The Lieutenant Governor:
Filling Vacancies and Assuring The Government Works

February 28, 2023
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Filling Vacancies and Assuring That Government Works

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Albany Law School Class of 1979
# 2023 Warren M. Anderson Series

## The Lieutenant Governor:
**Filling Vacancies and Assuring That Government Works**

**February 28, 2023**

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The Government Law Center at Albany Law School Presents
The 2023 Warren M. Anderson Series:
Structural Issues with the Lieutenant Governor’s Office

February 28, 2023

Speaker Biographies

HON. HELEN E. FREEDMAN (RET.) is a former Associate Justice of the New York Appellate Division of the Supreme Court, First Judicial Department. She was appointed to the court by former Governor David A. Paterson in July 2008. In 1979, Judge Freeman was elected to the New York City Civil Court. In 1988, she was elected to the Supreme Court of the State of New York, First Judicial District, and was re-elected in 2002. Before her election to the bench, she became a staff attorney at the American Arbitration Association and subsequently held a number of positions, including associate, law secretary, and senior attorney. Judge Freedman received her J.D. from New York University School of Law in 1967. Judge Freedman currently serves as a mediator for JAMS, an alternate dispute resolution provider.

BENNETT LIEBMAN is a Government Lawyer in Residence with the Government Law Center at Albany Law School and an adjunct professor of law. Mr. Liebman worked for Mario Cuomo while Cuomo was Secretary of State and served as his Counsel when he was Lieutenant Governor. When Cuomo was elected Governor in 1982, Bennett became his Special Deputy Counsel handling ethics matters, Freedom of Information Law questions, and many other issues. Bennett served as a member of the New York State Racing and Wagering Board for more than a decade beginning in 1988, including a term as its Acting Co-Chair. He concluded his government service in 2014 after three years as Deputy Secretary to the Governor for Gaming and Racing.

DAVID A. PATerson is former Governor of the State of New York (2008–2010) and former Lieutenant Governor of the State of New York (2007–2008). In 1985, he was elected to the New York State Senate and rose to the position of Senate minority leader in 2003. He received his J.D. from Hofstra Law School in 1983. After law school, Mr. Paterson worked in the District Attorney’s office of Queens County, New York. Since stepping down as Governor, Mr. Paterson has hosted a popular talk-radio show and served as an adjunct professor of Government at New York University (2011–2012). In 2013, he joined the faculty at the Touro College of Osteopathic Medicine as a Distinguished Professor of Health Care and Public Policy. His book, Black, Blind, & in Charge: A Story of Visionary Leadership and Overcoming Adversity, was published by Skyhorse Publishing in 2020.

PATRICK A. WOODS ’12 is Deputy Director of the Government Law Center at Albany Law School. Before joining the Government Law Center, Mr. Woods served as an Assistant Solicitor General in the Albany Office of the Appeals and Opinions Bureau of the New York State Attorney General. In this role, Mr. Woods represented the State of New York or its agencies and employees in dozens of appeals before the United States Court of Appeals for
the Second Circuit, the New York Court of Appeals, and the Third and Fourth Departments of the Appellate Division. Before the Attorney General's office, Mr. Woods was the 2015–2016 Supreme Court Fellow placed with the United States Sentencing Commission. Immediately after law school, he clerked for the Honorable Peter W. Hall of the United States Court of Appeals for the Second Circuit and the Honorable Richard K. Eaton ’74, of the United States Court of International Trade. Mr. Woods received his J.D. from Albany Law School in 2012.

About the Warren M. Anderson Series

The Warren M. Anderson Series, held annually since 1992, features experts who address major legal and policy issues pending before New York State government. The series is named in honor of WARREN M. ANDERSON ‘40, a distinguished alumnus of Albany Law School. He served in the New York State Senate for 36 years working with six governors. He was the longest-serving majority leader of the Senate, holding that position from 1973 to 1988. He was best known for working to bail out New York City from its fiscal crisis in the mid-1970s. He also was responsible for establishing the state’s Tuition Assistance Program which helped fund the education of thousands of New York college students.
Memorandum of the Law Revision Commission
Relating to Gubernatorial Inability and Succession

Purpose of the Bill (Resolution):

To clarify gubernatorial succession under sections 5 and 6 of article IV of the Constitution by deleting the term "absent from the state" and by inserting a procedure for determining gubernatorial inability; and to conform section 3 of article VI by adding a provision that would grant exclusive jurisdiction to the Court of Appeals to determine questions of gubernatorial inability when the issue is raised by the Lieutenant Governor and the four legislative leaders, acting unanimously.

Summary of the Provisions of the Bill (Resolution):

The New York Constitution (art IV, §5) provides, in part, that if the governor "is impeached, is absent from the state or is otherwise unable to discharge the powers and duties of his office, the lieutenant-governor shall act as governor until the inability shall cease or until the term of the governor shall expire." The Constitution does not define the term "absent from the state" and it fails to resolve the questions of what constitutes "inability" and who is to be the judge of its occurrence and of its termination in the absence of a voluntary declaration of inability by the Governor.

This resolution would amend the Constitution (art IV, §§5 and 6) to delete the words "absent from the state" and to add a procedure to section 5 of article IV thereof for a voluntary declaration of inability by the Governor and for a subsequent declaration that the inability has ceased. It would further amend the section to provide that, if the Governor will not or cannot declare his own inability to govern, the Court of Appeals may make such determination upon receipt of a written declaration, transmitted to the Chief Judge by the Lieutenant Governor, the Temporary President of the Senate, the Speaker of the Assembly and the minority leader of each House of the Legislature, that in their unanimous opinion the Governor is unable to discharge the powers and duties of his office. Once there has been an adjudication of inability under the proposed amendment, the powers and duties of the office would be restored to the Governor upon the unanimous written declaration of the Lieutenant Governor (Acting Governor) and the four legislative leaders that the inability has ceased or upon an adjudication by the Court of Appeals that such inability has ceased, which adjudication is initiated by the Governor by a written declaration (transmitted to the Chief Judge) that no inability exists. If there is a vacancy in the office of Lieutenant Governor, Temporary President of the Senate, Speaker of the Assembly, minority leader of the Senate or minority leader of the Assembly, this procedure would proceed upon the unanimous declaration of the remaining four officers. In addition, the Resolution would make a conforming amendment to article VI, section 3, of the Constitution to provide that the Court of Appeals shall have original and exclusive jurisdiction to determine questions of gubernatorial inability.

Statement in Support of the Bill (Resolution):

The importance of having a legal procedure by which inability of a governor shall be determined was highlighted by the terminal illness of the late Governor Ella Grasso of Connecticut and by the more recent sudden illness of Governor O'Neil, her successor in office, and his request that Lieutenant Governor Paulino act as Governor during the duration of his inability to govern. Absent a voluntary, intentional and rational relinquishment of the powers and duties of office by an incumbent governor, a vacuum in gubernatorial leadership would exist in New York (and many other states) upon the occurrence of an incapacitating illness or accident affecting the incumbent. For this reason, New York State should have a procedure by which gubernatorial "inability" shall
be determined so as to allow the assumption of authority by the Lieutenant Governor when required. The Commission believes that the Court of Appeals should be given jurisdiction over determinations of gubernatorial incapacity (when controverted). The Commission notes that 16 states out of the 27 states which have a procedure for determining gubernatorial incapacity have delegated the final responsibility to the highest court of the state, and 6 states delegate it to the legislature.

The Commission recognizes that under the 25th Amendment of the United States Constitution, Congress decides the issue of presidential ability or incapacity. The Commission has departed from this model because it believes that representatives of the Legislature should be involved in the initial declaration of the Governor's ability or inability to perform the duties of office. This question is the most critical since, if there is no initial declaration of incapacity by the unanimous act of the four leaders of the Legislature and the Lieutenant Governor (or if an initial determination of incapacity is not controverted by the Governor), the procedure goes no further.

Secondly, the procedure under the 25th Amendment cannot be realistically made applicable in New York. Under the 25th Amendment, the executive branch, i.e., the President, rules the Vice President, and majority of the President's Cabinet, makes the constitutional declaration of incapacity. If the President contests this declaration, the Congress decides the issue. In New York, there is no substantial branch (the Legislature) to decide this issue. Since it is clearly unacceptable to the Legislature to determine the issue without the Governor, the procedure under the 25th Amendment is not a viable option.

The Commission also makes the recommendation that the words "absent from the state" be deleted from section 5 of article IV (quoted above) and from section 6 of the state Constitution. The Commission believes that this provision has never been litigated in the same article of the state Constitution to avoid potential problems. While this issue has never been litigated in New York, there is a significant amount of controversy in other states over the meaning of "absent from the state." Some courts have construed "absent from the state" to mean that the Governor is physically present within the boundaries of the state, and others to mean presence outside the state. Whatever the answer, the Governor's ability to govern is an issue that cannot be decided by the Commission.

The Commission makes no recommendation at this time for a change in the gubernatorial line of succession. The Office of Lieutenant Governor should be the next in line of succession. However, the Commission recommends that the procedures used in other jurisdictions be considered. The Commission stands ready to work with the Legislature to determine the best course of action.

### Budget Implications:
None

### Effective Date:
When approved

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**RECOMMENDATION OF THE LAW REVISION COMMISSION**

**TO THE 1985 LEGISLATURE**

**Relating to Gubernatorial Inability and Succession**

This Recommendation is the result of a study made by the Commission on gubernatorial inability and succession as provided for under the New York State Constitution. As a part of this study, the Commission has reviewed not only the law of New York but also that of the other forty-nine states, as well as the provisions for presidential inability and succession under the Twenty-Fifth Amendment to the Constitution of the United States, as enacted in 1967 (hereinafter "25th Amendment").

The New York Constitution provides, in part, that

In case the governor is impeached, is absent from the state or is otherwise unable to discharge the powers and duties of his office, the Lieutenant-governor shall act as governor until the inability shall cease or until the term of the governor shall expire. (NY Const, art IV, §5)

There is no provision in New York, under either the Constitution or statute, for determining when a Governor is "unable to discharge the powers and duties of his office", as used in section 5 above. In other words, what constitutes such "inability" and who is to be the judge of its occurrence and of its termination are open questions in this State.

The importance of having a legal procedure by which inability of a governor shall be determined was highlighted by the terminal illness of the late Governor Ella Grasso of Connecticut and by the more recent sudden illness of Governor O'Neill, her successor in office, and his request that Lieutenant Governor Fauliso act as Governor during the duration of his

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1. Sections 5 and 6 of article IV.
inability to govern. The point was made that absent a voluntary, intentional and rational relinquishment of the powers and duties of office by an incumbent governor a vacuum in gubernatorial leadership would occur in the event that the incumbent became incapacitated.

In the course of the Commission's study of gubernatorial inability and succession, it became evident that there is confusion (in some jurisdictions) surrounding the meaning of the phrase "absent from the state", as used in sections 5 and 6 of article IV of the New York Constitution (quoted, in part, on the previous page). This provision was adopted in the eighteenth century when there was no effective means of communicating with a governor upon his absence from the state, or any way for an absent governor to return to the state promptly in the event of an emergency. The Commission discusses this issue, infra, and suggests that the Constitution be amended to delete the phrase "absent from the state" since the reasons for it no longer exist and to reduce potential confusion.

Related to this study is the issue of gubernatorial succession in New York which presently runs from the Lieutenant Governor, to the Temporary President of the Senate, and then to the Speaker of the Assembly (art IV, §6). The Commission recognizes the possibility of a succession to the office of Governor by a member of the opposite political party should both Governor and Lieutenant Governor be unavailable or otherwise unable to perform the powers and duties of that office. However, it has been the tradition in New York to select persons of stature and state-wide importance as Temporary President of the Senate and Speaker of the Assembly. Therefore, the Commission discusses (infra) this issue, including various alternatives as found in other states; but makes no recommendation at this time.

There are, in this study, three distinct issues. These are: (1) gubernatorial inability, (2) absence of the Governor from the State, and (3) gubernatorial succession when there is a vacancy in the office of Lieutenant Governor alone. Each of these issues is separately discussed below.

**Gubernatorial Inability**

Assume for the purposes of this discussion that the Governor of New York suffers a severe affliction rendering him unable to communicate and he remains in this condition for a period of time. The question arises as to the assumption of the powers and duties of the office of Governor by the Lieutenant Governor. The sudden and unexpected occurrence of an incapacitating illness or accident affecting the Governor of New York could leave the State without leadership; and, depending upon the nature of the inability, the interruption in continuity of government could extend for a prolonged period of time. In the Commission's opinion the State should have procedure for determining cases of gubernatorial "inability" so that the Lieutenant Governor may assume command should the Governor be unable to govern.

This is not a recent issue, nor is it a problem confined to the State of New York. All of the states have provided in their Constitutions for gubernatorial succession upon the inability of the incumbent Governor to perform the powers and duties of his or her office. About one-half of the states provide (by constitution) for the determination of gubernatorial inability (or for a determination that such inability is ended). Among these are three states in which the responsibility for providing the procedure for such

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2. Until the ratification of the 25th Amendment (February, 1967), there was a like concern with respect to the assumption of the powers and duties of the President in the event of presidential inability.

3. See attached Appendix A.
determination has been delegated solely to the state legislatures but, as of this date, no statutes have been enacted in any of them. In five additional states, the legislatures have enacted statutes which set forth the procedures for declaring gubernatorial inability (in none of these five states has this been authorized by constitutional provisions). Therefore, at last count, there were twenty-seven states having a procedure (either under their constitutions or by statute) for declaring gubernatorial inability, disability or incapacity.

Prior to the passage of the 25th Amendment, there was concern over the meaning of "inability" as it applied to presidential succession under the Constitution of the United States and for the absence of a procedure for establishing such "inability" should it occur. These concerns were addressed by the 25th Amendment which provides, in part, as follows:

Sec. 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Sec. 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

4. Alaska, California and Kansas, Illinois, which similarly delegated to its legislature the responsibility for designating the procedure for such determination of inability, avoided the problem of legislative inaction by providing that, in the event the Legislature fails to provide the procedures by law, the state Supreme Court shall make the determination under such rules as it may adopt. In any case, the Illinois Supreme Court has exclusive jurisdiction to make all final determinations in such matters even should a law be enacted.

5. Iowa, Nebraska, Oregon, Pennsylvania and Wisconsin.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Thus, the federal Constitution provides for either a voluntary declaration of inability or, if this is not forthcoming, a declaration of presidential inability made by joint action of the Vice President and a majority of the President's Cabinet or "such other body as Congress may by law provide." In either case, the powers and duties of the President would be assumed by the Vice President as Acting President. There would be congressional involvement only if the designation was not voluntary and then only if there is a dispute over the competency of the President between the President on one side, and the Vice President and a majority of the Cabinet on the other. In such cases, a two-thirds majority of both Houses is required to support a finding of inability.

There is no true equivalent in New York State of a presidential Cabinet. One reason for this is that the State Attorney-General and State Comptroller are elective offices, whereas the U. S. Attorney-General and the Secretary of the Treasury are appointed. Perhaps most analogous would be the heads of the

6. Congress has not acted to designate another body in place of the Cabinet.
civil departments of state government, most of whom are appointed by the Governor with the advice and consent of the Senate. Under the Constitution, there can be no more than twenty such departments (NY Const, art V, §2) but this number could be reduced by the Legislature, by consolidation or otherwise (id., §3). Included in this number also are the Department of Law and Department of Audit and Control headed by the Attorney-General and Comptroller, respectively (id., §4).

Other "bodies" have been proposed to certify to the Governor's inability to govern under circumstances where the Governor cannot or will not so certify voluntarily. For example, Senator John R. Dume, in a memorandum addressed to Senator Warren M. Anderson, Temporary President of the Senate, on March 16, 1982, suggested a three-step process involving all three branches of government. It would start with the filing of a "joint petition" with the Chief Judge of New York by the Lieutenant Governor, Temporary President of the Senate and Speaker of the Assembly declaring that in their judgment the Governor is unable to discharge the powers and duties of his office due to either physical or mental disability. The Chief Judge would convene a "Gubernatorial Disability Commission" composed of the Chancellor of the Board of Regents, the Secretary of State and the State Commissioner of Health to hear evidence and report its findings and conclusion on "the issue of disability" to the Chief Judge. He would then convene the Court of Appeals to approve or disapprove the Commission's findings and conclusion and, if the Court finds a disability, the Lieutenant Governor would immediately assume the powers and duties of the office of Governor.

In another proposal, by Assemblyman Guy J. Velessa (Assembly Bill No 9631, May 19, 1981), the determination that the Governor is unable to discharge the powers and duties of his office would be made by the Lieutenant Governor with the unanimous consent of the Temporary President of the Senate, the Speaker of the Assembly and the minority leaders of both Houses plus a majority of the members of the Senate and Assembly. Upon such determination, the Lieutenant Governor would assume the powers and duties of the office as Acting Governor. When the Governor makes a written declaration to the Temporary President of the Senate and the Speaker of the Assembly that no inability exists, he would resume the powers and duties of his office unless the Lieutenant Governor, with the unanimous consent of the Temporary President of the Senate, the Speaker of the Assembly and the minority leaders of both Houses, determine in a written declaration that the Governor is still disabled and this determination is concurred in by a two-thirds vote of both Houses of the Legislature, in which case the Lieutenant Governor would continue as Acting Governor.

The Commission, in its recommendation, has used procedures from these two proposals and incorporated others based upon its research into procedures adopted in some of the other forty-nine states. The following discussion of provisions found in other states summarizes the major factors leading to a declaration or non-declaration of gubernatorial inability.

As was mentioned herebefore, twenty-seven states have provided, by constitution or by statute, for a "declaration of gubernatorial inability" (sometimes referred to as "incapacity" or "disability"). Of these, sixteen states (by constitution) have delegated the final responsibility for a
determination of disability or inability to the highest court of the state, six states have delegated it to the state legislature, and five states have left it to a "conference" of officials. The preponderance of opinion appears to be that the highest court of the state is the appropriate body to make any final determination of gubernatorial inability. The Commission agrees and recommends that, in New York, the Court of Appeals should make such determination.

Only eleven of the state constitutions mention and provide for a voluntary relinquishment of the powers and duties of office by a Governor who finds himself or herself unable to discharge such functions. Notwithstanding this omission in most states, if a governor of any state (including New York) voluntarily declared his or her own inability, the Commission is of the opinion that the Lieutenant Governor would be compelled to assume the powers and duties of the office of Governor during such period of inability. However, to remove all doubt, the Commission believes that a procedure for voluntary declaration of inability should be included in the New York Constitution.

A review of the constitutional provisions of the various states fails to show a consensus among them as to how the procedure for an involuntary declaration of inability is to be started. The process is initiated in seven states by officers of cabinet rank (or equivalent) but even that varies from state to state as to the number and position of officers involved, whether the next person in line of succession is included among them, and whether the decision requires unanimity, a particular majority or merely a simple majority of them. In two states, the Lieutenant Governor alone may initiate the procedure. In two other states, the Secretary of State alone certifies the question to the state Supreme Court. In five states, the process is started by resolution of the Legislature and, in three states, it is initiated by the leaders of both houses of the state legislatures. A mixed group, composed of legislative leaders and cabinet level officer or officers, may begin the process in two states. The constitution of one state and the statutes of three states require a "conference" of several officials, including heads of state medical

8. Alabama, Colorado, Florida, Georgia, Illinois, Indiana, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, New Jersey, Ohio, South Dakota and Utah.
9. Delaware, Montana, North Carolina, Pennsylvania (by statute), South Carolina and Virginia.
10. Connecticut (by constitution); and Iowa, Nebraska, Oregon and Wisconsin (by statutes).
11. Under their Constitutions, three additional states (Alaska, California and Kansas) should have named a determining body but, by legislative inaction, have not done so to date.
12. Colorado, Illinois, Indiana, Louisiana, Maine, Maryland, Missouri, North Carolina, South Carolina, Utah and Virginia. These provisions for voluntary declaration of inability follow the procedure set forth in the 25th Amendment, differing only in the official or officials entitled to receive such declaration. Statutes in Pennsylvania and Wisconsin also provide for voluntary declarations of inability.
13. Or other next in line of succession.
14. Alabama, Florida, Georgia, Louisiana, Montana, Pennsylvania (by statute only) and South Carolina.
15. Connecticut (but may also be initiated by "a majority of the members" of the Council on Gubernatorial Incapacity) and Iowa (but may also be initiated by the Chief Justice). It should be noted here that the procedure in Iowa is according to statute, not constitution.
17. Colorado, Maryland, New Jersey, Ohio and Virginia.
18. Indiana, Michigan and Utah.
19. Missouri and Virginia.
schools, to initiate the process. 20 North Carolina's Constitution (art III, §3) differs from those of other states by delegating the entire process to the Legislature. The Constitutions of Illinois (art V, §6) and South Dakota (art IV, §6) leave it entirely to the highest courts of the states.

Examples of provisions which could create problems are found in Connecticut, Iowa, Nebraska and Wisconsin. Connecticut's newly approved constitutional amendment allows the process to be initiated either by the Lieutenant Governor alone or by a majority of the members of the "Council on Gubernatorial Incapacity". Thus, the Lieutenant Governor may have conflicting interests, or the members of the Council become both the initiators of and the final arbiters of gubernatorial incapacity. The statute in Iowa also permits the Lieutenant Governor alone to initiate the proceedings, or it may be initiated solely by the Chief Justice of the Supreme Court of Iowa who is also one of three members of the "Conference" which determines the issue of incapacity. (Nebraska has a similar problem with its statute.) In Wisconsin, the statutory procedure is initiated solely by members of the Disability Board which is itself the body which decides the ability of the governor to govern.

Delaware's Constitution (art III, §30, §1(b)) provides that the Lieutenant Governor "shall immediately assume the powers and duties of the office of Governor as Acting Governor" upon the unanimous written declaration, transmitted by the Chief Justice of the Delaware Supreme Court, the President of the Medical Society of Delaware and the Commissioner of the Delaware Department of Mental Health to the President pro tempore of the Senate and the Speaker of the House of Representatives, that the Governor is unable to discharge the powers and duties of his office. The Governor resumes the powers and duties of his office when he transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no disability exists unless, within five days, the state of his health is contested by unanimous written declaration by the Chief Justice, the President of the Medical Society and the Commissioner of the Department of Mental Health, as provided above, and the General Assembly (both houses of the Delaware Legislature) decides, within ten more days, by a two-thirds vote of all members elected to each house that his disability continues. This is essentially the procedure under the 25th Amendment with the exception that there the declaration is made by the Vice President with "a majority of the principal officers of the executive departments or of such other body as Congress may by law provide". Constitutional provisions of three other states besides Delaware allow the immediate assumption of gubernatorial powers and duties by the next in line of succession before there is an adjudication of gubernatorial inability. 21 The same procedure is followed in the statutes enacted by the legislatures of three states. 22 Of the remaining twenty states, eight 23 expressly provide for notice to the incumbent governor, opportunity to be heard, assistance of counsel, or other exemplifications of due process, in their provisions governing gubernatorial succession upon the incapacity of the incumbent Governor to govern. The rest are silent and,

20. Delaware (by constitution); and Nebraska, Oregon and Wisconsin (by statutes).

21. Missouri, South Carolina, and Virginia.

22. Nebraska, Oregon and Pennsylvania.

presumably, have left it to the determining body to prescribe its own rules of procedure.

It is also useful, as an additional source of reference, to examine the impeachment process in New York. Impeachment is a two-step process in New York (NY Const, art VI, §14). The first step could result in "articles of impeachment" being "preferred" to the Senate by a vote of a majority of all the members elected to the Assembly.24 The second step is the trial of impeachment by the "court for the trial of impeachments" which consists of the Senate, or "the major part of them," and the Judges of the Court of Appeals, or "the major part of them." Section 24 provides with respect to this second step that "no person shall be convicted without the concurrence of two-thirds of the members present."25 Also, pursuant to that section, judgment in impeachment cases "shall not extend further than to removal from office, or removal from office and disqualification to hold and enjoy any public office of honor, trust, or profit under this state ..." (NY Const, art VI, §24). Once articles of impeachment have been voted by a majority of the Assembly (the first step), the powers and duties of the office of Governor devolve upon the Lieutenant Governor as Acting Governor (id., art IV, §5; People ex rel Robin v. Hayes, 163 App Div 725, 728 [3d Dept 1914], app dismd 212 NY 603). If the proceeding in the Court for Trial of Impeachments (the second step)

results in an acquittal, the Governor then resumes such powers and duties. If, however, there is a conviction, the Lieutenant Governor becomes Governor for the remainder of the term (NY Const, art IV, §5).

The Commission believes that the procedure for the declaration of gubernatorial inability should be distinguished from that of impeachment. Impeachment results from reprehensibile conduct, sometimes even criminal conduct, on the part of the official being impeached. On the other hand, gubernatorial inability should carry no stigma. Furthermore, an adjudication of guilt in the impeachment process is permanent, a declaration of inability to perform the powers and duties of office is not. For these reasons, the Commission recommends a procedure for determining inability which is different from impeachment.

The Commission has considered, in addition to the matters heretofore discussed, the separation of powers of the three branches of government and accordingly suggests a procedure that is weighted heavily in favor of the elected Governor, involves representation by all branches of government, and yet is limited to a two-step process. The Commission's proposal, like the 25th Amendment, provides a means for a voluntary declaration of inability by the incumbent Governor which would allow the Governor to resume the powers and duties of office merely by a subsequent declaration that the inability has ceased. In extraordinary cases, where the Governor can not or will not voluntarily declare an inability to govern, provision is made for an adjudication of the issue upon the written declaration of the Lieutenant Governor, Temporary President of the Senate, Speaker of the Assembly, minority leader of the Senate, and minority leader of the Assembly, transmitted to the Chief Judge of the Court of Appeals, that in their unanimous opinion the Governor is

24. The first sentence of section 24 of article VI of the New York Constitution reads as follows:

The assembly shall have the power of impeachment by a vote of a majority of all the members elected thereto.

25. On the trial of an impeachment against the Governor or Lieutenant Governor, neither the Lieutenant Governor nor the Temporary President of the Senate shall act as a member of the Court.
unable to discharge the powers and duties of the office of Governor. If gubernatorial ability is then controverted by the incumbent, the Court of Appeals would convene to adjudicate the matter.

The Commission recognizes that under the 25th Amendment of the United States Constitution, Congress decides the issue of presidential ability or inability. The Commission has departed from this model because of its belief that representatives of the Legislature should be involved in the question of determining whether to make an initial declaration of the Governor's inability to perform the duties of office. This question is the most critical since, if there is no initial declaration by the unanimous act of the four leaders of the Legislature and the Lieutenant Governor (or if an initial determination of inability is not controverted by the Governor), the procedure goes no further.

Secondly, the procedure under the 25th Amendment cannot realistically be made applicable in New York. Under the 25th Amendment, the Executive branch, i.e., the Vice President and a majority of the President's Cabinet, makes the crucial initial declaration of inability. If the President contests this declaration, the Legislative branch (The Congress) decides the issue. In New York, there is no substantial equivalent to the President's Cabinet. Since it would be clearly unacceptable for the Lieutenant Governor alone to initiate the process, it is necessary to involve the Legislature, through its leaders, at the outset. But, if the Legislative branch has been vitally involved in the declaration of inability, it would be inappropriate for that same branch of government to decide the issue of inability if it is controverted by the Governor.26

26. This also differentiates the declaration of inability process from the impeachment process and protects against its becoming a substitute or secondary impeachment device.

The Commission has considered a possible reluctance on the part of a Lieutenant Governor to be a party to what might give the appearance of usurpation of the powers of the Governor. However, under the Commission's proposal the Lieutenant Governor, unlike the Vice President, would not immediately succeed to the office of the incumbent Chief Executive Officer. His succession must await a finding of inability by the Court of Appeals if the issue is contested. This delay in the assumption of command by the Lieutenant Governor until there can be an adjudication by an independent body, plus the involvement in the initiation process of a bipartisan body composed of both majority and minority leaders of the Legislature, should remove any suggestion of improper motive.

Absence of the Governor from the State

Under section 5 of article IV of the New York Constitution, the absence of the Governor from the State affects a transfer of the powers and duties of the office of Governor to the Lieutenant Governor as acting Governor during such absence. It is suggested that this provision be eliminated in light of the ease of communication and speed of transportation making the Governor more accessible even when absent from the State. It is noteworthy that there has been a significant amount of controversy in other states over the interpretation of the term "absent from the state". The courts of some states have construed it to mean "actual absence" (sometimes called "strict absence"), meaning physical nonpresence within the boundaries of the State.27

27. It is difficult to overstate the argument that the term "absent" is plain and unambiguous and lends itself to a single meaning, that being "physical nonpresence" (Bratina v. Rice, 438 A 2d 789 [1981]; Petition of Comm. on Governorship of California, 160 Cal Rptr 760, (continued, next page)
Governor of New York has found it necessary to leave the confines of the State to attend official conferences, to conduct State business in Washington (or elsewhere), or to tend to personal affairs. New Yorkers have been fortunate in the discretion exercised by our Lieutenant Governors over the years during these temporary periods of absence from the State (Cf., Brittenis v. Rice, 438 A 2d 789 [Conn 1981] and Petition of Comm. on Governorship of California, 160 Cal Rptr 760, 603 P 2d 1357, 26 C 3d 110 [1979]).

The Commission suggests, however, that in light of conflicting interpretations of this language in other states and the lack of judicial interpretation in New York, it would be desirable to delete the language "is absent from the state" from sections 5 and 6 of article IV of the Constitution. It believes that the reasons for the "absence from the state" provision no longer exist. The speed of modern communication and transportation, which allows prompt response to emergency situations, has obviated any need for this provision in New York. The Commission further believes that the language is extraneous, that it means the same as "unable to discharge the powers and duties of office," and that its retention may lead to confusion.

**Gubernatorial Succession—Vacancy in the Office of Lieutenant Governor**

Where there is a vacancy in the office of Lieutenant Governor the New York Constitution provides that the temporary president of the Senate "shall perform all the duties of lieutenant-governor during such vacancy..." (NY Const, art IV, §6). In case of vacancy in the offices of both Governor and Lieutenant Governor or if both of them shall be impeached, absent from the State or otherwise unable to discharge the powers and duties of the office of Governor, the Temporary President of the Senate shall act as Governor until
the inability shall cease or until a Governor is elected (id.). If, in such case, the Temporary President of the Senate is absent from the State or otherwise unable to discharge the duties of Governor, or his office is vacant, the Speaker of the Assembly shall act as Governor during such vacancy or inability of the Temporary President of the Senate.

The final paragraph of section 6 of article IV of the New York Constitution called upon the Legislature to provide for the devolution of the duty of acting as Governor in any case not otherwise covered in article IV (e.g., disasters). The Legislature did this by enacting chapter 343 of the laws of 1959 which added a section 5 to chapter 784 of the laws of 1951. Section 5 was later amended by chapter 420 of the laws of 1968 (see, McKinney's Unconsolidated Laws of New York, §9105). This section provides for further succession if, "as a result of an attack or a natural or peacetime disaster, the office of governor becomes vacant and each of the Lieutenant governor, the temporary president of the senate and the speaker of the assembly is unable to discharge the powers and duties of the office of governor or is absent from the state." The line of succession pursuant to this statute, following the Speaker, is: Attorney General, Comptroller, Commissioner of Transportation, Commissioner of Health, Commissioner of Commerce, Industrial Commissioner (now, the Commissioner of Labor), Chairman of the Public Service Commission, and Secretary of State.

The Commission has considered these provisions in light of the 25th Amendment which provides, in part,

Sec. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Essentially, this was proposed to assure that the President would rarely be without a successor in this age of critical international affairs, national security problems and instant crisis, and that the individual selected for the position would be from the same political party as the President, would be one who would most likely have a congenial working relationship with the President and who could effect a continuity of administration if called upon to succeed the President in office.

It may be that it is less critical at the State level to have a successor to the Governor always "waiting in the wings". However, should there be a vacancy in the office of Lieutenant Governor, as occurred recently when New York's Lieutenant Governor Alfred B. DelBello announced his resignation from office, effective February 1, 1985, there could be a lack of continuity in the administration of State affairs should the Governor be unable to discharge the powers and duties of his or her office.

New York's line of gubernatorial succession is not unlike that found in a plurality of the states. Forty-one states, including New York, provide for succession by a Lieutenant Governor (see, Appendix B). In the remaining nine states, the President of the State Senate is first in line of succession in six of them, and the elected Secretary of State in the other three. Fifteen states, including New York, provide that the President pro tempore of the Senate is second in line of succession (in addition, in states where the constitutions provide that succession after Lieutenant Governor is as provided by statute, the President of the Senate is usually designated as the next in line of succession). The Speaker of the lower house of the state legislature is second in line in eight states and third in line in ten other states. After the Speaker, the next most popular official for selection in the line of gubernatorial succession is the Secretary of State.
An interesting recent development in five states\(^{29}\) (probably as a result of the example found in the 25th Amendment) is the process of appointing a new Lieutenant Governor should such Office become vacant in the middle of a term of office. This process is in lieu of a specific line of succession being established by constitution or statute. In these states, if a vacancy exists in the office of Lieutenant Governor, the incumbent Governor appoints a new Lieutenant Governor who, upon being confirmed by the Legislature, would then be next in line to succeed should a vacancy occur in the office of Governor.

The Commission notes that, in New York, there have been only eight instances in which a Lieutenant Governor has permanently replaced a Governor, and only one of these was as a result of death.\(^{30}\) Of the remaining seven occurrences, one was a result of impeachment\(^{31}\) and six resulted from resignations.\(^{32}\)

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29. Alaska (Alaska Stats 44.19.040), Colorado (Const, art IV, §13), Montana (Const, art VI, §6), South Dakota (Const, art IV, §6) and Wisconsin (Const, art XIII, §19). Rhode Island now uses a system where, in lieu of a line of succession following the Lieutenant Governor, the Legislature convenes to elect a new Lieutenant Governor when that post becomes vacant.

30. Governor DeWitt Clinton died in office February 11, 1828 and was succeeded by Lieutenant Governor Nathaniel Packer.

31. Articles of impeachment were preferred against Governor William Sulzer on August 13, 1913 at which time Lieutenant Governor Martin H. Glyn became Acting Governor. The Court of Impeachments convicted Governor Sulzer on October 17, 1913 and Acting Governor Glyn became Governor.

32. Governor Daniel D. Tompkins resigned in March of 1817 to become Vice President of the United States; Governor Martin Van Buren resigned March 17, 1829 to become Secretary of State of the United States; Governor Grover Cleveland resigned January 8, 1885 to become President of the United States; Governor Charles L. Hughes resigned October 6, 1910 to become a Justice of the United States Supreme Court; Governor Herbert H. Lehman resigned the United States Supreme Court; Governor Nelson A. Rockefeller resigned December 18, 1973 and Governor Nelson A. Rockefeller resigned December 3, 1942 and Governor Nelson A. Rockefeller resigned December 18, 1973.

The Commission believes that there is much to recommend the procedure under which a person is nominated by the Governor to fill the vacancy in the Office of Lieutenant Governor and is then confirmed by each House of the Legislature before taking office; even though, in New York State, the Temporary President of the Senate has never, in recent memory, been called upon to act as Governor. It is the method used for filling a vacancy in the Office of Vice President of the United States under the 25th Amendment (supra) and, like the 25th Amendment, assures that the individual selected for the position is from the same political party as the Governor, is one who would most likely have a congenial working relationship with the Governor and is one who could effect a continuity of administration if called upon to succeed the Governor in office.

The Commission has considered the procedure for confirming a Governor's nominee for Lieutenant Governor, in light of the procedure under the 25th Amendment. It was noted that, although the 25th Amendment did not specify that it was to be a majority vote in each House of Congress of the members present (assuming the presence of a quorum), such was the interpretation given the Amendment when Congress confirmed Gerald Ford and, later, Nelson Rockefeller as Vice President of the United States.\(^{33}\) Congress also had to determine whether confirmation hearings were to be joint or separate. This issue was ultimately resolved under Congressional rule-making powers.\(^{34}\)

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34. Id. (Senator Ford and former-Governor Rockefeller were both confirmed after separate Congressional hearings.)
Because the procedure for selecting gubernatorial successors is closely related to the study being conducted by the Commission, this Recommendation would not be complete without some discussion of the various systems used in other jurisdictions, and of the issues raised. However, the Commission believes that any recommendation for a different line of succession in New York, or for a different system for selecting a new Lieutenant Governor, should come from the Legislature. Notwithstanding this, specific language has been provided (see, Appendix C, infra) to amend the resolution recommended by this Commission (infra) if the Legislature chooses to combine the Commission's proposed Constitutional amendments, which would delete the term "absent from the state" from the Constitution and insert a procedure for determining gubernatorial inability, with a new amendment to change the method for selecting an individual to fill the Office of Lieutenant Governor, should that office alone be vacant.

**Recommendation**

For reasons discussed hereinbefore, the Commission recommends that the Constitution be amended to delete the provision regarding the absence of the Governor from the State and to add a procedure for determining gubernatorial inability. It also recommends a conforming amendment to the Constitution to permit such determination to be made by the Court of Appeals.

The procedure for declaration of gubernatorial inability, as proposed by the Commission, would contain a process for a voluntary declaration by the incumbent, to be made to the Chief Judge of the Court of Appeals, the Lieutenant Governor, the Temporary President of the Senate, the Speaker of the Assembly, the minority leader of the Senate and the minority leader of the Assembly. This is a simplified process that allows the incumbent to declare, in writing, his or her own inability to discharge the powers and duties of the Office of Governor and to resume such powers and duties upon a subsequent written declaration that the inability has ended.

Absent a voluntary declaration, the procedure for an involuntary declaration of inability (as proposed) would be initiated by a written declaration by the Lieutenant Governor, the Temporary President of the Senate, the Speaker of the Assembly, the minority leader of the Senate and the minority leader of the Assembly, acting unanimously, transmitted to the Chief Judge of the Court of Appeals. The Chief Judge, upon notice to the incumbent Governor, would convene the Court of Appeals for the purpose of adjudicating the ability or inability of the Governor to discharge the powers and duties of the office of Governor, unless the Governor transmits to the Chief Judge his written declaration of inability. If such declaration is not forthcoming, or if the Governor declares that no inability exists, the Court

35. I.e., amendments to sections 5 and 6 of article IV, plus a conforming amendment to section 3 of article VI.

36. I.e., an amendment to section 6 of article IV only.

37. Under the Commission's proposed amendment, this declaration must contain the reason or reasons they believe the Governor is unable to govern.

