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

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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  
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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.

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## 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.<sup>1</sup> Lieutenant Governor David Paterson ascended to the governorship, and, over a year later, appointed Richard Ravitch to fill his former office.<sup>2</sup> In August 2021, Governor Andrew Cuomo resigned amidst sexual harassment allegations, leaving his lieutenant, Kathy Hochul, to take the office.<sup>3</sup> 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.<sup>4</sup>

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.<sup>5</sup> Second, political parties and affiliation should have a proper role in political decisions regarding filling vacancies in elected offices.<sup>6</sup> Third, the separation and independence of the executive,

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<sup>1</sup> 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>.

<sup>2</sup> Richard Briffault, *Skelos v. Paterson: The Surprisingly Strong Case for the Governor’s Surprising Power to Appoint a Lieutenant Governor*, 73 ALB. L. REV. 675, 678 (2010).

<sup>3</sup> Marina Villanueva, *Gov. Andrew Cuomo Resigns Over Sexual Harassment Allegations*, ASSOCIATED PRESS (Aug. 10, 2021), <https://apnews.com/article/andrew-cuomo-resigns-17161f546bb83c32a337036ecf8d2a34>.

<sup>4</sup> William K. Rushbaum et al., *Lt. Gov. Benjamin Resigns Following Campaign Finance Indictment*, N.Y. TIMES (Apr. 12, 2022), <https://www.nytimes.com/2022/04/12/nyregion/brian-benjamin-resigns-indicted.html>.

<sup>5</sup> Joel K. Goldstein, *Taking from the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 FORDHAM L. REV. 959, 981 (2010).

<sup>6</sup> Howard M. Wasserman, *Structural Principles and Presidential Succession*, 90 KY. L.J. 345, 347-48 (2002). Wasserman also notes a fourth principle: structural federalism, which balances the relation between state and federal governments.

legislative, and judicial branches must be respected.<sup>7</sup> 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.<sup>8</sup> This idea is related to the “elective principle,” by which, generally, an election should be the preferred means of filling vacancies in elective offices.<sup>9</sup>

## 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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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.”<sup>13</sup>

The 25<sup>th</sup> Amendment to the U.S. Constitution, which was ratified in 1967, addressed similar issues in the Constitution’s original presidential inability provision.<sup>14</sup> Health-related incapacity scares during the Garfield, Wilson, and Eisenhower administrations had highlighted the need for an update to the constitutional succession provisions.<sup>15</sup> Section 3 of the 25<sup>th</sup> 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.<sup>16</sup> 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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<sup>7</sup> *Id.*

<sup>8</sup> Wasserman, *supra* note 6, at 348.

<sup>9</sup> See *Skelos v. Paterson*, 13 N.Y.3d 141, 151 (2009).

<sup>10</sup> Clyde F. Snider, *Gubernatorial Disability*, 8 U. CHI. L. REV. 521, 522-23 (1941).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 526.

<sup>13</sup> N.Y. CONST. art. IV, § 6.

<sup>14</sup> U.S. CONST. art. II, § 1, cl. 6. During the Constitutional Convention of 1787, Delaware delegate John Dickinson articulated two questions raised by the language of the presidential disability clause: “What is the extent of the term ‘disability’” and “Who is to be the judge of it?” John D. Feerick, *The Twenty-Fifth Amendment: Its Crafting and Drafting Process*, 10 CONLAWNOW 161 (2019) (citing 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 427 (Max Farrand ed., 1911)). For the authoritative account of the 25<sup>th</sup> Amendment’s drafting, interpretations, and uses, see JOHN D. FEERICK, *THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS* (2014).

<sup>15</sup> Goldstein, *supra* note 5, at 966.

<sup>16</sup> U.S. CONST. amend. XXV, § 3.

president.<sup>17</sup> 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.<sup>18</sup> The 25<sup>th</sup> Amendment is generally acknowledged to have addressed some of the most significant ambiguities in the original inability provision.<sup>19</sup>

After the 25<sup>th</sup> 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.<sup>20</sup> Despite recommendations from the New York State Law Revision Commission in 1984, 1985, 1986, and 1987, New York has not reformed its inability provision.<sup>21</sup>

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.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> As such, designation of the *decision-makers* and the *process* of the inability determination are the most important features of an effective disability provision.<sup>25</sup>

### 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.<sup>26</sup> Fortunately, the inability section of the New York constitution has never been needed.<sup>27</sup> 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

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<sup>17</sup> U.S. CONST. amend. XXV, § 4. The Cabinet consists of the leaders of the executive departments listed in 5 U.S.C. § 101.

