.
9 Okay.

10 CHAIRMAN BENNETT: Let me ask this. In
11 Article 2, Section 11 in all cases in which it is
12 provided that an office shall not filled by the
13 same person more than a certain number of years,
14 that time period may -- shall not be reckoned part
15 of that term.

16 MR. HORTON: And that specifically says filled
17 and Article 6, Section 1 specifically speaks to
18 eligibility.

19 CHAIRMAN BENNETT: But it draws in by
20 reference all cases in which a certain number of
21 years needs to be reckoned. Do you know what
22 reckoned means?

23 MR. HORTON: Sure.

24 CHAIRMAN BENNETT: What?

25 MR. HORTON: I guess served or taken care of.

1 CHAIRMAN BENNETT: No. That means --
2 according to the dictionary, that means calculated.
3 And Article 2 tell us how to count or calculate the
4 number of years that imply the eligibility in the
5 constitution.

6 MR. HORTON: The office being filled that was
7 not eligibility for that office in all cases.

8 CHAIRMAN BENNETT: It says this is how you
9 calculate, this is how you reckon. This is a
10 reckoning provision in the Indiana constitution,
11 Article 2, Section 11 that tells us how to count
12 that time period. And it says you don't count the
13 time period that they were pro --

14 MR. HORTON: For the time they are to fill the
15 office, correct? Doesn't it specifically say to
16 fill?

17 CHAIRMAN BENNETT: To be filled by the same
18 person more than a certain number of years. It's
19 the number of years that this Article 2, Section 11
20 addresses. It's how you calculate, how you reckon
21 the number of years with the fill-in.

22 MR. HORTON: Correct. This says to be filled,
23 not be filled -- shall not be filled.

24 CHAIRMAN BENNETT: Okay. Anything else,
25 anyone else? Do you have any other evidence or

1 testimony to present?

2 MR. HORTON: Not at this time.

3 CHAIRMAN BENNETT: Is there a representative
4 of Secretary Lawson present to present today?

5 MR. BARRETT: Yes. Chairman Bennett, William
6 Barrett for the Secretary.

7 CHAIRMAN BENNETT: Thank you. You may
8 proceed.

9 MR. BARRETT: Thank you, sir. Chairman
10 Bennett, members of the Commission, counsel, if I
11 might approach -- might is the operative word -- I
12 have a brief for you and I have some exhibits that
13 I'd like to provide. Mr. Horton, we'll get you a
14 copy of what we're providing here.

15 Let me hand these out. And what I have here
16 are documents that, I believe, will not be subject
17 to dispute, public record documents. Specifically
18 what I have provided so that's there a factual
19 record --

20 MS. HORSEMAN: Excuse me, can we get copies to
21 Mr. Horton?

22 MR. BARRETT: Yeah, I'm going to give him a
23 copy, ma'am, as soon I -- I didn't realize all the
24 staff would be here. As soon as I cite from it,
25 I'll hand it to him.

1 MS. HORSEMAN: I'll tell you what, why don't
2 you hand him copies of everything and then we'll
3 share here. Matthew and I will share.

4 MR. BARRETT: Great. There you go, Mr.
5 Horton.

6 To lay out the timeline, which seems in the
7 earlier colloquy between the Commission and
8 Mr. Horton, we've put in Secretary Lawson's
9 appointment by Governor Daniels. And not only her
10 oath of office in 2012, but the actual appointment
11 because the actual appointment is important because
12 the language in the appointment recites the
13 statutory basis on which the appointment was made,
14 which gets to the question of whether the
15 appointment was a pro tempore appointment.

16 In addition, we have just a layout of the
17 timeline, provided her oath of office after her
18 election in 2014, and the documents from the state
19 convention in 2018 that put her back on the ballot
20 subject to this challenge today. That's all in Tab
21 1 of the folder.

22 Tab 2 is an affidavit of the Secretary of
23 State's office, business records, affidavit
24 attesting to two of the other documents that are
25 part the tab, behind Tab 2 and 3. These are legal

1 research materials relied on by the Secretary of
2 State's office that we received pursuant to what
3 you'll see in Tab 4, which is an APRA request,
4 Access to Public Records Act request and the
5 response from the Secretary of State's office.

6 Again, as I said, I wanted to lay out the
7 timeline. And so as to the law governing that
8 timeline, there's been discussion of two relevant
9 constitutional provisions, Article 6, Section 1 and
10 Article 2, Section 11.

11 It is well settled, going back to 1860, by the
12 Supreme Court, that the two have to be read
13 together. That as has been questioned from the
14 Commission today, that the time spent during a pro
15 tempore appointment does not count towards the
16 eight-year term limitation created by Article 6,
17 Section 1, Section 2 -- Section 1, sorry, excuse
18 me.

19 There is an unerring line of cases, and I've
20 cited a number of them starting in 1860 going
21 through the 1940's, all of which reach the same
22 conclusion which as you asked, that those are to be
23 read together and the pro temp time doesn't count.

24 So that raises the question of whether this
25 was a pro tempora appointment. And that brings us

1 to the third relevant provision of the constitution
2 which is Article 5, Section 18. That's the section
3 that gives the governor the authority to fill
4 vacancies. And by its terms, Article 5, Section 18
5 limits a governor's authority to filling a vacancy
6 for a state office -- state office being deemed to
7 be a statewide office as that phrase is used -- to
8 the balance of the unexpired term. The phrase used
9 by the founders, by the drafters, is until the
10 successor is elected and qualified.

11 Pursuant to Article 5, Section 18, the General
12 Assembly adopted 314.304 which is the code that
13 Governor Daniels cited in his appointment letter,
14 which also repeats that the scope of his authority,
15 any governor's authority, the duration of it is
16 only to filled the unexpired team. This fits the
17 dictionary definition of pro tempora which is
18 temporary as has been discussed.

19 So in a nutshell, those three constitutional
20 provisions have to be read together. The
21 precedence of the Supreme Court going back since
22 living memory of the delegates who drafted the
23 language in 1850, '51, has been that they are to be
24 drafted together and that the time spent during a
25 pro temp appointment does not count towards the

1 eight-year limitation.

2 We've discussed all of these points further in
3 our brief. And we have also pointed out the
4 statutory defects in the challenger's petition.
5 It's not notarized as the form calls for. It
6 contains a jurat that hasn't been completed. We
7 don't seek dismissal because of that. We do think
8 it does go to the weight that's to be afforded to
9 any statements that were made because they weren't
10 properly sworn.

11 As I said, we've outlined that further in our
12 brief. If you have questions, I'll be happy to
13 entertain them.

14 MR. CLAYTOR: Mr. Chairman, may I ask?

15 CHAIRMAN BENNETT: Yes.

16 MR. CLAYTOR: You've mentioned what you
17 believe to be a statutory defect in the CAN1 by the
18 petitioner. If a state agency puts a requirement
19 on a form and that requirement is not part of state
20 law, constitution, rule or any other matter, how is
21 that legally required?