38. It is believed that if personal service can not be effectuated upon the Governor, delivery of such notice to the office of the Governor plus the mailing of a copy to the Governor's residence should constitute adequate notice (see, CPLR 308 [subd 3]).

39. If the Governor prior to an adjudication of inability declares his or her inability, resumption of the powers and duties of the office of Governor may be accomplished by a subsequent written declaration, transmitted to the Chief Judge, the Lieutenant Governor, the Temporary President of the Senate, the Speaker of the Assembly and the minority leaders of both Houses of the Legislature, that the inability has ceased.
would have to consider the issue as controverted and provide for a speedy adjudication of the issue under rules of procedure the Court would have previously promulgated and published. Upon an adjudication that the Governor is unable to discharge the powers and duties of his office, the Lieutenant Governor would become acting Governor pursuant to the existing provisions of section 3 of article IV of the Constitution.

After an adjudication of gubernatorial inability, the Governor would resume the powers and duties of the office of Governor upon a written declaration, transmitted to the Chief Judge, by the Lieutenant Governor (acting Governor), the Temporary President of the Senate, the Speaker of the Assembly, the minority leader of the Senate and the minority leader of the Assembly that, in their unanimous opinion, the inability has ceased. Absent such a declaration, the Governor would have to wait at least thirty days after the adjudication before initiating a procedure to recover the powers and duties of the office of Governor. To initiate such procedure, the Governor would transmit to the Chief Judge a written declaration that no inability exists or that it has ceased. The Chief Judge, upon notice to the Lieutenant Governor (acting Governor) and to the majority and minority leaders of the Legislature, would then reconvene the Court of Appeals for the purpose of determining whether the inability has ceased.

If, for any reason, there is a vacancy in the Office of Lieutenant Governor, Temporary President of the Senate, Speaker of the Assembly, minority leader of the Senate or minority leader of the Assembly at a time the Governor is believed to be unable to govern, the procedure recommended above would proceed upon the unanimous declaration of the remaining four officials.

The Commission recognizes that there is no procedure under the New York Constitution for determining inability of a Lieutenant Governor or of any other state-wide elected official. The Commission believes, however, that it is too impractical and cumbersome to attempt to deal with every contingency in one legislative proposal, but that the most significant problems, or potential problems, are dealt with here.

The Commission therefore recommends that there be a Concurrent Resolution of the Senate and Assembly proposing an amendment to sections 5 and 6 of article IV of the Constitution, in relation to when the Lieutenant Governor is to act as Governor and to subdivision b of section 3 of article VI, in relation to the jurisdiction of the Court of Appeals in matters of gubernatorial inability.

I. Resolved (if the Senate/Assembly concur), that section five of article four of the constitution be amended to read as follows:

§5. In case of the removal of the governor from office or of his death or resignation, the lieutenant-governor shall become governor for the remainder of the term.

In case the governor-elect shall decline to serve or shall die, the lieutenant-governor-elect shall become governor for the full term.

In case the governor is impeached, is absent from the state or is otherwise unable to discharge the powers and duties of his office, the lieutenant-governor shall act as governor until the inability shall cease or until the term of the governor shall expire.

In case of the failure of the governor-elect to take the oath of office at the commencement of his term, the lieutenant-governor-elect shall act as governor until the governor shall take the oath.
Whenever the governor transmits to the chief judge of the court of appeals, the lieutenant-governor, the temporary president of the senate, the speaker of the assembly, the minority leader of the senate and the minority leader of the assembly his written declaration that he is unable to discharge the powers and duties of the office of governor, and until he thereafter transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the lieutenant-governor, or other person next in line of succession, as acting governor.

Whenever the lieutenant-governor, the temporary president of the senate, the speaker of the assembly, the minority leader of the senate and the minority leader of the assembly, acting unanimously, transmit to the chief judge of the court of appeals their written declaration that the governor is unable to discharge the powers and duties of the office of governor, together with the reasons for their declaration, the chief judge shall, upon due notice to the governor, convene the court for the purpose of determining the ability or inability of the governor to discharge the powers and duties of the office of governor. The court shall provide for a speedy adjudication of such matter under such rules of procedure as it shall have promulgated and published. However, if at any time prior to the final adjudication by the court, the governor transmits a written declaration of inability to the chief judge, lieutenant-governor, temporary president of the senate, speaker of the assembly, minority leader of the senate and minority leader of the assembly, all further procedure will be as provided in the paragraph immediately above.

After an adjudication of gubernatorial inability by the court of appeals, whenever the lieutenant-governor, temporary president of the senate, speaker of the assembly, minority leader of the senate and minority leader of the assembly, acting unanimously, transmit to the chief judge their written declaration that the inability has ceased, such declaration shall be conclusive. Absent such declaration, but no earlier than thirty days after an adjudication of gubernatorial inability by the court of appeals, whenever the governor transmits to the chief judge his written declaration that no inability exists, the chief judge shall, upon due notice to the lieutenant-governor, the temporary president of the senate, the speaker of the assembly, the minority leader of the senate and the minority leader of the assembly, reconvene the court for the purpose of determining whether the inability has ceased.

If there is a vacancy in the office of lieutenant-governor, temporary president of the senate, speaker of the assembly, minority leader of the senate or minority leader of the assembly, the procedure set forth above for determining the ability or inability of the governor to discharge the powers and duties of the office of governor shall proceed with the unanimous declaration of the remaining four officers.

II. Resolved (if the Senate/Assembly concur), That section six of article four of the constitution be amended to read as follows:

§6. The lieutenant-governor shall possess the same qualifications of eligibility for office as the governor. He shall be the president of the senate but shall have only a casting vote therein. The lieutenant-governor shall receive for his services an annual salary to be fixed by joint resolution of the senate and assembly.
In case of vacancy in the offices of both governor and lieutenant-governor, a governor and lieutenant-governor shall be elected for the remainder of the term at the next general election happening not less than three months after both offices shall have become vacant. No election of a lieutenant-governor shall be held in any event except at the time of electing a governor.

In case of vacancy in the offices of both governor and lieutenant-governor or if both of them shall be impeached, absent from the state, or otherwise unable to discharge the powers and duties of the office of governor, the temporary president of the senate shall act as governor until the inability shall cease or until a governor shall be elected.

In case of vacancy in the office of lieutenant-governor alone, or if the lieutenant-governor shall be impeached, absent from the state, or otherwise unable to discharge the duties of his office, the temporary president of the senate shall perform all the duties of lieutenant-governor during such vacancy or inability.

If, when the duty of acting as governor devolves upon the temporary president of the senate, there be a vacancy in such office or the temporary president of the senate shall be absent from the state or otherwise unable to discharge the duties of governor, the speaker of the assembly shall act as governor during such vacancy or inability.

The legislature may provide for the devolution of the duty of acting as governor in any case not provided for in this article.

III. Resolved (if the Senate/Assembly concur), That subdivision b of section three of article six of the constitution be amended by adding a new paragraph ten 40 to read as follows:

(10) The court of appeals shall have original and exclusive jurisdiction to determine all questions of gubernatorial inability as provided under article four of this constitution and shall promulgate and publish rules of procedure to govern such adjudications. The determination of gubernatorial inability shall have preference and priority over all other matters.

IV. RESOLVED (if the Senate/Assembly concur), that the foregoing amendments be referred to the first regular legislative session convening after the next succeeding general election of members of the Senate and Assembly and, in conformity with section one of article nineteen of the constitution, be published for three months previous to the time of such election.


40. See 1984 Assembly Bill No. 8860.
SUMMARIES OF STATE PROVISIONS FOR DECLARATION OF INABILITY

Alabama Const art V §128: The Supreme Court of Alabama

Upon request in writing by any two officers in line of succession, but not including the next in succession to the Office of Governor, and an adjudication by the Supreme Court. The line of succession is as follows: Lieutenant governor, president pro tem. of the Senate, speaker of the House of Representatives, attorney-general, state auditor, secretary of state and state treasurer.

Restoration of the powers and duties of the office is determined upon request of any one of the above officers or the governor and an adjudication by the Supreme Court.

The Supreme Court shall prescribe the rules.

Alaska Const art III §17: Unknown

[Procedure for absence and disability prescribed by law. No law enacted to date of this research]

California Const art V §10: Unknown

"Standing to raise question of vacancy or temporary disability vested exclusively in body to be provided by statute." Statute (California Government §§12750 through 12758) enacted by the legislature, sent to the voters for referendum and rejected by the voters. Statute is now inoperative. Therefore, California has no procedure.

Colorado Const art IV §13(c): The Supreme Court of Colorado

By voluntary declaration in writing to the President of the Senate and Speaker of the House of Representatives.

Upon a joint resolution adopted by two-thirds of the members of each house of the General Assembly requesting a hearing, disability shall be determined by a majority of the Supreme Court. Upon its own initiative, the Supreme Court shall determine if and when disability ceases.

Connecticut Const [P.A. 84-35]*: Council on Gubernatorial Incapacity

Upon a written declaration of the Lieutenant Governor or a majority of the members of the "Council" (composed of: Chief Justice of the Supreme Court [Chrm.], President pro tempore of the Senate, Speaker of the House of Representatives, Minority Leader of the Senate, Minority Leader of the House, and four persons appointed by the Governor), the "Council" convenes. A hearing is conducted by the "Council" which shall determine whether the Governor is unable to exercise the powers and perform the duties of his office by a two-thirds vote. If so determined, the Lieutenant Governor becomes acting Governor. [No procedure for restoration is provided.]

* Referendum passed November 1984.
Illinois (continued):

By voluntary written declaration transmitted to the President pro tem of the Senate and the Speaker of the House of Representatives. Restoration is by like declaration.

Upon the filing by the President pro tem of the Senate and the Speaker of the House with the Supreme Court a written statement, the Supreme Court shall meet with 48 hours to decide the question and such decision shall be final. Thereafter, whenever the Governor files with the Supreme Court his written declaration that no inability exists, the Supreme Court shall meet within 48 hours to decide, and such decision shall be final.

Indiana Const art V §10 (1973): The Supreme Court of Indiana

By voluntary written declaration transmitted to the President pro tempore of the Senate and the Speaker of the House of Representatives. Restoration is by like declaration.

Upon the filing by the President pro tem of the Senate and the Speaker of the House with the Supreme Court a written statement, the Supreme Court shall meet within 48 hours to decide the question and such decision shall be final. Thereafter, whenever the Governor files with the Supreme Court his written declaration that no inability exists, the Supreme Court shall meet within 48 hours to decide, and such decision shall be final.

Iowa Const art IV: [No Procedure Provided under the Constitution]

Iowa Statutes §7.14: A "Conference" *

When it appears the Governor is unable to discharge the duties of his office, the "person next in line of succession" [Lieutenant Governor] or the Chief Justice may call a "conference" consisting of the Chief Justice, Director of Mental Health and Dean of Medicine at the State University of Iowa, to examine the Governor. After the examination, or if unable to do so for reasons beyond their control, they may find temporary inability by unanimous vote (secret ballot).

Restoration is by "conference", initiated by the Governor, using the same procedure.

Kansas Const art I § 11 (1972): Unknown

"The procedure for determining disability and the removal thereof shall be provided by law." [No law has been enacted to date of this research]

Louisiana Const art IV § 17 & § 18 (1974): The Supreme Court of Louisiana

By voluntary written declaration transmitted to the presiding officers of the Senate and House of Representatives. Restoration is by like declaration.

Upon written declaration by a majority of the "statewide elected officials" to the presiding officer of each house and to the incumbent official, a copy of which is filed in the office of the Secretary of State, the constitutional successor takes office as acting official unless within 48 hours this is contested by counter-declaration of the official transmitted to the presiding officer of each house.

* Without authorization by the Iowa Constitution.
Louisiana (continued):

If contested above, upon resolution adopted by two-thirds of the elected members of each house of the Legislature that probable justification exists for the declaration of inability, the powers and duties of office are assumed by successor and copy of the resolution is transmitted to the Supreme Court. The Supreme Court shall determine the issue of inability, after due notice and hearing, by a majority vote of members elected to the Court, under such rules as it may adopt.

Maine Const art V §14 (1975): Supreme Judicial Court of Maine

By voluntary certification by the incumbent to the Chief Justice that he is unable to discharge the powers and duties of his office. Restoration is by like certification.

Upon certification by the Secretary of State to the Supreme Judicial Court, notice, hearing before the Court and a decision by a majority of the Court. Restoration is by the same means except that the Governor may also initiate the process by certifying to the Court.

Maryland Const art II §6 (1970): The Maryland Court of Appeals

By voluntary written notice to the Lieutenant Governor. Restoration is by like notice.

Upon a resolution by the General Assembly, adopted by vote of three-fifths of all its members in joint session, delivered to the Court of Appeals, the Court shall then have exclusive jurisdiction to determine the disability of the Governor and when the disability is terminated.

Michigan Const art V §26: The Supreme Court of Michigan

Upon a determination by a majority of the Supreme Court on joint request of the President pro tempore of the Senate and the Speaker of the House of Representatives. The Court upon its own initiative shall determine if and when the inability ceases.

Mississippi Const art V §131: The Supreme Court of Mississippi

Upon submission by the Secretary of State the question of disability (or of a vacancy) to the Supreme Court, it shall be determined, after investigation, by majority vote and an opinion furnished to the Secretary of State. Restoration is done in the same manner.

Missouri Const art IV §11(b) (1968): The Supreme Court of Missouri

By voluntary transmission of a written declaration to the President pro tempore of the Senate and the Speaker of the House of Representatives. Restoration is by like declaration.

Upon transmission, by a majority of the disability board (comprised of the Lieutenant Governor, Secretary of State, State Auditor, State Treasurer, Attorney General, President pro temp of the Senate, Speaker of the House, and the majority floor leaders of the Senate and of the House), of their written declaration that the

APPENDIX A

Missouri (continued):

Governor is unable to discharge the powers and duties of his office, the Lieutenant Governor immediately assumes . . . as acting Governor. Thereafter when the Governor transmits to the disability board his written declaration that no inability exists, he resumes office 4 days after transmission unless during those 4 days a majority of the disability board transmits to the Supreme Court their written declaration . . . . The Supreme Court (w/l 21 days) determines the issue by majority vote of all members . . . otherwise the Governor resumes office.

Montana Const art VI §14: The Legislature

Upon transmission by the Lieutenant Governor and the Attorney General their written declaration to the Legislature that the Governor is unable to discharge the powers and duties . . ., the Legislature shall convene to determine the issue (w/l 21 days) by two-thirds vote of its members. Restoration by written declaration by the Governor to the Legislature, resume office in 15 days unless Legislature, by two-thirds vote, determines otherwise.

Nebraska Const art IV §18: [No Procedure Provided under the Constitution]

Nebraska Statutes §584-127 and 84-128: A "Conference" *

The next in line of succession or Dean of the College of Medicine of the U. of Nebraska Medical Center may call a conference consisting of said Dean, the Director of the Nebraska Psychiatric Institute and a dean of an accredited college of medicine located in Nebraska selected by the other two members. The three members of the conference shall examine the Governor unless unable to for reasons beyond their control and may find him temporarily unable by unanimous vote under secret ballot. Upon notification, the next in line of succession assumes office.

Restoration: Governor calls the same conference into session, who examine the Governor and by unanimous vote (secret ballot) may find the disability removed.

New Jersey Const art V §1 4:8: The Supreme Court of New Jersey

Vacancy due to continuous absence from the State or by continuous inability to discharge the duties of office by reason of mental or physical disability shall be determined by the Supreme Court upon presentment to it of a concurrent resolution adopted by a vote of two-thirds of all members of each house of the Legislature, and upon notice, hearing before the Court and proof . . . .

North Carolina Const art III §3: The General Assembly (Legislature)

Physical Incapacity: By voluntary written statement filed with the Attorney General. Restoration by the same manner.

Mental Incapacity: Only by joint resolution adopted by a vote of two-thirds of all the members of each house of the General Assembly. Restoration by joint resolution adopted by vote of a majority.

* Without authorization by the Nebraska Constitution.

APPENDIX A
Ohio Const art III §22 (1976): The Supreme Court of Ohio

Upon presentation to the Supreme Court of a joint resolution by the General Assembly adopted by a two-thirds vote of the members elected to each house, the Supreme Court shall give notice to Governor and after a public hearing shall determine the question of disability (w/1 21 days). Restoration is by written declaration of the Governor transmitted to the Supreme Court that disability no longer exists, and Supreme Court-held public hearing and determination.

Supreme Court has original, exclusive, and final jurisdiction to determine disability of the Governor (or Gov.-elect) and all questions concerning succession to the office of the Governor or to its powers and duties.

Oregon Const art V §7: [No Procedure Provided under the Constitution]

Oregon Statute: A "Conference" *

Same as the statute of Nebraska except that the Conference shall consist of the Chairperson of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court of Oregon, Chief Medical Officer of the State Hospital in Salem, and the Dean of the University of Oregon Health Services Center, and is convened by the Governor in case of disability of the Chief Justice of the Supreme Court of Oregon.

Pennsylvania Const art IV: [No Procedure Provided under the Constitution]

Statute 71 P.A. §784.1 et seq.: The General Assembly (Legislature) *

By written, voluntary declaration to the General Assembly (Legislature), until the Governor transmits a written declaration to the contrary.

Upon written declaration by the Lieutenant Governor and a majority of the Governor's Cabinet to the General Assembly, and the Lieutenant Governor shall resign his duties as Governor, unless Governor of the Cabinet Governor of the Governor, unless Lieutenant (acting) Governor, and a majority of the Cabinet Governor's Cabinet. If declared by the Governor of the Legislature that Governor is unable to discharge the powers and duties. The Lieutenant Governor continues as acting Governor.

South Carolina Const art IV §12 (1973): The General Assembly (Legislature)

By voluntary transmittal of written declaration to the President pro tempore of the Senate and the Speaker of the House of Representatives. Restoration by like method.

Upon transmittal by a majority of the Attorney General, Secretary of State, Comptroller General and State Treasurer, or other body as the General Assembly

* Without authorization by the Oregon or Pennsylvania Constitutions.

APPENDIX A

South Carolina (continued):

may provide, to the President pro tem and Speaker that the Governor is unable to discharge the powers and duties of his office, the Lieutenant Governor assumes... as acting Governor.

Thereafter, if Governor transmits written declaration of inability to President pro tem and Speaker, he resumes duties... unless majority, as above, transmits (w/1 4 days) written declaration to the contrary, in which case the General Assembly considers and decides the issue, needing a two-thirds vote to find disability.

South Dakota Const art IV §6 (1972): The Supreme Court of South Dakota

"The Supreme Court shall have original and exclusive jurisdiction to determine when a continuous absence from the state or disability has occurred in the office of the Governor or a permanent vacancy exists in the office of lieutenant governor."

Utah Const VII §11 (1980): The Supreme Court of Utah

By voluntary written declaration to the Supreme Court. By a majority of the Supreme Court on joint request of the President of the Senate and the Speaker of the House of Representatives. Restoration by written declaration of ability by the Governor to the Supreme Court unless the Supreme Court, upon joint request by the President of the Senate and Speaker of the House, or upon its own initiative, determines inability still exists.

Virginia Const art V §16: The General Assembly (Legislature)

By voluntary written declaration transmitted to the President pro tempore of the Senate and the Speaker of the House of Delegates. Restoration by like declaration.

Upon declaration by the Attorney General, the President pro tem and the Speaker, or a majority of the total membership of the General Assembly, transmitted to the Governor of the Senate and the Clerk of the House, that Governor is unable to discharge powers and duties of his office. The Lieutenant Governor immediately assumes... as acting Governor.

Thereafter, when the Governor transmits his written declaration that no inability exists to the Clerk of the Senate and the Clerk of the House, he resumes... unless controverted by some persons as above (w/1 4 days). The General Assembly must decide (w/1 21 days) by a three-fourths vote of the elected membership of each house that Governor is unable... (Lieutenant Governor becomes Governor)... or Governor resumes office.

Wisconsin Const art V: [No Procedure Provided under the Constitution]

Wisconsin Statutes $14.015 and $17.025: A "Disability Board" *

By voluntary petition filed with any member of the "Disability Board" (composed of the Governor in case of absence or "disability" of the Governor, the

* Without authorization by the Wisconsin Constitution.
Wisconsin (continued):

Lieutenant Governor acts instead, the Chief Justice, the Speaker of the Assembly, the President pro tempore of the Senate, the Minority Leader of the Senate, the Majority Leader of the Assembly, the Minority Leader of the Senate and the Dean of the University of Wisconsin Medical School), and a hearing.

By petition signed by any four members of the Disability Board (but must include at least one member of each political party represented on the Board) and after a hearing conducted by the Board. Six members is a quorum and a finding of disability must be by six affirmative "secret" votes. A written certificate of temporary incapacity is filed in the office of the Secretary of State.

Restoration of office is by rehearing initiated in the same manner and having the same procedure but not before three months have passed since the conclusion of the last hearing.

SUMMARY OF WHAT GROUPS MAKE THE FINAL DETERMINATION OF INABILITY

Under State Constitutions:

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<th>Group</th>
<th>1st</th>
<th>2nd</th>
<th>3rd</th>
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<tbody>
<tr>
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<tr>
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<tr>
<td>Unknown (Legislative failure to act)</td>
<td>3</td>
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<tr>
<td>Not Mentioned in Constitution</td>
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Under State Statutes [but without constitutional authorization]:

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<th>Group</th>
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<td>Legislature of State</td>
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<td>Council, Board or Conference</td>
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a In five states, if a vacancy exists in the Office of Lieutenant Governor, the incumbent Governor shall appoint a new Lieutenant Governor who, upon being confirmed by the legislature, would then be next in line to succeed should a vacancy occur in the Office of Governor (until the next general election). In another state, if a vacancy exists in the Office of Lieutenant Governor, a new Lieutenant Governor is elected by the State Legislature.
PROPOSED AMENDMENT TO THE RESOLUTION
RELATING TO GUBERNATORIAL INABILITY AND SUCCESSION
(IF OPTED BY THE LEGISLATURE)

Relating to a New Procedure for Selecting a Lieutenant Governor
Where there is a Vacancy in that Office Alone

Section 1. Resolved (if the Senate/Assembly concur), that section five of article four of the constitution be amended to read as follows:

$5. In case of the removal of the governor from office or of his death or resignation, the lieutenant-governor shall become governor for the remainder of the term.

In case the governor-elect shall decline to serve or shall die, the lieutenant-governor-elect shall become governor for the full term.

In case the governor is impeached, is absent from the state or is otherwise unable to discharge the powers and duties of his office, the lieutenant-governor shall act as governor until the inability shall cease or until the term of the governor shall expire.

In case of the failure of the governor-elect to take the oath of office at the commencement of his term, the lieutenant-governor-elect shall act as governor until the governor shall take the oath.

Whenever the governor transmits to the chief judge of the court of appeals, the lieutenant-governor, the temporary president of the senate, the speaker of the assembly, the minority leader of the senate and the minority leader of the assembly his written declaration that he is unable to discharge the powers and duties of the office of governor, and until he thereafter transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the lieutenant-governor, or other person next in line of succession, as acting governor.

Whenever the lieutenant-governor, the temporary president of the senate, the speaker of the assembly, the minority leader of the senate and the minority leader of the assembly, acting unanimously, transmit to the chief judge of the court of appeals their written declaration that the governor is unable to discharge the powers and duties of the office of governor, together with the reasons for their declaration, the chief judge shall, upon due notice to the governor, convene the court for the purpose of determining the ability or inability of the governor to discharge the powers and duties of the office of governor. The court shall provide for a speedy adjudication of such matter under such rules of procedure as it shall have promulgated and published.

However, if at any time prior to the final adjudication by the court, the governor transmits a written declaration of inability to the chief judge, lieutenant-governor, temporary president of the senate, speaker of the assembly, minority leader of the senate and minority leader of the assembly, all further procedure will be as provided in the paragraph immediately above.

After an adjudication of gubernatorial inability by the court of appeals, whenever the lieutenant-governor, temporary president of the senate, speaker of the assembly, minority leader of the senate and minority leader of the assembly, acting unanimously, transmit to the chief judge their written declaration that the inability has ceased, such declaration shall be conclusive.

Absent such declaration, but no earlier than thirty days after an adjudication of gubernatorial inability by the court of appeals, whenever the governor

APPENDIX C
transmits to the chief judge his written declaration that no inability exists, the chief judge shall, upon due notice to the lieutenant-governor, the temporary president of the senate, the speaker of the assembly, the minority leader of the senate and the minority leader of the assembly, reconvene the court for the purpose of determining whether the inability has ceased.

If there is a vacancy in the office of lieutenant-governor, temporary president of the senate, speaker of the assembly, minority leader of the senate or minority leader of the assembly, the procedure set forth above for determining the ability or inability of the governor to discharge the powers and duties of the office of governor shall proceed with the unanimous declaration of the remaining four officers.

§ 2. Resolved (if the Senate/Assembly concur), That section six of article four of the constitution be amended to read as follows:

§ 6. The lieutenant-governor shall possess the same qualifications of eligibility for office as the governor. He shall be the president of the senate but shall have only a casting vote therein. The lieutenant-governor shall receive for his services an annual salary to be fixed by joint resolution of the senate and assembly.

In case of vacancy in the offices of both governor and lieutenant-governor or if both of them shall be impeached [absent from the state or otherwise] unable to discharge the powers and duties of the office of governor, the temporary president of the senate shall act as governor until the inability shall cease or until a governor shall be elected.

In case of vacancy in the office of lieutenant-governor alone, or if the lieutenant-governor shall be impeached [absent from the state or otherwise] unable to discharge the duties of his office, the temporary president of the senate shall perform all the duties of lieutenant-governor during such vacancy or inability.

In case of a vacancy in the office of lieutenant-governor alone, or if the lieutenant-governor shall be impeached, the governor shall nominate a lieutenant-governor who shall take office for the remainder of the term upon confirmation by a majority vote in each house of the legislature of the members present, assuming the presence of a quorum.

If, when the duty of acting as governor devolves upon the temporary president of the senate, there be a vacancy in such office or the temporary president of the senate shall be [absent from the state or otherwise] unable to discharge the duties of governor, the speaker of the assembly shall act as governor during such vacancy or inability.

The legislature may provide for the devolution of the duty of acting as governor in any case not provided for in this article.

§ 3. Resolved (if the Senate/Assembly concur), That subdivision b of section three of article six of the constitution be amended by adding a new paragraph ten to read as follows:

APPENDIX C
(10) The court of appeals shall have original and exclusive jurisdiction to determine all questions of gubernatorial inability as provided under article four of this constitution and shall promulgate and publish rules of procedure to govern such adjudications. The determination of gubernatorial inability shall have preference and priority over all other matters.

§4. RESOLVED (if the Senate/Assembly concur), that the foregoing amendments be referred to the first regular legislative session convening after the next succeeding general election of members of the Senate and Assembly and, in conformity with section one of article nineteen of the constitution, be published for three months previous to the time of such election.
LEGISLATIVE DOCUMENT (1985)

STATE OF NEW YORK

REPORT
of the
LAW REVISION COMMISSION
for 1985

CAROLYN GENTILE, CHAIRWOMAN

JUDAH GRIBETZ
JOHN D. FERRICK
KALMAN FINNIE
PAUL A. VICTOR

JOHN R. DUNNE, ex officio
SAUL WEPRIN, ex officio
RONALD B. STAFFORD, ex officio
MELVIN H. MILLER, ex officio

KENNETH F. JOYCE
Executive Director

JAY COX O'BRIEN
Assistant Executive Director

ROBERT E. LYNCH
Secretary-Counsel
STATE OF NEW YORK

REPORT
of the
LAW REVISION COMMISSION
for 1989

CAROLYN GENTILE, CHAIRWOMAN

KALMAN FINKEL
ALBERT J. ROSENTHAL
ROBERT M. PITLER

JOHN R. DUNNE, ex officio
G. OLIVER KOPPELL, ex officio
DALE M. VOLKER, ex officio
SHELDON SILVER, ex officio

KENNETH F. JOYCE
Executive Director

JAY COX O'BRIEN
Assistant Executive Director
Memorandum of the Law Revision Commission

Relating to Filling a Vacancy in the Office of Lieutenant Governor

Purpose of the Bill (Resolution):

To establish procedures under section 6 of article IV of the Constitution for filling a vacancy in the office of Lieutenant Governor.

Summary of the Provisions of the Bill (Resolution):

This resolution would provide that a vacancy in the office of the Lieutenant Governor would be filled by a person nominated by the Governor and confirmed by concurrent resolution of both Houses of the Legislature, if a majority of all members elected to each House concur therein.

Statement in Support of the Bill (Resolution):

Under the present provisions of the Constitution there is no procedure for selecting a new Lieutenant Governor when a vacancy occurs in that office. If such a vacancy does occur the Constitution provides that the Temporary President of the Senate shall perform all the duties of the Lieutenant Governor during such vacancy, i.e., until another Lieutenant Governor is elected. The Commission believes that the present Constitutional arrangement is inadequate for several reasons. First, the Temporary President of the Senate already has substantial responsibilities as a legislative leader. Secondly, if the Temporary President of the Senate is of a different political party from the Governor it would be difficult for such person to fulfill the role contemplated for a Lieutenant Governor who is jointly elected with the Governor. Thirdly, even if the Temporary President is of the same political party as the Governor, there would be limited opportunity for a Governor to delegate administrative tasks to a legislative leader serving simultaneously as Lieutenant Governor. Indeed, many of the duties of the Lieutenant Governor are executive in nature and it would seem unwise from the standpoint of separation of powers and checks and balances to have such an intermingling of executive and legislative functions. Finally, from a succession standpoint, it would appear that the principle of continuity of administration and policy is better served by a system which allows the party in control of the Executive branch to remain there until the people choose a new Governor and Lieutenant Governor. This is the philosophy which is embraced in the 25th Amendment to the United States Constitution and which was recognized in New York State by the adoption of the requirement of a joint election for Governor and Lieutenant Governor.

Budget Implications:

None

Effective Date:

When approved

RECOMMENDATION OF THE LAW REVISION COMMISSION
TO THE 1989 LEGISLATURE

Relating to Filling a Vacancy in the Office of Lieutenant Governor

I. Introduction

In 1986 and 1987, the Law Revision Commission recommended to the Legislature that section 6 of article IV of the Constitution be amended to establish a procedure for filling a vacancy in the office of Lieutenant Governor. Specifically, the Commission recommended that a vacancy be filled by a person nominated by the Governor and confirmed by concurrent resolution of both Houses of the Legislature, if a majority of all members elected to each House concur therein. These 1986 and 1987 proposals were made as part of a broader Commission recommendation which also dealt with gubernatorial inability and absence from the state.

In 1986 the Commission’s combined proposals passed the Assembly and advanced to third reading in the Senate. However, an impasse developed when the Senate amended the Assembly bill to provide that the nominee of the Governor to fill the vacancy in the office of Lieutenant Governor be confirmed by a vote of the Senate alone. In 1987 the Commission resubmitted its 1986 proposals but the Legislature again failed to agree on the method of filling a vacancy in the office of the Lieutenant Governor.

In light of the legislative disagreement concerning the method of filling a vacancy in the office of Lieutenant Governor the Commission in 1988 decided to sever its proposal on that issue from its proposals dealing with gubernatorial inability and absence from the state. The Commission concluded that there is no reason for a disagreement over a vacancy in the office of Lieutenant Governor to interfere with the solution of the distinct problems of gubernatorial inability and
absence from the state. The Commission has reaffirmed its conclusions in both of the above respects.

The remainder of this Recommendation, therefore, deals only with the method of filling a vacancy in the office of Lieutenant Governor. A separate Recommendation will be submitted dealing only with gubernatorial inability and absence from the state.

II. History of the Office of Lieutenant Governor

The office of Lieutenant Governor has a long history in New York. Research discloses that when the Dutch controlled New York (then New Amsterdam), the chief executive was a Director General appointed by the Dutch West India Company and he had a Vice Director whose commission provided that he was to fill the Director's place "in the absence of the said Director." When New York became a royal colony there was a Lieutenant Governor who, like the Governor, was commissioned by the Crown. "[A]lthough the lieutenant governor was appointed by the Crown, he might be suspended by the governor, who was authorized to appoint another in his place pending a royal appointment."¹ His primary function was to act as governor during the governor's absence or, in case of death of the governor, until a new governor was appointed. The colonial period in New York and elsewhere is filled with instances of lieutenant governors acting as governor when governors were absent from their colonies, resigned, were removed, or died.

The New York State Constitution of 1777 continued the office of Lieutenant Governor, providing that if the Governor were impeached, died, resigned or was absent from the state, the Lieutenant Governor would exercise the authority of governor until either another governor was chosen, the absent governor returned

¹  IV, Lincoln, Constitutional History of New York, 492 (hereinafter cited as "Lincoln").
or the impeached governor was acquitted. The Constitution further provided that the Lieutenant Governor:

... shall, at every election of a governor, and as often as the lieutenant governor shall die, resign, or be removed from office, be elected in the same manner with the governor, to continue in office until the next election of the governor ...

The provision calling for a special election of a Lieutenant Governor whenever there was a vacancy in the office was used in 1811 to elect DeWitt Clinton as Lieutenant Governor upon the death of Lieutenant Governor John Broome.

The New York State Constitution of 1821 eliminated the provision for a special election and provided instead that "the senate shall choose a temporary president, when the lieutenant governor shall not attend as president, or shall act as governor."² In addition, "[i]f, during a vacancy in the office of governor, the lieutenant governor shall be impeached, displaced, resign, die, or be absent from the state, the president of the senate shall act as governor until the vacancy shall be filled, or the disability shall cease."³

In the New York Constitutional Convention of 1846, "[t]he proposition to abolish the office of lieutenant governor found some favor, its advocates urging that the office was unnecessary, and that a large majority of the other states of the Union did not have such an office. The proposition was defeated ...".⁴ The Constitution of 1846 continued the office and, for the most part, the provisions of the 1821 Constitution relating to it. The inability of the Governor was added as a case where the Lieutenant Governor would serve as Governor. In addition, article X, section 5 of the Constitution stated that "[t]he legislature shall provide for filling

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2. Art. I §3.
4. Il, Lincoln, 135.
vacancies in office . . .". Thus, in 1847, when Lieutenant Governor Addison Gardiner was elected to the Court of Appeals, Hamilton Fish was elected Lieutenant Governor to fill the vacancy under an act passed in September of that year. The view which prevailed at the time was that the Temporary President of the Senate did not succeed to the office of Lieutenant Governor under the Constitution of 1846 and hence an election was required.

The New York State Constitution of 1894 made no changes with respect to the office of Lieutenant Governor but it added the Speaker of the Assembly to the line of gubernatorial succession.

At the New York State Constitutional Convention of 1915, two proposals were made concerning the office. One provided "that a vacancy in the office of lieutenant governor, occurring three months or more before a general election, shall be filled at that election." The other provided that "[i]f the lieutenant governor becomes governor, the temporary president shall become lieutenant governor for the residue of the term. If the lieutenant governor be impeached or be unable to discharge the duties of the office or be acting governor, the temporary president shall act as lieutenant governor during such impeachment or inability or while the lieutenant governor is acting as governor." 5 Neither proposal was adopted.

Recommendations for the abolition of the office were made unsuccessfully again at the New York State Constitutional Convention of 1938. One proposal provided that "[i]f the governor shall die, resign or be removed from office at any time more than sixty days before the next to the last general election occurring within his term of office, his place shall be filled by election, for the balance of the unexpired term, at the next general election occurring at least sixty days after the

5. Revised Record of the 1915 Convention, p. 3736.
vacancy occurs." The president of the senate would be first in the line of succession and apparently would act as governor from the start of the vacancy until the new governor took office.

In 1943, filling a vacancy in the New York State office of Lieutenant Governor became a subject of national interest when Lieutenant Governor Thomas Wallace died in office while Governor Thomas Dewey was considering a run for the Presidency. The question of whether a special election was required to fill the vacancy was widely debated. It was of particular interest because of the possibility of an election resulting in the selection of a Democratic lieutenant governor to serve alongside a Republican governor who would have to vacate office if elected President. The Attorney General of New York ruled that no election need be held and a court case ensued. The New York courts, however, held that an election was required. "[A] vacancy in such an elective office should be filled at a general election as soon as possible. No other view is thoroughly consistent with the Democratic process." 6

As a result of this litigation, an election to fill the vacancy took place and the temporary Republican president of the Senate, Joe R. Hanley, was chosen as the new Lieutenant Governor. This incident led to a change in the New York State Constitution to eliminate any special election to fill a vacancy in the office of Lieutenant Governor alone. Subsequently, the Constitution was changed to provide that the Governor and Lieutenant Governor shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices. The purpose of the amendment was to avoid the situation of members of different parties serving in

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our state's two highest elective offices. As Governor Dewey noted in a message of February 9, 1953 to the Legislature:

Under our Constitution separate votes are cast for the Governor and Lieutenant Governor and it is possible to elect a Governor and Lieutenant Governor of opposing political parties. When this has occurred in the past, it has resulted in wholly unnecessary strife and divisiveness.

Executive responsibilities in our government are so interwoven that the election of a Governor and Lieutenant Governor politically opposed to each other involves serious problems. As a practical matter the Governor must encounter difficulty in leaving the State even for a short period and on pressing public business. This has created the greatest embarrassment in other states, to the damage of public confidence in government and the injury of the public interest.

Even more important, there is a great advantage in being able to entrust many of the complex administrative tasks of the Governor to an able Lieutenant Governor. I have done this repeatedly and with notable benefit to the people of the State. This would not have been possible if the Lieutenant Governor was required, as a matter of party loyalty, to lead the minority party.

* * * * *

It is notable that the joint election of Governor and Lieutenant Governor has been the pattern of the national government in the joint election of President and Vice President for 150 years. No one even makes the proposal that they be separated. The two offices should be joined here as in the nation.

Various proposals were advanced at the Constitutional Convention of 1967 for filling a vacancy in the office of Lieutenant Governor, including an appointment procedure similar to the one contained in the 25th Amendment. The provisions which were adopted and set forth in the proposed 1967 Constitution were substantially identical to the current provisions of article IV of the Constitution.  