<sup>18</sup> *Id.*

<sup>19</sup> Joel K. Goldstein, *Celebrating the Presidential Inability Provisions of the Twenty-Fifth Amendment*, 10 CONLAWNOW 119, 134 (2019).

<sup>20</sup> Michael Hutter, "Who's In Charge?": *Proposals to Clarify Gubernatorial Inability to Govern and Succession*, 12 GOV'T & POL'Y J. 1, 30 (2010).

<sup>21</sup> *Id.*

<sup>22</sup> William E. Rafferty, *Gubernatorial Removal and State Supreme Courts*, 11 J. APP. PRAC. & PROCESS 165, 184-86 (2010).

<sup>23</sup> ALA. CONST. art. V, § 127; MISS. CONST. art. V, § 131. All state inability provisions are appended below at App. B.

<sup>24</sup> See Goldstein, *supra* note 19, at 133. For one proposed framework for diagnosing executive disability, see Daniel J.T. Schuker, *Burden of Decision: Judging Presidential Disability Under the Twenty-Fifth Amendment*, 30 J.L. & POL. 97 (2016).

<sup>25</sup> *Id.*

<sup>26</sup> Hutter, *supra* note 20, at 30.

<sup>27</sup> *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.<sup>28</sup>

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.”<sup>29</sup>

## **B. Proposals for Reform**

### **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.<sup>30</sup> 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.<sup>31</sup> Pennsylvania governor Robert Casey underwent a heart and liver transplant in 1993.<sup>32</sup> He transferred authority to his lieutenant governor, who led the state for more than six months while Mr. Casey recovered.<sup>33</sup>

Most states that have enacted analogs to the 25<sup>th</sup> Amendment’s voluntary inability provision mirror the federal model closely. Delaware’s constitution is emblematic. It provides that “[w]hensoever 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.”<sup>34</sup>

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

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<sup>28</sup> Video Interview with Patrick A. Woods, Deputy Director, The Government Law Center, Albany Law School (Mar. 11, 2022).

<sup>29</sup> N.Y. ST. L. REVISION COMM’N, RECOMMENDATION OF THE LAW REVISION COMMISSION TO THE 1984 LEGISLATURE RELATING TO GUBERNATORIAL INABILITY AND SUCCESSION 13 (1984) [hereinafter “Law Revision Commission Report”].

<sup>30</sup> Goldstein, *supra* note 19, at 131 (describing the voluntary inability declaration provision of the 25th Amendment as “relatively uncontroversial”).

<sup>31</sup> Goldstein, *supra* note 5, at 967-68.

<sup>32</sup> Sam Roberts, *Giving Up the Reins of Power, but Usually Not for Long*, N.Y. TIMES (Apr. 15, 2007), <https://www.nytimes.com/2007/04/15/nyregion/15governors.html>.

<sup>33</sup> Mr. Casey’s six-month recovery from the transplant included two postoperative hospitalizations. *Id.*

<sup>34</sup> DEL. CONST. art. III, § 20(b).

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.<sup>35</sup> 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.<sup>36</sup> An involuntary inability declaration provision should provide a two-step process. First, a designated body, other than the governor, declares the inability.<sup>37</sup> Second, if the governor contests the inability, a second designated body resolves the dispute.<sup>38</sup> Some states' provisions call for a resolution by the entire state legislature,<sup>39</sup> the legislative leadership,<sup>40</sup> or a single executive branch member<sup>41</sup> 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.<sup>42</sup> Still others designate the state's highest court for this role.<sup>43</sup>

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,<sup>44</sup> some require unanimity,<sup>45</sup> and some call for some

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<sup>35</sup> Goldstein, *supra* note 5, at 968.

<sup>36</sup> 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).

<sup>37</sup> In the federal context, the 25<sup>th</sup> 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.

<sup>38</sup> Law Revision Commission Report, *supra* note 29, at 5-6.

<sup>39</sup> *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.").

<sup>40</sup> *See, e.g.*, IND. CONST. art. V, § 10(c) (president pro tempore of the Senate and the speaker of the House of Representatives).

<sup>41</sup> *See, e.g.*, KY. CONST. art. VI, § 84 (attorney general).

<sup>42</sup> *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).

<sup>43</sup> *See, e.g.*, UTAH CONST. art. VII, § 11.