22 MR. BARRETT: The statute under which the
23 election division created that form or the statute
24 that's being implemented, IC3833, says that the
25 candidate challenge is to contain a sworn

1 statement.

2 Now, the CAN1 form as prepared by the election
3 division contains two things. It contains, for
4 those of us who are lawyers, a Rule 11 statement, I
5 swear and affirm under the penalties of perjury
6 that the foregoing statements are true. And the
7 signature line appears below that and the
8 challenger signs that.

9 Now, it could be argued that that is
10 statutorily sufficient. But the other relevant
11 statute -- I don't remember the cite off the top of
12 my head -- is the statute that says the election
13 division is charged with the preparation of uniform
14 forms to be used throughout elections in this
15 state, IC364.212, subpart 8. This CAN1 is one of
16 those forms.

17 And the administrative law of Indiana says
18 that the interpretation of the agency charged with
19 the administration of the statute -- of that
20 statute is entitled to deference. Well, the
21 election division has interpreted that statute by
22 including a jurat for a notary on there.

23 So to answer your question, I don't know what
24 would happen if an agency prepared something on a
25 form that had no basis in the law, because this

1 form has a sound basis in the law.

2 MR. CLAYTOR: Well, I'll understand we're not
3 under Trial Rule 11B, but I found nothing in the
4 law that would allow the election commission,
5 unless that statute specifically says that it has
6 to be subscribed or sworn before an office, as to
7 how the election commission or the election
8 division, by creating the form, could create
9 requirements of the law.

10 I understand your point. I disagree with it.

11 I do not believe that the CAN1 is defective.

12 MR. BARRETT: And we aren't seeking dismissing
13 to be clear. So I don't know that the point has to
14 be ultimately resolved.

15 MR. CLAYTOR: Well, the point is very well
16 clear in your brief.

17 MR. BARRETT: Thank you. I do think the
18 limitation on Trial Rule 11B is within court
19 proceedings, whether those are statutory court
20 proceedings or otherwise.

21 MR. CLAYTOR: Absolutely.

22 MR. BARRETT: Because we're out of court, the
23 ambiguity in the case law for a long time regarding
24 what constitutes "a sworn statement" given that
25 ambiguity, excuse me, prudence would dictate the

1 extra steps, perhaps the belt and suspenders in the
2 Commissioner's view the election division has
3 taken.

4 MR. CLAYTOR: Okay. I defied myself to find a
5 case that defined sworn statement in a way that it
6 required anything more, even though not under
7 trial, that it required anything more than what an
8 11 statement would make. I just -- I would rather
9 not go on the record to be thinking that the
10 Commission should necessarily agree with that
11 point. So I just wanted to bring up my point.

12 CHAIRMAN BENNETT: Anything further?

13 MS. HORSEMAN: So Mr. Horton -- you take a
14 contrary position to Mr. Horton in that Mr. Horton
15 says that Article 2, Section 11 is -- only applies
16 to those instances where an office is filled and
17 does not apply to the criteria for eligibility and
18 you disagree with that, correct?

19 MR. BARRETT: I do, yes.

20 MS. HORSEMAN: All right. And so tell me
21 why -- could you tell us why you think the two need
22 to be read together, again, I'm sorry?

23 MR. BARRETT: Sure. The Carson case decided
24 by the Indiana Supreme Court in 1860 on the same
25 day as it decided two other cases, makes clear,

1 says unambiguously that the provisions are to be
2 construed together, because otherwise 6, 1 on its
3 face would appear to control any term, because it
4 is measured in years. It doesn't say eligible for
5 election for office. It's measured in years.

6 And so to avoid that, and this is the Supreme
7 Court speaking about the drafters' intent, because
8 it was not their intent to let Article 6, Section 1
9 control, they put in Article 2, Section 11
10 precisely to avoid this issue.

11 There's no ambiguity in what the court ruled
12 back in 1860. And I point out that it's not
13 happenstance that they ruled on three cases in the
14 same day. If you think about 1860, it was nine
15 years after the promulgation of the constitution.
16 Terms had started to run out and people who wanted
17 to stay in office had litigated their right to try
18 to stay in office. And the Supreme Court clearly
19 stated you have to read them together.

20 And that comports with the overall rules of
21 statutory construction, as you know, requires
22 bodies to construe documents as a whole and not
23 read things in isolation.

24 MS. HORSEMAN: And the cases that have been
25 decided to date, though, none of them have involved

1 a statewide office, correct?

2 MR. BARRETT: That's correct.

3 MS. HORSEMAN: And so is there any distinction
4 to be made between a statewide office and a local
5 or county office?

6 MR. BARRETT: No, no, because the language of
7 limitation in Article 6, for state offices in
8 Section 1 and county offices in a subsequent
9 section, mirrors one another.

10 MS. HORSEMAN: Okay.

11 MR. CLAYTOR: To sort of follow up on that,
12 how did you feel about Judge Dixon's concurring
13 opinion in White versus IDX and Parker?

14 MR. BARRETT: I'm not familiar with
15 it, sir.

16 MR. CLAYTOR: Okay. That's Justice Dixon. It
17 was a concurring opinion, not a majority opinion.
18 It said that the only requirement for those offices
19 is that section of the constitution, and that is
20 how he would have ruled in the White case.

21 CHAIRMAN BENNETT: Anything else?

22 MS. HORSEMAN: I also wanted to add here that
23 I agree with my colleague that I think that there's
24 a -- they swear and affirm under penalties of
25 perjury certainly goes in line what was intended by

1 this. But I would like to suggest that the
2 election division look at this form to make sure
3 that we don't run into this. You've gratuitously
4 not made it an issue here today. But for the
5 future of this form use, it may be something you
6 guys want to consider in looking at.

7 MR. BARRETT: I do have one last point that
8 has sort of come out of all of this, if I might,
9 Mr. Chair. And that is even were the Commission
10 inclined to accept Justice Dixon's view and it only
11 being a concurring opinion against the weight of
12 other authority, that still raises the question of
13 why we're here today, because Article 6, Section 1
14 speaks in terms of years.

15 I shouldn't use the words terms. Article 6,
16 Section 1 talks about years. It doesn't talk about
17 terms of office. It says eight years out of 12.
18 And the Carson case says very eloquently that under
19 our constitution the eligibility refers not just to
20 seeking office, but to the holding of office.

21 There's no dispute that Secretary Lawson has
22 not, as we sit here today, served for eight years
23 and that in November of this year, she will not
24 have served eight years. Therefore, there is
25 nothing under Article 6, Section 1 that the

1 Commission can do today.

2 If you said and it became the law, that the
3 two are to be read separately and eight years
4 starts and stops with no ambiguity, she would
5 become ineligible on March 16th of 2020. That's no
6 different that a 69-year-old judge on the Court of
7 Appeals or justice on the Supreme Court being
8 retained for a ten-year period and becoming
9 ineligible on his or her 75th birthday.

10 The fact that there might be a date at which
11 alleged ineligibility will arise at some time in
12 the future says nothing about priority of staying
13 on the ballot today, two very separate issues.