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7. See Appendix "A".
B. Succession at the Federal Level

Article II, Section 1, Clause 6 of the United States Constitution provides for the Vice President to serve as President in the event of the death, resignation, removal or inability of the President. On nine occasions Vice Presidents have succeeded to the Presidency. In the case of death, resignation, removal or inability of both President and Vice President, this provision authorizes Congress to declare by law what officer of the United States shall act as President. Three such laws have been passed by Congress and none has ever been applied.

In 1792, Congress passed its first succession statute, which provided for the President pro tempore of the Senate and Speaker of the House of Representatives, respectively, to act as President until a disability be removed or a President shall be elected. Section 10 of the Act also provided that whenever the offices of President and Vice-President became vacant, the Secretary of State was to notify the Governor of every state that electors were to be appointed within thirty-four days prior to the first Wednesday of the ensuing December in the year next ensuing. If the term were to end in March, no election at all would take place.

In 1886, Congress passed a second succession statute, which removed the legislative officers from the line and added the heads of the Executive Departments, as follows: Secretary of State, Secretary of Treasury, Secretary of War, Attorney General, Postmaster General, Secretary of Navy and Secretary of Interior. One of the reasons for the law was that it would foster continuity of administration and policy.

In 1947, after the death of Franklin D. Roosevelt, Congress re-inserted the legislative leaders in the line of succession.

The 1947 law provides that "if, by reason of death, resignation, removal from office, inability, or failure to qualify, there is neither a President nor Vice President to discharge the powers and duties of the office of President then the Speaker
shall, upon his resignation as Speaker and as Representative in Congress, act as President." If there is no Speaker at the time, then the President pro tempore shall act as President, upon his resignation as President pro tempore and as Senator. If either the Speaker or President pro tempore acts, he does so until the end of the presidential term except in cases of failure to qualify or inability, in which cases he acts until a President or Vice-President qualifies or recovers from an inability. (If the President pro tempore acts, he cannot be replaced by a new Speaker.)

If there should be no Speaker or President pro tempore at the time of an emergency, then the line of succession runs to the highest on the following list who is not under a disability to discharge the powers and duties of the President: Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Postmaster General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor. A Cabinet officer automatically resigns his departmental position upon taking the presidential oath of office. He acts as President for the rest of the term or until a President, Vice-President, Speaker or President pro tempore is available. The 1947 law makes it clear that no one may act as President who does not have the constitutional requirements for the Presidency.

The impetus for the 1947 law was provided by President Harry S. Truman who, in a special message to Congress, stated:

Insofar as possible, the office of the President should be filled by an elective officer. There is no officer in our system of government, besides the President and Vice President, who has been elected by all the voters of the country.

The Speaker of the House of Representatives, who is elected in his own district, is also elected to be the presiding officer of the House by a vote of all the Representatives of all the people of the country. As a result, I believe that the Speaker is the official in the Federal Government, whose selection next to that of the President and Vice President, can be most accurately said to stem from the people themselves.
Following President Kennedy's death in 1963, Congress proposed and the states ratified the 25th Amendment to the Constitution. In addition to its provisions on presidential inability, it established a procedure for filling a vacancy in the Vice Presidency, as follows: "Whenever there is a vacancy in the office of the Vice-President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress."

Among the arguments advanced in favor of the procedure were that a Vice President, who would be of the same party and presumably of compatible temperament with the President, would be in the best position to succeed to the Presidency and insure the needed continuity of government. This position appears to be sustained by its successful application in 1973 (to appoint Gerald Ford) and in 1974 (to appoint Nelson Rockefeller).

III. Filling a Vacancy in the Office of Lieutenant Governor - Alternatives

In approaching the issue of filling a vacancy in the office of Lieutenant Governor, it may be asked whether there is a need for change. During the past 200 years of New York State history, there has never been a time when the offices of Governor and Lieutenant Governor have become vacant at the same time. There have been gubernatorial resignations, a death in office and a case of removal, resulting in the succession of the Lieutenant Governor and the creation of a vacancy in that office. There also have been deaths and resignations of lieutenant governors.

It can be argued that the present constitutional provisions are adequate to handle the infrequent occurrence of these contingencies. Under these provisions, the Temporary President of the Senate, who is one of the principal leaders in state government, would assume the duties of Lieutenant Governor and, if a vacancy
subsequently developed in the office of Governor, would serve as Governor pending a new election to fill both offices.

However, it can also be argued that this arrangement is not adequate inasmuch as the Temporary President of the Senate already has substantial responsibilities as legislative leader and may be of a different political party from the Governor. It would not be likely under such circumstances for a Temporary President of the Senate or a Speaker of the Assembly to play the kind of role contemplated for a Lieutenant Governor who is jointly elected with the Governor. There would be limited opportunity for a Governor to delegate administrative tasks to a legislative leader serving simultaneously as Lieutenant Governor. Many of these functions could only be performed by a member of the Executive Branch. Moreover, it would seem unwise from the standpoint of separation of powers and checks and balances to have such an intermingling of executive and legislative functions.

From a succession standpoint, it can be argued that the principle of continuity of administration and policy is better served by a system which allows the party in control of the executive branch to remain there until the people choose a new Governor and Lieutenant Governor. As noted, this philosophy is embraced in the 25th Amendment to the federal Constitution and was partly recognized in New

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8. The duties of the Lieutenant Governor include the following offices: President of the Senate (N.Y. Constitution, art IV, §7), and member of the Governor’s Unofficial Cabinet, the Impeachment Court (id., art VI, §24), the Committee on Public Assess to Records (Public Officers Law §89[1][a]), the State Defense Council (L. 1951, c. 784, §11; McK.Unconsol.Laws §9111), the Board of Trustees of the State University of New York [at Syracuse] College of Environmental Science and Forestry (Education Law §6003), the Urban Affairs Cabinet (Executive Order #85, 1979), the Rural Affairs Cabinet (Executive Order #93, 1979), and the Interdepartmental Committee of the Youth Commission (Executive Law §417).
York State by the adoption of the requirement of a joint election for Governor and Lieutenant Governor.\textsuperscript{9}

On the other hand, it can be argued that the procedure calling for an appointed Lieutenant Governor would violate the elective principle.\textsuperscript{10} Yet, it may be observed that the legislative leaders, who would succeed to the Office of Governor under present law, are not chosen in a statewide election, but rather from a particular district. In addition, the appointive principle is recognized with respect to other vacancies.\textsuperscript{11} On balance, it appears to the Commission that the appointive method, exemplified by the 25th Amendment to the U.S. Constitution, should be adopted.

If a vacancy in the office of Lieutenant Governor is to be filled by a nominee of the Governor, the question arises as to the kind of vote needed to confirm the nomination. The Commission believes that the preferable method is to involve both Houses of the Legislature\textsuperscript{12} and to require each house to vote separately, i.e. by concurrent resolution.\textsuperscript{13}

In making this recommendation, the Commission recognizes that under existing law vacancies in the office of Attorney General and Comptroller are filled by the joint ballot (unicameral) method. The historical development and rationale

\textsuperscript{9} N.Y.S. Constitution, art. IV, §6.

\textsuperscript{10} See Appendix "B" for a summary of the methods for filling vacancies in some elective offices.

\textsuperscript{11} N.Y. Constitution, art VI, §21 (Judges); Public Officers Law §42 (subd. 4a) (U. S. Senators).

\textsuperscript{12} The Commission’s research has found no state in which the confirmation is by only one House of the Legislature.

\textsuperscript{13} This is the method adopted by the 25th Amendment to the U.S. Constitution, and by the clear majority of states which fill the vacancy by the appointive method, e.g., Colorado, Indiana, Louisiana, Wisconsin.
for this methodology is unclear.\textsuperscript{14} Since this procedure is not initiated by gubernatorial nomination, the use of a joint ballot seems designed to facilitate a choice. The Commission's recommended procedure for filling a lieutenant governor vacancy differs for several reasons. First, the Commission believes the Governor should have the power to nominate a replacement in order to assure that the choice is a member of the same political party and that there will be an effective working relationship between the two officers. Secondly, the Commission believes that each house of the Legislature should have equal status in the confirmation of the nominee because the Lieutenant Governor is the immediate successor to the chief executive officer of the State. Equal status would recognize the uniqueness of the position of Lieutenant Governor and afford the people throughout the State a greater role in the process. A separate ballot also is in keeping with the long history in New York whereby the temporary president of the Senate immediately assumes

\textsuperscript{14} Originally (i.e., under the Constitution of 1777 [art. 23]), such officers were appointed by the Governor with the advice and consent of the Council of Appointments (a body of Senators elected by the "General Assembly"), and subsequent vacancies in office were filled in the same manner. This Council also had general powers of removal and was said by Lincoln to be guilty of great abuse of this authority. (I, Lincoln, 671) Under the Constitution of 1821 (art. IV, §6), the Legislature chose the Attorney General and Comptroller (and other officers) every three years ("unless sooner removed by concurrent resolution of the senate and assembly") in the following manner:

The senate and the assembly shall each openly nominate one person for the said offices [i.e., Attorney General, Comptroller, et al] respectively; after which, they shall meet together, and if they shall agree in their nominations, the person so nominated shall be appointed to the office for which he shall be nominated. If they shall disagree, the appointment shall be made by the joint ballot of the senators and members of the assembly . . . .

By 1846, such officers were to be chosen every two years in a general election (Const. art. V, §1; see also, L. 1842, ch. 130) but vacancies were to be filled as provided by the Legislature (Const. art. V, §5). Subsequently (chapter 28 of the laws of 1849), the Legislature provided:

... that when a vacancy exists in the offices of secretary of state, comptroller, treasurer, attorney general ... while the legislature is in session, the two houses thereof, by joint ballot, shall appoint a person to fill such vacancy; and any person appointed by the governor ... may be removed from such office, by concurrent resolution of both houses of the legislature. On such removal both houses shall, forthwith, by joint ballot, appoint a person to the office made vacant thereby.

This, essentially, has been the law ever since
the duties of the office of Lieutenant Governor upon a vacancy in that office or the
death, removal, absence, inability or impeachment of the incumbent in that office.
With a joint ballot, the Senate would have a lesser role in the process due to the
number of its members. Moreover, with a joint ballot the majority party in the
Assembly, which effectively elects its Speaker, might not be the majority party in the
Legislature meeting jointly.

Perhaps most important to the selection of a procedure calling for the
nomination by the incumbent Governor with confirmation by concurrent resolution
of both Houses of the Legislature, if a majority of all members elected to each
House concur, is the fact that it is the method adopted under the 25th Amendment.
This procedure has already received favorable acceptance by the people when it was
applied twice, in 1973 and again in 1974, to nominate and confirm Vice Presidents
pursuant to the 25th Amendment.

IV. **Recommendation**

The Commission therefore recommends that the State Constitution be
amended as follows:

Section 1. Resolved (if the Senate/Assembly concur), that section six of article
four of the constitution be amended to read as follows:

§6. The lieutenant governor shall possess the same qualifications of eligibility
for office as the governor. He shall be the president of the senate but shall have
only a casting vote therein. The lieutenant governor shall receive for his services an
annual salary to be fixed by joint resolution of the senate and assembly.

In case of vacancy in the offices of both governor and lieutenant governor, a
governor and lieutenant governor shall be elected for the remainder of the term at
the next general election happening not less than three months after both offices
shall have become vacant. No election of a lieutenant governor shall be had in any event except at the time of electing a governor.

In case of vacancy in the offices of both governor and lieutenant governor or if both of them shall be impeached, absent from the state or otherwise unable to discharge the powers and duties of the office of governor, the temporary president of the senate shall act as governor until the inability shall cease or until a governor shall be elected.

In case of vacancy in the office of lieutenant governor alone, or if the lieutenant governor shall be impeached, absent from the state or otherwise unable to discharge the duties of his office, the temporary president of the senate shall perform all the duties of lieutenant governor during such vacancy or inability.

Upon a vacancy in the office of lieutenant governor, the governor shall nominate a lieutenant governor who shall take office for the remainder of the term upon confirmation by concurrent resolution of both houses of the legislature, if a majority of all members elected to each house concur therein.

If, when the duty of acting as governor devolves upon the temporary president of the senate, there be a vacancy in such office or the temporary president of the senate shall be absent from the state or otherwise unable to discharge the duties of governor, the speaker of the assembly shall act as governor during such vacancy or inability.

The legislature may provide for the devolution of the duty of acting as governor in any case not provided for in this article.
§2. Resolved (if the Senate/Assembly concur), that the foregoing amendments be referred to the first regular legislative session convening after the next succeeding general election of members of the Senate and Assembly and, in conformity with section one of article nineteen of the constitution, be published for three months previous to the time of such election.

APPENDIX A

THE CONSTITUTION OF THE STATE OF NEW YORK

Article IV, Section 6

§6. [Duties and compensation of lieutenant-governor, succession to the governorship.] The lieutenant-governor shall possess the same qualifications of eligibility for office as the governor. He shall be the president of the senate but shall have only a casting vote therein. The lieutenant-governor shall receive for his services an annual salary to be fixed by joint resolution of the senate and assembly.

In case of vacancy in the offices of both governor and lieutenant-governor, a governor and lieutenant-governor shall be elected for the remainder of the term at the next general election happening not less than three months after both offices shall have become vacant. No election of a lieutenant-governor shall be had in any event except at the time of electing a governor.

In case of vacancy in the offices of both governor and lieutenant-governor or if both of them shall be impeached, absent from the state or otherwise unable to discharge the powers and duties of the office of governor, the temporary president of the senate shall act as governor until the inability shall cease or until a governor shall be elected.

In case of vacancy in the office of lieutenant-governor alone, or if the lieutenant-governor shall be impeached, absent from the state or otherwise unable to discharge the duties of his office, the temporary president of the senate shall perform all the duties of lieutenant-governor during such vacancy or inability.

If, when the duty of acting as governor devolves upon the temporary president of the senate, there be a vacancy in such office or the temporary president of the senate shall be absent from the state or otherwise unable to discharge the
duties of governor, the speaker of the assembly shall act as governor during such vacancy or inability.

The legislature may provide for the devolution of the duty of acting as governor in any case not provided for in this article.
APPENDIX B

FILLING VACANCIES IN ELECTIVE OFFICES

Article XIII §3 of the New York State Constitution directs the legislature to set up procedures for filling vacancies in office:

§3. Vacancies in office; how filled; boards of education

The legislature shall provide for filling vacancies in office, and in case of elective officers, no person appointed to fill a vacancy shall hold his office by virtue of such appointment longer than the commencement of the political year next succeeding the first annual election after the happening of the vacancy; . . . .¹

Pursuant to Article XIII §3, the legislature enacted the Public Officers Law §§40, 41, 42, and 43, which provide for filling vacancies in state offices other than Governor and Lieutenant Governor.

Vacancy in the Offices of Attorney-General or Comptroller

If a vacancy occurs in either of these two offices while the legislature is in session, §41 provides that "the two houses, by joint ballot, shall appoint a person to fill such . . . vacancy."² (emphasis added)

In addition, article V, §1 of the Constitution mandates that "[t]he comptroller and attorney-general shall be chosen at the same general election as the governor and hold office for the same term, . . . ."

¹ The general principle governing the application of this section is that when a vacancy in elective office occurs, the vacancy must be filled by an election in the shortest space of time reasonably possible (Roher v. Dinkins, 32 NY2d 180, 344 NYS2d 841, 298 NE2d 37 [1973]).

² Section 41 of the Public Officers Law is shown in full on the following pages of this Appendix.
Vacancy in the Office of United States Senator

In case of a vacancy in the office of United States Senator, the governor shall appoint a replacement to hold office until the third day of January following the election by the people of the state of a new senator. The timing of the election varies according to when the vacancy occurs (POL §42[4a]).

Vacancy on the State Board of Regents

"Each regent shall be elected by the legislature by concurrent resolution .... If, however, the legislature fails to agree on such concurrent resolution by the first Tuesday of such month, then the two houses shall meet in joint session ... and proceed to elect such regent by joint ballot." (Educ Law §202). Vacancies are filled in the same manner by the Legislature, at the next session following the vacancy, if not then in session. (Id.)

PUBLIC OFFICERS LAW

§40. Vacancy occurring in office of legislative appointee, during legislative recess

When a vacancy shall occur or exist, otherwise than by expiration of term, during the recess of the legislature, in the office of any officer appointed by the legislature, the governor shall appoint a person to fill the vacancy for a term which shall expire at the end of twenty days from the commencement of the next meeting of the legislature.

§41. Vacancies filled by legislature

When a vacancy occurs or exists, other than by removal, in the office of comptroller or attorney-general, or a resignation of either such officer to take effect at any future day shall have been made while the legislature is in session, the two houses thereof, by joint ballot, shall appoint a person to fill such actual or prospective vacancy.
§42. Filling vacancies in elective offices

1. A vacancy occurring before September twentieth of any year in any office authorized to be filled at a general election, except in the offices of governor or lieutenant-governor, shall be filled at the general election held next thereafter, unless otherwise provided by the constitution, or unless previously filled at a special election.

2. A vacancy occurring by the expiration of term at the end of an even numbered year in an office which may not under the provisions of the constitution be filled for a full term at the general election held prior to the expiration of such term, shall be filled at said general election for a term ending with the commencement of the political year next succeeding the first general election at which said office can be filled by election for a full term.

3. Upon the failure to elect to any office, except that of governor or lieutenant-governor, at a general or special election, at which such office is authorized to be filled, or upon the death or disqualification of a person elected to office before the commencement of his official term, or upon the occurrence of a vacancy in any elective office which cannot be filled by appointment for a period extending to or beyond the next general election at which a person may be elected thereto, the governor may in his discretion make proclamation of a special election to fill such office, specifying the district or county in which the election is to be held, and the day thereof, which shall be not less than thirty nor more than forty days from the date of the proclamation.

4. [Re: Member of House of Representative--not state-wide]

4-a. If a vacancy occurs in the office of United States senator from this state in any even numbered calendar year on or after the fifty-ninth day prior to the annual primary election, or thereafter during said even numbered year, the governor shall make a temporary appointment to fill such vacancy until the third day of January in
the year following the next even numbered calendar year. If such vacancy occurs in any even numbered calendar year on or before the sixtieth day prior to an annual primary election, the governor shall make a temporary appointment to fill such vacancy until the third day of January in the next calendar year. If a vacancy occurs in the office of United States senator from this state in any odd numbered calendar year, the governor shall make a temporary appointment to fill such vacancy until the third day of January in the next odd numbered calendar year. Such an appointment shall be evidenced by a certificate of the governor which shall be filed in the office of the state board of elections. At the time for filing such certificate, the governor shall issue and file in the office of the state board of elections a writ of election directing the election of a United States senator to fill such vacancy for the unexpired term at the general election next preceding the expiration for the term of such appointment.

* * * *

§43. Filling other vacancies

If a vacancy shall occur, otherwise than by expiration of term, with no provision of law for filling the same, if the office be elective, the governor shall appoint a person to execute the duties thereof until the vacancy shall be filled by an election. But if the term of such officer shall expire with the calendar year in which the appointment shall be made, or if the office be appointive, the appointee shall hold for the residue of the term.
The Government Law Center at Albany Law School Presents
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February 28, 2023

Speaker Biographies

HON. HELEN E. FREEDMAN (RET.) is a former Associate Justice of the New York Appellate Division of the Supreme Court, First Judicial Department. She was appointed to the court by former Governor David A. Paterson in July 2008. In 1979, Judge Freeman was elected to the New York City Civil Court. In 1988, she was elected to the Supreme Court of the State of New York, First Judicial District, and was re-elected in 2002. Before her election to the bench, she became a staff attorney at the American Arbitration Association and subsequently held a number of positions, including associate, law secretary, and senior attorney. Judge Freedman received her J.D. from New York University School of Law in 1967. Judge Freedman currently serves as a mediator for JAMS, an alternate dispute resolution provider.

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DAVID A. PATerson is former Governor of the State of New York (2008–2010) and former Lieutenant Governor of the State of New York (2007–2008). In 1985, he was elected to the New York State Senate and rose to the position of Senate minority leader in 2003. He received his J.D. from Hofstra Law School in 1983. After law school, Mr. Paterson worked in the District Attorney’s office of Queens County, New York. Since stepping down as Governor, Mr. Paterson has hosted a popular talk-radio show and served as an adjunct professor of Government at New York University (2011–2012). In 2013, he joined the faculty at the Touro College of Osteopathic Medicine as a Distinguished Professor of Health Care and Public Policy. His book, Black, Blind, & in Charge: A Story of Visionary Leadership and Overcoming Adversity, was published by Skyhorse Publishing in 2020.

PATRICK A. WOODS ’12 is Deputy Director of the Government Law Center at Albany Law School. Before joining the Government Law Center, Mr. Woods served as an Assistant Solicitor General in the Albany Office of the Appeals and Opinions Bureau of the New York State Attorney General. In this role, Mr. Woods represented the State of New York or its agencies and employees in dozens of appeals before the United States Court of Appeals for
the Second Circuit, the New York Court of Appeals, and the Third and Fourth Departments of the Appellate Division. Before the Attorney General’s office, Mr. Woods was the 2015–2016 Supreme Court Fellow placed with the United States Sentencing Commission. Immediately after law school, he clerked for the Honorable Peter W. Hall of the United States Court of Appeals for the Second Circuit and the Honorable Richard K. Eaton ’74, of the United States Court of International Trade. Mr. Woods received his J.D. from Albany Law School in 2012.

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Changing Hands: Recommendations to Improve New York’s System of Gubernatorial Succession

Fordham Law School Rule of Law Clinic

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Changing Hands: Recommendations to Improve New York’s System of Gubernatorial Succession

Fordham Law School Rule of Law Clinic*

Ian Bollag-Miller, Stevenson Jean, Maryam Sheikh, & Frank Tamberino
June 2022

Executive Summary of Recommendations

The Clinic recommends the following reforms to New York’s gubernatorial succession framework:

(1) Adoption of a “voluntary” gubernatorial inability provision permitting a governor, recognizing their own inability to discharge the powers and duties of their office, to temporarily transfer the powers and duties of the office to the lieutenant governor and subsequently reclaim the powers and duties by written declaration;

(2) Adoption of an “involuntary” gubernatorial inability provision:
   (a) transferring the powers and duties of the office of governor to the lieutenant governor upon a written declaration of gubernatorial inability by a majority of a Disability Commission, comprised of: the lieutenant governor, the attorney general, the comptroller, the president pro tempore of the Senate, the speaker of the Assembly, and the minority leaders of the Senate and Assembly; and
   (b) upon written declaration by the governor contesting the inability declaration, referring the dispute for resolution by the Court of Appeals;

(3) Removal of the state’s gubernatorial absence provision, or, alternatively, clarification of the absence provision to transfer the powers and duties of the office to the lieutenant governor only upon the “effective” absence of the governor from the state;

(4) Adoption of a procedure to replace the lieutenant governor in the event of a vacancy:
   (a) within 20 days of the governor’s assumption of office, requiring the governor to designate in advance a successor to the lieutenant governor in the event of a vacancy from among the following officials: attorney general, comptroller, and most recently elected president pro tempore of the Senate and speaker of the Assembly; and
   (b) Requiring the lieutenant governor successor designation to be confirmed by a majority of both houses of the Legislature;

(5) Adoption of language clarifying that (1) a temporary president of the Senate or speaker of the Assembly must vacate their legislative position before acting as governor or assuming the office of governor and (2) the entitlement of a successor to serve as governor is not based on the successor continuing to hold their prior office.

* The Rule of Law Clinic is supervised by Professors John D. Feerick (jfeerick@fordham.edu) and John Rogan (rogan@fordham.edu).
Introduction

Over the past 15 years, the offices of governor and lieutenant governor of New York have seen unanticipated turnovers. In March 2008, Governor Eliot Spitzer resigned amidst a prostitution scandal.\(^1\) Lieutenant Governor David Paterson ascended to the governorship, and, over a year later, appointed Richard Ravitch to fill his former office.\(^2\) In August 2021, Governor Andrew Cuomo resigned amidst sexual harassment allegations, leaving his lieutenant, Kathy Hochul, to take the office.\(^3\) Most recently, Lieutenant Governor Brian Benjamin—who had been appointed to that post by Hochul—resigned after an indictment on federal bribery and fraud charges.\(^4\)

Despite the frequency with which the state’s highest executive offices have changed hands, New York is unprepared to deal with a panoply of issues relating to its constitution’s gubernatorial succession provisions. In this memorandum, the Fordham Law School Rule of Law Clinic proposes reforms to address four principal issues with the existing gubernatorial succession provisions: gubernatorial inability, gubernatorial absence, lieutenant governor replacement, and the gubernatorial line of succession.

Section I investigates the New York State constitution’s gubernatorial inability provision. It discusses inability provisions in the U.S. Constitution and those adopted by other states, and recommends the adoption of procedural mechanisms for both voluntary and involuntary declarations of gubernatorial inability. Section II analyzes the state’s antiquated gubernatorial absence provision, arguing that it has become unnecessary and should be removed. Section III explores New York’s Senate leadership crisis of 2009 and recommends a procedure to replace the lieutenant governor in the event of a vacancy. Finally, Section IV explores the ambiguities and inconsistencies in the gubernatorial line of succession and proposes reforms to address them.

Several fundamental principles of political succession inform our discussion of the New York succession provisions. While there is no clear hierarchy among them—indeed, in certain instances they may be in conflict—responsible constitutional reform in this area should give them adequate consideration. First, succession provisions should ensure the continuity of executive leadership. Efficiency of transition is essential to minimize gaps in leadership and ensure someone will always be able to exercise the executive’s powers and duties.\(^5\) Second, political parties and affiliation should have a proper role in political decisions regarding filling vacancies in elected offices.\(^6\) Third, the separation and independence of the executive,

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\(^1\) Michael M. Grynbaum, *Spitzer Resigns, Citing Personal Failings*, N.Y. TIMES (Mar. 12, 2008), [https://www.nytimes.com/2008/03/12/nyregion/12cnd-resign.html](https://www.nytimes.com/2008/03/12/nyregion/12cnd-resign.html).


legislative, and judicial branches must be respected. Fourth, democratic legitimacy of those in power must be ensured. The voice of the electorate must be respected as the ultimate source of political authority. This idea is related to the “elective principle,” by which, generally, an election should be the preferred means of filling vacancies in elective offices.

I. Gubernatorial Inability

In 1938, Illinois Governor Henry Horner suffered a heart attack. Unable to physically attend meetings, he supposedly worked only a few hours a day from the governor’s mansion, and only a select group of friends and advisors (dubbed the “bedside cabinet”) were permitted to see him. Horner’s associates claimed he was merely secluded to facilitate his recovery. His political opponents pointed to the state constitution’s gubernatorial inability provision, which, in theory, would have devolved power onto the lieutenant governor. But the language of that provision was not clear enough to resolve the dispute. The result was two years of political turmoil, during which it was not clear whether an elected official was carrying out the powers of the state’s highest office.

The Illinois constitution’s gubernatorial inability provision was virtually identical to the corresponding provision in New York’s current constitution. The New York provision provides that “[i]n case the governor is impeached, is absent from the state or is otherwise unable to discharge the powers and duties of the office of governor, the lieutenant-governor shall act as governor until the inability shall cease or until the term of the governor shall expire.”

The 25th Amendment to the U.S. Constitution, which was ratified in 1967, addressed similar issues in the Constitution’s original presidential inability provision. Health-related incapacity scares during the Garfield, Wilson, and Eisenhower administrations had highlighted the need for an update to the constitutional succession provisions. Section 3 of the 25th Amendment, the “voluntary” inability provision, permits the president to transfer power to the vice president in recognition of a present or future inability by a written declaration, and then to reclaim it by the same means. Section 4, the “involuntary” provision, addresses the more complicated situation in which the president is unable or unwilling to declare their own incapacity. It sets forth a detailed procedure permitting the vice president, acting with a majority of the Cabinet or another body created by Congress, to declare presidential inability and transfer power to the vice

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7 Id.
8 Wasserman, supra note 6, at 348.
10 Clyde F. Snider, Gubernatorial Disability, 8 U. Chi. L. Rev. 521, 522-23 (1941).
11 Id.
12 Id. at 526.
13 N.Y. CONST. art. IV, § 6.
15 Goldstein, supra note 5, at 966.
16 U.S. CONST. amend. XXV, § 3.
president.\textsuperscript{17} If the president contests the inability declaration and the vice president and Cabinet reassert the inability declaration, the provision provides that the president returns to power unless two-thirds of both houses of Congress agree within 21-days that the president is unable.\textsuperscript{18} The 25\textsuperscript{th} Amendment is generally acknowledged to have addressed some of the most significant ambiguities in the original inability provision.\textsuperscript{19}

After the 25\textsuperscript{th} Amendment’s adoption, many states amended their constitutions to address similar concerns related to gubernatorial inability. Still, 19 states have no formal procedures for determining gubernatorial inability.\textsuperscript{20} Despite recommendations from the New York State Law Revision Commission in 1984, 1985, 1986, and 1987, New York has not reformed its inability provision.\textsuperscript{21}

One may critique the New York constitution’s inability provision for its failure to clearly define the term “inability.” Indeed, some states do provide a more limiting definition of inability.\textsuperscript{22} Alabama, for instance, limits grounds for removal based on inability to the governor’s “unsound mind,” and Mississippi specifies “protracted illness” as a permissible basis to exercise the inability provision.\textsuperscript{23} But creating an exhaustive definition risks unnecessarily limiting the scope of the clause and foreclosing situations of true incapacity that may be unforeseen at the time of drafting.\textsuperscript{24} As such, designation of the decision-makers and the process of the inability determination are the most important features of an effective disability provision.\textsuperscript{25}

A. Guiding Principles

Lack of a procedure to determine gubernatorial inability and initiate a transition of power in an efficient and legitimate way is bad public policy.\textsuperscript{26} Fortunately, the inability section of the New York constitution has never been needed.\textsuperscript{27} But that does not mean that a gubernatorial incapacity will never arise. And if it does, the consequences for the public may be significant. Such a circumstance is clearly ripe for partisan squabbling. But there could be especially serious implications if an inability arises in a time of crisis that requires swift executive action, such as a

\textsuperscript{17} U.S. CONST. amend. XXV, § 4. The Cabinet consists of the leaders of the executive departments listed in 5 U.S.C. § 101.
\textsuperscript{18} Id.
\textsuperscript{20} Michael Hutter, “Who’s In Charge?”: Proposals to Clarity Gubernatorial Inability to Govern and Succession, 12 Gov’t & Pol’y J. 1, 30 (2010).
\textsuperscript{21} Id.
\textsuperscript{23} ALA. CONST. art. V, § 127; MISS. CONST. art. V, § 131. All state inability provisions are appended below at App. B.
\textsuperscript{24} See Goldstein, supra note 19, at 133. For one proposed framework for diagnosing executive disability, see Daniel J.T. Schuker, \textit{Burden of Decision: Judging Presidential Disability Under the Twenty-Fifth Amendment}, 30 J.L. & Pol. 97 (2016).
\textsuperscript{25} Id.
\textsuperscript{26} Hutter, supra note 20, at 30.
\textsuperscript{27} Id.
natural disaster, public health emergency, or, in an extreme scenario, the need to mobilize National Guard troops in the face of a riot or violent civil unrest.\textsuperscript{28}

Gubernatorial inability provisions should account for several fundamental principles. They must provide a procedure efficient enough to avoid unnecessary periods of ambiguity in leadership. They must respect the voice of the people in electing the incumbent to the office of the governor. And they must account for the system of checks and balances reflected in the division of powers among the executive, legislative, and judiciary branches of the state. As the Law Revision Commission wrote in 1984, “The separation of powers of the three branches of government … suggests a procedure that is weighted heavily in favor of the elected Governor, involves representation by all branches of government, and yes is limited to a two-step process.”\textsuperscript{29}

\textbf{B. Proposals for Reform}

\textit{1. Voluntary Declaration of Inability}

The need for a procedural mechanism facilitating the governor’s voluntary transfer of power to the lieutenant governor during a present or expected inability is straightforward.\textsuperscript{30} When, for example, a governor requires a medical procedure that will result in prolonged hospitalization, a formal mechanism for the temporary transfer of power to the lieutenant governor reduces the temptation to forgo the procedure in order to maintain power.\textsuperscript{31} Pennsylvania governor Robert Casey underwent a heart and liver transplant in 1993.\textsuperscript{32} He transferred authority to his lieutenant governor, who led the state for more than six months while Mr. Casey recovered.\textsuperscript{33}

Most states that have enacted analogs to the 25\textsuperscript{th} Amendment’s voluntary inability provision mirror the federal model closely. Delaware’s constitution is emblematic. It provides that “[w]henever the Governor transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his or her written declaration that he or she is unable to discharge the powers and duties of his or her office, and until he or she transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Lieutenant Governor as Acting Governor.”\textsuperscript{34}

This provision provides for a written declaration by the governor, which reduces ambiguity regarding the duration of the power transfer. It also requires a second written declaration by the governor to re-assume powers and duties. A voluntary inability declaration provision thus puts the initial determination of inability squarely in the hands of the governor. It permits the

\begin{itemize}
  \item \textsuperscript{28} Video Interview with Patrick A. Woods, Deputy Director, The Government Law Center, Albany Law School (Mar. 11, 2022).
  \item \textsuperscript{30} Goldstein, supra note 19, at 131 (describing the voluntary inability declaration provision of the 25th Amendment as “relatively uncontroversial”).
  \item \textsuperscript{31} Goldstein, supra note 5, at 967-68.
  \item \textsuperscript{33} Mr. Casey’s six-month recovery from the transplant included two postoperative hospitalizations. \textit{Id.}
  \item \textsuperscript{34} DEL. CONST. art. III, § 20(b).
\end{itemize}
governor to choose when to resume the powers and duties of the office after the inability ceases. And a voluntary inability declaration can avoid the more politically costly involuntary inability procedure.\textsuperscript{35} A voluntary inability provision in New York’s constitution should incorporate these elements as well.

2. Involuntary Declaration of Inability

When a body other than the governor must declare gubernatorial inability because the governor is unwilling or unable to do so, the situation becomes more complex.\textsuperscript{36} An involuntary inability declaration provision should provide a two-step process. First, a designated body, other than the governor, declares the inability.\textsuperscript{37} Second, if the governor contests the inability, a second designated body resolves the dispute.\textsuperscript{38} Some states’ provisions call for a resolution by the entire state legislature,\textsuperscript{39} the legislative leadership,\textsuperscript{40} or a single executive branch member\textsuperscript{41} to declare gubernatorial inability. Others vest power in a “disability commission” consisting of a mix of representatives from each branch of government as well as certain medical officials.\textsuperscript{42} Still others designate the state’s highest court for this role.\textsuperscript{43}

A Disability Commission consisting of the lieutenant governor, the attorney general, the comptroller, the speaker of the Assembly, the president pro tempore of the Senate, and minority leaders of the Senate and Assembly should have the authority to make an initial inability determination. This approach most effectively reflects the principles of efficiency, democratic legitimacy, and separation of powers. The group should have seven members, which facilitates meaningful but swift deliberation.

The process for the designated body to declare inability should balance the principles of efficiency and democratic legitimacy. It should also set the bar for an inability declaration high enough that it will not be used for partisan gamesmanship, without making the declaration a practical impossibility. The primary procedural considerations during the first phase are the proportion of the designated declaratory body required to make the pronouncement and the opportunity for a second phase if the governor disputes the inability declaration. Some state provisions require a simple majority,\textsuperscript{44} some require unanimity,\textsuperscript{45} and some call for some

\textsuperscript{35} Goldstein, supra note 5, at 968.
\textsuperscript{36} It has been described as a “nightmare scenario.” Fresh Air: Trump’s Fitness to Serve is Officially Part of the Discussion in Congress, NPR (May 4, 2017), https://www.npr.org/2017/05/04/526857048/trump-s-fitness-to-serve-is-officially-part-of-the-discussion-in-congress (interview with Evan Osnos).
\textsuperscript{37} In the federal context, the 25th Amendment permits the vice president, acting with a majority of the president’s Cabinet, to make the initial inability declaration. U.S. CONST. amend. XXV, § 4.
\textsuperscript{38} Law Revision Commission Report, supra note 29, at 5-6.
\textsuperscript{39} See, e.g., Md. CONST. art. II, § 6(d) (“The General Assembly, by the affirmative vote of three-fifths of all its members in the joint session, may adopt a resolution declaring … disability.”).
\textsuperscript{40} See, e.g., Ind. CONST. art. V, § 10(c) (president pro tempore of the Senate and the speaker of the House of Representatives).
\textsuperscript{41} See, e.g., Ky. CONST. art. VI, § 84 (attorney general).
\textsuperscript{42} See, e.g., Del. CONST. art. III, § 20 (establishing a disability commission of the chief justice of the Supreme Court, the president of the Medical Society of Delaware, and the commissioner of the Department of Mental Health).
\textsuperscript{43} See, e.g., UTAH CONST. art. VII, § 11.
\textsuperscript{44} See, e.g., Mich. CONST. art. I, § 26.
\textsuperscript{45} See, e.g., Ky. CONST. art. VII, § 84.
proportion in between. For a seven-member Disability Commission, requiring the affirmative vote of six members would ensure general consensus without giving veto power to any single member. The inclusion of the legislative minority leaders on the Commission ensures that the vote of at least one elected representative from the governor’s political party is necessary to instigate the transition of the powers and duties of the office to the lieutenant governor. This reduces the risk of the provision being used as an improper political attack on the governor. Unlike the 25th Amendment’s Section 4 and the states that follow its lead, this procedure permits an inability declaration even without the lieutenant governor’s participation. This is to avoid a potential “catch 22” situation where the lieutenant governor is unable or unwilling to declare even an obvious gubernatorial inability.

Some states follow the federal model and designate the legislature as the decision-maker in the event the governor contests an inability declaration. Most commonly, however, states empower their highest court to resolve the dispute. A case of contested gubernatorial inability is, at its core, a dispute which requires resolution by the government organ best equipped to handle what may “amount[] to a bench trial.” While there may be some concern regarding judges appointed by a governor being tasked with the decision to remove the governor from power, these concerns are allayed by the insulation of the court from the first phase inability declaration by the Disability Commission. Even if there is a reluctance by the court to issue a finding of inability, this would be consistent with the presumption in favor of the incumbent’s retention of the office. Furthermore, the involvement of the court at the second stage ensures that the full process of the provision includes each branch of government. Thus, the New York Court of Appeals is the preferred body to resolve a contested inability.