<sup>44</sup> *See, e.g.*, MICH. CONST. art. I, § 26.

<sup>45</sup> *See, e.g.*, KY. CONST. art. VII, § 84.

proportion in between.<sup>46</sup> 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 25<sup>th</sup> Amendment’s Section 4 and the states that follow its lead, this procedure permits an inability declaration even without the lieutenant governor’s participation.<sup>47</sup> This is to avoid a potential “catch 22” situation where the lieutenant governor is unable or unwilling to declare even an obvious gubernatorial inability.<sup>48</sup>

Some states follow the federal model and designate the legislature as the decision-maker in the event the governor contests an inability declaration.<sup>49</sup> Most commonly, however, states empower their highest court to resolve the dispute.<sup>50</sup> 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.”<sup>51</sup> While there may be some concern regarding judges appointed by a governor being tasked with the decision to remove the governor from power,<sup>52</sup> 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.<sup>53</sup> Many states that follow the federal model of conferring decision-making authority to the legislature also incorporate the 25<sup>th</sup> Amendment’s establishment of time frames within which the body must meet and a decision must be rendered.<sup>54</sup> 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.

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<sup>46</sup> See, e.g., ALA. CONST. art. V, § 128.

<sup>47</sup> U.S. CONST. amend. XXV, § 3.

<sup>48</sup> See, e.g., *Constitutional Amendment and Accompanying Legislation Addressing Gubernatorial Succession: Hearing on HJ3 and HB 5090 Before the General Assembly Judiciary Comm.*, 1984 Leg. (Ct. 1984) (exchange between Atty. Gen. Lieberman and Rep. Tuliano, Member, G.A. Comm. on Judiciary).

<sup>49</sup> Law Revision Commission Report, *supra* note 29, at 8.

<sup>50</sup> William E. Raftery, *Gubernatorial Removal and State Supreme Courts*, 11 J. APP. PRAC. & PROCESS 165, 188 (2010).

<sup>51</sup> *Id.* at 183-84.

<sup>52</sup> Video Interview with Professor Jerry H. Goldfeder, Director, Voting Rights and Democracy Project, Fordham University School of Law (Feb. 25, 2022).

<sup>53</sup> See, e.g., S.C. CONST. art. IV, § 12(2) (“[T]he Lieutenant Governor shall continue to discharge the same as acting Governor”).

<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup> In colonial times, physical absence from the state rendered the governor incapable of performing many of the powers and duties of their office.<sup>57</sup> 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.<sup>58</sup> 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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<sup>55</sup> N.H. CONST. pt. 2, art. XLIX(a).

<sup>56</sup> N.Y. CONST. art. XX (1777).

<sup>57</sup> See generally JOHN D. FEERICK, FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION 23-36 (1965) (providing an overview of colonial succession arrangements).

<sup>58</sup> 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 state-wide mask ban on May 27, 2021, one week after announcing her run for governor.<sup>59</sup>

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.<sup>60</sup>

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.<sup>61</sup>

## **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.<sup>62</sup> His personal and state-issued phone were powered off, and he did not respond to phone calls or

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<sup>59</sup> Maya Yang, *Idaho Lieutenant Governor Bans Vaccine Mandates While Governor Out of State*, GUARDIAN (Oct. 6, 2021), <https://www.theguardian.com/us-news/2021/oct/06/idaho-janice-mcgeachin-lieutenant-governor-brad-little>.

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

<sup>61</sup> Jeremy W. Peters, *Who Would Lead New York if Paterson Left? Who Knows?*, N.Y. TIMES (July 6, 2009), <https://www.nytimes.com/2009/07/07/nyregion/07succession.html>.

<sup>62</sup> Jim Rutenberg & Robbie Brown, *Governor Used State's Money to Visit Lover*, N.Y. TIMES (June 25, 2009), <https://www.nytimes.com/2009/06/26/us/26sanford.html>.

text messages.<sup>63</sup> 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.<sup>64</sup> 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.”<sup>65</sup> 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.

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<sup>63</sup> 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>.

<sup>64</sup> 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.

<sup>65</sup> *Sawyer v. First Judicial District Court*, 410 P.2d 748, 750 (1966).

### 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.<sup>66</sup> 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.<sup>67</sup> 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*.<sup>68</sup> 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.”<sup>69</sup> 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.”<sup>70</sup> 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.

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<sup>66</sup> *Skelos v. Paterson*, 13 N.Y.3d 141 (2009); *Matter of Ward v. Curran*, 291 N.Y. 642 (1943).