14 MS. HORSEMAN: My head spins thinking about
15 how that process would work.

16 CHAIRMAN BENNETT: Any other questions or
17 examination? Any other presentation from the
18 challenger?

19 MR. HORTON: I'd just like to bring up -- I
20 mean this in my opinion is a dangerous precedent
21 that we're beginning to set where we only appoint
22 individuals and they get to run their terms as
23 elected because we are construing this pro temp
24 temporary thing as a means to skirt the
25 constitution, it appears to me.

1 That's how it appears to me, a concerned
2 citizen, about term limits on offices held.

3 MS. HORSEMAN: But I think the argument that
4 Mr. Barrett presented was that it actually -- the
5 two are intended to work together. So they are a
6 part of the constitution and you have to read them
7 together.

8 MR. HORTON: I understand that. One speaks to
9 filled office and one speaks to eligibility.

10 MS. HORSEMAN: But in filling the office, I
11 think that's just a term. Filling office can be
12 done by election. It can be done by appointment.
13 That's why it doesn't say one or the other. That's
14 why it uses the word. And to be eligible to run,
15 to be elected by the voters is what Article 6,
16 Section 1 addresses.

17 MR. HORTON: Understood. But we agree that
18 Ms. Lawson has not gone beyond her eight years as
19 laid out in Article 6, Section 1. There's no
20 contention there. But the point is that, as the
21 esteemed gentleman has already pointed out, her
22 term of office potentially is up in 2020.

23 MS. HORSEMAN: But he's also pointed out that
24 this doesn't say that you have to serve the full
25 term to which you are elected. If you went -- what

1 he was saying is an alternative argument. He was
2 saying even if you went with what you were saying,
3 she would not have filled eight years by the time
4 the election is held.

5 MR. HORTON: But her eligibility runs out in
6 the middle of her next term.

7 MS. HORSEMAN: No, the eligibility --

8 MR. HORTON: It says eight years in 12.

9 MS. HORSEMAN: Right. And she's still
10 eligible. She hasn't gotten eight years. That's
11 what he's saying.

12 MR. HORTON: Correct. But pursuant to one
13 other article, which one was it -- excuse me, I
14 lost track here. Article 2, Section 11 speaks to
15 being filled. It says here even that the named
16 person more than a certain number of years
17 continuously.

18 So if you look at Article 6, Section 1, Ms.
19 Lawson can serve no more -- according to this
20 Article 2, Section 11, can serve no more than eight
21 years.

22 MS. HORSEMAN: No, it's not saying that.

23 MR. HORTON: It says it right here.

24 MS. HORSEMAN: It's saying that in an office
25 where there is a term limitation --

1 MR. HORTON: Shall be filled by the same
2 person more than a certain number of years.

3 MS. HORSEMAN: It's saying that when you have
4 a provision that says an office cannot be held by a
5 person more than a certain number of years, then it
6 shall be -- in calculating that number that they
7 hold the office, you shall not include the period
8 of their appointment.

9 MR. HORTON: Okay. So then her term has to
10 end in 2020, then, according to Article 6, Section
11 1.

12 MS. HORSEMAN: No. Okay. I appreciate the
13 fact -- I see what you're arguing, yes.

14 CHAIRMAN BENNETT: Anything further before we
15 ask for a motion? Hearing none, is there a motion?

16 MR. CLAYTOR: Mr. Chairman, in light of
17 Article 2, Section 11 of the Indiana constitution I
18 would move that we find in favor of the respondent
19 and dismiss the candidate filing challenge.

20 MR. KLUTZ: Second.

21 CHAIRMAN BENNETT: So I understand the motion
22 it's on the merits, you're not saying it should be
23 dismissed; you're saying the motion should be
24 denied?

25 MR. CLAYTOR: Correct.

1 CHAIRMAN BENNETT: We have a motion and a
2 second. Is there any further discussion? Hearing
3 none, all in favor say "aye."

4 THE COMMISSION: Aye.

5 CHAIRMAN BENNETT: All opposed say "nay." The
6 ayes have. The motion carries. The challenge is
7 denied. Thank you all for your presentation and
8 patience for the proceedings here today.

9 MS. HORSEMAN: And thank you for coming, Mr.
10 Horton, in challenging the election of a Secretary
11 of State.

12 CHAIRMAN BENNETT: The Indiana Election
13 Commission has finished its business for today. Is
14 there a motion of the Indiana Election Commission
15 to adjourn?

16 MR. CLAYTOR: So move.

17 CHAIRMAN BENNETT: Those in favor say "aye."

18 THE COMMISSION: Aye.

19 CHAIRMAN BENNETT: All opposed say "nay." The
20 ayes have it, and the meeting is adjourned.

21

22 (Time noted 2:35 p.m.)

23

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25

1 STATE OF INDIANA)
2 COUNTY OF MARION)

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5 I, CLARICE H. HOWARD, CCR-KY, Notary Public, do
6 hereby certify that foregoing hearing was taken on
7 behalf of the Indiana Election Commission at the Indiana
8 State House, 200 West Washington Street, Room 125,
9 Indianapolis, Indiana, on July 17, 2018, pursuant to the
10 applicable rules;

11 That said hearing was taken down by me in
12 stenograph notes and afterwards reduced to typewriting
13 under my direction and that the typewritten transcript
14 is a true record of the testimony given by the said
15 participants;

16 That the parties were represented by their
17 counsel as aforementioned.

18 I do further certify that I am a disinterested
19 person in this cause of action, that I am not a relative
20 or attorney of either party or otherwise interested in
21 the event of this action; and that I am not in the
22 employ of the attorneys for any party.

23

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1 IN WITNESS WHEREOF, I have hereunto set my hand
2 this 27th day of July, 2018.