Procedural efficiency is important but less of a concern for the dispute phase if the gubernatorial successor acts as governor until a judgment is issued, as many existing state provisions provide. Many states that follow the federal model of conferring decision-making authority to the legislature also incorporate the 25th Amendment’s establishment of time frames within which the body must meet and a decision must be rendered. But when the state’s highest court is the dispute resolution body, the timing of the process is less of a concern because there are fewer individuals who must gather to deliberate, and because the court is already well-practiced in adjudication.

46 See, e.g., ALA. CONST. art. V, § 128.
47 U.S. CONST. amend. XXV, § 3.
51 Id. at 183-84.
52 Video Interview with Professor Jerry H. Goldfeder, Director, Voting Rights and Democracy Project, Fordham University School of Law (Feb. 25, 2022).
53 See, e.g., S.C. CONST. art. IV, § 12(2) (“[T]he Lieutenant Governor shall continue to discharge the same as acting Governor”).
54 See, e.g., MONT. CONST. art. VI, § 14(5) (requiring the legislature to decide within 21 days of convening).
Because of the decreased importance of the procedural efficiency of dispute resolution, other components of an inability provision can be implemented to ensure the principles of democratic legitimacy and presumption in favor of the incumbent can be implemented. For example, New Hampshire’s provision contains due process protections for the governor. It must “reasonably appear” that the governor is incapacitated to initiate the process, which protects against arbitrary invocation by political opponents. The provision also includes a notice and hearing requirement, and a preponderance-of-the-evidence standard for the inability determination. These protections ensure the fairness and transparency of the dispute proceedings.

II. Gubernatorial Absence

Ever since New York’s first constitution was enacted in 1777, the state constitution has provided for the lieutenant governor to exercise gubernatorial power when the governor is absent from the state. In colonial times, physical absence from the state rendered the governor incapable of performing many of the powers and duties of their office. However, the development of modern communication and transportation capabilities permit governors today to continue to discharge their state duties even when outside state lines. Moreover, the governor’s “presence” can be achieved through video conferencing, telephone, and email.

In New York, when the governor is physically absent from the state, the absence provision is automatically invoked, and the lieutenant governor immediately begins acting as governor. In other words, the operative understanding of gubernatorial absence in New York is that a governor’s physical “absence from the state” renders the governor unable to conduct state duties. Aside from this no longer being necessarily true, the outcome is absurd: every time the New York governor crosses a bridge into New Jersey, or leaves the state for an important meeting, the lieutenant governor becomes governor immediately, empowered to issue executive orders, deploy the National Guard, appoint judges, and sign or veto legislation. Modern transportation capabilities make instances of gubernatorial absence more frequent and shorter, increasing the opportunities for lieutenant governors to misuse gubernatorial powers.

New York should abandon its strict interpretation of gubernatorial absence and only provide for transfers of power when it is impossible for the governor to communicate and govern. This interpretation would protect the absent governor’s policies and ensure the continuity of uninterrupted governance.

A. “Rogue Lieutenant Governors”

Although there are no examples of unreasonable usurpation of power by New York lieutenant governors, such scenarios are possible. Lieutenant governors in other states have undermined their governors during absences from the state.

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55 N.H. CONST. pt. 2, art. XLIX(a).
56 N.Y. CONST. art. XX (1777).
58 Hutter, supra note 20, at 29.
On October 6, 2021, while Idaho Governor Brad Little was out of state on official business, political rival and Lieutenant Governor Janice McGeachin issued an executive order banning COVID-19 vaccine mandates in schools. This was the third time McGeachin double-crossed the governor while he was absent from the state. The day before, on October 5, 2021, McGeachin tried mobilizing the National Guard at the U.S.-Mexico border while Governor Little was meeting other Republican governors to discuss border policies. McGeachin also issued a statewide mask ban on May 27, 2021, one week after announcing her run for governor.59

In March 1979, California Governor Edmund G. Brown Jr. left the state on official state business to Washington, D.C. During the 40 hours of the governor’s absence, the governor’s secretary was informed by the executive assistant to Lieutenant Governor Mike Curb that he intended to appoint a judge to the vacant presiding justiceship on the Court of Appeal. Despite being advised that the governor intended to appoint another judge for this position and that his name was already submitted to the State Bar for evaluation, Lieutenant Governor Curb proceeded hastily with his judicial appointment the same day. When the governor returned, he withdrew the appointment and reappointed a judge to the vacancy and simultaneously filled the vacancy created in the lower court. The governor sued the lieutenant governor, and the Supreme Court of California decided that because the governor was not “effectively absent,” the lieutenant governor was not acting within his duties when he claimed to appoint the judge.60

With an absolute definition of absence, the governor may be reluctant to leave the state even for official state business. In 2008, when he was serving as governor with no lieutenant, David Paterson avoided leaving the state entirely to avoid confusion about who would act as governor in his absence, as well as to avoid power falling into the hands of his political opponents.61

**B. Effective Absence**

During each of the above-described instances of gubernatorial absence, the governor was physically absent from the state but still capable of communicating with their staff to make crucial governance decisions using a telephone or the internet. These cases are therefore illustrative of the distinction between “physical absence” and “effective absence.” While modern communication technology makes situations of effective gubernatorial absence increasingly rare, there are examples in recent history where an absence of the governor could have warranted the transfer of power to the lieutenant governor.

For example, in 2009, South Carolina Governor Mark Sanford disappeared for nearly six days.62 His personal and state-issued phone were powered off, and he did not respond to phone calls or

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60 *In re Governorship*, 26 Cal. 3d 110, 113 (1979).


During the time period when Sanford was functionally unreachable, he was arguably “effectively absent” from the state, notwithstanding his physical presence in a foreign country.

C. Guiding Principles

A gubernatorial absence provision reflects the principle that there should always be an individual capable of exercising the office of the state’s highest executive. As the Supreme Court of Nevada explained, “[T]he crux of a provision for succession in the event of ‘absence’ is the state’s immediate need for a specific act or function.” During the period of history when a governor’s physical absence from the state rendered them entirely incapable of carrying out the powers and duties of their office, a constitutional provision automatically transferring the office to their lieutenant was necessary to permit the governor to travel out of state without effectively leaving the state without a governor.

D. Proposal for Reforms

While New York uses a strict interpretation, other states’ absence provisions are interpreted with more nuance. Some state courts, like the California Supreme Court, have required a finding of “effective absence” to trigger the provision transferring the governor’s powers and duties to the lieutenant governor. Other states’ provisions require physical absence of the governor for a minimum amount of time. Given that the president routinely performs government business while outside of the United States, it is reasonable to allow a governor to continue exercising state powers outside their state.

Gubernatorial powers should not transfer every time the governor leaves the state. If an absence from the state caused the governor to become unable to discharge the office’s responsibilities, the process for declaring gubernatorial inability set forth in the preceding section could be invoked. As such, the Clinic recommends amending the New York constitution to remove the absence provision, contingent on the creation of processes for declaring gubernatorial inabilities.

If removal of the absence provision is not possible, then “absence” from the state should be interpreted to mean “presence outside the state under circumstances that would make it impossible to govern” or “effectively absent.” This interpretation would allow for governors to continue conducting state business outside of state lines and would preserve the continuity of government, as constant transfers of power to the lieutenant governor would be unnecessary.

63 Sanford later admitted that his extramarital affair was the reason for his disappearance. Robbie Brown & Shaila Dewan, Mysteries Remain After Governor Admits an Affair, N.Y. TIMES (June 24, 2009), https://www.nytimes.com/2009/06/25/us/25sanford.html.

64 The text of the state constitution clearly articulates the situation the absence provision was designed to avoid: a governor who, by virtue of their absence, is “unable to discharge the powers and duties of the office of governor.” N.Y. CONST. art. VI, § 5.

III. Lieutenant Governor Succession

New York currently lacks a specifically-designed and permanent legal mechanism for filling vacancies in the office of the lieutenant governor. Since the landmark 2009 decision of Skelos v. Paterson, the governor is permitted to fill such vacancies via the catchall provision that is Public Officers Law 43. This method was necessary during the 2009 New York Leadership Crisis, but it is inappropriate and insufficient as an enduring solution. The Clinic recommends a reformed process that safeguards the continuity of government, prioritizes efficiency, and strikes a balance between the elective principle and the concept of the unified executive. No one of these principles should dominate; it is important that all are reflected in some form.

The recent controversy stemming from former Lieutenant Governor Brian Benjamin’s indictment emphasizes the need for a permanent mechanism to fill vacancies in this office. Indeed, commentators are currently calling for a constitutional amendment to reform the appointment power granted to the governor in 2009. However, this opportunity should not be squandered with insufficient consideration, nor should a constitutional amendment be taken lightly. The following discussion canvasses scholarly opinion and the lessons of history to envision just how such an amendment should look, particularly in light of the damage done during the crisis of 2009.

A. Guiding Principles

1. Elective Principle

Developing an adequate lieutenant governor replacement process entails balancing different and often conflicting interests. The elective principle is cited in the two most important cases on New York lieutenant governor succession: Skelos v. Paterson and Matter of Ward v. Curran. The elective principle is “a fundamental principle of our form of government that a vacancy in an elective office should be filled by election as soon as practicable after the vacancy occurs.” In other words, the principle demands that an elective office be filled by election. Since these decisions, courts have maintained that while the elective principle is important, it cannot always be “preeminent.” Thus, a more abstract concept that one might term elective privity has emerged. This concept involves positioning an appointment as close to the legitimacy of an election as possible without sacrificing other, perhaps equally significant ideals. Scholars since these decisions have approximated close elective privity by, for instance, recommending that whoever makes the appointment was elected to their respective office, or by only allowing the appointment of individuals who were elected to whichever office they hold at present.

68 Id.
69 Wing v. Ryan, 255 A.D. 163, 167 (3d Dep’t 1938), aff’d, 278 N.Y. 710 (1938).
70 Skelos, 13 N.Y.3d 141.
2. Unified Executive Principle

The unified executive principle must also be incorporated into any process for filling lieutenant governor vacancies. Under this concept, the governor is granted the privilege of an administration populated by generally like-minded officials. In other words, the governor should be permitted to choose officials who share their agenda and therefore act in assistance of the executive’s goals and beliefs. This is not a principle to favor the governor’s personal mission or career but rather a method of promoting competent government and thereby effectuating democracy. If the governor is paired with an official who diverges from their agenda, even if the selection of that individual is in line with the elective principle, then the government is generally hampered. Democracy cannot be served if nothing is being accomplished politically.

3. Efficiency of Transition of Leadership

Relatedly, efficiency is a virtue that is central to discussions of lieutenant governor succession. Delays must be avoided to the greatest extent possible, and gaps in the maintenance and operation of government must be obviated. But the continuity of government demands rapidity in the transfer of power that nevertheless cannot overtake the principles outlined above.

B. Proposals for Reform

The Clinic identifies two proposals that provide the best options for reforming the lieutenant governor replacement process. One proposal is based on the current federal model for filling vacancies in the office of the vice president that is included in the U.S. Constitution’s 25th Amendment. This proposal would require the governor to appoint a replacement lieutenant governor in the event of a vacancy with approval from both houses of the state legislature. The second proposal is based on the approach used in Alaska, which sets a deadline for a newly elected governor to choose an official who would become lieutenant governor in the event of a lieutenant governor vacancy. The governor chooses from a limited pool of elected officials.

The Clinic proposes a hybrid approach, combining elements of the Federal and Alaska-Woods Models. First, a newly elected governor, within 20 days of assuming office, would be required to identify a successor lieutenant governor to serve in the event of a vacancy. This appointment would need to come from a limited pool of elected officials that should include the attorney general, the comptroller, the most recently elected temporary president of the Senate, and the most recently elected speaker of the Assembly. Second, this appointment would then be subject to confirmation by both houses of the New York State Legislature via majority vote, as in the

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72 Letter from Jerry H. Goldfeder to Secretary to the Governor Charles O’Byrne (July 1, 2008) (outlining the position of the New York City Bar Association’s Committee on Election Law); see also Jerry H. Goldfeder, New York State of Mindlessness, N.Y. TIMES (June 10, 2009), https://www.nytimes.com/2009/06/11/opinion/11goldfeder.html. For an overview of the two uses of the 25th Amendment’s vice presidential replacement process, which both occurred in the 1970s, see Feerick, THE TWENTY-FIFTH AMENDMENT, supra note 14, at 135-57, 167-89.
73 Woods, supra note 71, at 2304-05.
25th Amendment process. This confirmation vote would take place at the beginning of the gubernatorial term, prior to the existence of a vacancy in the office of the lieutenant governor.

1. Historical Background

One of the earliest documents of its kind, the New York State Constitution of 1777 was so revolutionary that it declared its independence from Great Britain at the same time that it set forth the structure of the state’s government. On the topic of the executive branch and vacancies and succession therein, the landmark document states, “…a lieutenant-governor shall, at every election of a governor, and as often as the lieutenant-governor shall die, resign, or be removed from office, be elected in the same manner with the governor, to continue in office until the next election of a governor…”74 Future iterations of the constitution have included provisions that generally follow this model, with the 1938 constitution providing for the joint election of these two officials at intervals of four years.75

The 1777 constitution recognized the possibility of lieutenant governor vacancies, stating “…whenever the government shall be administered by the lieutenant-governor, or he shall be unable to attend as president of the senate, the senators shall have power to elect one of their own members to the office of president of the senate…”76

In 1984, the New York State Law Revision Commission made several crucial points about the dangers that resulted from the absence of a mechanism for filling a lieutenant governor vacancy.77 The Commission observed that a vacancy in this office “could [cause] a lack of continuity in the administration of State affairs should the Governor be unable to discharge the powers and duties of his (or her) office.”78 The Commission also noted the analogous federal model in the 25th Amendment that requires the filling of the office of the vice president by presidential appointment and confirmation by both houses of Congress. Despite these observations, the Commission declined to advocate for any legislative action or reform. They reasoned that the absence of a replacement process had not historically caused serious problems, noting “there have been only eight instances in which a Lieutenant Governor has permanently replaced a Governor…”79 Indeed, before Skelos, no sitting governor had ever attempted to fill a vacancy in the office of their successor. However, the justification that the problem has never manifested is no longer valid and has not been since before 2009.

The 2009 New York Leadership Crisis occurred over a period of about three months when there was no acknowledged lieutenant governor. During the crisis, wasteful and destructive political shenanigans resulted in $2.9 billion of waste.80 This crisis never would have arisen had there been a legal mechanism requiring the appointment of a replacement lieutenant governor. And, because such a mechanism still does not exist, the possibility of another, similar crisis looms. What finally resolved the 2009 crisis was the Court of Appeal’s decision in Skelos, which held

74 N.Y. CONST. art. XXI (1777).
75 N.Y. CONST. art. IV, § 1.
76 Id.
78 Id.
79 Id.
80 Woods, supra note 71, at 2301.
that Governor David Paterson’s appointment of Richard Ravitch as lieutenant governor was constitutional. Although the court upheld the legality of unilateral replacement by the governor, that approach to filling lieutenant governor vacancies is flawed.

The Court in *Skelos* held that Public Officers Law 43 could be utilized by the governor to appoint a lieutenant governor in the event of a vacancy in that office.\(^\text{81}\) This was the interpretation advanced by the governor’s counsel as a means of moving forward from the ongoing gridlock crisis. Public Officers Law 43 is one of three statutes born of Section XIII of the New York Constitution which provides that “[t]he legislature shall provide for filling vacancies in office.”\(^\text{82}\) The other two statutes, §§ 41 and 42, pertain specifically to vacancies in the offices of attorney general and comptroller. Public Officers Law 43 does not approximate any such specificity; it does not mention the office of lieutenant governor. Instead, the statute applies to “Filling other vacancies” and functions thus as a catchall provision that allows the governor to appoint individuals to offices that are not covered by any other law.

2. The Next Step in a Historical Progression

This catchall statute allowing for the unilateral appointment of a lieutenant governor is insufficient for three fundamental reasons. First, it runs counter to the elective principle: no other branch of the state government is involved in the appointment process. And, in some cases, the governor could be an individual who was not elected for the position by the people of the state. Second, the 45-word statute does not impose any deadline for appointment and therefore creates the possibility of significant delay. As the state witnessed in 2009, delay can result in massive waste and political chaos.\(^\text{83}\) Finally, this process should be outlined by constitutional amendment instead of a statute. Patrick Woods, an essential scholar on this topic, argues that an amendment is preferable given the controversy, division, and confusion that can result from the circumstances prompting succession.\(^\text{84}\) Woods asserts that a statute is too vulnerable to political manipulation and even erasure. A constitutional provision, on the other hand, is sufficiently protected and permanent to guard against the chaos and malice of a political crisis.

The time is right to use the stepping stone of *Skelos* to move to a more deliberate and democratically sound mechanism for the replacement of a lieutenant governor. This mechanism must carry forward the lessons learned from the 2009 crisis, preserve the elective principle, allow for unity in the executive, and minimize or perhaps eliminate gaps and delays in the transfer of power. Thirty states already have explicit processes for filling lieutenant governor vacancies.\(^\text{85}\) A majority of those states utilize an appointment process, and many of those states have made strides to preserve the elective principle by placing a check on the governor’s power by requiring confirmation by state legislatures.\(^\text{86}\) It is time for New York to join these states. The two proposals for reform that the Clinic finds particularly appealing would be a vast improvement on the current system.

\(^{82}\) *Id.*
\(^{83}\) Woods, *supra* note 71, at 2301.
\(^{84}\) *Id.*
\(^{86}\) *Id.*
3. The Alaska-Woods Model

Woods’ 2013 article cites the 2009 Leadership Crisis as proof that the state needs a process that minimizes delay. Woods rejects special elections for choosing replacement lieutenant governors because they are notoriously slow. Even appointment upon vacancy is viewed by Woods as allowing for too much delay. Woods therefore proposes a modified system of automatic succession modeled on an Alaskan statute.\(^{87}\) This system would require the governor to select a successor lieutenant governor from a limited pool of officials within a set period of time after assuming office (20 days in Alaska). The pool includes “the elected attorney general, the elected comptroller, the most recently elected temporary president of the senate, and the most recently elected speaker of the assembly.”\(^{88}\) This bounded range of potential successors emphasizes the elective principle and mitigates the arbitrary nature of the appointment. Along with this addition to the Alaska statute, Woods removes the requirement for confirmation from the legislature.

The Alaska-Woods Model tends to nearly every concern outlined above. It preserves the elective principle by mandating not only that the recently elected governor make the appointment but that he or she choose a successor lieutenant governor from a group of elected officials. It allows for unity in the executive by giving the governor a freedom of choice in this appointment. And it almost completely avoids delay by setting a deadline for appointment.

4. The Federal Model

Another model of appointment and confirmation is the federal approach in the U.S. Constitution’s 25th Amendment.\(^{89}\) If this model were applied to New York, the governor would be required to fill a vacancy in the office of lieutenant governor with approval from majorities of both houses of the Legislature. Professor Jerry Goldfeder stresses the importance of the check on the governor’s appointment via approval from the legislative branch. This check would support the elective principle as the legislature represents the people.

The Federal Model rejects unilateral appointment by the governor as excessive. Scandal associated with an impeached or resigning governor might taint a lieutenant governor who the governor had appointed without any check. At the same time, the Federal Model’s approach of waiting for a vacancy to occur before activating the appointment mechanism defeats the purpose of the solution and does not get us far enough from the crisis of 2009.\(^{90}\) Had the Federal Model’s provisions for confirmation been in place at the time of that crisis, the disastrous gridlock still could have occurred for nothing about the model of checks and balances on its own promotes the expediency required to mitigate delay.

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\(^{87}\) Appended below at App. F.
\(^{88}\) Id.
\(^{89}\) Letter from Jerry H. Goldfeder, supra note 72.
\(^{90}\) Video Interview with Patrick A. Woods, supra note 28.
5. The Hybrid Model

New York should implement a process that draws on both the Alaska-Woods and Federal Models. It should both eliminate wasteful delay by demanding that a newly-elected governor appoint a prospective successor to the lieutenant governor’s office and require the incorporation of multiple branches of government by requiring confirmation of the governor’s choice from both houses of the Legislature at the outset of the new governor’s term.

Capturing Woods’ modifications providing for a set deadline and a limited range of appointees while restoring the original Alaska statute’s confirmation requirement would effectively sync the Alaska-Woods Model and the Federal Model, extract the most valuable elements from both, and preserve the elective principle without sacrificing expediency or the unity of the executive. Until such a mechanism is in place, New York State awaits another crisis of democratic leadership.

IV. Line of Succession

All of the New York State constitutions since 1777 have made the temporary president of the Senate the next successor to the governorship after the lieutenant governor. The 1894 constitution extended the line of succession to include the speaker of the Assembly after the temporary president of the Senate. These are the only successors identified in the current constitution. In the event of a dual vacancy, inability, or absence from the state in the offices of governor and lieutenant governor, the temporary president would serve as acting governor until the governor or lieutenant governor became available or until a new governor was elected. If there is no temporary president at the time of a dual vacancy, the speaker would serve as acting governor.

The constitution delegates authority to the Legislature to extend the line of succession beyond the speaker. In 1951, the Legislature exercised this authority, passing the Defense Emergency Act of 1951. Article 1-A, § 5 of the Act provides for further succession if, as a result of an emergency, “the office of governor becomes vacant and each, the Lieutenant Governor, the Temporary President of the Senate, and the Speaker of the Assembly is unable to discharge the powers and duties of the office of governor.” The Act named eight officials to succeed to the governorship after the speaker in the following order: the attorney general, comptroller, commissioner of transportation, commissioner of health, commissioner of commerce, industrial commissioner (now, the commissioner of labor), chairman of the public service commission, and secretary of state. These officials serve as acting governor until the election or the qualification of the governor, lieutenant governor, temporary president of the Senate, or speaker of the Assembly.

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91 Appended below at App. G.
92 N.Y. Const. art. XXI. (1777); see, e.g., art. III, § 6 (1821); art. IV, § 7 (1846); art. IV, § 7 (1894); art. IV, § 6 (1938).
93 N.Y. Const. art. IV, § 7 (1894).
94 N.Y. Const. art. IV, § 6.
95 Id.
97 Id.
The current line of succession is flawed. The provisions contain ambiguities and raise concerns about separation of powers, continuity of government, and democratic legitimacy. This section explores those concerns and recommends reforms.

**A. Resignation Requirement**

The New York constitution is not clear on whether the temporary president or speaker must vacate their offices before acting as governor. Article III, § 7 requires resignation when lawmakers take some positions, but it does not expressly mention the position of acting governor:

> If a member of the legislature be elected to congress, or appointed to any office, civil or military, under the government of the United States, the state of New York, or under any city government except as a member of the national guard or naval militia of the state, or of the reserve forces of the United States, **his or her acceptance thereof shall vacate his or her seat in the legislature**, providing, however, that a member of the legislature may be appointed commissioner of deeds or to any office in which he or she shall receive no compensation.  

It is not clear whether this section prevents the temporary president or speaker from succeeding to the governorship without first resigning from their legislative posts. And no statutory provision exists that prohibits them from simultaneously holding their legislative offices and serving as acting governor. A careful review of the scholarship and legislative history concerning gubernatorial succession provisions provide no answers. However, there is case law that addresses “incompatible offices.” Generally, a person may hold two offices at the same time unless there is some constitutional or statutory provision to the contrary or unless the offices are incompatible. The presidential line of succession statute requires successors to resign from their offices before discharging the powers of the presidency.  

For present purposes, assume that Article III, § 7 prohibits both the temporary president and speaker from acting as governor before vacating their legislative offices. If there is a dual vacancy in the offices of governor and lieutenant governor, a temporary president acting as governor must be prepared to cede executive responsibilities back to either the governor or lieutenant once the vacancies or inabilities have ended. If the temporary president was forced to resign from their legislative office, they would be left without an office once the governor or

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98 N.Y. CONST. art. III, § 7 (emphasis added).


100 3 U.S.C. § 19. The U.S. Constitution designates the vice president as the first successor to the presidency and empowers Congress to identify additional successors. See U.S. Const. art. II, § 1, Cl. 6. Congress has used this authority to create a line of succession that lists the speaker of the House of Representatives, the Senate president pro tempore, and the Cabinet secretaries in the order of the creation of their respective departments. 3 U.S.C. § 19.
lieutenant governor returns to their office. And if another person had been elected to the prior position, the chances of regaining it may be slim. Accordingly, lawmakers could be discouraged from serving as acting governor.

1. **Source of Authority to Act as Governor**

If the temporary president of the Senate acts as governor—either temporarily or for the remainder of the term—and then another temporary president is elected, it is unclear whether gubernatorial power shifts to the newly elected temporary president. Does the power of the governor then shift hands to the new temporary Senate president? Some courts in other states have held that the power shifts to the new temporary president because the power to act as governor is tied to the office, not the person. In other words, if the temporary president resigns their office, their tenure as acting governor would end instantaneously because gubernatorial succession powers are tied to the office of temporary president, not the person who serves in the position—the moment the temporary president resigns they become a private citizen without entitlement to the governorship.

Though this concept has a certain appeal, it is impractical. Recall Article IV, Section 5 of the constitution, and, this time, imagine that the lieutenant governor replaces the governor from office and then a new lieutenant governor is appointed or elected. Taken to its logical consequence, the “power tied to the office” view would suggest that the newly-appointed or elected lieutenant governor is actually the proper governor because the lieutenant governor’s office is the source of the authority to act as governor. Clearly, this is untenable. The ambiguity about the source of the acting governor’s authority could lead to instability in the leadership of the executive branch and raise questions about the acting governor’s legitimacy.

**B. Separation of Powers**

Placing legislators in the line of succession for executive positions creates separation of powers issues. The New York constitution, like the U.S. Constitution, provides for a distribution of powers among three branches of government: legislative, executive, and judicial. This distribution is designed to avoid excessive concentration of power in any one branch or individual. While the framers of the New York constitution took great steps to separate government power across the different branches, they took only limited steps to prevent particular individuals from amassing excessive power by jointly holding offices in more than one branch of government at the same time. Indeed, the constitution seems to allow the temporary president of the Senate or speaker of the Assembly to hold offices in the executive and legislative branches concurrently.

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102 Yeargain, supra note 101. The states include Maine, Louisiana, Arkansas, among others. Id.

103 N.Y. Const. art. III, IV, VI.
If the temporary president is not required to resign from the Legislature before assumption of the governorship, upon succession, they would hold two incompatible offices simultaneously. This would affect the balance of power between the executive and legislative branches and would give too much power to the temporary president, even if perhaps for a brief moment. They would be at once entitled to cast the tie-breaking vote and take part in legislative debates, while also being entitled to approve or veto bills and convene the legislature.

Moreover, in the event that the Legislature considers articles of impeachment against the temporary president as acting governor, although he would not be allowed to preside over such proceedings, there would be a significant appearance of bias. It would be hard to imagine a more glaring conflict of interest than where the Legislature would have to impeach and convict one of its members.

**C. Party Continuity and Democratic Legitimacy**

The New York State constitution vests in the lieutenant governor the power to preside over the Senate, but to ensure no interruption in the continuity of government, the constitution requires the Senate to elect a temporary president to guide the business of the Senate during the lieutenant governor’s absence from the chamber. The temporary president is elected by voters from one of the many districts throughout the state, rather than chosen in a statewide election. In like manner, the constitution requires the Assembly to elect from among its membership a speaker to preside over the Assembly. The speaker is an independently elected official who represents her district and serves as an Assembly member for two-year terms in the lower house of the legislature.

The presence of the temporary president and speaker in the line of succession creates the possibility of a change of party control in the governorship. There could be a takeover by the opposition party without it having to win the governor’s office in a statewide election because the temporary president or speaker may not be of the same political party as the governor. A change in party leadership could undermine the will of the voters.

But even if the temporary president (or speaker) and governor are from the same party, elevating them to the governorship may lack democratic legitimacy because neither the speaker nor temporary president are elected by a statewide electorate. The smaller share of voters that elected them cannot give these lawmakers as legitimate a claim to the governorship as would a statewide election.

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104 N.Y. CONST. art. VI, § 24 (“On the trial of an impeachment against the governor or lieutenant-governor, neither the lieutenant-governor nor the temporary president of the senate shall act as a member of the court.”).
106 Id.
107 N.Y. CONST. art. III, § 5.
D. Proposals for Reform

While the issue as to whether a legislator ascending to the governorship must resign from their legislative office has never been a cause of controversy in New York, the state cannot go on without addressing it. In 2009, the state came close to confronting this issue during the leadership crisis, and the prospect was raised again with the resignation of Lieutenant Governor Brian Benjamin. To avoid many of the above-mentioned problems, New York State should amend Article III, § 7 of the constitution to clarify that a temporary president or speaker ascending to act as governor must vacate their office before acting as governor. Even if their succession to the governorship can be expected to be temporary, they should be required to vacate their legislative posts before acting. This must also be done to avoid the possibility of holding incompatible offices.

Generally, two offices are incompatible if there is an inconsistency between their functions, or if one office is subordinate to the other.\textsuperscript{108} Put differently, if one official has the power to appoint or remove the other, or has the right to interfere in any way with the performance of the duties of the other, the two offices should be regarded as incompatible.\textsuperscript{109} When the temporary president or speaker acts as governor, they would be holding two incompatible offices, because they would have the ability to interfere with the business of the executive and legislative branches. As such, both the temporary president and speaker should be required to resign their legislative offices before ascending to the governorship to act as governor. Additionally, the constitution should be amended to clarify that an official’s entitlement to serve as acting governor is not based on the official concurrently holding their prior legislative office. This would remove the existing ambiguity regarding the source of an acting governor’s authority.

While we recognize the value of party continuity and democratic legitimacy, we do not recommend removing the temporary president or speaker from the line of succession in order to prevent a possible change in party control of the governorship. That both officials are elected and then chosen as leaders by their respective chambers of the Legislature provides an important measure of democratic legitimacy. The same cannot be said for many of the other successors in the line who are appointed, rather than elected.

\textsuperscript{108} People ex rel. Ryan v. Green, 58 N.Y. 295 (1874). See also People v. Tremaine, 252 N.Y. 27 (1929); Hubert, \textit{supra} note 99, at 943.
\textsuperscript{109} Hubert, \textit{supra} note 99, at 944.
Appendixes

Appendix A: Sample Gubernatorial Inability Provision

Whenever the governor transmits to the chief judge of the Court of Appeals a written declaration that they are unable to discharge the powers and duties of the office, and until they transmit to the chief judge a written declaration to the contrary, such powers and duties shall be discharged by the lieutenant governor as acting governor.

Whenever at least six of the lieutenant governor, the attorney general, the comptroller, the temporary president of the Senate, the speaker of the Assembly, and the minority leaders of the Senate and the Assembly submit to the chief judge of the Court of Appeals written declaration that the governor is unable to discharge the powers and duties of the office, the lieutenant governor shall immediately assume the powers and duties of the office as acting governor. Thereafter, when the governor transmits to the temporary president of the Senate and the speaker of the Assembly their written declaration that no disability exists, the governor shall resume the powers and duties of the office of governor, unless a majority of the lieutenant governor, the attorney general, the chief judge of the Court of Appeals, the temporary president of the Senate, and the speaker of the Assembly submit to the secretary of state a written declaration to the contrary.

Thereafter, following notice and hearing, the judges of the Court of Appeals shall render such judgment as they find warranted by a preponderance of the evidence. If a majority of the Court of Appeals holds that the governor is unable to discharge the powers and duties of the office of governor, the lieutenant governor shall continue to act as governor until such time as the disability of the governor is removed or a newly elected governor is inaugurated. Such disability, once determined by the Court of Appeals, may be removed upon petition for declaratory judgment to the Court of Appeals by the governor if the Court finds, after notice and hearing, by a preponderance of the evidence that the governor is able to discharge the powers and duties of the office of governor.
Appendix B: Survey of State Gubernatorial Succession Provisions

<table>
<thead>
<tr>
<th>State</th>
<th>Constitution</th>
<th>Section</th>
<th>Provisions</th>
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<tbody>
<tr>
<td>Alabama</td>
<td>ALA. CONST. art. V, § 128</td>
<td>If the governor or other officer administering the office shall appear to be of unsound mind, it shall be the duty of the supreme court of Alabama, at any regular term, or at any special term, which it is hereby authorized to call for that purpose, upon request in writing, verified by their affidavits, of any two of the officers named in section 127 of this Constitution, not next in succession to the office of governor, to ascertain the mental condition of the governor or other officer administering the office, and if he is adjudged to be of unsound mind, to so decree, a copy of which decree, duly certified, shall be filed in the office of the secretary of state; and in the event of such adjudication, it shall be the duty of the officer next in succession to perform the duties of the office until the governor or other officer administering the office is restored to his mind. If the incumbent denies that the governor or other person entitled to administer the office has been restored to his mind, the supreme court, at the instance of any officer named in section 127 of this Constitution, shall ascertain the truth concerning the same, and in the event of such adjudication, the office shall be restored to him. The supreme court shall prescribe the method of taking testimony and the rules of practice in such proceedings, which rules shall include a provision for the service of notice of such proceedings on the governor or person acting as governor.</td>
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<tr>
<td>Alaska</td>
<td>ALASKA CONST. art. III, § 12</td>
<td>Whenever for a period of six months, a governor has been continuously absent from office or has been unable to discharge the duties of his office by reason of mental or physical disability, the offices shall be deemed vacant. The procedure for determining absence and disability shall be prescribed by law.</td>
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<tr>
<td>Arizona</td>
<td>ARIZ. CONST. art. V, § 6</td>
<td>In the event of ... permanent disability to discharge the duties of the office, the secretary of state, if holding by election, shall succeed to the office of governor until his successor shall be elected and shall qualify[. then] the attorney general, the state treasurer, or the superintendent of public instruction, if holding by election, shall, in the order named, succeed to the office of governor. ... Any successor to the office shall become governor in fact and entitled to all of the emoluments, powers and duties of governor upon taking the oath of office. In the event of ... temporary disability to discharge the duties of the office, the powers and duties of the office of governor shall devolve upon the same person as in case of vacancy, but only until the disability ceases.</td>
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<tr>
<td>Arkansas</td>
<td>ARK. CONST. art. VI, § 12</td>
<td>In case of the death, conviction on impeachment, failure to qualify, resignation, absence from the State, or other disability of the Governor, the powers, duties and emoluments of the office for the remainder of the term, or until the disability be removed ... shall devolve upon, and accrue, to the President of the Senate</td>
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<tr>
<td>California</td>
<td>CAL. CONST. art. VI, § 10</td>
<td>... The Lieutenant shall act as governor during ... temporary disability of the Governor or of a Governor-elect who fails to take office. The Legislature shall provide an order of precedence after the Lieutenant Governor for succession to the office of Governor and for the temporary exercise of the Governor’s functions. The Supreme Court has exclusive jurisdiction to determine all questions arising under this section. Standing to raise questions of vacancy or temporary disability is vested exclusively in a body provided by statute.</td>
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<td></td>
<td>Cal. Gov’t Code § 12070</td>
<td>There is in the state government a Commission on the Governorship, consisting of the President pro Tempore of the Senate, the Speaker of the Assembly, the President of the University of California, the Chancellor of the California State Colleges, and the Director of Finance.</td>
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</table>
**Colorado**

**COLO. CONST. art. IV, § 13(5)**

In the event the governor or lieutenant governor ... is absent from the state or suffering from a physical or mental disability, the powers and duties of the office of governor and the office of lieutenant governor shall, until the absence or disability ceases, temporarily devolve upon the lieutenant governor, ... except that if the lieutenant governor and none of said members of the general assembly are affiliated with the same political party, the temporary vacancy in the office of lieutenant governor shall be filled by the first named member in said subsection (7)....

**COLO. CONST. art. IV, § 13(6)**

The governor or governor-elect, lieutenant governor or lieutenant governor-elect, or person acting as governor or lieutenant governor may transmit to the president of the senate and the speaker of the house of representatives his written declaration that he suffers from a physical or mental disability and he is unable to properly discharge the powers and duties of the office of governor or lieutenant governor. In the event no such written declaration has been made, his physical or mental disability shall be determined by a majority of the supreme court after a hearing held pursuant to a joint request submitted by joint resolution adopted by two thirds of all members of each house of the general assembly. Such determination shall be final and conclusive. The supreme court, upon its own initiative, shall determine if and when such disability ceases.

**Connecticut**

**CONN. CONST. amend. art. XXII(d)**

In the absence of a written declaration of incapacity by the governor, whenever the lieutenant-governor or a majority of the members of the Council on Gubernatorial Incapacity transmits to the Council ... a written declaration ... the Council shall convene ... to determine if the governor is unable to exercise the powers and perform the duties of his office. If the Council ... determines by two-thirds vote that the governor is unable to exercise the powers and perform the duties of his office, it shall transmit a written declaration to that effect to the president pro tempore of the Senate and the speaker of the House of Representatives and to the lieutenant-governor and the lieutenant-governor, upon receipt of such declaration, shall exercise the powers and authority and discharge the duties appertaining to the office of the governor as acting governor; otherwise, the governor shall continue to exercise the powers and discharge the duties of his office. Upon receipt by the president pro tempore of the Senate and the speaker of the House of Representatives of such a written declaration from the Council, the General Assembly shall, in accordance with its rules, decide the issue, assembling ... for that purpose if not in session. If the General Assembly ... determines by two-thirds vote of each house that the governor is unable to exercise the powers and discharge the duties of his office, the lieutenant-governor shall continue to exercise the powers and authority and perform the duties appertaining to the office of governor; otherwise, the governor shall resume the powers and duties of his office.

**Delaware**

**DEL. CONST. art. III, § 20**

(a) In case [of] inability to discharge the powers and duties of the said office, the same shall devolve on the Lieutenant-Governor ... until the disability of the Governor or Lieutenant-Governor is removed, or a Governor shall be duly elected and qualified. ...

(b) Whenever the Governor transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his or her written declaration that he or she is unable to discharge the powers and duties of his or her office, and until he or she transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Lieutenant Governor as Acting Governor.

Whenever the Chief Justice of the Delaware Supreme Court, the President of the Medical Society of Delaware and the Commissioner of the Department of Mental Health, acting unanimously, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives, their written declaration that the Governor is unable to discharge the powers and duties of his or her office because of mental or physical disability, the Lieutenant Governor shall immediately assume the powers and duties of the office as Acting Governor.