<sup>67</sup> Editorial, *Second Things First: How Hochul Should Pick a New LG*, N.Y. DAILY NEWS (Apr. 14, 2022), <https://www.nydailynews.com/opinion/ny-edit-lieutenant-governor-20220414-widdeotb4bgyfoxfvoxn6j7bm-story.html>.

<sup>68</sup> *Id.*

<sup>69</sup> *Wing v. Ryan*, 255 A.D. 163, 167 (3d Dep't 1938), *aff'd*, 278 N.Y. 710 (1938).

<sup>70</sup> *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.<sup>71</sup> 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 25<sup>th</sup> Amendment.<sup>72</sup> 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.<sup>73</sup>

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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<sup>71</sup> Patrick A. Woods, *Automatic Lieutenant Gubernatorial Succession: Preventing Legislative Gridlock without Sacrificing the Elective Principle*, 76 ALB. L. REV. 2301 (2014).

<sup>72</sup> 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 25<sup>th</sup> 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.

<sup>73</sup> Woods, *supra* note 71, at 2304-05.

25<sup>th</sup> 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..."<sup>74</sup> 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.<sup>75</sup>

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..."<sup>76</sup>

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.<sup>77</sup> 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."<sup>78</sup> The Commission also noted the analogous federal model in the 25<sup>th</sup> 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..."<sup>79</sup> 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.<sup>80</sup> 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

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<sup>74</sup> N.Y. CONST. art. XXI (1777).

<sup>75</sup> N.Y. CONST. art. IV, § 1.

<sup>76</sup> *Id.*

<sup>77</sup> Law Revision Commission Report, *supra* note 29, at 18.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> 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.<sup>81</sup> 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.”<sup>82</sup> 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.<sup>83</sup> 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.<sup>84</sup> 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.<sup>85</sup> 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.<sup>86</sup> 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.

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<sup>81</sup> *Skelos v. Paterson*, 13 N.Y.3d 141 (2009).

<sup>82</sup> *Id.*

<sup>83</sup> Woods, *supra* note 71, at 2301.

<sup>84</sup> *Id.*

<sup>85</sup> Citizens Union of the City of New York, *Filling Vacancies in the Office of Lieutenant Governor* (May 2009).

<sup>86</sup> *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.<sup>87</sup> 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."<sup>88</sup> 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 25<sup>th</sup> Amendment.<sup>89</sup> 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.<sup>90</sup> 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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<sup>87</sup> Appended below at App. F.

<sup>88</sup> *Id.*

<sup>89</sup> Letter from Jerry H. Goldfeder, *supra* note 72.

<sup>90</sup> 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.<sup>91</sup> 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.<sup>92</sup> The 1894 constitution extended the line of succession to include the speaker of the Assembly after the temporary president of the Senate.<sup>93</sup> 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.<sup>94</sup> If there is no temporary president at the time of a dual vacancy, the speaker would serve as acting governor.<sup>95</sup>

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."<sup>96</sup> 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.<sup>97</sup>

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<sup>91</sup> Appended below at App. G.

<sup>92</sup> 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).

<sup>93</sup> N.Y. CONST. art. IV, § 7 (1894).

<sup>94</sup> N.Y. CONST. art. IV, § 6.

<sup>95</sup> *Id.*

<sup>96</sup> N.Y. Defense Emergency Act of 1951, Article 1-A, § 5.

<sup>97</sup> *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.<sup>98</sup>

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.<sup>99</sup> The presidential line of succession statute requires successors to resign from their offices before discharging the powers of the presidency.<sup>100</sup>

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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<sup>98</sup> N.Y. CONST. art. III, § 7 (emphasis added).

<sup>99</sup> See, e.g., *People v. Tremaine*, 252 N.Y. 27 (1929); *People ex rel. Ryan v. Green*, 58 N.Y. 295 (1874); *Luce v. Beiter*, 239 A.D. 23 (4th Dep’t 1933); *In re Flynn*, 203 A.D. 839 (4th Dep’t 1922); *Stewart v. City of New York*, 15 A.D. 548 (2d Dep’t 1897); *People v. Irwin*, 166 Misc. 492 (N.Y. Gen. Sess. 1938); see also 1976 N.Y. Op. Atty Gen. No. 338 (Dec. 30, 1976); 2005 N.Y. Op. Atty Gen. 1 (N.Y.A.G.); 26 N.Y. Jur. 2d Counties, etc. § 544; 96 N.Y. Jur. 2d State of New York § 143; Frank W. R. Hubert, Jr., *Constitutional Restraints on Dual Office-Holding and Dual Employment in Texas-A Proposed Amendment*, 43 TEX. L. REV. 943 (1965); Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045 (1994).