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Clarice Howard

CLARICE H. HOWARD
Kentucky CCR

Transcript of Proceedings
July 17, 2018

Index: \$5,000..begin

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<hr/> <p style="text-align: center;">\$</p> <hr/> <p>\$5,000 6:14</p> <p>\$50 6:13</p> <hr/> <p style="text-align: center;">1</p> <hr/> <p>1 13:1 16:4,12,24 17:6,17 20:21 21:9,17 27:2,8 28:8 29:13,16,25 31:16,19 32:18 33:11</p> <p>11 14:1,17,25 16:3,5,21 17:11 18:11,19 21:10 24:4 26:8,15 27:9 32:14, 20 33:17</p> <p>11B 25:3,18</p> <p>12 14:23 29:17 32:8</p> <p>12-year 15:25</p> <p>16th 30:5</p> <p>17 3:3</p> <p>18 22:2,4,11</p> <p>1850 22:23</p> <p>1860 21:11,20 26:24 27:12,14</p> <p>1940's 21:21</p> <hr/> <p style="text-align: center;">2</p> <hr/> <p>2 14:1,17,25 16:3,5,21 17:11 18:3,11,19 20:22, 25 21:10,17 26:15 27:9 32:14,20 33:17</p> <p>2012 20:10</p> <p>2014 20:18</p> <p>2018 3:3 4:16 8:5 20:19</p> <p>2018-12 12:11</p> <p>2018-23 8:3,11</p> <p>2018-5 8:3,10</p> <p>2020 30:5 31:22 33:10</p> <p>23 4:16 8:5</p> <p>23rd 4:10,22</p> <p>2:00 3:3</p> <hr/> <p style="text-align: center;">3</p> <hr/> <p>3 20:25</p>	<p>314.304 22:12</p> <p>394.420 6:22</p> <hr/> <p style="text-align: center;">4</p> <hr/> <p>4 21:3</p> <hr/> <p style="text-align: center;">5</p> <hr/> <p>5 22:2,4,11</p> <p>51 22:23</p> <hr/> <p style="text-align: center;">6</p> <hr/> <p>6 13:1 16:3,12,24 17:6,17 21:9,16 27:2,8 28:7 29:13,15,25 31:15,19 32:18 33:10</p> <p>69-year-old 30:6</p> <hr/> <p style="text-align: center;">7</p> <hr/> <p>75th 30:9</p> <hr/> <p style="text-align: center;">8</p> <hr/> <p>8 24:15</p> <hr/> <p style="text-align: center;">A</p> <hr/> <p>A-l-a-n 12:19</p> <p>Abby 5:15</p> <p>absence 3:13</p> <p>Absolutely 25:21</p> <p>accept 29:10</p> <p>Access 21:4</p> <p>Act 21:4</p> <p>action 8:4</p> <p>actual 20:10,11</p> <p>add 28:22</p> <p>addition 17:3 20:16</p> <p>additional 9:21 10:2,11, 20 17:2</p> <p>addresses 18:20 31:16</p> <p>adjourn 34:15</p> <p>adjourned 34:20</p>	<p>administer 12:4</p> <p>administered 12:6</p> <p>administration 11:16 12:3 24:19</p> <p>administrative 24:17</p> <p>adopt 8:10,25 11:4</p> <p>adopted 5:8 8:22 22:12</p> <p>adopting 8:23</p> <p>adoption 4:20 7:24 8:7 9:2</p> <p>advise 6:12</p> <p>affidavit 20:22,23</p> <p>affirm 24:5 28:24</p> <p>afforded 23:8</p> <p>afternoon 12:22,23</p> <p>agency 23:18 24:18,24</p> <p>agenda 3:24</p> <p>agree 15:15 26:10 28:23 31:17</p> <p>agreement 4:7 5:19 8:21</p> <p>agreements 5:10,17 7:9, 22</p> <p>Alan 12:19</p> <p>alleged 30:11</p> <p>alternative 32:1</p> <p>ambiguity 25:23,25 27:11 30:4</p> <p>Andy 12:20</p> <p>Angie 3:12 4:15</p> <p>answering 9:23</p> <p>Anthony 3:6</p> <p>Appeals 30:7</p> <p>appears 15:1 24:7 30:25 31:1</p> <p>applies 26:15</p> <p>apply 16:21 26:17</p> <p>appoint 13:15 30:21</p> <p>appointed 14:10 15:1 16:8</p> <p>appointment 14:8 15:22 16:8 20:9,10,11,12,13,15 21:15,25 22:13,25 31:12 33:8</p>	<p>appointments 15:11</p> <p>approach 19:11</p> <p>approval 4:9</p> <p>approve 4:22 5:7 7:8</p> <p>approved 8:6 9:1</p> <p>APRA 21:3</p> <p>argued 24:9</p> <p>arguing 33:13</p> <p>argument 31:3 32:1</p> <p>arise 30:11</p> <p>article 13:1 14:1,16,25 16:2,3,5,12,20,24 17:6, 11,17 18:3,11,19 21:9,10, 16 22:2,4,11 26:15 27:8,9 28:7 29:13,15,25 31:15, 19 32:13,14,18,20 33:10, 17</p> <p>Assembly 22:12</p> <p>Associates 3:17</p> <p>Association 3:14</p> <p>attach 15:20</p> <p>attending 3:14</p> <p>attesting 20:24</p> <p>attorney 6:9</p> <p>authority 22:3,5,14,15 29:12</p> <p>authorized 10:7</p> <p>avoid 27:6,10</p> <p>aye 5:4,5 7:18,19 8:18,19 11:12,13 34:3,4,17,18</p> <p>eyes 5:7 7:21 8:21 11:15 34:6,20</p> <hr/> <p style="text-align: center;">B</p> <hr/> <p>back 20:19 21:11 22:21 27:12</p> <p>balance 22:8</p> <p>ballot 20:19 30:13</p> <p>Barrett 19:5,6,9,22 20:4 23:22 25:12,17,22 26:19, 23 28:2,6,14 29:7 31:4</p> <p>basis 20:13 24:25 25:1</p> <p>begin 3:18 9:8 12:7,10</p>
--	--	---	--