Thereafter, when the Governor transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his or her written declaration that no disability exists, he or she shall resume the powers and duties of his or her office unless the Chief Justice of the Supreme Court of Delaware, the President of the Medical
Society of Delaware and the Commissioner of the Department of Mental Health, acting unanimously, transmit within five days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the Governor is unable to discharge the powers and duties of his or her office because of mental or physical disability. Thereupon the General Assembly shall decide the issue, assembling within seventy-two hours for that purpose if not then in session. If the General Assembly within ten days after receipt of the latter written declaration determines by two-thirds vote of all the members elected to each house that the Governor is unable to discharge the powers and duties of his or her office because of mental or physical disability, the Lieutenant Governor shall continue to discharge same as Acting Governor; otherwise, the Governor shall resume the powers and duties of his or her office.

Florida

FLA. CONST. art. IV, § 3

(a) Upon vacancy in the office of governor, the lieutenant governor shall become governor. Further succession to the office of governor shall be prescribed by law. A successor shall serve for the remainder of the term.
(b) Upon impeachment of the governor and until completion of trial thereof, or during the governor’s physical or mental incapacity, the lieutenant governor shall act as governor. Further succession as acting governor shall be prescribed by law. Incapacity to serve as governor may be determined by the supreme court upon due notice after docketing of a written suggestion thereof by three cabinet members, and in such case restoration of capacity shall be similarly determined after docketing of written suggestion thereof by the governor, the legislature or three cabinet members. Incapacity to serve as governor may also be established by certificate filed with the custodian of state records by the governor declaring incapacity for physical reasons to serve as governor, and in such case restoration of capacity shall be similarly established.

Georgia

GA. CONST. art. V, § 1, para. 5

(a) In case of the temporary disability of the Governor as determined in the manner provided in Section IV of this article, the Lieutenant Governor shall exercise the powers and duties of the Governor and receive the same compensation as the Governor until such time as the temporary disability of the Governor ends.
(b) In case of the death, resignation, or permanent disability of the Governor or the Governor-elect, the Lieutenant Governor or the Lieutenant Governor-elect, upon becoming the Lieutenant Governor, shall become the Governor until a successor shall be elected and qualified as hereinafter provided. A successor to serve for the unexpired term shall be elected at the next general election; but, if such death, resignation, or permanent disability shall occur within 30 days of the next general election or if the term will expire within 90 days after the next general election, the Lieutenant Governor shall become Governor for the unexpired term. No person shall be elected or appointed to the office of Lieutenant Governor for the unexpired term in the event the Lieutenant Governor shall become Governor as herein provided.
(c) In case of the death, resignation, or permanent disability of both the Governor or the Governor-elect and the Lieutenant Governor or the Lieutenant Governor-elect or in case of the death, resignation, or permanent disability of the Governor and there shall be no Lieutenant Governor, the Speaker of the House of Representatives shall exercise the powers and duties of the Governor until the election and qualification of a Governor at a special election, which shall be held within 90 days from the date on which the Speaker of the House of Representatives shall have assumed the powers and duties of the Governor, and the person elected shall serve out the unexpired term.

GA. CONST. art. V, § 4

(1) ‘Elected constitutional executive officer,’ how defined. As used in this section, the term ‘elected constitutional executive officer’ means the Governor, the Lieutenant Governor, the Secretary of State, the Attorney General, the State School Superintendent, the Commissioner of Insurance, the Commissioner of Agriculture, and the Commissioner of Labor.

(2) Procedure for determining disability. Upon a petition of any four of the elected constitutional executive officers to the Supreme Court of Georgia that another elected constitutional executive officer is unable to perform the duties of office because of a physical or mental disability, the Supreme Court shall by appropriate rule provide for a speedy and public hearing on such matter, including notice of the nature and cause of the accusation, process for obtaining witnesses, and the assistance of counsel. Evidence at such hearing shall include testimony from not fewer than three qualified physicians in private practice, one of whom must be a psychiatrist.
(3) **Effect of determination of disability.** If, after hearing the evidence on disability, the Supreme Court determines that there is a disability and that such disability is permanent, the office shall be declared vacant and the successor to that office shall be chosen as provided in this Constitution or the laws enacted in pursuance thereof. If it is determined that the disability is not permanent, the Supreme Court shall determine when the disability has ended and when the officer shall resume the exercise of the powers of office. During the period of temporary disability, the powers of such office shall be exercised as provided by law.

### Hawaii

**HAW. CONST. art. V, § 4**

In the event of the absence of the governor from the State, or the governor’s inability to exercise and discharge the powers and duties of the governor’s office, such powers and duties shall devolve upon the lieutenant governor during such absence or disability.

When the office of lieutenant governor is vacant, or in the event of the absence of the lieutenant governor from the State, or the lieutenant governor’s inability to exercise and discharge the powers and duties of the lieutenant governor’s office, such powers and duties shall devolve upon such officers in such order of succession as may be provided by law.

In the event of the impeachment of the governor or of the lieutenant governor, the governor or the lieutenant governor shall not exercise the powers of the applicable office until acquitted.

### Idaho

**IDAHO CONST. art. IV, § 12**

In case of the failure to qualify, the impeachment, or conviction of treason, felony, or other infamous crime of the governor, or his death, removal from office, resignation, absence from the state, or inability to discharge the powers and duties of his office, the powers, duties and emoluments of the office for the residue of the term, or until the disability shall cease, shall devolve upon the lieutenant governor.

**IDAHO CONST. art. IV, § 14**

In case of the failure to qualify in his office, death, resignation, absence from the state, impeachment, conviction of treason, felony or other infamous crime, or disqualification from any cause, of both governor and lieutenant governor, the duties of the governor shall devolve upon the president of the senate pro tempore, until such disqualification of either the governor or lieutenant governor be removed, or the vacancy filled; and if the president of the senate, for any of the above named causes, shall become incapable of performing the duties of governor, the same shall devolve upon the speaker of the house.

### Illinois

**ILL. CONST. art. V, § 6**

(b) If the Governor is unable to serve because of death, conviction on impeachment, failure to qualify, resignation or other disability, the office of Governor shall be filled by the officer next in line of succession for the remainder of the term or until the disability is removed.

(c) Whenever the Governor determines that he may be seriously impeded in the exercise of his powers, he shall so notify the Secretary of State and the officer next in line of succession. The latter shall thereafter become Acting Governor with the duties and powers of Governor. When the Governor is prepared to resume office, he shall do so by notifying the Secretary of State and the Acting Governor.

(d) The General Assembly by law shall specify by whom and by what procedures the ability of the Governor to serve or to resume office may be questioned and determined. The Supreme Court shall have original and exclusive jurisdiction to review such a law and any such determination and, in the absence of such a law, shall make the determination under such rules as it may adopt.

### Indiana

**IND. CONST. art. V, § 10(c)**

Whenever the Governor transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives the Governor’s written declaration that the Governor is unable to discharge the powers and duties of the office, and until the Governor transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Lieutenant Governor as Acting Governor. Thereafter, when the Governor transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives the
Governor’s written declaration that no inability exists, the Governor shall resume the powers and duties of the office.

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<tr>
<th>State</th>
<th>Constitution Section</th>
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<tr>
<td>Indiana</td>
<td>IND. CONST. art. V, § 10(d)</td>
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<td>Whenever the President pro tempore of the Senate and the Speaker of the House of Representatives file with the Supreme Court a written statement suggesting that the Governor is unable to discharge the powers and duties of the office, the Supreme Court shall meet within forty-eight hours to decide the question and such decision shall be final. Thereafter, whenever the Governor files with the Supreme Court the Governor’s written declaration that no inability exists, the Supreme Court shall meet within forty-eight hours to decide whether such be the case and such decision shall be final. Upon a decision that no inability exists, the Governor shall resume the powers and duties of the office.</td>
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<tr>
<td>Iowa</td>
<td>IOWA CONST. art. IV, § 17</td>
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<td>In the case of the death, impeachment, resignation, removal from office, or other disability of the governor, the powers and duties of the office for the residue of the term, or until he shall be acquitted, or the disability removed, shall devolve upon the lieutenant governor.</td>
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<td>Kansas</td>
<td>KAN. CONST. art. I, § 11</td>
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<td>In the event of the disability of the governor, the lieutenant governor shall assume the powers and duties of governor until the disability is removed. The legislature shall provide by law for the succession to the office of governor should the offices of governor and lieutenant governor be vacant, and for the assumption of the powers and duties of governor during the disability of the governor, should the office of lieutenant governor be vacant or the lieutenant governor be disabled. ... The procedure for determining disability and the removal thereof shall be provided by law.</td>
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<td>Kentucky</td>
<td>KY. CONST. art. VI, § 84</td>
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<td>Should the Governor be impeached and removed from office, die, refuse to qualify, resign, certify by entry on his Journal that he is unable to discharge the duties of his office, or be, from any cause, unable to discharge the duties of his office, the Lieutenant Governor shall exercise all the power and authority appertaining to the office of Governor until another be duly elected and qualified, or the Governor shall be able to discharge the duties of his office. On the trial of the Governor, the President of the Senate shall not preside over the proceedings, but the Chief Justice of the Supreme Court shall preside during the trial.</td>
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<td>If the Governor, due to physical or mental incapacitation, is unable to discharge the duties of his office, the Attorney General may petition the Supreme Court to have the Governor declared disabled. If the Supreme Court determines in a unanimous decision that the Governor is unable to discharge the duties of his office, the Chief Justice shall certify such disability to the Secretary of State who shall enter same on the Journal of the Acts of the Governor, and the Lieutenant Governor shall assume the duties of the Governor, and shall act as Governor until the Supreme Court determines that the disability of the Governor has ceased to exist. Before the Governor resumes his duties, the finding of the Court that the disability has ceased shall be certified by the Chief Justice to the Secretary of State who shall enter such finding on the Journal of the Acts of the Governor.</td>
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<tr>
<td>Louisiana</td>
<td>LA. CONST. art. IV, § 18</td>
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<td>(A) Declaration and Counter-Declaration. When a majority of the statewide elected officials determine that any other such official is unable to discharge the powers and duties of his office, they shall transmit a written declaration to this effect to the presiding officer of each house and to the official, and shall file a copy of the declaration in the office of the secretary of state. Thereafter, the constitutional successor shall assume the office as acting official unless, within forty-eight hours after the declaration is filed in the office of the secretary of state, the elected official files in that office and transmits to the presiding officer of each house his written counter-declaration of his ability to exercise the powers and perform the duties of his office.</td>
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<td>(B) Determination by the Legislature. The legislature shall convene at noon on the third calendar day after the filing of any counter-declaration, which may be filed by the official at any time. Should two-thirds of the elected members of each house fail to adopt a resolution within seventy-two hours declaring probable justification for the determination that inability exists, the official shall continue in or resume office.</td>
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</table>
(C) **Assumption of Office by Constitutional Successor.** If two-thirds of the elected members of each house adopt a resolution declaring that probable justification exists for the declaration of inability, the constitutional successor shall assume the powers and duties of the office and a copy of the resolution shall be transmitted forthwith to the supreme court.

(D) **Determination by Supreme Court.** By preference and with priority over all other matters, the supreme court shall determine the issue of inability after due notice and hearing, by a majority vote of members elected to the court, under such rules as it may adopt.

(E) **Reconsideration by Supreme Court.** A judgment of the supreme court affirming inability may be reconsidered by the court, after due notice and hearing, either upon its own motion or upon the application of the official. Upon proper showing and by majority vote of its elected members, the court may determine that no inability then exists, whereupon the official shall immediately resume the powers and duties of his office.

**Maine**

**ME. CONST. art. V, § 14**

**Mental or physical disability of the Governor continuously for more than 6 months**

Whenever for 6 months a Governor in office shall have been continuously unable to discharge the powers and duties of that office because of mental or physical disability such office shall be deemed vacant. Such vacancy shall be declared by the Supreme Judicial Court upon presentment to it of a joint resolution declaring the ground of the vacancy, adopted by a vote of 2/3 of the Senators and Representatives in convention, and upon notice, hearing before the court and a decision by a majority of the court that ground exists for declaring the office to be vacant

**ME. CONST. art. V, § 15**

**Temporary Mental or Physical Disability of Governor**

Whenever the Governor is unable to discharge the powers and duties of that office because of mental or physical disability, the President of the Senate, or if that office is vacant, the Speaker of the House of Representatives, shall exercise the powers and duties of the office of Governor until the Governor is again able to discharge the powers and duties of that office, or until the office of Governor is declared to be vacant or until another Governor shall be duly qualified.

Whenever the Governor is unable to discharge the powers and duties of that office, the Governor may so certify to the Chief Justice of the Supreme Judicial Court, in which case and upon notice from the Chief Justice, the President of the Senate, or if that office is vacant, the Speaker of the House of Representatives, shall exercise the powers and duties of the office of Governor until such time as the Governor shall certify to the Chief Justice that the Governor is able to discharge such powers and duties and the Chief Justice shall so notify the officer who is exercising the powers and duties of the office of Governor.

When the Secretary of State shall have reason to believe that the Governor is unable to discharge the duties of that office, the Secretary of State may so certify to the Supreme Judicial Court, declaring the reason for such belief. After notice to the Governor, a hearing before the court and a decision by a majority of the court that the Governor is unable to discharge the duties of the office of Governor, the court shall notify the President of the Senate, or if that office is vacant the Speaker of the House of Representatives, of such inability and that officer shall exercise the functions, powers and duties of the office of Governor until such time as the Secretary of State or the Governor shall certify to the court that the Governor is able to discharge the duties of the office of Governor and the court, after notice to the Governor and a hearing before the court, decides that the Governor is able to discharge the duties of that office and so notifies the officer who is exercising the powers and duties of the office of Governor.

Whenever either the President of the Senate or Speaker of the House of Representatives shall exercise the office of Governor, the officer shall receive only the compensation of Governor, but the officer’s duties as President or Speaker shall be suspended; and the Senate or House shall fill the vacancy resulting from such suspension, until the officer shall cease to exercise the office of Governor.

**Maryland**

**MD. CONST. art. II, § 6(d)**

The General Assembly, by the affirmative vote of three-fifths of all its members in joint session, may adopt a resolution declaring that the Governor or Lieutenant Governor is unable by reason of physical or mental disability to perform the duties of the office. When action is undertaken pursuant to this subsection of the Constitution, the
officer who concludes that the other officer is unable, by reason of disability to perform the duties of the office shall have the power to call the General Assembly into Joint Session. The resolution, if adopted, shall be delivered to the Supreme Court of Maryland, which then shall have exclusive jurisdiction to determine whether that officer is unable by reason of the disability to perform the duties of the office. If the Supreme Court of Maryland determines that such officer is unable to discharge the duties of the office by reason of a permanent disability, the office shall be vacant. If the Supreme Court of Maryland determines that such officer is unable to discharge the duties of the office by reason of a temporary disability, it shall declare the office to be vacant during the time of the disability and the Court shall have continuing jurisdiction to determine when the disability has terminated. If the General Assembly and the Supreme Court of Maryland, acting in the same manner as described above, determine that the Governor-elect or Lieutenant Governor-elect is unable by reason of physical or mental disability to perform the duties of the elected office, the elected officer shall be disqualified to assume office.
from protracted illness, to perform the duties of the office, the Lieutenant Governor shall discharge the duties of said office until the Governor be able to resume his duties; but if, from disability or otherwise, the Lieutenant Governor shall be incapable of performing said duties, or if he be absent from the State, the President of the Senate Pro Tempore shall act in his stead; but if there be no such President, or if he be disqualified by like disability, or be absent from the state, then the Speaker of the House of Representatives shall assume the office of Governor and perform the duties; and in case of the inability of the foregoing officers to discharge the duties of Governor, the Secretary of State shall convene the Senate to elect a President Pro Tempore. ... Should a doubt arise as to whether a vacancy has occurred in the office of Governor or as to whether any one of the disabilities mentioned in this section exists or shall have ended, then the Secretary of State shall submit the question in doubt to the judges of the Supreme Court, who, or a majority of whom, shall investigate and determine the question and shall furnish to the Secretary of State an opinion, in writing, determining the question submitted to them, which opinion, when rendered as aforesaid, shall be final and conclusive.

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<tr>
<th>Missouri</th>
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<tr>
<td>MO. CONST. art. IV, § 11(b)</td>
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<tr>
<td>Whenever the governor transmits to the president pro tempore of the Senate and the speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the lieutenant governor. ... Whenever a majority of a disability board comprised of the lieutenant governor, the secretary of state, the state auditor, the state treasurer, the attorney general, president pro tempore of the Senate, the speaker of the House of Representatives, the majority floor leader of the Senate, and majority floor leader of the House, transmits to the president pro tempore of the Senate and the speaker of the House of Representatives their written declaration that the governor is unable to discharge the powers and duties of his office, the lieutenant governor shall immediately assume the powers and duties of the office as acting governor. Thereafter when the governor transmits to the disability board his written declaration that no inability exists, he shall resume the powers and duties of his office on the fourth day after he transmits such declaration unless a majority of the disability board transmits their written declaration that the governor is unable to discharge the powers and duties of his office to the Supreme Court within that four-day period, and the Supreme Court shall then convene to decide the issue. If the Supreme Court within twenty-one days after receipt of such declaration, determines by a majority vote of all members thereof that the governor is unable to discharge the powers and duties of his office, the acting governor shall continue to discharge the same as acting governor; otherwise, the governor shall resume the powers and duties of his office.</td>
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<th>Montana</th>
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<tr>
<td>MONT. CONST. art. VI, § 14</td>
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<td>(4) Whenever, at any other time, the lieutenant governor and attorney general transmit to the Legislature their written declaration that the governor is unable to discharge the powers and duties of his office, the Legislature shall convene to determine whether he is able to do so.</td>
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<tr>
<td>(5) If the Legislature, within 21 days after convening, determines by two-thirds vote of its members that the governor is unable to discharge the powers and duties of his office, the lieutenant governor shall serve as acting governor. Thereafter, when the governor transmits to the Legislature his written declaration that no inability exists, he shall resume the powers and duties of his office within 15 days, unless the Legislature determines otherwise by two-thirds vote of its members. If the Legislature so determines, the lieutenant governor shall continue to serve as acting governor.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Nebraska</th>
</tr>
</thead>
<tbody>
<tr>
<td>NEB. CONST. art. IV, § 16</td>
</tr>
<tr>
<td>... If the Governor or the person in line of succession to serve as Governor is absent from the state, or suffering under an inability, the powers and duties of the office of Governor shall devolve in order of precedence until the absence or inability giving rise to the devolution of powers ceases as provided by law.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Nevada</th>
</tr>
</thead>
<tbody>
<tr>
<td>NEV. CONST. art. V, § 18</td>
</tr>
<tr>
<td>In case of the impeachment of the Governor, or his removal from Office, death, inability to discharge the duties of the said Office, resignation or absence from the State, the powers and duties of the Office shall devolve upon the Lieutenant Governor for the residue of the term, or until the disability shall cease. But when the Governor shall with the consent of the Legislature be out of the State, in time of War, and at the head of any military force thereof, he shall continue Commander in Chief of the military forces of the State.</td>
</tr>
</tbody>
</table>
### New Hampshire

N.H. Const. pt. 2, art. XLIX(a)

Whenever the governor transmits to the secretary of state and president of the senate his written declaration that he is unable to discharge the powers and duties of his office by reason of physical or mental incapacity and until he transmits to them a written declaration to the contrary, the president of the senate, for the time being, shall act as governor as provided in article 49, subject to the succession provisions therein set forth.

... Whenever it reasonably appears to the attorney general and a majority of the council that the governor is unable to discharge the powers and duties of his office by reason of physical or mental incapacity, but the governor is unwilling or unable to transmit his written declaration to such effect as above provided, the attorney general shall file a petition for declaratory judgment in the supreme court requesting a judicial determination of the ability of the governor to discharge the powers and duties of his office. After notice and hearing, the justices of the supreme court shall render such judgment as they find warranted by a preponderance of the evidence; and, if the court holds that the governor is unable to discharge the powers and duties of his office, the president of the senate, for the time being, shall act as governor as provided in article 49, subject to the succession provisions therein set forth, until such time as the disability of the governor is removed or a newly elected governor is inaugurated. Such disability, once determined by the supreme court, may be removed upon petition for declaratory judgment to the supreme court by the governor if the court finds, after notice and hearing, by a preponderance of the evidence that the governor is able to discharge the powers and duties of his office. Whenever such disability of the governor, as determined by his written declaration or by judgment of the supreme court, has continued for a period of 6 months, the general court may, by concurrent resolution adopted by both houses, declare the office of governor vacant. Whenever the governor-elect fails to qualify to discharge the powers and duties of his office by reason of physical or mental incapacity or any cause other than death or resignation, for a period of 6 months following the inauguration date established by this constitution, the general court may, by concurrent resolution adopted by both houses, declare the office of governor vacant. The provisions of article 49 shall govern the filling of such vacancy, either by special election or continued service of an acting governor. If the general court is not in session when any such 6-month period expires, the acting governor, upon written request of at least 1/4 of the members of each house, shall convene the general court in special session for the sole purpose of considering and acting on the question whether to declare a vacancy in the office of governor under this article.

### New Jersey

N.J. Const. art. V, § 1(7)

In the event of the failure of the Governor-elect to qualify, or of the absence from the State of a Governor in office, or the Governor’s inability to discharge the duties of the office, or the Governor’s impeachment, the functions, powers, duties and emoluments of the office shall devolve upon the Lieutenant Governor, until the Governor-elect qualifies, or the Governor in office returns to the State, or is no longer unable to discharge the duties of the office, or is acquitted, as the case may be, or until a new Governor is elected and qualifies. In the event that the Lieutenant Governor in office is absent from the State, or is unable to discharge the duties of the office, or is impeached, or if the Lieutenant Governor-elect fails to qualify, or if there is a vacancy in the office of Lieutenant Governor, the functions, powers, duties, and emoluments of the office of Governor shall devolve upon the President of the Senate. In the event there is a vacancy in the office of the President of the Senate, or of the Senate President’s absence from the State, inability to discharge the duties of the office, or impeachment, then such functions, powers, duties, and emoluments shall devolve upon the Speaker of the General Assembly. In the event there is a vacancy in the office of Speaker of the General Assembly, or of the Speaker’s absence from the State, inability to discharge the duties of the office, or impeachment, then such functions, powers, duties, and emoluments shall devolve upon such officers and in the order of succession as may be provided by law. The functions, powers, duties, and emoluments of the office of Governor shall devolve upon the President of the Senate, the Speaker of the General Assembly or another officer, as the case may be, until the Governor-elect or Lieutenant Governor-elect qualifies, or the Governor or Lieutenant Governor in office returns to the State, or is no longer unable to discharge the duties of the office, or is acquitted, or until a new Lieutenant Governor is appointed, as the case may be, or a new Governor or Lieutenant Governor is elected and qualifies.

### New Mexico

N.M. Const. art. I, § 7

[In case the governor is absent from the state, or is for any reason unable to perform his duties, the lieutenant governor shall act as governor, with all the powers, duties and emoluments of that office until such disability be removed. ...]
<table>
<thead>
<tr>
<th>State</th>
<th>Constitution</th>
<th>Article</th>
<th>Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>New York</td>
<td>N.Y. Const. art. IV, § 5</td>
<td>When Lieutenant-Governor to Act as Governor</td>
<td>In case the governor is impeached, is absent from the state or is otherwise unable to discharge the powers and duties of the office of governor, the lieutenant-governor shall act as governor until the inability shall cease or until the term of the governor shall expire. ...</td>
</tr>
<tr>
<td>North Carolina</td>
<td>N.C. Const. art. III, § 3</td>
<td>(2) Succession as Acting Governor. During the absence of the Governor from the State, or during the physical or mental incapacity of the Governor to perform the duties of his office, the Lieutenant Governor shall be Acting Governor. The further order of succession as Acting Governor shall be prescribed by law.</td>
<td></td>
</tr>
<tr>
<td>(3) Physical incapacity. The Governor may, by a written statement filed with the Attorney General, declare that he is physically incapable of performing the duties of his office, and may thereafter in the same manner declare that he is physically capable of performing the duties of his office.</td>
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<tr>
<td>(4) Mental incapacity. The mental incapacity of the Governor to perform the duties of his office shall be determined only by joint resolution adopted by a vote of two-thirds of all the members of each house of the General Assembly. Thereafter, the mental capacity of the Governor to perform the duties of his office shall be determined only by joint resolution adopted by a vote of a majority of all the members of each house of the General Assembly. In all cases, the General Assembly shall give the Governor such notice as it may deem proper and shall allow him an opportunity to be heard before a joint session of the General Assembly before it takes final action. When the General Assembly is not in session, the Council of State, a majority of its members concurring, may convene it in extra session for the purpose of proceeding under this paragraph.</td>
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<tr>
<td>(5) Impeachment. Removal of the Governor from office for any other cause shall be by impeachment.</td>
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<tr>
<td>North Dakota</td>
<td>N.D. Const. art. V, § 11</td>
<td>The lieutenant governor shall succeed to the office of governor when a vacancy occurs in the office of governor. If, during a vacancy in the office of governor, the lieutenant governor is unable to serve because of death, impeachment, resignation, failure to qualify, removal from office, or disability, the secretary of state shall act as governor until the vacancy is filled or the disability removed.</td>
<td></td>
</tr>
<tr>
<td>Ohio</td>
<td>OHIO Const. art. III, § 15</td>
<td>(B) When the governor is unable to discharge the duties of office by reason of disability, the lieutenant governor shall serve as governor until the governor’s disability terminates.</td>
<td></td>
</tr>
<tr>
<td>Oklahoma</td>
<td>OKLA. Const. art. VI, § 15</td>
<td>In case of impeachment of the Governor, or of his death, failure to qualify, resignation, removal from the State, or inability to discharge the powers and duties of the office, the said office, with its compensation, shall devolve upon the Lieutenant Governor for the residue of the term or until the disability shall be removed.</td>
<td></td>
</tr>
<tr>
<td>Oregon</td>
<td>OR. Const. art. V, § 8(a)</td>
<td>In case of the removal from office of the Governor, or of his death, resignation, or disability to discharge the duties of his office as prescribed by law, the Secretary of State ... shall become Governor until the disability be removed, or a Governor be elected at the next general biennial election. The Governor elected to fill the vacancy shall hold office for the unexpired term of the outgoing Governor. The Secretary of State or the State Treasurer shall appoint a person to fill his office until the election of a Governor, at which time the office so filled by appointment shall be filled by election; or, in the event of a disability of the Governor, to be Acting Secretary of State or Acting State Treasurer until the disability be removed. The person so appointed shall not be eligible to succeed to the office of Governor by automatic succession under this section during the term of his appointment.</td>
<td></td>
</tr>
</tbody>
</table>
Pennsylvania
PA. CONST. art. IV, § 13
In the case of the death, conviction on impeachment, failure to qualify or resignation of the Governor, the Lieutenant Governor shall become Governor for the remainder of the term and in the case of the disability of the Governor, the powers, duties and emoluments of the office shall devolve upon the Lieutenant Governor until the disability is removed.

Rhode Island
R.I. CONST. art IX, § 9
If the office of the governor shall be vacant by reason of death, resignation, impeachment or inability to serve, the lieutenant governor shall fill the office of governor, and exercise the powers and authority appertaining thereto, until a governor is qualified to act, or until the office is filled at the next election.

South Carolina
S.C. CONST. art. IV, § 11
In the case of the removal of the Governor from office by impeachment, death, resignation, disqualification, disability, or removal from the State, the Lieutenant Governor shall be Governor. In case the Governor be impeached, the Lieutenant Governor shall act in his stead and have his powers until judgment in the case shall have been pronounced. In the case of the temporary disability of the Governor and in the event of the temporary absence of the Governor from the State, the Lieutenant Governor shall have full authority to act in an emergency. In the case of the temporary absence of the Governor from office by impeachment, death, resignation, disqualification, disability, or removal from the State, the Governor shall appoint, with the advice and consent of the Senate, a successor to fulfill the unexpired term.

S.C. CONST. art. IV, § 12
(1) Whenever the Governor transmits to the President of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Lieutenant Governor as acting Governor.

(2) Whenever a majority of the Attorney General, the Secretary of State, the Comptroller General and the State Treasurer, or of such other body as the General Assembly may provide, transmits to the President of the Senate and the Speaker of the House of Representatives a written declaration that the Governor is unable to discharge the powers and duties of his office, the Lieutenant Governor shall forthwith assume the powers and duties of the office as acting Governor.

Thereafter, if the Governor transmits to the President of the Senate and the Speaker of the House of Representatives his written declaration that no such inability exists he shall forthwith resume the powers and duties of his office unless a majority of the above members or of such other body, whichever the case may be, transmits within four days to the President of the Senate and the Speaker of the House of Representatives their written declaration that the Governor is unable to discharge the powers and duties of his office. Thereupon, the General Assembly shall forthwith consider and decide the issue, and if not in session it shall assemble within forty-eight hours for the sole purpose of deciding such issue. If the General Assembly, within twenty-one days, excluding Sundays, after the first day it meets to decide the issue, determines by two-thirds vote of each House that the Governor is unable to discharge the powers and duties of his office, the Lieutenant Governor shall continue to discharge the same as acting Governor; otherwise, the Governor shall resume the powers and duties of his office.

South Dakota
S.D. CONST. art. IV, § 6
When the office of Governor shall become vacant through death, resignation, failure to qualify, conviction after impeachment or permanent disability of the Governor, the lieutenant governor shall succeed to the office and powers of the Governor. When the Governor is unable to serve by reason of continuous absence from the state, or other temporary disability, the executive power shall devolve upon the lieutenant governor for the residue of the term or until the disability is removed.

Whenever there is a permanent vacancy in the office of the lieutenant governor, the Governor shall nominate a lieutenant governor who shall take office upon confirmation by a majority vote of all the members of each house
of the Legislature. Whenever there is a concurrent vacancy in the office of Governor and lieutenant governor, the
order of succession for the office of Governor shall be as provided by law.

The Supreme Court shall have original and exclusive jurisdiction to determine when a continuous absence from
the state or disability has occurred in the office of the Governor or a permanent vacancy exists in the office of
lieutenant governor.

**Tennessee**

TENN. CONST. art. III, § 12

In case of the removal of the governor from office, or of his death, or resignation, the powers and duties of the
office shall devolve on the speaker of the Senate; and in case of the death, removal from office, or resignation of
the speaker of the Senate, the powers and duties of the office shall devolve on the speaker of the House of
Representatives.

**Texas**

TEX. CONST. art. IV, § 16

(c) In the case of the temporary inability or temporary disqualification of the Governor to serve, the impeachment
of the Governor, or the absence of the Governor from the State, the Lieutenant Governor shall exercise the
powers and authority appertaining to the office of Governor until the Governor becomes able or qualified to
resume serving, is acquitted, or returns to the State.

(d) If the Governor refuses to serve or becomes permanently unable to serve, or if the office of Governor becomes
vacant, the Lieutenant Governor becomes Governor for the remainder of the term being served by the Governor
who refused or became unable to serve or vacated the office. On becoming Governor, the person vacates the
office of Lieutenant Governor, and the resulting vacancy in the office of Lieutenant Governor shall be filled in
the manner provided by Section 9, Article III, of this Constitution.

**Utah**

UTAH CONST. art. VII, § 11

(1) A vacancy in the office of Governor occurs when:
(a) the Governor dies, resigns, is removed from office following impeachment, ceases to reside within the state,
or is determined, as provided in Subsection (6), to have a disability that renders the Governor unable to discharge
the duties of office for the remainder of the Governor's term of office; or

(b) the Governor-elect fails to take office because of the Governor-elect's death, failure to qualify for office, or
disability, determined as provided in Subsection (6), that renders the Governor-elect unable to discharge the
duties of office for the Governor-elect's full term of office.

(2) If a vacancy in the office of Governor occurs, the Lieutenant Governor shall become Governor, to serve:
(a) until the first Monday in January of the year following the next regular general election after the vacancy
occurs, if the vacancy occurs during the first year of the term of office; or

(b) for the remainder of the unexpired term, if the vacancy occurs after the first year of the term of office.

(3) (a) In the event of simultaneous vacancies in the offices of Governor and Lieutenant Governor, the President
of the Senate shall become Governor, to serve:

(i) until the first Monday in January of the year following the next regular general election after the vacancy
occurs, if the vacancy occurs during the first year of the term of office; or

(ii) for the remainder of the unexpired term, if the vacancy occurs after the first year of the term of office.

(b) In the event of simultaneous vacancies in the offices of Governor, Lieutenant Governor, and President of the
Senate, the Speaker of the House of Representatives shall become Governor, to serve:

(i) until the first Monday in January of the year following the next regular general election after the vacancy
occurs, if the vacancy occurs during the first year of the term of office; or
(ii) for the remainder of the unexpired term, if the vacancy occurs after the first year of the term of office.

(4) If a vacancy in the office of Governor occurs during the first year of the term of office, an election shall be held at the next regular general election after the vacancy occurs to elect a Governor and Lieutenant Governor, as provided in Article VII, Section 2, to serve the remainder of the unexpired term.

(5) (a) If the Governor is temporarily unable to discharge the duties of the office because of the Governor’s temporary disability, as determined under Subsection (6), or if the Governor-elect is temporarily unable to assume the office of Governor because of the Governor-elect’s temporary disability, as determined under Subsection (6), the powers and duties of the Governor shall be discharged by the Lieutenant Governor who, in addition to discharging the duties of the office of Lieutenant Governor, shall, without additional compensation, act as Governor until the disability ceases.

(b) (i) If, during a temporary disability of the Governor or Governor-elect, as determined under Subsection (6), a vacancy in the office of Lieutenant Governor occurs or the Lieutenant Governor is temporarily unable to discharge the duties of the office of Governor because of the Lieutenant Governor’s temporary disability, as determined under Subsection (6), the powers and duties of the Governor shall be discharged by the President of the Senate who shall act as Governor until the Governor or Governor-elect’s disability ceases or, in the case of the Lieutenant Governor's temporary disability, the Lieutenant Governor's disability ceases, whichever occurs first.

(ii) If, during a temporary disability of the Governor or Governor-elect, as determined under Subsection (6), neither the Lieutenant Governor nor the President of the Senate is able to discharge the duties of the office of Governor because of a vacancy in the office of Lieutenant Governor or President of the Senate, or both, or because of a temporary disability of either or both officers, as determined under Subsection (6), or a combination of vacancy and temporary disability, the powers and duties of the Governor shall be discharged by the Speaker of the House of Representatives who shall act as Governor until the Governor's disability ceases or until the vacancy, if applicable, in the office of President of the Senate is filled or the temporary disability, if applicable, of the Lieutenant Governor or President of the Senate ceases, whichever occurs first.

(c) (i) During the time that the President of the Senate acts as Governor under this Subsection (5), the President may not exercise the powers and duties of President of the Senate or Senator. The powers and duties of President of the Senate may be exercised during that time by an acting President, chosen by the Senate.

(ii) During the time that the Speaker of the House of Representatives acts as Governor under this Subsection (5), the Speaker may not exercise the powers and duties of Speaker of the House of Representatives or Representative. The powers and duties of Speaker of the House of Representatives may be exercised during that time by an acting Speaker, chosen by the House of Representatives.

(d) When acting as Governor under this Subsection (5), the President of the Senate or Speaker of the House of Representatives, as the case may be, shall be entitled to receive the salary and emoluments of the office of Governor.

(6) (a) A disability of the Governor, Governor-elect, or person acting as Governor shall be determined by:

(i) the written declaration of the Governor, Governor-elect, or person acting as Governor, transmitted to the Supreme Court, stating an inability to discharge the powers and duties of the office; or

(ii) a majority of the Supreme Court upon the joint request of the President or, if applicable, acting President of the Senate and the Speaker or, if applicable, acting Speaker of the House of Representatives.

(b) The Governor or person acting as Governor shall resume or, in the case of a Governor-elect, shall assume the powers and duties of the office following a temporary disability upon the written declaration of the Governor, Governor-elect, or person acting as Governor, transmitted to the Supreme Court, that no disability exists, unless the Supreme Court, upon the joint request of the President or, if applicable, acting President of the Senate and the Speaker or, if applicable, acting Speaker of the House of Representatives, or upon its own initiative, determines
that the temporary disability continues and that the Governor, Governor-elect, or person acting as Governor is unable to discharge the powers and duties of the office.

(c) Each determination of a disability under Subsection (6)(a) shall be final and conclusive.

(7) The Supreme Court has exclusive jurisdiction to determine all questions arising under this section.

**Vermont**

Ch. 2, § 24

The Legislature shall provide by general law what officer shall act as Governor whenever there shall be a vacancy in both the offices of Governor and Lieutenant-Governor, occasioned by a failure to elect, or by the removal from office, or by the death or resignation of both Governor and Lieutenant-Governor, or by the inability of both Governor and Lieutenant-Governor to exercise the powers and discharge the duties of the office of Governor; and such officer so designated, shall exercise the powers and discharge the duties appertaining to the office of Governor accordingly until the disability shall be removed, or a Governor shall be elected. And in case there shall be a vacancy in the office of Treasurer, by reason of any of the causes enumerated, the Governor shall appoint a Treasurer for the time being, who shall act as Treasurer until the disability shall be removed, or a new election shall be made.

**Virginia**

VA. CONST. art. V, § 16

Whenever the Governor transmits to the President pro tempore of the Senate and the Speaker of the House of Delegates his written declaration that he is unable to discharge the powers and duties of his office and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Lieutenant Governor as Acting Governor.

Whenever the Attorney General, the President pro tempore of the Senate, and the Speaker of the House of Delegates, or a majority of the total membership of the General Assembly, transmit to the Clerk of the Senate and the Clerk of the House of Delegates their written declaration that the Governor is unable to discharge the powers and duties of his office, the Lieutenant Governor shall immediately assume the powers and duties of the office as Acting Governor.

Thereafter, when the Governor transmits to the Clerk of the Senate and the Clerk of the House of Delegates his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Attorney General, the President pro tempore of the Senate, and the Speaker of the House of Delegates, or a majority of the total membership of the General Assembly, transmit within four days to the Clerk of the Senate and the Clerk of the House of Delegates their written declaration that the Governor is unable to discharge the powers and duties of his office. Thereupon the General Assembly shall decide the issue, convening within forty-eight hours for that purpose if not already in session. If within twenty-one days after receipt of the latter declaration or, if the General Assembly is not in session, within twenty-one days after the General Assembly is required to convene, the General Assembly determines by three-fourths vote of the elected membership of each house of the General Assembly that the Governor is unable to discharge the powers and duties of his office, the Lieutenant Governor shall become Governor; otherwise, the Governor shall resume the powers and duties of his office.