<sup>100</sup> 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?<sup>101</sup> 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.<sup>102</sup> 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.<sup>103</sup> 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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<sup>101</sup> T. Quinn Yeagain, *Democratizing Gubernatorial Succession*, 73 RUTGERS U. L. REV. 1145, 1158 (2021); see also Akhil Reed Amar & Vikram David Amar, *Is the Presidential Succession Law Constitutional*, 48 STAN. L. REV. 113 (1995); Sanford Levinson, *Political Party and Senatorial Succession: A Response to Vikram Amar on How Best to Interpret the Seventeenth Amendment*, 35 HASTINGS CONST. L.Q. 713 (2008); see generally Michael L. Ticktin, *Succession to the Office of Governor and Separation of Powers: The Unfinished Business of the 1947 Constitution*, 29 RUTGERS L.J. 1021 (1998); Travis Lynch, *The Problem with the Lieutenant Governor: A Legislative or Executive Position under the Separation of Powers Clause*, 84 SUPRA 87 (2015).

<sup>102</sup> Yeagain, *supra* note 101. The states include Maine, Louisiana, Arkansas, among others. *Id.*

<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup> 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.<sup>106</sup> 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.<sup>107</sup>

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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<sup>104</sup> 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.”).

<sup>105</sup> N.Y. CONST. art. III, § 9.

<sup>106</sup> *Id.*

<sup>107</sup> 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.<sup>108</sup> 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.<sup>109</sup> 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.

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<sup>108</sup> *People ex rel. Ryan v. Green*, 58 N.Y. 295 (1874). See also *People v. Tremaine*, 252 N.Y. 27 (1929); Hubert, *supra* note 99, at 943.

<sup>109</sup> Hubert, *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 Governatorial Succession Provisions

<b>Alabama</b>
ALA. CONST. art. V, § 128
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 if the officer has been restored to his mind, shall so adjudge and file a duly certified copy of its decree with the secretary of state; 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.
<b>Alaska</b>
ALASKA CONST. art. III, § 12
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.
<b>Arizona</b>
ARIZ. CONST. art. V, § 6
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.
<b>Arkansas</b>
ARK. CONST. art. VI, § 12
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
<b>California</b>
CAL. CONST. art. VI, § 10
... 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.
Cal. Gov't Code § 12070
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.

<b>Colorado</b>
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.
<b>Connecticut</b>
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.
<b>Delaware</b>
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.
IND. CONST. art. V, § 10(d)
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.
<b>Iowa</b>
IOWA CONST. art. IV, § 17
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.
<b>Kansas</b>
KAN. CONST. art. I, § 11
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.
<b>Kentucky</b>
KY. CONST. art. VI, § 84
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.
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.
<b>Louisiana</b>
LA. CONST. art. IV, § 18
(A) <i>Declaration and Counter-Declaration.</i> 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.
(B) <i>Determination by the Legislature.</i> 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.

(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

<p>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.</p>
<b>Massachusetts</b>
MASS. CONST. pt. 2, ch. 2, § 2, art. III
<p>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.</p>
MASS. CONST. amend. art. LV
<p>Whenever the offices of governor and lieutenant-governor shall both be vacant, by reason of death, absence from the commonwealth, or otherwise, then one of the following officers, in the order of succession herein named, namely, the secretary, attorney-general, treasurer and receiver-general, and auditor, shall, during such vacancy, have full power and authority to do and execute all and every such acts, matters and things as the governor or the lieutenant-governor might or could lawfully do or execute, if they, or either of them, were personally present.</p>
<b>Michigan</b>
MICH. CONST. art. V, § 26
<p><i>Succession to Governorship</i>  In case of the conviction of the governor on impeachment, his removal from office, his resignation or his death, the lieutenant governor, the elected secretary of state, the elected attorney general and such other persons designated by law shall in that order be governor for the remainder of the governor's term.  ...  <i>Duration of successor's term as governor</i>  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.    <i>Determination of inability</i>  The inability of the governor or person acting as governor shall be determined 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. Such determination shall be final and conclusive. The supreme court shall upon its own initiative determine if and when the inability ceases</p>
<b>Minnesota</b>
MINN. CONST. art. V, § 5
<p>In case a vacancy occurs from any cause whatever in the office of governor, the lieutenant governor shall be governor during such vacancy. ... The last elected presiding officer of the senate shall become lieutenant governor in case a vacancy occurs in that office. In case the governor is unable to discharge the powers and duties of his office, the same devolves on the lieutenant governor. The legislature may provide by law for the case of the removal, death, resignation, or inability both of the governor and lieutenant governor to discharge the duties of governor and may provide by law for continuity of government in periods of emergency resulting from disasters caused by enemy attack in this state, including but not limited to, succession to the powers and duties of public office and change of the seat of government.</p>
<b>Mississippi</b>
MISS. CONST. art. V, § 131
<p>When the office of Governor shall become vacant, by death or otherwise, the Lieutenant Governor shall possess the powers and discharge the duties of the office. When the Governor shall be absent from the state, or unable,</p>