<p>beginning 3:20 30:21</p> <p>behalf 3:19 10:16</p> <p>belt 26:1</p> <p>Bennett 3:1,5 4:6,9,21, 24 5:2,6 6:3,7,19 7:5,10, 17,20 8:9,13,16,20,25 11:7,9,14 12:7,23 13:19, 23 17:10,19,24 18:1,8,17, 24 19:3,5,7,10 23:15 26:12 28:21 30:16 33:14, 21 34:1,5,12,17,19</p> <p>big 15:18</p> <p>birthday 30:9</p> <p>Black's 15:17</p> <p>bodies 27:22</p> <p>Brad 3:12 4:14</p> <p>bring 26:11 30:19</p> <p>brings 21:25</p> <p>Bryce 3:5</p>	<p>24</p> <p>Celestino-horseman 3:7</p> <p>CFA 5:13</p> <p>chair 10:1 29:9</p> <p>Chairman 3:1,5,6 4:2,6, 9,13,21,24 5:2,6,12,22 6:3,7,15,19 7:5,8,10,17, 20 8:2,9,13,16,20,25 11:7,9,14 12:7,23 13:19, 23 17:10,19,24 18:1,8,17, 24 19:3,5,7,9 23:14,15 26:12 28:21 30:16 33:14, 16,21 34:1,5,12,17,19</p> <p>challenge 9:3,5,7,11 11:5 12:8,12,15 20:20 23:25 33:19 34:6</p> <p>challenger 9:12,17,18 10:9,13,14,17,23 11:1 12:17,18 24:8 30:18</p> <p>challenger's 9:18 23:4</p>	<p>committees 5:24 6:24</p> <p>complete 13:13</p> <p>completed 23:6</p> <p>completes 9:16</p> <p>compliance 3:25 4:4</p> <p>comports 27:20</p> <p>concerned 31:1</p> <p>conclusion 21:22</p> <p>concurring 28:12,17 29:11</p> <p>conduct 9:4</p> <p>conference 3:14</p> <p>conflict 5:24 6:4,8 11:17, 19</p> <p>Connie 12:12</p> <p>Connor 3:16</p> <p>consideration 12:8</p>	<p>correct 7:16 14:24 18:15, 22 26:18 28:1,2 32:12 33:25</p> <p>corrections 4:18</p> <p>counsel 19:10</p> <p>Counsels 3:11</p> <p>count 14:13 15:4 16:9 18:3,11,12 21:15,23 22:25</p> <p>counted 9:24</p> <p>county 28:5,8</p> <p>court 3:16,19 21:12 22:21 25:18,19,22 26:24 27:7,11,18 30:6,7</p> <p>cover 4:17</p> <p>create 25:8</p> <p>created 21:16 23:23</p> <p>creating 25:8</p> <p>criteria 26:17</p> <p>cross-examination 10:18,20 13:20</p> <p>cross-examine 10:14, 17 13:24</p> <p>current 13:6,11,12 16:15</p>
<p>business 20:23 34:13</p> <hr/> <p style="text-align: center;">C</p> <hr/> <p>calculate 18:3,9,20</p> <p>calculated 18:2</p> <p>calculating 15:4 33:6</p> <p>call 3:1</p> <p>called 9:7</p> <p>calls 23:5</p> <p>campaign 5:9,15,16,20 6:12,23 7:22,24 8:7,10, 23,25 11:20,21</p> <p>CAN1 23:17 24:2,15 25:11</p> <p>candidate 9:2,5,7,10,12 10:7,9,14,15,16,23 11:5 12:8,12,15 23:25 33:19</p> <p>candidate's 10:7</p> <p>care 17:25</p> <p>carries 11:15 34:6</p> <p>Carson 26:23 29:18</p> <p>case 9:19 10:10 13:3 14:5,12 25:23 26:5,23 28:20 29:18</p> <p>cases 10:18 17:11,20 18:7 21:19 26:25 27:13,</p>	<p>challenging 34:10</p> <p>charged 24:13,18</p> <p>cite 19:24 24:11</p> <p>cited 21:20 22:13</p> <p>citing 14:15</p> <p>citizen 31:2</p> <p>Clarice 3:16</p> <p>Claytor 3:6 6:15 7:8 8:12 23:14,16 25:2,15,21 26:4 28:11,16 33:16,25 34:16</p> <p>clear 25:13,16 26:25</p> <p>close 14:13</p> <p>Co-director 4:14</p> <p>Co-directors 3:12</p> <p>Co-general 3:10</p> <p>code 22:12</p> <p>colleague 28:23</p> <p>colloquy 20:7</p> <p>commission 3:2,4 4:3,4, 10,14,16 5:5,13 7:19 8:3, 5,19 9:3,6,10,14,20,22 10:4,11,19,25 11:2,4,13, 18 12:2 19:10 20:7 21:14 25:4,7 26:10 29:9 30:1 34:4,13,14,18</p> <p>Commissioner's 26:2</p>	<p>considered 11:18</p> <p>constitutes 15:5 25:24</p> <p>constitution 14:2,15 17:1,5 18:5,10 22:1 23:20 27:15 28:19 29:19 30:25 31:6 33:17</p> <p>constitutional 12:25 21:9 22:19</p> <p>constitutionally 13:10, 13 16:17</p> <p>constraint 17:5,7</p> <p>constraints 17:1</p> <p>construction 27:21</p> <p>construe 27:22</p> <p>construed 27:2</p> <p>construing 30:23</p> <p>contention 31:20</p> <p>contesting 13:8</p> <p>continuously 14:8 32:17</p> <p>contrary 26:14</p> <p>control 27:3,9</p> <p>convention 20:19</p> <p>copies 19:20 20:2</p> <p>copy 12:14,15 19:14,23</p>	<hr/> <p style="text-align: center;">D</p> <hr/> <p>Dale 3:11 10:6 12:4</p> <p>dangerous 30:20</p> <p>Daniels 20:9 22:13</p> <p>date 27:25 30:10</p> <p>day 26:25 27:14</p> <p>decided 26:23,25 27:25</p> <p>deemed 22:6</p> <p>defect 23:17</p> <p>defective 25:11</p> <p>defects 23:4</p> <p>deference 24:20</p> <p>defied 26:4</p> <p>defined 26:5</p> <p>defines 17:6</p> <p>definition 22:17</p> <p>definitions 15:20</p>