**Washington**

WASH. CONST. art. III, § 10

In case of the removal, resignation, death or disability of the governor, the duties of the office shall devolve upon the lieutenant governor; and in case of a vacancy in both the offices of governor and lieutenant governor, the duties of the governor shall devolve upon the secretary of state. In addition to the line of succession to the office and duties of governor as hereinabove indicated, if the necessity shall arise, in order to fill the vacancy in the office of governor, the following state officers shall succeed to the duties of governor and in the order named, viz.: Treasurer, auditor, attorney general, superintendent of public instruction and commissioner of public lands. In case of the death, disability, failure or refusal of the person regularly elected to the office of governor to qualify at the time provided by law, the duties of the office shall devolve upon the person regularly elected to and qualified for the office of lieutenant governor, who shall act as governor until the disability be removed, or a governor be elected; and in case of the death, disability, failure or refusal of both the governor and the lieutenant governor elect to qualify, the duties of the governor shall devolve upon the secretary of state; and in addition to the line of succession to the office and duties of governor as hereinabove indicated, if there shall be the failure or
refusal of any officer named above to qualify, and if the necessity shall arise by reason thereof, then in that event in order to fill the vacancy in the office of governor, the following state officers shall succeed to the duties of governor in the order named, viz: Treasurer, auditor, attorney general, superintendent of public instruction and commissioner of public lands. Any person succeeding to the office of governor as in this section provided, shall perform the duties of such office only until the disability be removed, or a governor be elected and qualified; and if a vacancy occur more than thirty days before the next general election occurring within two years after the commencement of the term, a person shall be elected at such election to fill the office of governor for the remainder of the unexpired term.

<table>
<thead>
<tr>
<th>West Virginia</th>
<th>W. Va. Const. art. VII, § 16</th>
</tr>
</thead>
<tbody>
<tr>
<td>In case of the death, conviction or impeachment, failure to qualify, resignation, or other disability of the governor, the president of the Senate shall act as governor until the vacancy is filled, or the disability removed; and if the president of the Senate, for any of the above named causes, shall become incapable of performing the duties of governor, the same shall devolve upon the speaker of the House of Delegates; and in all other cases where there is no one to act as governor, one shall be chosen by joint vote of the Legislature. Whenever a vacancy shall occur in the office of governor before the first three years of the term shall have expired, a new election for governor shall take place to fill the vacancy.</td>
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</tbody>
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<thead>
<tr>
<th>Wisconsin</th>
<th>Wis. Const. art. V, § 8</th>
</tr>
</thead>
<tbody>
<tr>
<td>(2) If the governor is absent from this state, impeached, or from mental or physical disease, becomes incapable of performing the duties of the office, the lieutenant governor shall serve as acting governor for the balance of the unexpired term or until the governor returns, the disability ceases or the impeachment is vacated. But when the governor, with the consent of the legislature, shall be out of this state in time of war at the head of the state’s military force, the governor shall continue as commander in chief of the military force.</td>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Wyoming</th>
<th>Wyo. Const. art. IV, § 6</th>
</tr>
</thead>
<tbody>
<tr>
<td>If the governor be impeached, displaced, resign or die, or from mental or physical disease or otherwise become incapable of performing the duties of his office or be absent from the state, the secretary of state shall act as governor until the vacancy is filled or the disability removed.</td>
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</tr>
</tbody>
</table>
## Appendix C: Survey of State Gubernatorial Absence Provisions

<table>
<thead>
<tr>
<th>State</th>
<th>Constitutional Provision</th>
<th>Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Art. V, § 127</td>
<td>…If the governor shall be absent from the state over twenty days, the secretary of state shall notify the lieutenant governor, who shall enter upon the duties of governor…</td>
</tr>
<tr>
<td>Alaska</td>
<td>Art. III, § 9</td>
<td>In case of the temporary absence of the governor from office, the lieutenant governor shall serve as acting governor.</td>
</tr>
<tr>
<td>Arizona</td>
<td>Art. V, § 6</td>
<td>…In the event of the impeachment of the governor, his absence from the state, or other temporary disability to discharge the duties of the office, the powers and duties of the office of governor shall devolve upon the same person as in case of vacancy, but only until the disability ceases.</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Art. VI, § 12</td>
<td>In case of the death, conviction on impeachment, failure to qualify, resignation, absence from the State, or other disability of the Governor, the powers, duties and emoluments of the office for the remainder of the term, or until the disability be removed, or a Governor elected and qualified, shall devolve upon, and accrue, to the President of the Senate.</td>
</tr>
<tr>
<td>California</td>
<td>Art. V, § 10</td>
<td>The Lieutenant Governor shall act as Governor during the impeachment, absence from the State, or other temporary disability of the Governor or of a Governor-elect who fails to take office.</td>
</tr>
<tr>
<td>Colorado</td>
<td>Art. IV, § 13(5)</td>
<td>…In the event the governor or lieutenant governor, or governor-elect or lieutenant governor-elect, at the time either of the latter is to take the oath of office, is absent from the state or is suffering from a physical or mental disability, the powers and duties of the office of governor and the office of lieutenant governor shall, until the absence or disability ceases, temporarily devolve upon the lieutenant governor, in the case of the governor, and, in the case of the lieutenant governor, upon the first named member of the general assembly listed in subsection (7) of this section who is affiliated with the same political party as the lieutenant governor…</td>
</tr>
<tr>
<td>Connecticut</td>
<td>Art. IV, § 18</td>
<td>In case of the death, resignation, refusal to serve or removal from office of the governor, the lieutenant-governor shall, upon taking the oath of office of governor, be governor of the state until another is chosen at the next regular election for governor and is duly qualified. In case of the inability of the governor to exercise the powers and perform the duties of his office, or in case of his impeachment or of his absence from the state, the lieutenant-governor shall exercise the powers and authority and perform the duties appertaining to the office of governor until the disability is removed or, if the governor has been impeached, he is acquitted or, if absent, he has returned.</td>
</tr>
<tr>
<td>Hawaii</td>
<td>Art. V, § 4</td>
<td>…In the event of the absence of the governor from the State, or the governor's inability to exercise and discharge the powers and duties of the governor's office, such powers and duties shall devolve upon the lieutenant governor during such absence or disability….</td>
</tr>
<tr>
<td>Idaho</td>
<td>Art. IV, § 12</td>
<td>In case of the failure to qualify, the impeachment, or conviction of treason, felony, or other infamous crime of the governor, or his death, removal from office, resignation, absence from the state, or inability to discharge the powers and duties of his office, the powers, duties and emoluments of the office for the residue of the term, or until the disability shall cease, shall devolve upon the lieutenant governor.</td>
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<td>Article/Section</td>
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<tr>
<td>Louisiana</td>
<td>Art. IV, § 19</td>
<td>When the governor is temporarily absent from the state, the lieutenant governor shall act as governor. When any other statewide elected official is temporarily absent from the state, the appointed first assistant shall act in his absence.</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Pt. 2, ch. 2, § II, art. III</td>
<td>Whenever the chair of the governor shall be vacant, by reason of his death, or absence from the commonwealth, or otherwise, the lieutenant governor, for the time being, shall, during such vacancy, perform all the duties incumbent upon the governor, and shall have and exercise all the powers and authorities, which by this constitution the governor is vested with, when personally present.</td>
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<tr>
<td>Michigan</td>
<td>Art. V, § 26</td>
<td>…If the governor or the person in line of succession to serve as governor is absent from the state, or suffering under an inability, the powers and duties of the office of the governor shall devolve in order of precedence until the absence or inability giving rise to the devolution of powers ceases.</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Art. V, § 131</td>
<td>…When the Governor shall be absent from the state, or unable, from protracted illness, to perform the duties of the office, the Lieutenant Governor shall discharge the duties of said office until the Governor be able to resume his duties…</td>
</tr>
<tr>
<td>Missouri</td>
<td>Art. IV, § 11(a)</td>
<td>…On the failure to qualify, absence from the state or other disability of the governor, the powers, duties and emoluments of the governor shall devolve upon the lieutenant governor for the remainder of the term or until the disability is removed.</td>
</tr>
<tr>
<td>Montana</td>
<td>Art. VI, § 14(2)</td>
<td>After the governor has been absent from the state for more than 45 consecutive days, the lieutenant governor shall serve as acting governor.</td>
</tr>
<tr>
<td>Nevada</td>
<td>Art. V, § 18</td>
<td>In case of the impeachment of the Governor, or his removal from Office, death, inability to discharge the duties of the said Office, resignation or absence from the State, the powers and duties of the Office shall devolve upon the Lieutenant Governor for the residue of the term, or until the disability shall cease. But when the Governor shall with the consent of the Legislature be out of the State, in time of War, and at the head of any military force thereof, he shall continue Commander in Chief of the military forces of the State.</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>Pt. 2, art. XLIX</td>
<td>In the event of … absence from the state … of the governor, the president of the senate, for the time being, shall act as governor until the vacancy is filled or the incapacity is removed…</td>
</tr>
<tr>
<td>New Jersey</td>
<td>Art. V, § 1(7)</td>
<td>In the event of the failure of the Governor-elect to qualify, or of the absence from the State of a Governor in office, … the functions, powers, duties and emoluments of the office shall devolve upon the Lieutenant Governor, until … the Governor in office returns to the State. In the event that the Lieutenant Governor in office is absent from the State, … the functions, powers, duties, and emoluments of the office of Governor shall devolve upon the President of the Senate. In the event of … the Senate President’s absence from the State, … such functions, powers, duties, and emoluments shall devolve upon the Speaker of the General Assembly. In the event … of the Speaker’s absence from the State, … such functions, powers, duties, and emoluments shall devolve upon such officers and in the order of succession as may be provided by law. The functions, powers, duties, and emoluments of the office of Governor shall devolve upon the President of the Senate, the Speaker of the General Assembly or another officer, as the case may be, until the Governor-elect or Lieutenant Governor-elect.</td>
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<tr>
<td>State</td>
<td>Article</td>
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<td>New Mexico</td>
<td>Art. V, § 7</td>
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<td>New York</td>
<td>Art. IV, § 5</td>
<td></td>
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<tr>
<td>North Carolina</td>
<td>Art. III, § 3(2)</td>
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| Oklahoma      | Art. IV, § 15 |         | If, during a vacancy of the office of Governor, the Lieutenant Governor shall be … absent from the State, or become incapable of performing the duties of the office, the president, pro tempore, of the Senate, shall act as Governor until the vacancy be filled or the disability shall cease…  

**Note:** There is no absence provision pertaining to absence of the Governor. |
| South Carolina| Art. IV, § 11 |         | …In the case of the temporary disability of the Governor and in the event of the temporary absence of the Governor from the State, the Lieutenant Governor shall have full authority to act in an emergency…. |
| South Dakota  | Art. IV, § 6 |         | When the Governor is unable to serve by reason of continuous absence from the state, or other temporary disability, the executive power shall devolve upon the lieutenant governor for the residue of the term or until the disability is removed.  

…The Supreme Court shall have original and exclusive jurisdiction to determine when a continuous absence from the state or disability has occurred in the office of the Governor or a permanent vacancy exists in the office of lieutenant governor. |
<p>| Texas         | Art. IV, § 16(c) |         | In the case of the temporary inability or temporary disqualification of the Governor to serve, the impeachment of the Governor, or the absence of the Governor from the State, the Lieutenant Governor shall exercise the powers and authority appertaining to the office of Governor until the Governor becomes able or qualified to resume serving, is acquitted, or returns to the State. |</p>
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<tr>
<th>State</th>
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<th>Section</th>
<th>Text</th>
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<tr>
<td>Vermont</td>
<td>Ch. 2, § 20</td>
<td>The Governor, and in the Governor’s absence, the Lieutenant-Governor, shall have power to [carry out the functions of the office of the state’s highest executive].</td>
<td></td>
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<tr>
<td>Wisconsin</td>
<td>Art. V, § 7(2)</td>
<td>If the governor is absent from this state, impeached, or from mental or physical disease, becomes incapable of performing the duties of the office, the lieutenant governor shall serve as acting governor for the balance of the unexpired term or until the governor returns, the disability ceases or the impeachment is vacated. But when the governor, with the consent of the legislature, shall be out of this state in time of war at the head of the state’s military force, the governor shall continue as commander in chief of the military force.</td>
<td></td>
</tr>
<tr>
<td>Wyoming</td>
<td>Art. IV, § 6</td>
<td>If the governor be impeached, displaced, resign or die, or from mental or physical disease or otherwise become incapable of performing the duties of his office or be absent from the state, the secretary of state shall act as governor until the vacancy is filled or the disability removed.</td>
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</tr>
</tbody>
</table>
Appendix D: New York Election Law Committee Proposal

COMMITTEE ON ELECTION LAW

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July 1, 2008

Charles O’Byrne
Secretary to the Governor
The Executive Chamber
The State Capitol
Albany, New York 12224

Dear Mr. O’Byrne:

The Committee on Election Law of the Association of the Bar of the City of New York has reflected upon the recent extraordinary vacancies in the offices of New York State Comptroller and New York State Governor, and urges you to consider the following reforms as subjects for proposed amendments to the New York State Constitution and the Public Officers Law. I write on behalf of the Committee.¹

Background

On the first of January, 2007, Comptroller Alan Hevesi, who had been re-elected the previous November to a new four-year term to commence that day, offered his resignation rather than assume office. As a result, on February 7, 2007, pursuant to Article V, §1 of the New York State Constitution and §41 of the Public Officers Law, the Legislature selected then-Assemblyman Thomas DiNapoli to fill out the remainder of Mr. Hevesi’s term.²

¹ The within letter of course reflects the views of the members qua members, and does not reflect our views as practicing lawyers, members of the judiciary or as government employees. The letter was drafted by Subcommittee members Cynthia Kouril, Jerry H. Goldfeder and Michael Stallman. After revision, it was adopted unanimously at our meeting on April 29, 2008.

² The timing of the Hevesi “resignation” itself raised complicating questions implicating § 41 of the Public Officers Law, which requires the Governor to fill the vacancy. Since Hevesi pled guilty to a felony on December 22, 2006, his status automatically created a vacancy in the office of the Comptroller for the remainder of the term ending December 31, 2006. N.Y. Pub. Officers Law § 30. As such, his resignation that day was not necessary. It appears that no one considered filling the Comptroller’s position for the remaining nine days of the term. On January 1, 2007, Hevesi’s felony status continued to bar him from assuming office, and, again, no resignation was required. Nevertheless, Hevesi “resigned” from his new term on January 14. In that the new Legislature had not yet been gavelled into session, then-Governor Spitzer could have appointed the new Comptroller. There is no evidence that the Executive Chamber considered this, or even interpreted the law as such. Accordingly, after the new Legislature was sworn in, it began the process to fill the vacancy.

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
42 West 44th Street, New York, NY 10036-6689 www.nycbar.org
On March 12, 2008, Governor Spitzer resigned, effective the following Monday, March 17, 2008. On that same day, of course, pursuant to Article IV, § 5 of the New York State Constitution, Lt. Governor David A. Paterson was sworn in as Governor to fill the remainder of the term. The office of Lt. Governor became vacant, and, as you know, New York has no constitutional or statutory provision to fill a vacancy in that office. The New York State Constitution does, however, permit the "duties of the Lt. Governor" to be performed by the temporary president of the State Senate. N.Y.Const. art. IV, § 6.

Each of these circumstances underscored problems with our existing constitutional and statutory framework, which we believe ought to be corrected. We offer our suggestions.

The Problems

When there is a vacancy in the offices of Governor, Lt. Governor, Attorney General or Comptroller, there is no special election to fill the vacancy. Attorney General and Comptroller vacancies are filled either by gubernatorial appointment or by the Legislature. The sitting Lt. Governor, who was the gubernatorial candidate’s running mate and elected together with the Governor, fills a gubernatorial vacancy.¹ No special election for a new Governor would be held in this circumstance. Thus, a new Attorney General, Comptroller or Governor may serve for several months or as much as a full four year term without the voters’ direct choice in the matter.²

In fact, Comptroller DiNapoli will have served for a month shy of a full four-year term without the voters participating in his selection. Similarly, Governor Paterson will serve for almost three full years by virtue of succeeding to the position. Thus, in both of these situations, the voters have been deprived of any role in choosing a replacement through a special election -- and this is unlike the way we fill vacancies in most public offices in New York.

Additional problems occur as a result of the temporary president of the State Senate fulfilling the duties of the Lt. Governor during a vacancy. First of all, the temporary president may or may not be of the same political party as the new Governor. As such, when the temporary president assumes the duties of the Lt. Governor, the reciprocal philosophical loyalties enjoyed by the Governor/Lt. Governor running mates may not exist in this circumstance. Second, the temporary president obviously casts a vote as a sitting senator. If she then has to break a tie, it is problematic as to whether the temporary president can do so by casting a “second” vote. Third, if the extraordinary event occurs that there is a vacancy in the new Governor’s office, the temporary president becomes Acting Governor.³ This raises the issue of a person from a different party ascending to the governorship. But, more importantly, the law is unclear as to whether the temporary president must resign her State Senate seat to become Acting Governor until a special election is held. If not, then we are faced with obvious separation of powers issues.⁴

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¹ N.Y. Const. art. IV, § 1.
² In the absence of a sitting Lt. Governor, the temporary president of the State Senate becomes Acting Governor. If this occurs earlier than three months prior to the General Election, a special election for Governor is held on the day of the General Election to fill the remainder of the term; if it occurs afterward, the special election is held the following November. N.Y. Const. art. IV, § 6.
³ It could be fairly argued, however, that when a voter casts a ballot for the Governor/Lt. Governor ticket, she knows that the Lt. Governor will succeed to the governorship should a vacancy occur.
⁴ N.Y. Const. art. IV, Sec. 6.
⁵ In the federal scheme, when a Speaker of the House of Representatives becomes Acting President, she must first resign from Congress. 3 U.S.C.A. § 19.
Proposed Solutions: Attorney General and Comptroller

We further urge that the filling of a vacancy in either of these offices should be effected by a “replacement” election at the next regularly scheduled General Election. \(^\text{12}\) Currently filled by appointment by the Governor or selection by the Legislature, a replacement election would allow the voters to participate.

Specifically, this Committee suggests that a vacancy in either office be filled for the remainder of the term at a replacement election at the next scheduled General Election, provided that the vacancy occurs prior to September 20\(^\text{th}\). If the vacancy occurs on or after September 20\(^\text{th}\), the replacement election would be held at the following year’s regularly scheduled General Election. This framework conforms to the existing time lines set out in the Public Officers Law. \(^\text{13}\) The new attorney general or comptroller would take office as soon as the votes of the replacement election are certified.

This reform would require a revision of the constitutional provision that currently bars an attorney general or comptroller from being elected at a time other than at the same time as the gubernatorial election. \(^\text{14}\)

In that a replacement election and the certification of a new attorney general or comptroller might very well be months after the vacancy occurred, it is the view of the Committee that the Legislature, if in session, or the Governor if the Legislature were not in session, should name an interim office holder until certification of the replacement. Thus, an interim attorney general or comptroller would be selected pursuant to current procedures, allowing the important work of the office to continue until the replacement election.

* * *

Our recommendations are designed to allow continuity in government and maximum voter participation. We look forward to discussing them with you.

Very truly yours,

Jerry H. Goldfeder

---

\(^\text{12}\) We are calling it a “replacement” election rather than a special election because the latter is a term of art in the Election Law. Under the current law, nominations in a special election are filled by the rules of the political parties. N.Y. Elec. Law § 6-114. It is the Committee’s view that replacement elections for attorney general or comptroller would be held as any other statewide election, and thus should include party primaries when the petitioning schedule permits. N.Y. Elec. Law § 6-158. (Of course, state conventions could place candidates’ names on the ballot as well. N.Y. Elec. Law § 6-126.) When the vacancy occurs too late in the year for a traditional primary election to be held, the replacement election would be conducted as a garden-variety special election.

\(^\text{13}\) N.Y. Pub. Off. Law § 42.

\(^\text{14}\) N.Y. Const. art V, § 1.
All of these issues are compounded by the further complication that these succession rules come into play not just when there is a vacancy, but also when the Governor or Lt. Governor suffers an “inability.”

Proposed Solutions: Governor and Lt. Governor

The Election Law Committee discussed various alternatives and determined that the most practical and fair solution would be to adopt the model relied upon by the federal government with respect to vacancies in the office of President and Vice-President of the United States.

This change would permit a new Governor who has succeeded to the post from the Lt. Governorship to select a new Lt. Governor whose nomination would be confirmed by the Legislature. There are several advantages to following this model. It has been used successfully in the early 1970s to great benefit, resulting in stability and continuity in government. Moreover, in that the public is familiar with the federal model, importing it to New York would undoubtedly be readily accepted.

Furthermore, insofar as a vacancy in the Lt. Governorship can be expected to be of short duration, the problems of the current system identified above --a temporary president of the senate simultaneously acting in both executive and legislative roles; and the question as to whether a temporary president can cast a vote as a sitting senator and as a tie-breaking presiding officer-- would be practically eliminated. Most importantly, the public would be reassured that the line of succession was clear and unambiguous, and that the new Governor—who had, after all, been elected as a running mate of the previous Governor—would select a new Lt. Governor who would continue the philosophy and policies voted upon at the last election.

We offer one procedural improvement upon the federal model. The twenty-fifth amendment provides that the Vice President-designate “shall take office upon confirmation by a majority vote of both Houses of Congress.” (Emphasis supplied.) This has been interpreted to mean that both houses sit and vote as one body. Nevertheless, we should avoid ambiguity by including language that requires “confirmation by a majority vote of the two houses of the legislature by joint ballot.”

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8 See N.Y. Const. art. IV, §§ 5 (Par. 3), 6 (Par. 4). “Inability” is the term used in federal and state law connoting some kind of temporary or permanent status that renders an office holder unable to discharge her duties. The federal system has procedures in place to govern this contingency. New York does not. Indeed, when Governor Paterson was recently hospitalized and treated for glaucoma and cataract, it would not have been far-fetched for someone to suggest that an inability temporarily existed.

9 See U.S. Const. amend. XXV, which provides in pertinent part:

“b...§ 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.”

This provision has been invoked only twice. After Vice President Spiro Agnew resigned, President Nixon selected Rep. Gerald Ford (R-Mich.) to be Vice President. The Congress confirmed him. Upon President Nixon’s resignation, Vice President Ford assumed the presidency, and, in turn, selected Nelson Rockefeller as his new Vice President. The Congress approved this appointment as well.

10 We have learned anecdotally that many voters were surprised that New York did not already follow this model.

11 This language is derived from § 41 of the New York Public Officers Law.
Within twenty (20) days of assuming office, either by election or succession to office in case of vacancy, the governor shall appoint, from among the elected attorney general, the elected comptroller, the most recently elected temporary president of the senate, and the most recently elected speaker of the assembly, a person to succeed to the office of lieutenant-governor if the office of lieutenant-governor becomes vacant. The person designated is next in line for succession to the office of lieutenant-governor, subject to the pleasure of the governor. If the person designated is removed from appointment, vacates the appointment, or ceases to meet the qualifications required for appointment, the governor shall appoint a successor subject to the same qualifications as the person initially appointed.

If a vacancy occurs in the office of governor and the lieutenant-governor succeeds to the office of governor or if the office of lieutenant-governor otherwise becomes vacant, the person designated as next successor to the office of lieutenant-governor as provided in herein succeeds to the office of lieutenant-governor for the remainder of the term vacated. Within twenty (20) days of the appointed successor assuming the office of lieutenant-governor, the governor shall appoint a person to succeed to office of lieutenant-governor in case of subsequent vacancy from among the potential candidates identified in the previous paragraph.
Appendix G: Hybrid Lieutenant Governor Succession Amendment

Within twenty (20) days of assuming office, either by election or succession to office in case of vacancy, the governor shall appoint, from among the attorney general, the elected comptroller, the most recently elected temporary president of the senate, and the most recently elected speaker of the assembly, a person to succeed to the office of lieutenant-governor if the office of lieutenant-governor becomes vacant. This appointment shall be subject to confirmation by a majority of the members of both houses of the legislature, voting separately.
Appendix H: Proposed Reforms to the Line of Succession

Proposed Amendment to the New York Constitution, Article III, Section 7:

SECTION 1. No person shall serve as a member of the legislature unless he or she is a citizen of the United States and has been a resident of the state of New York for five years before the date of their election, nor anyone who has not been for the twelve months immediately preceding their election, a resident of the county or district where he or she may be chosen.

SECTION 2. No member of the legislature shall – during the time for which he or she was elected – receive, succeed, or be appointed to any civil office under the authority of the United States or the state of New York, which shall have been created, or the salaries of which have been increased during such time. And no person holding any office under the government of the United States, the state of New York, or under any city government, shall be a member of either House of the Legislature during their continuance in office.

SECTION 3. If a member of the legislature be elected to congress, appointed, or succeed to any office, civil or military, under the government of the United States, the state of New York, or under any city government except as a member of the national guard or naval militia of the state, or of the reserve forces of the United States, their acceptance thereof shall vacate their seat in the legislature, providing, however, that a member of the legislature may be appointed commissioner of deeds or to any office in which he or she shall receive no compensation.
New York State Bar Association
Committee on the New York State Constitution

GUBERNATORIAL SUCCESSION IN NEW YORK

Constitutional and Statutory Recommendations Regarding Gubernatorial Succession and Inability

Report Approved by the Committee on Thursday, October 27, 2022

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1. INTRODUCTION

The Lieutenant-Governor position in New York seldom draws public attention. However, it has moved to center stage in the past 18 months. The position is normally filled through the elective process, with the Governor and Lieutenant-Governor running jointly in the general election. However, in August 2021, Andrew Cuomo resigned as Governor, elevating Lieutenant-Governor Kathy Hochul to the governorship. Under New York law, Governor Hochul was free to appoint unilaterally whomever she chose as Lieutenant-Governor. That person, though not vetted by the electorate or the Legislature, would accede to the governorship if she left office. Governor Hochul selected state Senator Brian Benjamin, an ill-fated choice since Benjamin was indicted
eight months later and resigned. Hochul again exercised unfettered discretion to appoint a Lieutenant-Governor, and appointed Congressman Anthony Delgado. Delgado won the Democratic primary, securing his place on the ballot with Governor Hochul in the general election.¹

Having two Lieutenant-Governors chosen exclusively by the Governor within such a brief period of time has reignited concerns over whether this is an appropriate way to select a person who is a heartbeat from the governorship. Whether the procedure itself has ever gained the legitimate consent of the governed is debatable. The procedure is not clearly spelled out in New York’s constitution or statutes; it arose out of necessity. The state constitution provides when a vacancy exists in the office of Lieutenant-Governor, the duties of that office are discharged by the Temporary President of the Senate. Historically, intra-term vacancies in the Lieutenant-Governor office remained unfilled. Sixteen months after Lieutenant-Governor David Paterson became Governor following Eliot Spitzer’s resignation in March 2008, he faced an evenly divided Senate with both major parties claiming leadership of the house and no Lieutenant-Governor (or Temporary President acting as Lieutenant-Governor) to break the tie.² Paterson appointed Richard Ravitch as Lieutenant-Governor, ostensibly to provide the tie-breaking vote. In doing so, he relied on Section 43 of the Public Officers Law, which provides that the Governor has the power to fill vacancies not covered in other statutes. This appointment was challenged, and a closely divided Court of Appeals, in Skelos v. Paterson, agreed with Paterson. This interpretation prevails today, but is it the best way to select someone who might become Governor?

NYSBA’s Committee on the New York State Constitution decided to address the topic of who serves as Lieutenant-Governor if that office becomes vacant. It formed a Subcommittee which considered scenarios about how to fill the vacancy, including one in which both the Governor and Lieutenant-Governor positions are vacant. That led to consideration of how to deal with other gubernatorial succession issues and how to address the inability of a Governor to serve. The federal government addressed the issue of presidential inability and vacancies in the office of Vice President with the Twenty-Fifth Amendment, but New York does not have a comparable law.

¹ As the deadline for Benjamin to decline the nomination to be on the primary ballot had passed by the time of his resignation, a swift change in the law had to be adopted to allow him to remove his name from the ballot.
² Under New York law, the Lieutenant-Governor has a casting vote in the state senate on procedural matters.
This report will set forth its recommendations and the reasons supporting them, with an appendix proposing constitutional and statutory language changes.

2. SUMMARY OF RECOMMENDATIONS

- **Absence from the state.** The constitutional provision that the Lieutenant-Governor act as Governor when the Governor is absent from the state should be repealed.

- **Filling a Lieutenant-Governor vacancy.** In the event of a vacancy in the office of Lieutenant-Governor, the Governor should have the authority to appoint the Lieutenant-Governor, subject to confirmation by separate majority votes in each house of the Legislature.

- **Timeline for filling vacancy.** The Governor should have 60 days to nominate a successor Lieutenant-Governor, and the Legislature should have 60 days to vote on whether to confirm the nominee. If one house of the Legislature were to vote against confirmation, the Governor’s clock should restart, with the Governor having 30 days from the date of rejection to submit a new nominee and the Legislature having 30 days to vote on the new nominee. If the Governor were to fail to nominate a person within either the 60-day or 30-day limit, the Legislature should be authorized to fill the position for the remainder of the Lieutenant-Governor’s term, following the procedure currently provided by statute for vacancies in the offices of Attorney General and Comptroller. If the Legislature were to fail to either confirm or reject a nominee within 60 days after it receives a nomination (or 30 days in the case of a second or subsequent nominee), the nominee should be deemed appointed for the remainder of the gubernatorial term.

- **Whoever succeeds to governorship assumes the office.** The constitution should provide that, when the Governor ceases to act as Governor, either temporarily or permanently, the officer who succeeds discharges the powers and duties of Governor during the time of that succession to the same extent as if that official had been elected Governor.³

³ This should be true even if the Governor who left office eventually returns to the position, as after an impeachment not resulting in removal from office or after an inability to serve ceases.
- **Succession by Temporary President of the Senate or Speaker.** The current order of succession to the governorship, namely Lieutenant-Governor, Temporary President of the Senate, and Speaker of the Assembly, should be continued. If the Temporary President of the Senate or Speaker of the Assembly permanently assumes the office of Governor, that official must resign from legislative office. However, if the succession is temporary due to an impeachment or inability of the Governor to serve, the Temporary President or Speaker need not relinquish legislative office until they have held the governorship for sixty consecutive days. During the sixty consecutive days of incumbency, that officer may not exercise his or her powers and duties as a legislator.

- **If the Temporary President of the Senate and Speaker Decline to Serve.** If the Temporary President of the Senate and Speaker of the Assembly both decline to assume the office of Governor, the Attorney-General, Comptroller and certain commissioners from executive departments who have been confirmed by the Senate, as provided by law, should be next in line to serve as Governor.

- **Gubernatorial Inability to Serve.** There should be a procedure to declare the inability of a Governor to serve which parallels the procedure in the federal Constitution’s Twenty-Fifth Amendment. A Governor could voluntarily declare an inability to serve. In addition, a committee on gubernatorial inability, consisting of the Lieutenant-Governor, Attorney General, Comptroller and six executive department heads confirmed by the Senate, as provided by law, could declare an inability by a vote of a majority of the members designated to that committee. Each house of the Legislature must confirm the Governor’s inability by a two-thirds vote of the elected members of the house. A Governor could then declare at any time in the future an ability to resume the duties of office, unless the committee on gubernatorial disability declares otherwise and each house of the Legislature agrees by two-thirds vote.

Draft language to effectuate these changes can be found in the Appendix. We recommend that these changes be made by constitutional amendment except for proposed statutes to create an order of gubernatorial succession and a committee on gubernatorial inability.
We recognize there is substantial complexity in these recommendations. We expect these recommendations to be submitted to the Legislature in several separate proposals.

3. BACKGROUND

New York has had a Lieutenant-Governor since before its first constitution was adopted in 1777.\(^4\) Although there have been at least twelve vacancies in that position over the decades, no Governor attempted to appoint a Lieutenant-Governor until 2009. Among the prior vacancies, all remained unfilled except for special elections held in 1847, for which the Legislature passed a special statute, and in 1944 when, after the death of Lieutenant-Governor Thomas Wallace, the state Democratic Party chair sued to force a special election. The courts agreed that the constitutional and statutory provisions then in effect required such an election.

Then-Governor Thomas Dewey, concerned that a special election could lead to the election of a Lieutenant-Governor from a different political party than that of the Governor, urged constitutional and legislative changes, which included requiring the Governor and Lieutenant-Governor of the same party to run on a joint ticket in the general election—the first state to do so—and providing that no election for Lieutenant-Governor could occur unless an election to fill a vacancy in the office of Governor was also held. These changes were eventually adopted in a 1953 constitutional amendment. A prior constitutional amendment in 1945 clarified that the Temporary President of the Senate serves as Lieutenant-Governor if that position is vacant, and an amendment a year earlier to the Public Officers Law removed the offices of Governor and Lieutenant-Governor from that section of the law [section 42] requiring a special election to fill a vacancy occurring in an elected office.

Lieutenant-Governor David Paterson assumed the governorship in March 2008 after Eliot Spitzer resigned. In mid-2009, he was faced with the unusual circumstance of two groups of state Senators, each with thirty-one votes, claiming to control the Senate, with each group claiming to include the rightful Temporary President of the Senate. As this dispute dragged on, it became impossible to conduct legislative business (if a Lieutenant-Governor had been in place, he or she

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would have had a tie-breaking vote on procedural matters, but that office was vacant. Governor Paterson appointed Richard Ravitch as Lieutenant-Governor in July of that year, relying on section 43 of the Public Officers Law, which provides:

If a vacancy shall occur otherwise than by expiration of term, with no provision of law for filling the same, if the office be elective, the governor shall appoint a person to execute the duties thereof until the vacancy shall be filled by an election. But if the term of such office shall expire with the calendar year in which the appointment shall be made, or if the office is appointive, the appointee shall hold for the residue of the term.

The Temporary President of the Senate challenged the appointment, and the Court of Appeals, by a 4-3 vote in Skelos v. Paterson, upheld the appointment. The Court reasoned there was no statutory or constitutional provision explicitly providing for filling the Lieutenant-Governor vacancy, and therefore section 43 applied. The Court held the Public Officers Law could be read in harmony with Article IV, Section 6 of the constitution, which provided for the Temporary President to “perform all the duties of lieutenant-governor during such vacancy or inability.” The Temporary President would perform those functions, the Court reasoned, until the Governor filled the vacancy under section 43.

The dissent reasoned that Article IV controlled, providing that the Temporary President perform the duties of Lieutenant-Governor until the next election, and that no such election could be held unless and until there was a vacancy in the offices of both the Governor and the Lieutenant-Governor. Section 43 was never meant to fill the Lieutenant-Governor position, the dissent said, and the Legislature, by excluding the Lieutenant-Governor from those offices that required an intervening election under section 42 of the Public Officers Law, demonstrated that the sole recourse for filling a vacancy in the Lieutenant-Governor position could be found in Article IV.

Under Skelos, the Governor has the authority to appoint a Lieutenant-Governor should a vacancy occur. As no Lieutenant-Governor had been appointed before 2009, and that specific appointment was made in the midst of unique legislative gridlock, it was conceivable that when

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the situation next arose a Governor would revert to pre-2009 practice. However, with Skelos as support, Governor Hochul twice appointed Lieutenant-Governors—while at the time not having been elected Governor herself. Should Governor Hochul have left office before that term ended, the Lieutenant-Governor would have become Governor without having stood for election to either office or having been confirmed by the Legislature. We believe this is an unsatisfactory devolution of the highest office in the state. Below, we set forth our recommended approach and the reasoning behind the recommendations.

In addition, in reviewing Governor/Lieutenant-Governor succession, we have identified a number of issues which should be addressed in the constitution and accompanying statutes.

- Article IV, Section 5 of the constitution provides that the Lieutenant-Governor, in addition to succeeding the Governor if impeached or otherwise unable to serve, shall act as Governor if the Governor “is absent from the state.” This appears to be an anachronistic rule in the current age of worldwide, instant communication, and has been a source of mischief in other states.

- The constitution does not clarify the role of a successor to the Governor. For example, Article IV, Section 6, provides that the Temporary President of the Senate or Speaker of the Assembly shall “act as governor” if there be no Governor or Lieutenant-Governor. What does that mean? The same language is found in Section 5, where the Lieutenant-Governor acts as Governor during a Governor’s impeachment, absence from the state, or when the Governor is unable to discharge the office’s duties. The status of the person serving as Governor should be clarified.

- Though the Temporary President of the Senate or the Speaker of the Assembly may “act as governor” or “perform the duties of lieutenant-governor,” nothing in the constitution or statute appears to bar them from simultaneously exercising their duties as a legislator. Thus, a Temporary President might be able vote on a measure as a senator and then, if there were a tie vote, vote to break that tie as acting Lieutenant-Governor. Holding executive and legislative positions simultaneously poses a serious separation of powers issue.

- There is lack of clarity as to who succeeds to the governorship if the Lieutenant-Governor, Temporary President and Speaker are unable or unwilling to serve, which may become more of a
distinct possibility if the Temporary President and Speaker cannot hold executive and legislative positions simultaneously.

- New York has no provision similar to the federal Twenty-Fifth Amendment to deal with the situation in which the Governor has an inability preventing the Governor from discharging the duties of the office.

This report addresses these issues and proposes constitutional and statutory language to deal with them. While we attempt to encompass additional situations not currently or adequately addressed by existing law, we do not attempt to solve for all permutations, or to anticipate every situation that might arise in the future. The events of 2009, for example, were a confluence of unusual factors, with a Governor who was not elected to that office, no Lieutenant-Governor, and an even split in the Senate with two Senators claiming to lead the body. However, we hope our recommendations provide a roadmap for a variety of situations and clarify the roles and authority of the involved officials.

4. GOVERNOR’S ABSENCE FROM THE STATE

Article IV, Section 5 of the constitution provides:

In case the governor is impeached, absent from the state or is otherwise unable to discharge the powers and duties of the office of governor, the lieutenant-governor shall act as governor until the inability shall cease or until the term of the governor shall expire.