<p>delegates 22:22</p> <p>denied 33:24 34:7</p> <p>desire 6:2</p> <p>dictate 25:25</p> <p>dictionary 15:17,18 18:2 22:17</p> <p>Directors 3:15</p> <p>disagree 25:10 26:18</p> <p>disclose 6:3 11:17</p> <p>disclosure 11:25</p> <p>discussed 22:18 23:2</p> <p>discussion 5:3 7:11,13 8:17 11:11 21:8 34:2</p> <p>dismiss 10:25 33:19</p> <p>dismissal 23:7</p> <p>dismissed 33:23</p> <p>dismissing 25:12</p>	<p>election 3:2,10,15 4:3 5:14 9:8,14,16,25 10:5 12:2,14 20:18 23:23 24:2, 12,21 25:4,7 26:2 27:5 29:2 31:12 32:4 34:10,12, 14</p> <p>elections 15:12 24:14</p> <p>eligibility 13:2,4,7 14:17, 19,21 15:23 16:11,14,23 17:7,18 18:4,7 26:17 29:19 31:9 32:5,7</p> <p>eligible 13:10 27:4 31:14 32:10</p> <p>eloquently 29:18</p> <p>end 33:10</p> <p>enforcement 5:20 7:25</p> <p>English 15:18</p> <p>entered 5:19 9:14</p> <p>entertain 23:13</p> <p>entire 6:1 7:7,15</p> <p>entities 5:18</p> <p>entitled 24:20</p> <p>errata 4:18</p> <p>esteemed 31:21</p> <p>evidence 10:3 18:25</p> <p>examination 30:17</p> <p>excuse 19:20 21:17 25:25 32:13</p> <p>exhibits 19:12</p> <p>expressly 13:3</p> <p>extra 26:1</p>	<p>fill 18:14,16 22:3</p> <p>fill-in 18:21</p> <p>filled 14:7 17:12,16 18:6, 17,22,23 22:16 26:16 31:9 32:3,15 33:1</p> <p>filling 22:5 31:10,11</p> <p>finance 5:10,15,17,20 6:12,23 7:22,25 8:8,10,23 9:1</p> <p>find 5:14 26:4 33:18</p> <p>fine 6:14,24,25</p> <p>fines 6:23</p> <p>finished 34:13</p> <p>firm 6:10</p> <p>fits 22:16</p> <p>folder 20:21</p> <p>follow 28:11</p> <p>foregoing 24:6</p>	<p>17 14:12 16:1,9 17:25</p> <p>guys 29:6</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>H-o-r-t-o-n 12:20</p> <p>half 14:13</p> <p>hand 19:15,25 20:2</p> <p>happen 24:24</p> <p>happenstance 27:13</p> <p>happy 23:12</p> <p>head 24:12 30:14</p> <p>hearing 5:3 8:17 9:3,8 11:11,24 12:11 33:15 34:2</p> <p>hearings 9:5 11:5</p> <p>held 13:2,11 16:1 17:4 31:2 32:4 33:4</p> <p>historically 9:4</p> <p>hold 14:22 16:17 33:7</p> <p>holder 13:13</p> <p>holding 29:20</p> <p>Hollister 6:6</p> <p>Horning 12:20</p> <p>HORSEMAN 4:23 6:11 11:8 13:21,25 14:5,19,25 15:15 16:2,13,19 17:8 19:20 20:1 26:13,20 27:24 28:3,10,22 30:14 31:3,10,23 32:7,9,22,24 33:3,12 34:9</p> <p>Horton 12:19,24 13:25 14:3,16,24 15:9,23 16:11, 14,23 17:16,23,25 18:6, 14,22 19:2,13,21 20:5,8 26:13,14 30:19 31:8,17 32:5,8,12,23 33:1,9 34:10</p> <p>Howard 3:16</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>IC364.212 24:15</p> <p>IC3833 23:24</p> <p>identify 3:19 12:9</p> <p>identifying 3:21</p> <p>IDX 28:13</p>
<p>dispute 19:17 29:21</p> <p>distinction 28:3</p> <p>division 3:10 5:14 9:8, 14,16,25 10:5 12:14 23:23 24:3,13,21 25:8 26:2 29:2</p> <p>Dixon 28:16</p> <p>Dixon's 28:12 29:10</p> <p>documentation 3:24</p> <p>documents 9:9,13 10:2 19:16,17 20:18,24 27:22</p> <p>donation 11:20</p> <p>door 3:25 4:5</p> <p>drafted 16:6 22:22,24</p> <p>drafters 22:9</p> <p>drafters' 27:7</p> <p>draws 17:19</p> <p>duration 22:15</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>earlier 20:7</p> <p>eight-year 15:24 21:16 23:1</p> <p>elected 15:2 22:10 30:23 31:15,25</p>	<hr/> <p style="text-align: center;">F</p> <hr/> <p>face 27:3</p> <p>fact 13:5,9 30:10 33:13</p> <p>factual 19:18</p> <p>failed 11:1</p> <p>familiar 13:25 28:14</p> <p>favor 5:3 7:18 8:18 11:12 33:18 34:3,17</p> <p>February 4:10,16,22 8:5</p> <p>feel 28:12</p> <p>filing 12:15 33:19</p>	<p>form 12:15 23:5,19,23 24:2,25 25:1,8 29:2,5</p> <p>forms 9:11 24:14,16</p> <p>found 25:3</p> <p>founders 22:9</p> <p>four-year 13:12</p> <p>fulfill 15:2</p> <p>full 6:24 31:24</p> <p>Fund 6:6</p> <p>future 29:5 30:12</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>General 22:11</p> <p>gentleman 31:21</p> <p>give 19:22</p> <p>good 12:21</p> <p>governing 21:7</p> <p>Government 6:6</p> <p>governor 20:9 22:3,13</p> <p>governor's 22:5,15</p> <p>gratuitously 29:3</p> <p>Great 20:4</p> <p>guess 5:25 7:12 13:9,16,</p>	

<p>implemented 23:24</p> <p>imply 18:4</p> <p>important 20:11</p> <p>imposed 14:14</p> <p>inclined 29:10</p> <p>include 33:7</p> <p>including 9:10 24:22</p> <p>incumbency 15:13</p> <p>Indiana 3:1,10 12:2 14:1 18:10 24:17 26:24 33:17 34:12,14</p> <p>individuals 30:22</p> <p>ineligibility 30:11</p> <p>ineligible 13:13 30:5,9</p> <p>information 9:9</p> <p>instances 26:16</p> <p>intended 23:25 31:5</p>	<p>Kochevar 3:11 4:1,6,8, 11 5:11 7:2 8:1</p> <hr/> <p style="text-align: center;">L</p> <hr/> <p>laid 31:19</p> <p>language 20:12 22:23 28:6</p> <p>law 4:5 15:17 21:7 23:20 24:17,25 25:1,4,9,23 30:2</p> <p>laws 3:25</p> <p>Lawson 12:12 14:12 15:25 19:4 29:21 31:18 32:19</p> <p>Lawson's 20:8</p> <p>lawyers 16:6 24:4</p> <p>lay 20:6 21:6</p> <p>layout 20:16</p> <p>leave 16:6</p>	<p>23:9 28:4 29:4</p> <p>majority 28:17</p> <p>make 11:9 26:8 29:2</p> <p>makes 26:25</p> <p>mandatory 13:12</p> <p>March 30:5</p> <p>materials 21:1</p> <p>matter 12:3,11,16 23:20</p> <p>matters 8:8</p> <p>Matthew 3:11 6:25 20:3</p> <p>meaning 15:11</p> <p>means 15:10,16,19 17:22 18:1,2 30:24</p> <p>measured 27:4,5</p> <p>meeting 3:2 4:3,17 8:5 9:15 34:20</p> <p>member 3:7,8</p>	<p>necessarily 26:10</p> <p>needed 6:16</p> <p>notarized 23:5</p> <p>notary 24:22</p> <p>notice 9:11 12:16</p> <p>noticed 4:4</p> <p>November 29:23</p> <p>number 12:21 14:8 15:5 17:13,20 18:4,18,19,21 21:20 32:16 33:2,5,6</p> <p>Nussmeyer 3:13 4:15</p> <p>nutshell 22:19</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>oath 11:16 12:4,5,6 20:10,17</p> <p>objection 9:13</p>
<p>intent 27:7,8</p> <p>interpretation 24:18</p> <p>interpreted 24:21</p> <p>involve 8:7</p> <p>involved 27:25</p> <p>isolation 27:23</p> <p>issue 4:12 11:22 12:21 27:10 29:4</p> <p>issues 30:13</p> <p>item 3:24</p> <hr/> <p style="text-align: center;">J</p> <hr/> <p>Jr 3:5</p> <p>judge 28:12 30:6</p> <p>July 3:2</p> <p>jurat 23:6 24:22</p> <p>justice 28:16 29:10 30:7</p> <hr/> <p style="text-align: center;">K</p> <hr/> <p>Karen 3:7</p> <p>King 3:12 4:14</p> <p>Klutz 3:8 5:1,22 6:5,9,13 7:7,16 8:15 11:6 33:20</p>	<p>legal 6:19 20:25</p> <p>legally 23:21</p> <p>letter 22:13</p> <p>leverage 15:13</p> <p>light 33:16</p> <p>limitation 21:16 23:1 25:18 28:7 32:25</p> <p>limited 10:18,21</p> <p>limits 13:7 14:14 22:5 31:2</p> <p>list 5:14,16,23 6:1,17 7:7, 15</p> <p>listed 5:24</p> <p>litigated 27:17</p> <p>living 22:22</p> <p>local 28:4</p> <p>long 3:6 25:23</p> <p>longer 13:10</p> <p>looked 15:16,17</p> <p>lost 32:14</p> <p>louses 15:10</p> <hr/> <p style="text-align: center;">M</p> <hr/> <p>made 10:21 11:19 20:13</p>	<p>members 3:4 4:2,14 5:12 8:2 9:10,22 19:10</p> <p>memory 22:22</p> <p>mentioned 23:16</p> <p>merits 33:22</p> <p>Michael 3:5</p> <p>Michelle 5:15</p> <p>middle 32:6</p> <p>minutes 4:10,16,22 5:7 8:6 9:20 10:10,19,24</p> <p>mirrors 28:9</p> <p>motion 4:21,24 5:2,7 7:11,12 8:10,13,16,21,25 11:3,7,9,10,15,23 33:15, 21,23 34:1,6,14</p> <p>move 4:23 8:12 9:5 33:18 34:16</p> <p>moved 7:8</p> <hr/> <p style="text-align: center;">N</p> <hr/> <p>named 32:15</p> <p>National 3:14</p> <p>nature 6:3,7</p> <p>nay 5:6 8:20 11:14 34:5, 19</p>	<p>occasions 11:21</p> <p>offers 10:2</p> <p>office 13:11,12 14:6,11, 22 15:2 16:1,17,25 17:12 18:6,7,15 20:10,17,23 21:2,5 22:6,7 25:6 26:16 27:5,17,18 28:1,4,5 29:17,20 31:9,10,11,22 32:24 33:4,7</p> <p>officeholder 13:6 16:15</p> <p>offices 28:7,8,18 31:2</p> <p>open 3:25 4:5 12:14</p> <p>operative 19:11</p> <p>opinion 6:20 28:13,17 29:11 30:20</p> <p>opposed 5:6 7:20 8:20 11:14 34:5,19</p> <p>order 3:3</p> <p>orders 7:25 8:3,6,10,23 9:1</p> <p>originally 5:23</p> <p>originals 10:4</p> <p>outlined 23:11</p> <p>Overholt 3:8</p> <p>Oxford 15:18</p>

<p style="text-align: center;">P</p> <p>p.m. 3:3</p> <p>Parker 28:13</p> <p>part 14:9 17:14 20:25 23:19 31:6</p> <p>parties 12:16</p> <p>party 12:13 15:13</p> <p>past 11:19,21</p> <p>patience 34:8</p> <p>pay 6:24</p> <p>paying 5:19</p> <p>penalties 5:20 24:5 28:24</p> <p>people 27:16</p> <p>period 14:23 15:20,25 17:14 18:12,13 30:8 33:7</p> <p>perjury 24:5 28:25</p> <p>person 14:7 17:13 18:18 32:16 33:2,5</p> <p>petition 23:4</p> <p>petitioner 23:18</p> <p>Philadelphia 3:15</p> <p>phrase 22:7,8</p> <p>physical 10:3</p> <p>places 13:6 16:15</p> <p>plain 16:7</p> <p>plans 12:1</p> <p>point 25:10,13,15 26:11 27:12 29:7 31:20</p> <p>pointed 23:3 31:21,23</p> <p>points 23:2</p> <p>portion 16:11</p> <p>position 17:4 26:14</p> <p>potentially 31:22</p> <p>power 15:14</p> <p>precedence 22:21</p> <p>precedent 13:14 30:20</p> <p>precisely 27:10</p> <p>preparation 24:13</p> <p>prepared 5:14 8:4 24:2,</p>	<p>24</p> <p>present 3:4,9,12 4:11 9:19 10:10,23 12:1,24 19:1,4</p> <p>presentation 5:11 8:1 9:17,23 10:9,13,22 12:18 30:17 34:7</p> <p>presented 4:22 8:11 31:4</p> <p>presenter 9:21,25 10:2, 12,22</p> <p>presenter's 10:1</p> <p>preserve 10:6</p> <p>previously 10:3</p> <p>primary 13:16</p> <p>priority 30:12</p> <p>pro 14:8 15:9,15 17:2 18:13 20:15 21:14,23,25 22:17,25 30:23</p> <p>procedures 9:3,4,6 11:4</p> <p>proceed 11:24 19:8</p> <p>proceedings 25:19,20 34:8</p> <p>process 13:17 30:15</p> <p>promulgation 27:15</p> <p>properly 23:10</p> <p>proposed 6:24</p> <p>provide 9:9 19:13</p> <p>provided 5:23 9:10,13 10:5 12:14 14:6 17:12 19:18 20:17</p> <p>providing 19:14</p> <p>provision 14:15 18:10 22:1 33:4</p> <p>provisions 15:8 21:9 22:20 27:1</p> <p>proxy 3:6,7</p> <p>prudence 25:25</p> <p>public 3:2 19:17 21:4</p> <p>pursuant 21:2 22:11 32:12</p> <p>put 20:8,19 27:9</p> <p>puts 23:18</p>	<p style="text-align: center;">Q</p> <p>qualified 22:10</p> <p>question 13:17 20:14 21:24 24:23 29:12</p> <p>questioned 21:13</p> <p>questions 9:22,24 10:21 13:21,23 23:12 30:16</p> <p style="text-align: center;">R</p> <p>raise 11:22</p> <p>raises 21:24 29:12</p> <p>ratification 5:9,21</p> <p>ratified 7:23</p> <p>ratify 8:21</p> <p>reach 21:21</p> <p>read 21:12,23 22:20 26:22 27:19,23 30:3 31:6</p> <p>ready 4:19 8:7</p> <p>realize 19:23</p> <p>realm 16:16</p> <p>rebuttal 10:23</p> <p>received 10:3 21:2</p> <p>recites 20:12</p> <p>reckon 18:9,20</p> <p>reckoned 14:9 17:14,21, 22</p> <p>reckoning 18:10</p> <p>recognize 12:4,17</p> <p>recognized 9:17 10:8</p> <p>recognizing 9:8</p> <p>reconcile 15:7</p> <p>record 9:15 10:6 19:17, 19 26:9</p> <p>records 20:23 21:4</p> <p>recusal 11:23</p> <p>recuse 5:25 7:5</p> <p>recusing 7:14</p> <p>reference 17:20</p> <p>refers 29:19</p> <p>reflect 8:4</p>	<p>relevant 21:8 22:1 24:10</p> <p>relied 21:1</p> <p>remainder 15:3</p> <p>remember 6:17 24:11</p> <p>remind 3:18 12:9</p> <p>repeats 22:14</p> <p>report 4:1</p> <p>reporter 3:16,19</p> <p>representative 9:19 10:8 12:18 19:3</p> <p>Republican 12:13</p> <p>request 21:3,4</p> <p>required 23:21 26:6,7</p> <p>requirement 23:18,19 28:18</p> <p>requirements 25:9</p> <p>requires 27:21</p> <p>requiring 7:1</p> <p>research 21:1</p> <p>resolved 25:14</p> <p>respondent 33:18</p> <p>response 16:10 21:5</p> <p>rest 6:17</p> <p>retained 30:8</p> <p>reviewed 4:15</p> <p>rule 23:20 24:4 25:3,18</p> <p>ruled 27:11,13 28:20</p> <p>rules 27:20</p> <p>run 27:16 29:3 30:22 31:14</p> <p>runs 32:5</p> <p style="text-align: center;">S</p> <p>scope 22:14</p> <p>seats 13:2</p> <p>seconded 11:10</p> <p>seconding 7:12</p> <p>Secretary 11:20 12:13 13:2,9 19:4,6 20:8,22 21:1,5 29:21 34:10</p> <p>section 13:1 14:1,17,25</p>
--	--	---	--