The phrase “absent from the state” also appears three times in Section 6, regarding other succession procedures. The exception was logical when a Governor’s leaving the state meant the Governor was unable to maintain contact with developments and could not be an effective decision-maker if the need arose. However, in the Internet age, a Governor need never be out of touch, and is able to convey decisions instantaneously. **We see no reason to maintain the “absent from the state” language in Article IV.**

This provision is not harmless. While there is no reported instance in New York of a Lieutenant-Governor using the Governor’s absence to make decisions that run counter to the
Governor’s policies, such as has happened in other states. Most recently, in Idaho, Lieutenant Governor Janice McGeachin used Governor Brad Little’s absence from the state as an opportunity to issue an order banning COVID-19 mask mandates in schools, reversing Governor Little’s order. Although members of the same political party, McGeachin was a political rival of Governor Little; a similar situation could arise in New York, because the Lieutenant-Governor runs separately from the Governor in party primaries. In the 2022 election, Lieutenant-Governor Delgado, preferred by Governor Hochul, could have lost the primary to one of two challengers who had been critical of the Governor. Having a Lieutenant-Governor at odds with the Governor has happened before in New York and even a Lieutenant-Governor elected with a Governor’s support could become disaffected. It is better to remove an unnecessary provision of the constitution than to retain a superfluous provision that could lead to political mischief and a governing crisis.

Admittedly, there may be instances in which a Governor is absent and out of communication. One well-publicized incident involved Governor Mark Sanford of South Carolina, who disappeared for nearly six days in 2009, not responding to communications, reportedly involving a personal matter. If a Governor does not want to be found, the Governor could also disappear within the state, though this would be an exceedingly rare occurrence. This situation can be addressed through the language in Article IV, Section 5, as the Governor would be “unable to discharge the powers and duties” of the office. Here, if necessary, the use of a declaration of inability that we propose [see section 7 of this report] would allow for a temporary transition of power.

An additional concern with the existing language, flagged by the New York Law Revision Commission, is that there is some disagreement among other states over the meaning of the term “absent from the state.”

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https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1000&context=rule_of_law_clinic
8 Id. at 9.
10 Fordham Rule of Law Clinic Report, supra note 5, at 9.
Some courts have construed “absent from the state” to mean physical non presence within the boundaries of the state, and others to mean presence outside the state to the extent there is an inability to govern.\textsuperscript{11}

One example arose in California, in 1979, when the Lieutenant Governor appointed a judge when the Governor was out of state. The California Supreme Court allowed the Governor to withdraw the nomination but ruled that absence meant physical absence.\textsuperscript{12} On the other hand, the Nevada Supreme Court ruled that absence meant “effective absence”, citing other court decisions as precedent.\textsuperscript{13} This uncertainty should not remain in New York’s constitution.

The Law Revision Commission and the Temporary Commission on the Revision and Simplification of the Constitution,\textsuperscript{14} among others, have recommended this provision be removed from the constitution. We believe this should be done promptly.

5. **GOVERNOR/LIEUTENANT-GOVERNOR SUCCESSION**

a. **Replacing a Lieutenant-Governor**

For close to a year and a half immediately preceding the swearing in on January 1, 2023, of the Lieutenant-Governor elected in November 2022, the Lieutenant-Governor of the state was neither elected by the people to that position nor confirmed by any government body. Yet, he could have had all the enormous power of the Governor if Kathy Hochul were to have resigned or otherwise been unable to serve. We believe that giving the Governor sole authority to install anyone the Governor wants as Lieutenant-Governor, with no checks, is unwise. We are joined in this view by the New York Law Revision Commission\textsuperscript{15} and others.\textsuperscript{16} This office is too important

\textsuperscript{11} 1986 Law Revision Commission Report, supra note 1, at 12.
\textsuperscript{12} In re Governorship, 26 Cal. 3d 110, 113 (1979).
\textsuperscript{13} Sawyer v. First Judicial District Court, 82 Nev. 53, 410 P.2d 748 (1966).
\textsuperscript{14} 1986 Law Revision Commission Report at 46. See also Fordham Rule of Law Clinic Report at 8-10.
\textsuperscript{15} See 1986 NYS Law Revision Commission Report. supra note 1, at 95.
to leave to one person to fill, a view underscored by the events of the last few years, when substantial powers were placed in the Governor’s hands, or otherwise invoked, to deal with the COVID-19 pandemic.

In considering proposals for reform, a threshold issue is whether a Lieutenant-Governor who leaves office mid-term (either through elevation to the governorship, resignation, or otherwise) should be replaced at all. Despite having at least nine prior Lieutenant-Governors leave office without being replaced, David Paterson appointed Richard Ravitch in 2009 to fill the vacancy created when he assumed the office of Governor as he was faced with a deadlocked Senate unable to function. When there is a vacancy in the office of Lieutenant-Governor, the state constitution provides that the Temporary President of the Senate will assume the duties of the Lieutenant-Governor. This raises a basic issue of whether that individual may exercise a tie-breaking vote in the Senate, as he or she would already have had a vote as a sitting senator in that body. In addition, legislative leaders have an entirely different focus than a Governor or Lieutenant-Governor, and an all-consuming job of their own to run a house of the Legislature. They are not in a position to both manage the business of a legislative body and immerse themselves in executive decision-making and administration, which could be thrust upon them immediately should they become Lieutenant-Governor or Governor.

The logistical problems that counsel removal of the “absence from the state” language above could similarly exist when a Temporary President of the Senate serves as Lieutenant-Governor. The Temporary President may not agree with the Governor’s policies and may even be from a different party. And although the Temporary President is an elected official, that person is elected from only one senate district, representing less than two percent of the state’s population. If the Temporary President is unable to assume the duties of Lieutenant-Governor, the Speaker of the Assembly serves in that role, which raises the same concerns but reduces to 0.67% the size of the state’s population that has actually voted on the Acting Lieutenant-Governor.

A Lieutenant-Governor, in contrast to a legislator, must be ready to succeed the Governor in acting on behalf of the entire state. By virtue of serving as second-in-command, a Lieutenant-
Governor will have been directly exposed at some level to the administration’s decision-making and governing strategy. In the case of David Paterson, he had virtually no notice that he would be taking on the responsibilities of governing and he was confronted with a governance crisis soon after taking office. Doubtless his ability to observe up close the inner workings of the Governor’s office helped him when he assumed the office of Governor.

We believe that the Governor should be able to fill a Lieutenant-Governor vacancy by appointing a person of the Governor’s choice, subject to checks and balances. The Governor should be able to have a second-in-command of the Governor’s own choosing who agrees with the Governor’s policies and manner of governing. The Governor was elected presumably because the electorate approved of the Governor’s approach to governing. Allowing the Governor to appoint a Lieutenant-Governor who shares the same views serves the interests of the electorate and avoids the inevitable conflicts of interest that arrive when the duties of that office are executed by one of the leaders of the legislature.

b. Other States and Territories

The large majority of states and territories have some method to replace a Lieutenant-Governor. Twenty-one states and territories, as of last count, have explicit succession procedures. Other replacement mechanisms are implicit or the result of court decisions, such as in New York. Most states with explicit procedures provide for the Governor to appoint a new Lieutenant-Governor, subject to some form of legislative confirmation.\(^\text{17}\) Of those, most require confirmation by both houses of the Legislature. Similarly, the Twenty-Fifth Amendment provides for the President to appoint a Vice President, subject to confirmation by both houses of Congress.

Six states and territories allow the Legislature to fill a vacancy in the office of Lieutenant-Governor, and three states—Florida, Montana, and New Jersey—expressly permit the Governor to appoint a new Lieutenant-Governor without confirmation.\(^\text{18}\) Alaska requires the Governor to identify someone from a list of cabinet members at the beginning of the Governor’s term (subject to legislative confirmation), so that person would be in place should the Lieutenant-Governor

\(^{17}\) Information on other states and territories is from T. Quinn Yeargain, Recasting the Second Fiddle: The Need for a Clear Line of Lieutenant-Gubernatorial Succession, 84 Albany Law Review ___ (2021) at 20. (Hereinafter “Recasting the Second Fiddle”)

\(^{18}\) Recasting the Second Fiddle, supra note 15, at 19-27.
position become vacant. The Fordham Rule of Law Clinic report suggests that procedure for New York, with such person then subject to legislative confirmation.

c. Our Recommendation

In considering our recommendation, we sought a procedure that provides appropriate checks and balances, efficiency of government, and continuity of the outgoing Governor’s policies. This approach best reflects the electorate’s wishes and would build public credibility.

We believe that the Governor should be able to select the Lieutenant-Governor nominee (who must have the constitutional qualifications to serve as Governor). We oppose leaving the replacement decision entirely to the Legislature. The Governor, as the head of the executive branch, must be able to decide initially who to nominate. A Governor should be able to work with a Lieutenant-Governor of the Governor’s own choosing and have confidence that, should the Governor leave office, the successor would continue the Governor’s policies. Although harmony between the two officials cannot be guaranteed, the likelihood of harmony is higher when the Lieutenant-Governor is selected by the Governor. But the Governor’s discretion to appoint should not be unfettered, as it is today.

We do not favor limiting the Governor to choosing from only certain officials, as some have proposed. None of the allowable officials may align with the Governor’s views and approach to governing. In addition, selecting the person ahead of time, as in Alaska, would unduly limit the Governor in appointing someone appropriate for the moment when a vacancy occurs. Allowing the Governor a full choice of nominees, subject to legislative confirmation, strikes the proper balance.

We recommend that the Governor’s nominee for Lieutenant-Governor be subject to confirmation by a separate majority vote of the elected members of each house of the Legislature. This recommendation aligns with the Law Revision Commission’s recommendation. We believe the importance of the office necessitates a confirmation process that involves both houses. If two elected legislative bodies review and approve the nominee the public will have confidence that the Governor’s appointment is properly vetted.\(^\text{19}\) Similar to the requirements to

\(^{19}\) We note that the majority in \textit{Skelos} made clear they were not favoring gubernatorial appointment without review as a policy: “Before us, however, is not the abstract question of whether it would be better in the case of a vacancy in the office of the Lieutenant Governor to fill the vacancy by election or by
pass legislation, approval in each house must be by a majority of the elected members of that house (as opposed to a majority of those voting on the nomination).

In choosing the process, we have considered and specifically reject changing the law to require filling a vacancy in the office of Lieutenant-Governor by a special election. Three states fill Lieutenant-Governor vacancies through special elections. While using a special election to fill a vacancy involves the voters, such an election does not enhance the state’s governance. The voters may elect someone from a different party than the Governor or someone who is at odds with the Governor. Indeed, concern about this possibility in New York after the court-ordered special election for Lieutenant-Governor in 1943 led to the amendment eliminating the possibility of a Lieutenant-Governor special election. A special election would also likely draw a low turnout of voters to select someone who might eventually be Governor. We believe gubernatorial appointment and legislative confirmation will provide the Governor with someone the Governor can work with, subject to scrutiny by two bodies of duly elected representatives. If, however, both the Governor and Lieutenant-Governor positions are vacant, then an election should be held at the earliest feasible general election, as the constitution currently requires.

d. Timeline

We recommend that deadlines be set to require that the Lieutenant-Governor position be filled and to reduce some of the political gamesmanship that could follow a vacancy. **The Governor should have 60 days to nominate a person to fill the vacancy.** While 60 days may seem like a long time, it would allow the Governor’s office, the State Police, and other authorities to screen candidates properly. Unlike the lengthy election process, which affords the public and the media ample time before voting to “vet” candidates, the shorter window before a nominee assumes office makes screening even more important—especially because the Lieutenant-Governor may assume the governorship. Approximately two weeks after she became Governor, Kathy Hochul selected Brian Benjamin as Lieutenant-Governor despite reported issues concerning gubernatorial appointment subject to legislative confirmation or by gubernatorial appointment alone.” 13 N.Y.3d at 153.

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1986 Law Revision Commission Report, supra note 1, at 19. A special election would in principle be in conflict with the constitutional requirement that the governor and lieutenant-governor run jointly in the general election.
his fitness for office. He was eventually indicted and resigned. More rigorous vetting may have avoided such a blunder.22

We propose that once the Governor submits the nominee to the Legislature, the Legislature would have 60 days to act. The Legislature’s failure to either confirm or reject a nominee within that 60-day window would result in the nominee being deemed confirmed for the office of Lieutenant-Governor for the remainder of the term. If one house of the Legislature rejects a Lieutenant-Governor nominee, the Governor’s appointment clock starts again, with 30 days to name a subsequent nominee. If the Legislature does not confirm or reject any subsequent nominee within 30 days, the Governor’s nominee would be deemed confirmed. On the other hand, if the Governor fails to nominate someone within either the 60-day or 30-day timeframe (which we believe would be extremely unlikely), the Legislature would fill the position as it fills vacancies in the Attorney-General and Comptroller position (a joint vote of the two houses).23

Giving the Governor 30 days to nominate a second person after a legislative rejection would move the process along swiftly if a second nominee is needed. Sixty days is a significant period for the Governor to initially nominate a Lieutenant-Governor, and during that period the Governor would have ample opportunity to identify other nominees.

We recognize that any confirmation procedure may lend itself to political strategizing. There could be gaming of the approach we recommend, such as a Legislature that keeps rejecting a governor’s nominees. If either house is controlled by a party opposed to the Governor, there may be a temptation to block multiple Lieutenant-Governor nominees. However, experience with the replacement of a Lieutenant-Governor in other states has not led to that result, even in controversial situations.24 The Governor and Legislature have an interest in working together and have many issues to address in any legislative session. We believe disputes regarding who should serve as Lieutenant-Governor would be resolved as have other disagreements, through negotiation.

Requiring legislative confirmation necessarily builds a time into the process. The constitution provides that the Temporary President of the Senate, and failing that, then the Speaker

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22 See, e.g., Gothamist, “Hochul: We were told Benjamin’s background check came up ‘clean’”, April 13, 2022. https://gothamist.com/news/hochul-we-were-told-benjamins-background-check-came-up-clean.
23 NY Public Officers Law §41.
24 See Recasting the Second Fiddle, supra note 15, at 59.
of the Assembly, shall assume the duties of Lieutenant-Governor when the latter office is vacant. There is a possibility that one of these legislative leaders may become Acting Governor during that time. We believe the importance of having a Lieutenant-Governor who is vetted in a significant way by the Legislature outweighs the small risk of a legislative leader serving as Governor. And, as noted in Article IV, Section 6(c), in the event the Governor and Lieutenant-Governor positions both become vacant, there would be a general election be held as soon as feasible to fill both positions.

6. TEMPORARY PRESIDENT/SPEAKER SUCCESSION TO GOVERNORSHIP

a. What Does It Mean to “Act” as Governor

Article IV, Section 6 provides:

In case of a vacancy in the offices of both governor and lieutenant-governor or if both of them shall be impeached, absent from the state or otherwise unable to discharge the powers and duties of the office of governor, the temporary president of the senate shall act as governor until the inability shall cease or until the governor shall be elected.

In case of a vacancy in the office of lieutenant-governor alone, or if the lieutenant-governor shall be impeached, absent from the state or otherwise unable to discharge the powers and duties of office, the temporary president of the senate shall perform all the duties of the lieutenant-governor during such vacancy or inability.

If the Temporary President is unable to serve either as acting Governor or acting Lieutenant-Governor, the Speaker of the Assembly would assume the designated role.

There are two problems posed by the current language. First, what does it mean that the Temporary President “shall act as governor”? Does this mean the Temporary President is the Governor? What authority, if any, is missing if the Temporary President simply “acts” as Governor? If the Temporary President simply acts as Governor, and during that period the Senate elects another Temporary President, does the Temporary President then serving as Governor lose the position because that individual no longer serves as Temporary President? In other words,
does the source of the power rest with the person or the office? A similar issue has arisen in other states.  

We believe that a legislative leader, and indeed anyone in the line of succession, who succeeds to the governorship—even temporarily—should be empowered to discharge the powers and duties of the office of Governor as if that individual had been elected as Governor. This makes clear that the officer has the full authority of the governorship. This also would insulate the succeeding Governor from challenges as to validity of the Governor’s actions.

b. Holding Gubernatorial and Legislative Positions Simultaneously

A second problem is posed because, in serving as Governor, the Temporary President would have decisive roles in both the executive and legislative branches of government. This undermines the principle of the separation of powers between the branches. Even if the Temporary President is serving as Lieutenant-Governor, that officer theoretically would have a tie-breaking vote in the Senate in addition to casting a vote as a Senator.

In addition, the Temporary President has been the Majority Leader and shapes the agenda of the Senate. The Temporary President would then also be exercising the powers of Governor, including shaping policy, presenting and negotiating the budget, signing or vetoing bills and exercising other uses of executive authority. The state has not experienced the situation where the Temporary President has taken on the role of Governor for an extended term, with both executive and legislative authority, but twice in the past two years (and many longer periods in the past) there was no Lieutenant-Governor.

We believe the constitution must make clear that the Temporary President or Speaker cannot possess gubernatorial and legislative authority at the same time. Should the Temporary President or Speaker be required to exercise the powers and duties of the Governor, that official should have to resign from both the legislative seat and the legislative leader position. For certain situations, such as temporary inability or an impeachment procedure, the resignation requirement would trigger if the officer acts as Governor for more than 60 days, but during those 60 days, the legislative leader acting as Governor would be unable to

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25 See Fordham Rule of Law Clinic Report, supra note 5, at 18.
exercise the powers and duties of any legislative position. In addition, a Temporary President serving as Lieutenant-Governor should not also be able to have a casting vote in the Senate.\textsuperscript{26}

We recommend a further minor change to Section 6 to conform two sections. Currently, if the Governor is unable to discharge the responsibilities of the office, with no Lieutenant-Governor, the Temporary President of the Senate acts as Governor until the “inability shall cease or until a governor shall be elected.” When the Temporary President is unable to act as Governor and the Speaker does so, the Speaker acts as Governor “during such vacancy or inability.” We do not see a reason why the two sections are different, and so we recommend combining aspects of both and changing both to read: “until the earlier of the cessation of the vacancy/inability or the election of a new governor,” though also acknowledging that the Speaker would no longer act as Governor once the Temporary President is able to undertake the duties of Governor.

c. Who Should be Next in Line?

Having to relinquish a Senate or Assembly leadership position to become Governor might cause both leaders to decline to serve – particularly if the tenure as Governor is anticipated to be relatively short. The 60-day provision attempts to address that situation by only requiring relinquishment if the service is longer term. To further address this situation, the constitution should acknowledge explicitly that there may be such a declination and the Legislature should provide by statute that the Attorney General and Comptroller, in that order, would take the office of Governor. Under this scenario, there would not be a fundamental separation of powers issue if another statewide elected official in the executive branch takes the office. Beyond that, there should be an order of succession, again created through an act of the Legislature, of certain heads of executive departments who have been confirmed by the Senate.

\textsuperscript{26} Other than removing the authority to vote as Lieutenant-Governor, we do not recommend any changes in the current constitutional framework for the Temporary President of the Senate or Speaker of the Assembly assuming the duties of Lieutenant-Governor. Therefore, these legislative leaders would retain their seats and leadership positions while assuming the duties of the Lieutenant-Governor.
The Legislature has already provided for succession involving heads of departments in the Defense Emergency Act of 1951.\(^{27}\) This statute was enacted in the early years of the Atomic Age, out of concern that an attack could severely disable the ability to govern. Therefore, the statute only applies “as a result of an attack or a natural or peacetime disaster.” We propose to have a succession statute that covers all situations and suggest in the Appendix a different line-up than in the Defense Emergency Act, which currently includes heads of departments that no longer exist. A proposed succession order is provided, but we do not express a strong position about which Senate-confirmed heads of departments are in the line of succession, or their ordering; the most important thing is that the Legislature establish a line of succession.

We note that in proposing this approach, we have left in place the long-standing procedure of the Temporary President and Speaker being next in line of succession after the Lieutenant-Governor. We acknowledge the possible merits of succession devolving to other statewide officials in the first instance. Having executive department succession, relying on the Attorney General and Comptroller, avoids separation of powers issues should a legislative leader succeed to executive office. In addition, the Attorney General and Comptroller already have been subject to a statewide election, while a legislative leader represents one district. And beyond the two statewide officials, succession would devolve to department heads, as is true now in certain circumstances, and those officers are more likely than legislative leaders to be in sync with the policies and politics of the former Governor.

7. INABILITY OF GOVERNOR TO SERVE

a. The Twenty-Fifth Amendment

The state constitution (Article IV, §§ 5 and 6) refers to the Lieutenant-Governor and others as taking over as Governor if the Governor is “unable to discharge the powers and duties” of the office. However, it is unclear how that determination is made. The federal government wrestled with this question in the 1960s, after one President had serious surgeries and the next was assassinated. Following years of careful work, Congress approved, and the states ratified, the Twenty-Fifth Amendment to the federal Constitution. The amendment, in addition to providing a mechanism for a President appointing a Vice President should that position become vacant, set out a procedure to declare the inability of a President to serve.

Essentially, the Twenty-Fifth Amendment provides that a President can declare an inability to perform the powers and duties of the office, in which case the Vice President assumes those powers and duties until the President declares the inability no longer exists.\(^{28}\) The amendment also provides for the situation in which the President is unable to discharge the powers and duties of the office but has not so declared. The Vice President and a majority of the cabinet may then declare the President’s inability to serve, and the Vice President assumes the authority unless the President contests, in which case Congress must decide, by a two-thirds vote of each house.

New York does not have a procedure for determining when a Governor is unable to serve, which risks a governmental crisis. At this point, at least half the states have a procedure to address inability,\(^ {29}\) and New York should have one as well. Too many issues, including emergencies, face New York’s Governor to risk having no procedure for resolving whether and how to deal with gubernatorial inability to serve.

b. A Procedure for New York

We believe the federal model should be adapted to New York. This model sets out a clear process for determining inability while setting a high bar for making the determination absent the consent of the chief executive, involving an extensive number of officers in the executive branch

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\(^{29}\) NYS Law Revision Commission, Memorandum: Relating to Gubernatorial Inability and Succession (Senate No. 3619; Assembly No. 5669) (1985) at 3. (Found at HeinOnline).
as well as the Legislature. The model also should provide for a relatively smooth transition of power in what would certainly be a fraught situation, maintaining public credibility and having the court system available to resolve legal issues.

We propose that the Legislature establish by law a committee on gubernatorial inability, to be composed of the Lieutenant-Governor, Attorney General, Comptroller and six heads of executive agencies who have been confirmed by the Senate. If a majority of this committee declares that the Governor is unable to discharge the powers and duties of the office, the Lieutenant-Governor would assume those responsibilities. However, if the Governor contests the declaration, it would be up to the Legislature to decide promptly. The Governor could at any time in the future assert the ability to function as Governor and would resume the powers and duties of the office. However, if the committee on gubernatorial inability, by majority vote, again declares the Governor unable to serve, the Legislature would decide whether the Governor could continue to exercise those responsibilities, again on a two-thirds vote of each house. If there is any vacancy on the committee on gubernatorial disability at the time a decision on gubernatorial inability is made, then a two-thirds vote of the remaining members of the committee would be required to declare an inability.

If there is no Lieutenant-Governor at the time a gubernatorial inability is declared by the committee, the Temporary President of the Senate or Assembly Speaker is called upon to succeed the Governor. The procedures discussed in the section on succession would apply, such as when the legislative leaders would have to either relinquish their legislative roles or resign from their position.

While this proposal is similar to the federal model, it departs from models used in a number of states. A review of other states shows no consensus as to which officials trigger the procedure for declaring inability. Some states require the votes of a number of executive department officials, others involve legislative leaders or the Legislature in some way, and some permit one or two officials to begin the process. However, while most states leave the final decision to the state’s highest court, several give the Legislature the final say.30 We note the Law Revision Commission

30 See Ballotpedia, Vacancy Procedures by State: https://ballotpedia.org/How_gubernatorial_vacancies_are_filled#:~:text=Whenever%20the%20governor%20is%20unable,or%20until%20the%20next%20election.
proposed a process in which the legislative leaders and Lieutenant-Governor would declare an inability and the Court of Appeals would make the determination on inability.31

Our approach relies on the executive branch to declare an inability and the legislative branch to decide, as the Twenty-Fifth Amendment provides. An argument for New York not following the Twenty-Fifth Amendment model is that the state does not have a body analogous to the presidential cabinet. However, the state does have heads of executive agencies who have been confirmed by the Senate. They can function much like federal cabinet members should the need to determine inability arise. In addition, New York has two officials elected statewide, independent of the Governor, who can provide additional perspectives. The proposed composition of the committee on gubernatorial inability thus provides a mix of elected executive officers and appointees with a presumed loyalty to the Governor to consider a declaration of inability. Unlike the federal model, which allows the Vice President to quash a declaration even if the entire cabinet disagrees, we would not give the Lieutenant-Governor such a veto; rather we would make the Lieutenant-Governor one of the members of the committee, with a majority needed to determine inability.

We are concerned about having the Court of Appeals determine disability. The Court may need to decide legal questions that may be posed during the process, and its credibility would be clouded if it were making such decisions while also having the responsibility for determining the Governor’s disability. We are further concerned because the Court’s decision to declare a Governor unable to serve is different from the type of determinations courts are called upon to make and is not based on an interpretation of law (for example, there is no definition of inability).

In addition, involving the Court in a determination of disability would inject it directly in a political process. The Twenty-Fifth Amendment reflects the understanding that a determination of inability inevitably will be perceived as political. As all Court of Appeals judges are gubernatorially appointed (a process we fully support), there could be a perception that could taint the decision.32

31 See 1986 Law Revision Commission Report”, supra note 1, at 81. See also Fordham Rule of Law Clinic Report, supra note 5, at 6. As of 1986, according to the Law Revision Commission, 17 of the 28 states with inability procedures relied on the courts to decide inability and only six called upon legislatures. 1986 Law Revision Commission Report at 82.

32 We also note that the Court of Appeals sits on the court for the trial of impeachment, along with the State Senate, which could add a further complication. (N.Y. Const., Art. VI, §24).
Our approach does not include a definition of “inability” or of being “unable to exercise the powers and duties of the office.” The Twenty-Fifth Amendment does not include such a definition, nor has Congress enacted one. As explained by John Feerick, who was instrumental in drafting the Twenty-Fifth Amendment:

[...]ny attempt to define such terms would run the risk of not including every contingency that could give rise to a presidential inability. It was also felt that a detailed definition could lead to problems of interpretation at a time of an inability crisis, when the country could least afford debate and controversy.33

We are convinced with the difficulty of trying to define these terms. The process is designed to set an appropriately high bar for declaring an inability to serve, and any such decision will not be made lightly. We contemplate that the committee on gubernatorial inability will consult medical authorities as appropriate, though the exigencies of a situation should not compel them to do so. The plain language of the amendment requires the declaration that the Governor is unable to serve, not that the committee would simply rather replace the Governor. The Commissioners of Health and of Mental Hygiene should be on the committee, so that they can bring expertise in these areas. In the Appendix we recommend which department heads should be on the committee.

New York should no longer ignore the potential crisis that would develop should a Governor lack the physical or mental competence to continue to serve as Governor. A procedure must be adopted to provide for an orderly determination of inability and transfer of power.

8. CONCLUSION

There are too many concerns and omissions in the current state constitution to ignore with regard to Governor/Lieutenant-Governor succession. In this report, we provide recommendations for:

- Eliminating the “absent from the state” provision
- Establishing a constitutional procedure for replacing a Lieutenant-Governor

- Assuring that a succeeding Governor discharge all the powers and duties of the office, and providing for an orderly succession process
- Requiring legislative leaders to relinquish their legislative roles upon becoming governor
- Establishing a procedure to address gubernatorial inability

The constitutional amendment process requires passage of an amendment by two consecutively elected Legislatures prior to its submission to the voters. We urge the Legislature to give the attached amendments first passage during the current legislative session.
APPENDIX

Language Implementing Lieutenant-Governor Recommendations

New language is in bold; deleted language is in brackets

I. Removing Provision re: Absence from the State

*NY Const. Article IV, Section 5, shall be amended as follows:*

In case of the removal of the governor from office or of his or her death or resignation, the lieutenant-governor shall become governor for the remainder of the term.

In case the governor-elect shall decline to serve or shall die, the lieutenant-governor-elect shall become governor for the full term.

In case the governor is impeached [, is absent from the state] or is otherwise unable to discharge the powers and duties of the office of governor, the lieutenant-governor shall act as governor until the inability shall cease or until the term of the governor shall expire.

In case of the failure of the governor-elect to take the oath of office at the commencement of his or her term, the lieutenant-governor-elect shall act as governor until the governor shall take the oath.

II. Vacancy in Office of Lieutenant-Governor; Simultaneous Vacancies in Office of Governor and Lieutenant Governor; Succession

A. *NY Const. Article IV, Section 6, shall be amended as follows:*

Text of Section 6:
Duties and Compensation of Lieutenant-Governor; Succession to the Governorship

The lieutenant-governor shall possess the same qualifications of eligibility for office as the governor. The lieutenant-governor shall be the president of the senate but shall have only a casting vote therein. The lieutenant-governor shall receive for his or her services an annual salary to be fixed by joint resolution of the senate and assembly.

Upon a vacancy in the office of lieutenant-governor other than by expiration of the term of office, the governor shall, within sixty days from the date of creation of the vacancy, nominate an individual to hold the office of lieutenant-governor for the remainder of the term. This individual shall be required to satisfy the qualifications of eligibility for office as the governor. The governor shall convey the nomination to the temporary president of the senate and the speaker of the assembly and shall make public the nomination. Said nominee shall take office upon confirmation by a vote in each house of the legislature by a majority of all members elected to such house taken within sixty days of receiving the nomination. If either house of the legislature shall vote to reject the nomination within said time period, the nomination shall be deemed rejected and the governor shall have thirty days from the date of the first vote of rejection to nominate another individual to serve as lieutenant-governor, who shall then be subject to the confirmation procedure described in this paragraph except that the legislature shall have thirty rather than sixty days to act. If the legislature fails to either confirm or reject any nomination for lieutenant-governor within sixty days of receiving the first nomination or thirty days for any subsequent nomination to fill a specific vacancy, the nominee shall assume the office of lieutenant-governor.

If the governor shall not nominate an individual to hold the office of lieutenant-governor within sixty days of the creation of the vacancy or within thirty days of the rejection of a nomination by a house of the legislature, the legislature shall fill the position in accordance with the procedure provided by law for filling vacancies in the office of the attorney general and comptroller.

In case of vacancy in the offices of both governor and lieutenant-governor, a governor and lieutenant-governor shall be elected for the remainder of the term at the next general election
happening not less than three months after both offices shall have become vacant. No election of a lieutenant-governor shall be had in any event except at the time of electing a governor.

In case of vacancy in the offices of both governor and lieutenant-governor or if both of them shall be impeached[, absent from the state] or otherwise unable to discharge the powers and duties of the office of governor, the temporary president of the senate shall act as governor until the earlier of the cessation of the vacancy/inability or until a new governor shall be elected.

In case of vacancy in the office of lieutenant-governor alone, or if the lieutenant-governor shall be impeached[, absent from the state] or otherwise unable to discharge the duties of office, the temporary president of the senate shall perform all the duties of lieutenant-governor during such vacancy or inability, except the temporary president of the senate shall not have a casting vote in the senate during the period of time in which he or she is acting as lieutenant-governor.

If, when the duty of acting as governor devolves upon the temporary president of the senate, there be a vacancy in such office or the temporary president of the senate shall be [absent from the state or otherwise] unable to discharge the duties of governor, the speaker of the assembly shall act as governor until the earlier of the cessation of the vacancy/inability or the election of a new governor, or until the temporary president of the senate is able to discharge the duties of governor.

Whenever the temporary president of the senate or the speaker of the assembly shall act as governor, that officer shall be required to vacate that officer’s seat in the legislature and the temporary president or speaker position. Notwithstanding the foregoing, if the temporary president of the senate or the speaker of the assembly shall assume the office of governor in the case of impeachment of the governor or in the case the governor is unable to discharge the powers and duties of the office, under section 9 of this Article, the temporary president or speaker shall not be required to vacate that officer’s seat in the legislature and the temporary president or speaker position unless provided below, but that person shall not be permitted to discharge any powers and duties of that officer’s seat in the legislature or any powers and duties of that temporary president or speaker position until that person no longer holds the office of governor. However, if the temporary president of the senate or the speaker of the assembly acts as governor beyond sixty
consecutive days, that officer shall then be required to vacate that officer’s seat in the legislature and the temporary president or speaker position.

The temporary president of the senate or speaker of the assembly may decline to act as governor, thus making them unable to act as governor. If there is a vacancy in the office of governor, and each of the lieutenant governor, temporary president of the senate and speaker of the assembly is unable to act as governor, the legislature shall provide for an order of succession to the office of governor from either statewide elected officers or heads of executive departments who have been confirmed by the senate, or a combination thereof.

The legislature may provide for the devolution of the duty of acting as governor in any case not provided for in this article.

In the event an official acts as governor under this section, that individual shall discharge all the powers and duties of the office of governor as if the individual had been elected governor.

B. The Public Officers Law shall be amended to add a new Section 44, to read as follows:

Persons eligible to succeed governor.

1. For the purposes of sections six and nine of article IV of the constitution, if the office of governor becomes vacant and each of the lieutenant governor, the temporary president of the senate and the speaker of the assembly is unable to act as governor, then the officer of the state who is highest in order of the following list shall assume the office of governor: attorney general, comptroller, commissioner of transportation, commissioner of health, commissioner of financial services, secretary of state, commissioner of labor and commissioner of agriculture, provided that such officer otherwise meet the criteria set forth in this constitution to serve as governor.

2. In the event any officer listed in paragraph one of this section declines to act as governor or does not meet the criteria set forth in this constitution to serve as governor, the officer next highest in order who does meet the criteria set forth in this constitution to serve as governor shall act as governor until the earlier of the cessation of the vacancy/ inability or
the election of a new governor. Any official acting as governor under this section shall discharge all the powers and duties of the office of governor as if the individual had been elected governor.

C. Article 1-a of the Defense Emergency Act of 1951, Chapter 784, Laws of 1951, is hereby repealed.

III. Gubernatorial Disability

NY Const. Article IV shall be amended to add a new Section 9, as follows:

1. Governor’s Declaration of Inability

Whenever the governor transmits to the lieutenant-governor, the temporary president of the senate, the speaker of the assembly, the minority leader of the senate and the minority leader of the assembly a written declaration of inability to discharge the powers and duties of the office of governor, and until the governor thereafter transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the lieutenant-governor, or other person next in line of succession as provided by law, as acting governor.

2. Committee on Gubernatorial Disability

A committee on gubernatorial inability shall be comprised of the lieutenant-governor, the attorney general, comptroller and six commissioners of executive departments, divisions or offices, as provided by law, who shall have been confirmed by the senate.
3. Lieutenant-Governor and Committee on Gubernatorial Inability’s Declaration of Inability

Whenever a majority of the committee on gubernatorial inability shall transmit to the temporary president of the senate, the speaker of the assembly, the minority leader of the senate and the minority leader of the assembly their written declaration that the governor is unable to discharge the powers and duties of the office of governor, the lieutenant-governor shall immediately assume the powers and duties of the office as acting governor.

4. Governor’s Declaration of No Inability

When, following a declaration of inability as provided in paragraph 3, the governor transmits to the lieutenant-governor, the temporary president of the senate, the speaker of the assembly, the minority leader of the senate and the minority leader of the assembly a written declaration that no inability exists, the governor shall resume the powers and duties of the office of governor unless a majority of the committee on gubernatorial inability shall transmit within four days to the temporary president of the senate, the speaker of the assembly, the minority leader of the senate and the minority leader of the assembly their written declaration that the governor is unable to discharge the powers and duties of the office of governor.

5. Legislative Determination of Gubernatorial Inability

In the event there is a disagreement between the governor and a majority of the committee on gubernatorial inability concerning whether the governor is unable to discharge the powers and duties of the office of governor, the legislature shall decide whether the governor is unable to discharge the powers and duties of the office of governor, assembling within forty-eight hours from the expiration of the four days described above for that purpose if not in session. If the legislature, within twenty-one days after being required to assemble for that purpose, determines by two-thirds vote of all members elected to each
house of the legislature that the governor is unable to discharge the powers and duties of the office of governor, the lieutenant-governor shall continue to exercise the powers and duties of the office of governor; otherwise, the governor shall resume the powers and duties of that office.

6. Procedure if Office of Lieutenant-Governor is Vacant

If there is a vacancy in the office of lieutenant-governor when the legislature makes its determination under paragraph 5 of this section, the person next in line of succession as determined by law shall act as governor under the procedures set forth in this Section. For the purposes of paragraphs 3 and 4 of this Section, should there be a vacancy in the committee on gubernatorial inability, a written declaration required under those sections shall require a two-thirds vote of the committee on gubernatorial inability. Should the temporary president of the senate or speaker of the assembly decline to serve as acting governor under this section and if as the result of such a declination, there is a vacancy in the office of governor, the legislature shall provide for an order of succession to the office of governor from either statewide elected officers or heads of state executive departments who have been confirmed by the senate, or a combination thereof.

7. Composition of Committee on Gubernatorial Inability

A. The Public Officers Law shall be amended by creating a new Section 45, to read as follows:

1. There shall be a committee on gubernatorial inability, consisting of the lieutenant-governor, attorney general, comptroller, and heads of the following departments and officers, provided they have been confirmed by the senate:

   Division of Criminal Justice Services

   Department of Health

   Division of Human Rights
Department of Labor

Office of Mental Hygiene

Department of State

The committee on gubernatorial inability shall perform the functions set forth in Article IV, Section 9 of the constitution. If there are one or more vacancies on the committee, or if any of the commissioners listed above shall not have been confirmed by the senate and thus not able to serve on the committee, the procedure set forth above for determining the inability of the governor to discharge the powers and duties of the office of governor shall require a two-thirds vote of the committee.
SOURCES

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AUTOMATIC LIEUTENANT GUBERNATORIAL SUCCESSION: PREVENTING LEGISLATIVE GRIDLOCK WITHOUT SACRIFICING THE ELECTIVE PRINCIPLE

Patrick A. Woods*

I. INTRODUCTION

In June of 2009 the government of the State of New York came to a shuddering halt.1 Two candidates for Temporary President of the Senate, the office that represents party control, commanded equal votes for the position.2 The tie-breaking vote would ordinarily have been cast by the lieutenant-governor, but due to the resignation of Eliot Spitzer and elevation of David Paterson, that position was vacant.3 The uncertainty as to who held the position paralyzed Senate operations and left open a very real question as to who would succeed to the governorship should something happen to then-Governor Paterson.4 The delay caused by the impasse cost state and local governments $2.9 billion.5 The deadlock prompted Paterson to appoint Richard Ravitch to lieutenant-governor, marking the first time in New York history that any governor had attempted to fill that post despite numerous historical vacancies.6

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1 Eric Lane & Laura Seago, Albany's Dysfunction Denies Due Process, 30 PACE L. REV. 965, 965 (2010) [hereinafter “Albany's Dysfunction”] (“The coup that shut down the New York State Senate for over a month last summer brought the State Legislature's dysfunction to the forefront of public consciousness.”).