<p>16:3,4,5,12,21,24 17:6, 11,17 18:11,19 21:9,10, 17 22:2,4,11 26:15 27:8,9 28:8,9,19 29:13,16,25 31:16,19 32:14,18,20 33:10,17</p> <p>seek 23:7</p> <p>seeking 25:12 29:20</p> <p>separate 6:1 30:13</p> <p>separately 30:3</p> <p>serve 14:11 17:2 31:24 32:19,20</p> <p>served 13:6 17:25 29:22, 24</p> <p>session 3:2</p> <p>set 5:17 7:9 13:15 30:21</p> <p>settle 5:19</p> <p>settled 21:11</p> <p>settlement 5:10,17 7:9, 22</p> <p>settlements 5:13,18</p> <p>share 14:3 20:3</p> <p>sheet 4:18</p> <p>signal 9:25</p> <p>signature 24:7</p> <p>signed 4:17</p> <p>signs 24:8</p> <p>Simmons 3:11 4:1,2,11, 13 5:11,12 6:21 7:3 8:1,2, 24 12:4</p> <p>sir 4:8 19:9 28:15</p> <p>sit 29:22</p> <p>situation 16:22</p> <p>skirt 30:24</p> <p>sort 4:18 28:11 29:8</p> <p>sound 25:1</p> <p>spanned 15:12</p> <p>speak 3:20,21,22 14:16, 17</p> <p>speaking 12:10 27:7</p> <p>speaks 17:17 29:14 31:8, 9 32:14</p> <p>special 15:12</p>	<p>specifically 15:23 17:16, 17 18:15 19:17 25:5</p> <p>spell 3:20</p> <p>spelled 12:19</p> <p>spent 9:23 21:14 22:24</p> <p>spins 30:14</p> <p>spoken 16:23</p> <p>staff 3:10 5:15 9:9,16 10:5 19:24</p> <p>stand 12:3</p> <p>standpoint 12:25</p> <p>started 27:16</p> <p>starting 21:20</p> <p>starts 30:4</p> <p>state 3:15 12:13 13:3,9 20:18 22:6 23:18,19 24:15 28:7 34:11</p> <p>State's 11:20 20:23 21:2, 5</p> <p>stated 27:19</p> <p>statement 24:1,4 25:24 26:5,8</p> <p>statements 10:21 23:9 24:6</p> <p>states 13:3</p> <p>statewide 22:7 28:1,4</p> <p>statute 23:22,23 24:11, 12,19,20,21 25:5</p> <p>statutorily 24:10</p> <p>statutory 20:13 23:4,17 25:19 27:21</p> <p>stay 27:17,18</p> <p>staying 30:12</p> <p>steps 26:1</p> <p>Stettinius 6:6</p> <p>stops 30:4</p> <p>Strictly 16:14</p> <p>strike 6:16</p> <p>subject 19:16 20:20</p> <p>submitted 5:21</p> <p>subpart 24:15</p> <p>subscribed 25:6</p>	<p>subsequent 28:8</p> <p>subvert 13:16</p> <p>successor 22:10</p> <p>sufficient 24:10</p> <p>suggest 29:1</p> <p>Supreme 21:12 22:21 26:24 27:6,18 30:7</p> <p>suspenders 26:1</p> <p>sustain 7:3</p> <p>Suzanne 3:8</p> <p>swear 24:5 28:24</p> <p>sworn 23:10,25 25:6,24 26:5</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>tab 5:13 20:20,22,25 21:3</p> <p>Taft 6:5</p> <p>talk 29:16</p> <p>talks 13:1 29:16</p> <p>Taylor 5:15</p> <p>team 22:16</p> <p>technique 15:13</p> <p>tells 18:11</p> <p>temp 21:23 22:25 30:23</p> <p>tempora 14:9 17:2 21:25 22:17</p> <p>temporarily 15:19 16:8</p> <p>temporary 15:10,16,22 16:8 17:3 22:18 30:24</p> <p>tempore 15:9,15 20:15 21:15</p> <p>ten 9:20 10:10</p> <p>ten-year 30:8</p> <p>term 13:12,14 14:9 15:3, 9,10 16:24 17:15 21:16 22:8 27:3 31:2,11,22,25 32:6,25 33:9</p> <p>terms 22:4 27:16 29:14, 15,17 30:22</p> <p>testify 11:1 12:1</p> <p>testifying 10:16</p> <p>testimony 10:15 19:1</p>	<p>thing 30:24</p> <p>things 24:3 27:23</p> <p>thinking 26:9 30:14</p> <p>Thompson 5:16</p> <p>thought 6:15</p> <p>time 3:22 9:21,23 10:1, 12,20 12:17 13:5 14:11, 14 15:19,20 17:14 18:12, 13,14 19:2 21:14,23 22:24 25:23 30:11 32:3</p> <p>timeframe 15:24 17:7</p> <p>timeline 20:6,17 21:7,8</p> <p>today 3:13,16 9:6 12:3 13:18 19:4 20:20 21:14 29:4,13,22 30:1,13 34:8, 13</p> <p>today's 4:3 11:4</p> <p>top 24:11</p> <p>track 32:14</p> <p>transcript 4:15,19</p> <p>trial 25:3,18 26:7</p> <p>true 24:6</p> <p>turn 5:9 7:24 9:2</p> <p>Twelve 14:24</p> <p>two-year 17:3</p> <p>typically 6:22</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultimately 25:14</p> <p>unambiguously 27:1</p> <p>unanimous 6:16,23</p> <p>understand 7:14 14:20 25:2,10 31:8 33:21</p> <p>understanding 7:17 16:19</p> <p>Understood 31:17</p> <p>unerring 21:19</p> <p>unexpired 22:8,16</p> <p>uniform 24:13</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>vacancies 22:4</p>
---	--	---	---

vacancy 22:5
versus 28:13
Vice 3:6
view 26:2 29:10
vote 6:1 7:4,21
voters 31:15
votes 7:4 9:20 10:11,19

W

wait 13:22
wanted 21:6 26:11 27:16
28:22
wavier 6:23
weight 23:8 29:11
White 28:13,20
William 19:5
Wilson 3:8

word 19:11 31:14
words 14:10 29:15
work 30:15 31:5

Y

year 29:23
years 13:15 14:8,12,23
15:4,5,6,12 16:1,4,9,15,
18 17:3,13,21 18:4,18,19,
21 27:4,5,15 29:14,16,17,
22,24 30:3 31:18 32:3,8,
10,16,21 33:2,5
yellow 5:13

Z

Zachary 3:8