3 Id.


6 Briffault, supra note 5, at 676 (citing Skelos, 915 N.E.2d at 1152 (Pigott, J., dissenting)).
Litigation as to the propriety of the appointment immediately ensued, eventually resulting in the New York Court of Appeals upholding the legitimacy of the appointment.⁷ Had the situation not resolved itself politically on the day of the appointment,⁸ the deadlock could have continued for more than an additional two months during the pendency of the appeal.⁹

Although the crisis was in no small measure a result of the fact that “New York’s [legislature] was, by far, the most dysfunctional legislature in the nation,”¹⁰ the impasse could have been solved in a day had there been an effective constitutional mechanism for succession to the office of lieutenant-governor in the case of a vacancy. The absence of such a mechanism led to unprecedented gubernatorial action and the New York Court of Appeals’s authorization, by a slim majority and in a decision that has been heavily criticized,¹¹ of Ravitch’s appointment via a statutory catch-all provision typically used only for minor officials.¹² That decision also left in place many of the structural problems that allowed the crisis to come to a head in the first place, such as when a replacement lieutenant-governor must be appointed.

This article is an attempt to find a solution to the problem of lieutenant gubernatorial succession in New York. Part II will discuss the problems created by allowing appointment pursuant to Public Officers Law section 43 and the structural issues that remain unresolved even with the present judicially approved method of appointment. Part III will consider several alternative methods of gubernatorial succession and to filling a vacancy in the office of lieutenant-governor. It will discuss whether any of those approaches would suffice to meet the policy goals of the lieutenant-governor’s office in New York’s constitutional structure. Part IV will offer a potential solution, which avoids the risk of legislative gridlock and preserves some electoral input into which candidates may be chosen to succeed to the office of lieutenant-governor.

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⁷ Briffault, supra note 5, at 681–82.
⁹ Briffault, supra note 5, at 681–82 (summarizing the procedural history of the Skelos case).
¹⁰ Albany’s Dysfunction, supra note 1, at 966 (citations omitted).
¹¹ See, e.g., id. at 984 (describing the Skelos decision as being on “thin law”).
¹² Skelos, 91 N.E.2d at 1146–47 (Lippman, C.J.) (upholding the appointment through the use of New York Public Officers Law section 43); id. at 1147, (Pigott, J., dissenting) (“Until now [Public Officers Law section 43] had been used to fill vacancies in local offices but, in no instance, the second most important executive office in the state.”).
II. THE UNACCEPTABLE SKELOS SOLUTION

The Court of Appeals’s decision in Skelos v. Paterson removes any electoral check from those selected to fill the position of lieutenant-governor and leaves several structural problems unresolved. Chief Judge Lippman’s opinion recognized that the Skelos solution is not necessarily the best solution to the issue of succession, and held only that the present constitutional and statutory scheme permits the governor to appoint a lieutenant-governor in case of a vacancy.13

Three major flaws with the present structure are discussed below.

A. Appointment Without Limitations Violates the Elective Principle

The present structure permits the possibility that an entirely unelected person could succeed to the office of governor without ever facing any elective check or second-hand elective scrutiny. Appointment through the mechanism of Public Officers Law section 43 does not permit any check, either by ratification or special election, on the authority of the governor to choose whomever he or she likes for the position.14 Moreover, because Article VI of the New York State Constitution provides that “[n]o election of a lieutenant-governor shall be had in any event except at the time of electing a governor,”15 it seems as though this appointee would be eligible to serve the remaining balance of the previous, elected lieutenant-governor’s term, however long that may be. Accordingly, the office of lieutenant-governor could be occupied by an individual beyond scrutiny by anyone other than the governor himself for nearly a full four-year term.

Occupation of the office of lieutenant-governor by an unelected person runs contrary to the office as viewed through the lens of the other relevant constitutional provisions. The principle that the lieutenant-governor be elected has been with us since New York’s first constitution in 1777 and remained unchanged since.16 In the

13 Id. at 1146 (Lippman, C.J.) (“Before us . . . is not the abstract question of whether it would be better [to have some other system]. For now, the Legislature, pursuant to an express grant of constitutional authority, has specified that the vacancy is to be filled not by election but by gubernatorial appointment alone—a determination that the Legislature is always free to revisit.”).
14 See N.Y. PUB. OFF. LAW § 43 (McKinney 2013) (containing no limitations on candidate selection and no provision for ratification of the decision).
15 N.Y. CONST. art. IV, § 6.
two vacancy instances directly addressed by the New York Constitution, the lieutenant-governor is succeeded by someone who has faced election. Where only the lieutenant-governor’s office is vacant, “the temporary president of the senate shall perform all the duties of lieutenant-governor during such vacancy or inability.”

Prior to the Skelos decision, this section had meant that the Temporary President was lieutenant-governor as far as mattered. No distinction between being a placeholder and permanent occupant of the office was necessary because no governor had ever attempted to appoint a replacement. As Judge Pigott noted in his dissent, this practice ensures that the elective principle is assured by “plac[ing] the duties of Lieutenant Governor in the hands of a duly elected state Senator—one who is elected president of that body by the entire Senate, representing all citizens of this state.”

The other instance constitutionally addressed is when both the governor’s and lieutenant-governor’s offices are vacant, requiring a special election at the next general election if one is not too close in time to be practicable. The appointment, potentially for the majority of a gubernatorial term, of someone never subjected to elective scrutiny runs contrary to this clear principle.

More worrying than the potential occupation of the lieutenant-governor’s office by an unelected person is the possibility, created by the Skelos decision, that an unelected person could occupy the office of governor itself. As observed by Attorney General Nathaniel...
Goldstein more than sixty years ago, the application of Public Officers Law section 43 to the office of lieutenant-governor “lead[s] to the anomalous result that a Governor by appointing a Lieutenant-Governor and then resigning could impose upon the people his own choice as their Governor.” 22 This section was, as observed by Judge Pigott, written to decry the use of Public Officers Law section 43 to fill Lieutenant Gubernatorial vacancies, rather than endorse it. 23 The Attorney General’s opinion made its reason clear as well; it argued that “[t]his special treatment not only maintains uninterrupted functioning of government but seeks to make certain that the State’s Chief Executive be chosen only after opportunity for the full and free expression of the people’s will.” 24 The people’s will would obviously be thwarted in the “anomalous” situation identified above. Moreover, the governor need not make a calculated appointment and then resign to effect the possibility of an unelected governor, the office need only become vacant by whatever means. Had, for example, Governor Paterson died on September 23, 2009 (the day after the Skelos decision was issued), then Richard Ravitch would have succeeded to the office of governor under our constitutional scheme without ever having been subject to elective scrutiny. He could then, entirely permissibly, have appointed an additional lieutenant-governor, creating an entirely unelected executive branch of the New York State Government. 25

It is difficult to imagine a situation more disconcerting than the second one outlined above. The Skelos majority’s nonchalance when faced with this possibility is puzzling. 26 Any system admitting the possibility of an unelected chief executive of a state after only two vacancies is a cause for serious concern. 27 A functional system that

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23 Skelos, 91 N.E.2d at 1155 (Pigott, J., dissenting).
24 1943 N.Y. Op. Att’y Gen. 378, 1943 WL 54210. The notion that governors must be popularly elected is, of course, not a New York specific phenomenon. By 1866 every state in the union had a popularly elected governor and no state admitted since has failed to have one. THOMAS SCHICK, THE NEW YORK STATE CONSTITUTIONAL CONVENTION OF 1915 AND THE MODERN STATE GOVERNOR 7 (1978).
25 To take the theoretical exercise to its utmost extreme, Ravitch could then have resigned or died, making his appointee governor, allowing the appointment of another lieutenant-governor, and creating an entire executive branch that was neither elected nor even appointed by someone who was elected.
26 See Skelos, 915 N.E.2d at 1146 (Lippman, C.J.) (“Rules of succession are inevitably imperfect and, at some stage of devolution they direct, invariably compromise elective principles.”).
27 It is worth noting that without the appointment of a replacement lieutenant-governor, the devolution of office would have to go through six elected officials prior to reaching an
does not pose such grave risks to the elective principle can certainly be devised.

B. The Possibility for Gridlock Still Exists

Because the appointment mechanism now in place does not require the governor to appoint a successor within any particular time frame, the possibility for legislative gridlock still remains. It was not until a crisis of arguably constitutional proportions arose as to who occupied the office of Temporary President that any governor in the history of New York attempted to fill a vacancy in the office of lieutenant-governor. Moreover, Paterson did not attempt to do so until more than a year after he was elevated to governor and probably would not have done so but for the crisis itself. Legislative leaders, when alerted to the ambiguity of constitutional provisions relating to lieutenant gubernatorial succession, have not considered appointment of a successor or clarification of the method of filling the position to be particularly important. Additionally, given the seeming unimportance of appointing a replacement lieutenant-governor and the potential political ramifications of doing so, it is entirely possible that future governors when faced with a vacancy may delay appointment until after a crisis has begun and the need to have a replacement lieutenant governor in place has already arisen. In fact, the argument that prior vacancies “were [potentially] left unfilled [as] the result of political considerations” was among the reasons the Skelos majority rejected the argument that lieutenant gubernatorial vacancies must remain unfilled for the duration of the term.  

appointee. See N.Y. UNCONSOL. LAW § 9105 (McKinney 2013) (adding “attorney general, comptroller, commissioner of transportation, commissioner of health, commissioner of commerce, industrial commissioner, chairman of the public service commission, secretary [sic] of state” to the line of succession after governor, lieutenant-governor, Temporary President of the Senate, and Speaker of the Assembly.).

28 Briffault, supra note 5, at 676 (citing Skelos, 915 N.E.2d at 1152 (Pigott, J., dissenting)).
29 Skelos, 915 N.E.2d at 1142 (Lippman, C.J.) (noting that Paterson was elevated to governor upon the March 17, 2008 resignation of Eliot Spitzer).
30 See, e.g., Joseph L. Bruno, Remarks at the Nelson A. Rockefeller Institute of Government (May 29, 2008), in LIEUTENANT GUBERNATORIAL SUCCESSION FORUM, supra note 16, at 14–20 (stating that a pending proposed constitutional amendment to create an appointment and confirmation system for the lieutenant-governor’s office would probably not pass, downplaying the importance of the issue, and suggesting that other amendments—such as a constitutional spending cap—are more pressing); see also Galie, supra note 16, at 22 (discussing that the issue had not been taken seriously at other constitutional conventions).
31 Rose Mary Bailly, Administrative Law, 61 SYRACUSE L. REV. 557, 564 (2011) (citing
The likelihood of a delay in appointment creates the possibility of additional gridlock scenarios. Consider a scenario where Governor Paterson dies during the first few days of the 2009 gridlock. In such a case, “the temporary president of the senate shall act as governor until the inability shall cease or until a governor shall be elected.” However, at that time the very question causing the crisis had been just who the Temporary President of the Senate was. It is also not clear whether such a situation would qualify as one in which the office of Temporary President is deemed “vacant,” passing governance down to the Speaker. There is also the possibility that a future governor could purposefully choose to delay appointing a successor, and prolong gridlock, for some situational political purpose.

The present appointment power does no more to mitigate these two possibilities than any other procedure that allows the timing of the appointment of a replacement to be discretionary. A proper scheme for filling a vacancy in the office of lieutenant-governor should be able to incorporate mechanisms that prevent the very possibility of 2009 style gridlock reoccurring. As discussed below, several of the systems employed by other states are structured such that gridlock is not possible.

C. Unchecked Appointment Gives Too Much Discretion to the Governor

Allowing a governor to, without any outside input, select a replacement goes too far toward ensuring a unified executive branch. At least as a constitutional matter, New York does not give a gubernatorial candidate the discretion to pick his own running-mate. The constitution requires that a governor and lieutenant-governor “shall be chosen jointly, by the casting by each voter of a single vote applicable to both offices.” However, this joint ticket is comprised of the two most successful party candidates for each position, not the most successful gubernatorial candidate and his chosen lieutenant-gubernatorial candidate. Of course, a

Skelos, 915 N.E.2d at 1146 (Lippman, C.J.)).
32 N.Y. Const. art. IV, § 6.
33 This possibility when paired with the possibility of an unelected governor is particularly troubling.
34 See infra Part III.
35 N.Y. Const. art. IV, § 1.
36 See, e.g., Adam Nagourney, Democrats Hope to Trim Their Pool of Candidates, N.Y.
particularly strong or influential gubernatorial candidate may, as a matter of practical politics, get to select their running mate. However, that they can do so is by no means constitutionally or legally mandated and “guarantees only compatible political parties but not necessarily personal or political compatibility.” This disjunction serves as an elective check on a governor with a weak mandate.

There are, of course, good reasons to want a unified executive branch of state government. The constitutional provision requiring a joint ticket itself was put into place to help ensure that there would be a unified executive. Prior to a 1953 amendment, New York did not require that the two offices be elected together and “candidates for different parties could be—and were—elected.” But allowing direct appointment of a replacement lieutenant-governor goes farther than our constitutional structure was intended to allow by ensuring that a governor gets exactly who they want, rather than the person considered most qualified by the other members of their political party. A well-designed system of gubernatorial succession should be able to account for the need for political unification of the executive branch without giving the governor the ability to select a candidate as his lieutenant who his party and the electorate would never have approved.

III. OTHER APPROACHES

Other states approach the issue of succession and of the position of lieutenant-governor in myriad fashions. While every state has a governor and a plan for gubernatorial succession, five states—Arizona, Maine, New Hampshire, Oregon, and Wyoming—

TIMES (May 24, 1998), http://www.nytimes.com/1998/05/24/nyregion/democrats-hope-to-trim-their-pool-of-candidates.html (discussing the multiple candidates for lieutenant-governor that year and noting that the governor and lieutenant governor run together on a single ticket during the general election, despite having been chosen individually during the primaries).

37 Jacob Gershman, Cuomo Picks Running Mate, WALL ST. J. (May 27, 2010), http://online.wsj.com/article/SB100014240527487047170045752682919112969642.html (identifying Robert Duffy as the picked running mate of Andrew Cuomo, but also noting that Duffy was “running unopposed.”).


39 Id.

40 Id.

41 See generally ARIZ. CONST. art. V (providing for no lieutenant-governor).

42 See generally ME. CONST. art. V (providing for no lieutenant-governor).

43 See generally N.H. CONST. pt. 2, art. 49 (providing for no lieutenant-governor).
do not have a lieutenant-governor at all. Several states are structured similarly to New York and contain the same pre-Skelos ambiguity regarding succession. The most common approaches are discussed below.

A. Statutory or Constitutional Provision?

Of the states that do have succession plans for the office of lieutenant-governor, not all are contained in their constitutions; some are instead delegated to statute. The Skelos decision effectively rendered New York one such state by assigning the appointment of a successor to lieutenant-governor to Public Officers Law section 43 and noting that assignment was “a determination that the Legislature is always free to revisit.”

This raises a question: Why should we correct the problems with succession by constitutional amendment rather than by statute? Peter Galie put the principle underlying why we should constitutionalize the succession provisions well when discussing the purpose of constitutions and constitutional amendments. “Constitutionalism,” he said, “is a struggle to render government immune, as far as possible from human frailties and their political consequence, what the [r]epublican tradition called, ‘corruption,’ in its larger sense, while simultaneously establishing institutions that will be effective and powerful enough to do the job we have asked them to do.” Whatever else belongs in constitutions, certainly those provisions that lay out its structure and ensure its basic functioning at times of political upheaval are properly constitutional.
provisions. The need to invoke succession provisions, in particular those addressing vacancies in the office of a chief executive, seem almost by definition to be accompanied by periods of political division and uncertainty. The death, resignation, or impeachment of a governor or lieutenant-governor is the most likely cause of a vacancy in the lieutenant-governor’s office. However neither of the latter two cases arises so suddenly as to keep the order of succession, if as malleable as a statute, out of the political arena.\textsuperscript{50} It is entirely possible that in the face of an impending gubernatorial impeachment an opposition party would seek to amend the governing succession provisions, whatever they may be, as a means to blunt the new governor or as a political chip to be traded away for other gubernatorial concessions.

The structure of New York’s amendment process would keep the order of succession away from political gamesmanship during the periods of leadership crisis likely to accompany a vacancy. Neither of the two methods of amendment permitted in New York can happen quickly as both require the action of a legislative body in addition to a referendum.\textsuperscript{51} The first method requires that both houses of the state legislature propose the amendment, the Attorney General issue a recommendation, the houses pass the amendment, and then refer it to the next legislative session after an intervening election.\textsuperscript{52} Only if in the second session both houses pass the amendment again and the people then approve it by referendum will an amendment become effective.\textsuperscript{53} The second method requires a full-blown constitutional convention followed by a referendum.\textsuperscript{54} Either way, the order of gubernatorial succession would be safe from the politics of the moment, as it ought to be.

\textbf{B. Gubernatorial Appointment and Legislative Confirmation}

By far the most common and most commonly proposed method of lieutenant gubernatorial succession is that the governor nominates a candidate to fill the vacancy and then the legislature confirms the

\textsuperscript{50} See Benjamin, \textit{supra} note 19, at 27 (“Sometimes vacancies occur in a relatively planned way.”).

\textsuperscript{51} See Burton C. Agata, \textit{Amending and Revising the New York State Constitution}, \textit{in The New York State Constitution: A Briefing Book} 9 (Gerald Benjamin, ed. 1994).

\textsuperscript{52} N.Y. Const. art. XIX, § 1.

\textsuperscript{53} Id.

\textsuperscript{54} N.Y. Const. art. XIX, § 2.
nomination. Several states use this approach.\textsuperscript{55} The Federal Constitution also follows a similar pattern for filling a vacancy in the office of Vice President.\textsuperscript{56} This method has been suggested several times in New York,\textsuperscript{57} and there is at the time of writing legislation pending to create such a scheme statutorily.\textsuperscript{58} Such a format is not as simple as it appears and, despite its popular appeal, does not actually resolve many of the succession related issues the 2009 crisis brought to light.

As an initial hurdle, there is the question: “Who gets to ratify?” Is it the Senate,\textsuperscript{59} the Assembly, both the Assembly and Senate sitting in joint session,\textsuperscript{60} or both bodies sitting separately and having to ratify separately?\textsuperscript{61} There are proponents of all of these views and each has arguments as to why one structure would be better than another.\textsuperscript{62} However, no matter how a confirmation system is set up, the key problems remain the same.

First, a system requiring confirmation is not automatic. As a result, any such system engenders the same potential delayed appointment gridlock identified with appointment under Public Officers Law section 43.\textsuperscript{63} It similarly does not avoid the problem of an indeterminate Temporary President. In such a case there is no lieutenant-governor to call the Senate into session and the

\textsuperscript{55} See, e.g., CAL. CONST. art. V, § 5 (2011); COLO. CONST. art. IV, § 13 (2011); IND. CONST. art. V, § 10 (2011); LA. CONST. art. IV, § 15 (2011); MD. CONST. art. II, § 6 (2011); N.M. CONST. art. V, § 16 (2011).

\textsuperscript{56} U.S. CONST. amend. XXV (“Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.”).

\textsuperscript{57} Skelos v. Paterson, 915 N.E.2d 1141, 1156 (N.Y. 2009) (Pigott, J., dissenting) (listing two examples of similar defeated proposals).

\textsuperscript{58} A.B. 3607, 234th Leg., Reg. Sess. (N.Y. 2011).

\textsuperscript{59} E.g., UTAH CONST. art. VII, § 10 (2011).

\textsuperscript{60} See Robin Schiminger, Remarks at the Nelson A. Rockefeller Institute of Government (May 29, 2008), in LIEUTENANT GUBERNATORIAL SUCCESSION FORUM, supra note 16, at 4–5; see also, e.g., MD. CONST. art. II, § 6 (requiring a majority in the General Assembly—which includes the Senate and the House of Delegates—to confirm a nomination by the governor to fill a vacancy in the office of the lieutenant-general).

\textsuperscript{61} Skelos, 91 N.E.2d at 1156 (Pigott, J., dissenting) (identifying this proposal as having been suggested by the Law Revision Commission in 1985).

\textsuperscript{62} That is, all of these schemas have proponents except, perhaps, for the proposal that Assembly votes alone. I have yet to locate anyone who has proposed this particular approach in a bicameral system. However, there are elective principle and separation of powers arguments that could be made for this structure. For example, having the Assembly only decide would remove a level of self serving bias from asking a senate majority leader and temporary president to get his party to approve a candidate that would effectively oust him from the position of presiding officer over his own chamber.

\textsuperscript{63} See discussion supra Part II.B.
Temporary President cannot do so because the cause of the deadlock itself is uncertainty about who the Temporary President is. Without a presiding officer, the Senate could not convene in order to confirm a nomination. Moreover, even if it did convene, it seems unlikely that the deadlock regarding the present Senate leadership would not spill over into the confirmation vote, resulting in an unbroken tie to confirm the nominee and opening the question as to whether an evenly split vote is a confirmation or disconfirmation of the nominee.

Second, New York’s structure makes it unlikely that any nominee from the same party as the governor would be confirmed if the opposing party controls either house of the state legislature. If the system is one that requires confirmation of the Senate only or both houses of the legislature separately then the Senate leadership is likely to block opposition party nominees. Under our present constitutional structure, when there is a vacancy in the office of lieutenant-governor “the temporary president of the senate shall perform all the duties of lieutenant-governor during such vacancy or inability.”64 Note that the Temporary President is merely performing the duties of the lieutenant-governor; he does not become lieutenant-governor.65 Instead he keeps his position as a member of the Senate and serves as acting lieutenant-governor.66 As a practical matter, this means that the party leader of the dominant party in the Senate gets two votes on any particular piece of legislation: one as a member of the Senate and a casting vote in case of a tie.67 It is not difficult to see how an opposition party to the governor would not want to give up the tie-breaking vote on key political legislation or important procedural issues.68
consequence, the confirmation in the Senate of an opposition party lieutenant-governor seems unlikely and at a minimum would be subject to significant political gamesmanship prior to confirmation. The gamesmanship alone would result in considerable delay in the appointment process and may forestall appointment altogether.

Although the specific issue of Senate leadership blocking confirmation might be avoided in a confirmation system that has both houses sitting together as one body or the Assembly sitting alone, that alternative only shifts the problem of gamesmanship to the Assembly. An opposition party Assembly is no more likely to approve of a replacement lieutenant-governor than the Senate would be because the appointment remains a bargaining chip. A joint session is no better because as a practical matter, due to the comparative sizes of the houses of the legislature, when the two bodies sit as one the Assembly essentially rules the day.69

Finally, although better than a nominee who is subject to no scrutiny, direct or indirect, the confirmation process still leaves something to be desired when taking the elective principle into account. Admittedly, the houses voting can conceptually act as a “stand in” for direct action by the electorate; but the confirmation process still leaves open the possibility that the replacement lieutenant-governor is someone who has never been directly elected to any office.70

C. Legislative Appointment

Another alternative to the present system is legislative appointment. Under this system, the two houses of the state legislature convene as one and jointly elect someone to fill the vacancy. New York is no stranger to this method, as it is how we fill vacancies in two other statewide elected offices: Comptroller and

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69 Briffault, supra note 65, at 34 (“Not surprisingly, the Assembly tends to dominate [the joint voting] process.”).
70 See Benjamin, supra note 19, at 27. That such a person would be, at least, nominated is not at all farfetched. Although Richard Ravitch had a long career in government and public service, Paterson appointed Ravitch despite the fact that Ravitch “has never held elected office.” Chris Rovzar, Paterson Names Dick Ravitch Lieutenant Governor, N.Y. MAG. (July 8, 2009, 4:56 PM), http://nymag.com/daily/intelligencer/2009/07/paterson_to_name_dick_ravitch.html.
Attorney General.\textsuperscript{71} There are, however, several problems with this approach.

Two concerns are the same as those expressed with the confirmation process in the section above. Election from a joint session of the legislature means in practice that the office will be elected by the Assembly, and the appointee will probably be a member of the Assembly.\textsuperscript{72} It also permits the risk, if a distant one, that someone who does not and has never held elective office will be appointed to the position.

A more significant concern is that if the Assembly is not of the same party as the governor, odds are good that the replacement lieutenant-governor will not be politically compatible with the existing executive branch. As noted earlier, the purpose of joint election for governor and lieutenant-governor was to avoid exactly such a scenario.\textsuperscript{73} At least one state that uses legislative appointment for lieutenant-governor—Michigan—has attempted to solve this problem by restricting the potential nominees for the vacancy “of the same political party as the governor.”\textsuperscript{74} The provision, however, has never been used.\textsuperscript{75} It is also doubtful how much practical effect a limitation of this kind would have on the appointment. In theory, an aspiring nominee of the opposition party could switch parties long enough to be appointed and then switch back thereafter or simply remain in the position and the party despite having had no real change in beliefs. Even without such shenanigans on the part of potential opposition party nominees, an opposing party is likely to appoint whatever member of the opposition they find politically tolerable, rather than someone who may actually be compatible with the sitting governor. When, due to the primary process, governors and lieutenant-governors of the same party but from opposite ends of the political spectrum have been selected, the results were less than ideal.\textsuperscript{76} Unlike the

\textsuperscript{71} N.Y. PUB. OFF. LAW § 41 (McKinney 2011).
\textsuperscript{72} Briffault, \textit{supra} note 65, at 34 (observing that the past two times that a vacancy has been filled by joint Senate-Assembly voting the elected candidate has been an assemblyman).
\textsuperscript{73} GALIE, \textit{supra} note 38, at 272 (“A responsible, cohesive administration necessitated the election of a governor and lieutenant-governor from the same party.”).
\textsuperscript{74} MICH. COMP. LAWS ANN. § 168.67 (West 2011).
\textsuperscript{76} GALIE, \textit{supra} note 38, at 272 (“Having governor and lieutenant-governor . . . from
risk of an incompatible lieutenant-governor being selected in a primary, where the lieutenant gubernatorial candidate is selected by members of the governor’s own party, here the replacement lieutenant-governor would be selected by the opposition, likely handicapping even a governor with a strong electoral mandate from his party. Finally, it is not impossible that short of some mechanism forcing an opposition legislature to act, they may do nothing rather than appoint a party-opponent, particularly where that opponent could potentially wield considerable influence in a sharply divided Senate.

D. Special Election

Another alternative used by several other states is to hold a special election. The election can be held immediately or as close to immediately as possible, at the next general election, or the next general election in reasonable proximity to the creation of the vacancy. New York uses the latter process when there is a simultaneous vacancy in both the governor and lieutenant-governor’s offices. Currently, the New York Constitution expressly prohibits the holding of a special election to fill a lieutenant gubernatorial vacancy. The present forbiddance is a wise policy, despite its close adherence to the elective principle. Holding a special election contains numerous problems and solves none of the other issues identified.

Far from being automatic, a special election can involve significant delay. A special election, whenever held, takes an extended period of time to complete and, if following a similar structure to that already in place for dual vacancy, could take as long as fifteen months depending the timing of the vacancy. Such a mechanism could potentially allow 2009 style gridlock, disastrous when lasting only a month, to extend for over a year.

ideologically opposed wings of the same party, created serious problems."); Benjamin, supra note 19, at 28–29 (discussing recent historical examples of this problem).

77 Stratton v. Priest, 932 S.W.2d 321 (Ark. 1996) (holding a statutory provision for special election of lieutenant-governor constitutional).

78 N.J. Const. art. V, § 1, ¶ 9.

79 N.Y. Const. art. IV, § 6 (“[A] governor and lieutenant-governor shall be elected for the remainder of the term at the next general election happening not less than three months after both offices shall have become vacant.”).

80 Id. (“No election of a lieutenant-governor shall be had in any event except at the time of electing a governor.”).

81 See id.; Briffault, supra note 65, at 33.
There is also no guarantee that a candidate compatible with the sitting governor would be elected. The special election would, by necessity, have to allow candidates from both political parties and all ends of the political spectrum. The chances of an incompatible candidate being elected may actually be higher that they might otherwise be with a completely independently elected governor and lieutenant-governor if the vacancy was created by the impeachment or disgraceful resignation of the office’s former occupant.

E. Automatic Succession

Some states have automatic succession provisions. Unlike in New York, where the Temporary President only becomes acting lieutenant-governor, under these provisions the next person in line becomes lieutenant-governor, usually requiring them to forfeit their prior position.82 This is the mechanism by which New York fills a vacancy in the governor’s office with the lieutenant-governor, creating a lieutenant gubernatorial vacancy.83 Although this method can have severe flaws if inartfully drafted, a well-crafted automatic succession mechanism can solve many of the problems identified above.

An automatic succession mechanism can prevent gridlock. A mechanism of automatic succession has the benefit of immediately moving a party into the vacated position and, if crafted carefully, can avoid problematic ambiguity. By having a successor lieutenant-governor come immediately into place, gridlocks requiring the casting of a tie-breaking vote can be immediately solved. Had someone already been lieutenant-governor in May 2009, there would not have been a month of senatorial inaction.

What offices are chosen to succeed and how specifically they are identified can pose difficulties. The office chosen can potentially run afoul of the elective principle if the party selected is one that has not been elected, directly or indirectly, to some other statewide office. This can happen one of two ways. First, the succeeding party can come from an office not elected in the first place.84 This

82 E.g., MINN. CONST. art. V, § 5; PA. CONST. art. IV, § 14.
83 N.Y. CONST. art. IV, § 5 (2011) (“In case of the removal of the governor from office or of his or her death or resignation, the lieutenant-governor shall become governor for the remainder of the term.”).
84 For example, Alaska’s succession provision has the person succeeding to the office of lieutenant-governor coming “from among the officers who head the principal departments of the state government or otherwise.” ALASKA STAT. ANN. § 44.19.040 (West 2011).
problem is easily avoided by choosing only elective positions for the line of succession, or at least doing so before getting too far down the list for it to be practical any longer.

The second way to run afoul of the elective principle is to identify a succeeding party that is occupying an elected office, but, because of a quirk of timing, was not actually elected to that office. This situation could occur where an office is typically elected, but had already been vacated and a replacement appointed. For example, if the New York Attorney General were chosen to be next in the line of succession, but one had already resigned and a replacement been appointed by the Senate and Assembly pursuant to Public Officers Law section 41, the automatic identification of that person would be discordant with the elective principle. Arizona, an automatic succession state that does not have a Lieutenant-governor, demonstrates how to avoid this pitfall. Its succession provision specifically qualifies that the person succeeding shall only do so “if holding by election.” Otherwise, that office is skipped in the line of succession.

Latent ambiguity in exactly which human being occupies a particular office that is designated to succeed can also be problematic. Identifying an office itself, particularly one that can be in flux, can cause rather than abate succession problems. For example, identifying “Temporary President” or other office that is tied to party control of a particular legislative body can be problematic in several ways. First, automatic succession would be of little help where there is an ongoing leadership dispute, as in 2009. A provision that said that the Temporary President became lieutenant-governor rather than was acting lieutenant-governor would have made little difference in that situation. Additionally, there is some question as to the permanency of those types of positions over periods when the legislature is not in session. Some scholars have argued that leadership positions in the various houses of the legislature expire at the end of each legislative session. That would mean that between sessions, if a vacancy

85 ARIZ. CONST. art. V, § 6 (“[T]he secretary of state, if holding by election, shall succeed to the office of governor until his successor shall be elected and shall qualify.”).
86 Id. (“If the secretary of state be holding otherwise than by election, or shall fail to qualify as governor, the attorney general, the state treasurer, or the superintendent of public instruction, if holding by election, shall, in the order named, succeed to the office of governor.”).
87 Briffault, supra note 65, at 41.
occurred, there would be no human being clearly identifiable as the holder of that office, particularly if in between the sessions the balance of power in the chamber had shifted. \textsuperscript{88} Minnesota’s succession provision provides an example of how to avoid this problem. \textsuperscript{89} It provides that “[t]he last elected presiding officer of the senate shall become lieutenant governor in case a vacancy occurs in that office.” \textsuperscript{90} By adding that temporal component (“last elected”) any ambiguity as to which human being occupies the office is avoided.

Another objection to automatic succession is that it can also run contrary to having a unified executive branch in a similar manner to holding a special election. There is absolutely no guarantee that whoever occupies a particular elective office in the order of succession at a given period of time will be compatible with the present administration. \textsuperscript{91} The potential inflexibility of automatic succession makes this problem virtually unavoidable if there is simply going to be an enumerated list of offices in an order of devolution. However, a set list of offices in a line of succession does not necessarily need to be the mechanism by which automatic succession takes place.

Alaska has a somewhat ingenious automatic succession scheme with a guarantee that the successor will be politically compatible with the sitting governor. Alaska makes no constitutional provision for the replacement of a lieutenant-governor. \textsuperscript{92} However, statutorily, they have created a backup appointment system. The governor, who is constitutionally required to be elected at the same time as the lieutenant-governor, \textsuperscript{93} “shall appoint . . . [subject to legislative confirmation] a person to succeed to the office of lieutenant governor if the office of lieutenant governor becomes vacant.” \textsuperscript{94} The statute has some other problems \textsuperscript{95} but this added level of forward planning allows a successor to be identified—as a human being thus avoiding ambiguity—far in advance of any

\begin{flushright}
88 Id. at 33.
89 MINN. CONST. art. V, § 5.
90 Id.
91 See Benjamin, supra note 19, at 28–29 (discussing “automaticity in succession”).
93 Id. § 13.
94 ALASKA STAT. § 44.19.040 (2011).
95 It requires legislative confirmation, raising some of the issues discussed supra in Part III.B., and may violate the elective principle by appointing from unelected officials, as mentioned supra in footnote 84.
\end{flushright}
vacancy while also allowing the sitting governor, presumably with some input from the sitting lieutenant-governor, to identify a successor who is politically aligned. If drafted in a manner that limits gubernatorial choice of backups to elected officials such a system could avoid colliding with the elective principle.

IV. A PROPOSED SOLUTION

After review of the succession mechanisms above, it seems that a solution avoiding the lion’s share of the potential systemic problems can be devised. A system which requires that a governor, within a short, specific period of time of taking office, to appoint a successor to the lieutenant-governor, drawing only from a pool of those elected directly or indirectly elected to statewide office, avoids a clash with the elective principle, prevents 2009 style senatorial gridlock, and ensures that the governor can select a politically compatible successor without having unfettered discretion as to who that person is. The language of such an amendment, modeled after the Alaska statute with some modifications to avoid problems identified earlier, which could be added to Article IV, Section 6 could read:

Within twenty (20) days of assuming office, either by election or succession to office in case of vacancy, the governor shall appoint, from among the elected attorney general, the elected comptroller, the most recently elected temporary president of the senate, and the most recently elected speaker of the assembly, a person to succeed to the office of lieutenant-governor if the office of lieutenant-governor becomes vacant. The person designated is next in line for succession to the office of lieutenant-governor, subject to the pleasure of the governor. If the person designated is removed from appointment, vacates the appointment, or ceases to meet the qualifications required for appointment, the governor shall appoint a successor subject to the same qualifications as the person initially appointed.

If a vacancy occurs in the office of governor and the lieutenant-governor succeeds to the office of governor or if the office of lieutenant-governor otherwise becomes vacant,

96 As a practical matter, this limits the potential pool to the elected Attorney General, the elected Comptroller, the most recently elected Temporary President of the Senate, and the most recently elected Speaker of the Assembly.
the person designated as next successor to the office of lieutenant-governor as provided in herein succeeds to the office of lieutenant-governor for the remainder of the term vacated. Within twenty (20) days of the appointed successor assuming the office of lieutenant-governor, the governor shall appoint a person to succeed to office of lieutenant-governor in case of subsequent vacancy from among the potential candidates identified in the previous paragraph.

Obviously, this proposal is not perfect and somewhat unorthodox. For example, although a politically compatible lieutenant-governor is likely to be among the four choices, this structure does not guarantee that the successor lieutenant-governor will in fact be politically compatible with or of the same party as the sitting governor. It is possible that between the four choices to succeed to lieutenant-governor, not a single one will be of the same party and politically compatible with the governor. Such a worry is somewhat minor, however, because as a practical matter any governor without a single friend among the other major elected figures in the state is unlikely to be effective regardless of who his lieutenant-governor turns out to be. Moreover, this potential detriment more closely mirrors the possibility that a governor running for office will end up with a politically incompatible lieutenant-governor as a consequence of the primary election and, in that sense, is more compatible with the present structure of the New York Constitution.

The most realistic objection to this format is that it is politically unlikely to happen any way other than through constitutional convention. It would be asking for a lot of statesmanship from the houses of the state legislature to twice pass an amendment that shuts them out of the process for appointing a lieutenant governor.97 Mixed alternatives that might be more politically palatable, such as providing a disconfirmation procedure whereby the legislature could reject a nominee to be the successor, reintroduce the horse-trading that must be avoided, and again invite the questions as to how disconfirmation procedure would function as are involved in a confirmation procedure.98

98 See supra Part III.B.
Politics aside, the proposed provision addresses all of the major concerns identified in the foregoing discussion. The elective principle is satisfied in that all of the potential appointees have been elected, directly or indirectly, to a statewide office. Confirmation and other sources of legislative gamesmanship have been screened out of the appointment process. Succession to the office is automatic in case of a vacancy, preventing any gridlock caused by delay in a new lieutenant-governor taking office. Finally, a short time limit is in place requiring the governor to swiftly appoint a backup, minimizing the risk that a delay in appointment of a backup could translate into delay in the succession of a lieutenant-governor.

V. CONCLUSION

The foregoing article has been an examination of the problems caused by the decision in *Skelos v. Paterson*, which permitted the governor of New York to appoint the lieutenant-governor pursuant to a catchall, restrictionless statutory section. It has examined various alternative ways to deal with the problem of vacancy in the office of lieutenant-governor and has proposed language that may solve the problem. If the people of the State of New York adopt the provision outlined in section IV, or something similar, we should be able to avoid disastrous government deadlock like that of 2009 without sacrificing the principle that the highest and second highest offices in the state should always be occupied by those who have been, at some stage of things, elected.