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.

### **Missouri**

MO. CONST. art. IV, § 11(b)

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.

### **Montana**

MONT. CONST. art. VI, § 14

(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.  
(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.

### **Nebraska**

NEB. CONST. art. IV, § 16

... 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.

### **Nevada**

NEV. CONST. art. V, § 18

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.

**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 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

[I]n 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. ...

<b>New York</b>
N.Y. CONST. art. IV, § 5
<i>When Lieutenant-Governor to Act as Governor</i> 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. ...
<b>North Carolina</b>
N.C. CONST. art. III, § 3
(2) <i>Succession as Acting Governor.</i> 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.
(3) <i>Physical incapacity.</i> 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.
(4) <i>Mental incapacity.</i> 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.
(5) <i>Impeachment.</i> Removal of the Governor from office for any other cause shall be by impeachment.
<b>North Dakota</b>
N.D. CONST. art. V, § 11
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.
<b>Ohio</b>
OHIO CONST. art. III, § 15
(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.
<b>Oklahoma</b>
OKLA. CONST. art. VI, § 15
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.
<b>Oregon</b>
OR. CONST. art. V, § 8(a)
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.



<b>Pennsylvania</b>
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.
<b>Rhode Island</b>
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.
<b>South Carolina</b>
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 removal of the Lieutenant 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.
<b>South Dakota</b>
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.

**West Virginia**

W. VA. CONST. art. VII, § 16

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.

**Wisconsin**

WIS. CONST. art. V, § 8

(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.

**Wyoming**

WYO. CONST. art. IV, § 6

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.

Appendix C: Survey of State Gubernatorial Absence Provisions

<b>State</b>	<b>Constitutional Provision</b>	<b>Text</b>
<b>Alabama</b>	Art. V, § 127	...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...
<b>Alaska</b>	Art. III, § 9	In case of the temporary absence of the governor from office, the lieutenant governor shall serve as acting governor.
<b>Arizona</b>	Art. V, § 6	...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.
<b>Arkansas</b>	Art. VI, § 12	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.
<b>California</b>	Art. V, § 10	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.
<b>Colorado</b>	Art. IV, § 13(5)	...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...
<b>Connecticut</b>	Art. IV, § 18	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.
<b>Hawaii</b>	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....
<b>Idaho</b>	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.

<b>Louisiana</b>	Art. IV, § 19	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.
<b>Massachusetts</b>	Pt. 2, ch. 2, § II, art. III	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.
<b>Michigan</b>	Art. V, § 26	...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.
<b>Mississippi</b>	Art. V, § 131	...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...
<b>Missouri</b>	Art. IV, § 11(a)	...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.
<b>Montana</b>	Art. VI, § 14(2)	After the governor has been absent from the state for more than 45 consecutive days, the lieutenant governor shall serve as acting governor.
<b>Nevada</b>	Art. V, § 18	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.
<b>New Hampshire</b>	Pt. 2, art. XLIX	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...
<b>New Jersey</b>	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, ... 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

		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.
<b>New Mexico</b>	Art. V, § 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. In case there is no lieutenant governor, or in case he is for any reason unable to perform the duties of governor, then the secretary of state shall perform the duties of governor, and, in case there is no secretary of state, then the president pro tempore of the senate, or in case there is no president pro tempore of the senate, or he is for any reason unable to perform the duties of governor, then the speaker of the house shall succeed to the office of governor, or act as governor as hereinbefore provided.
<b>New York</b>	Art. IV, § 5	...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.
<b>North Carolina</b>	Art. III, § 3(2)	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.
<b>Oklahoma</b>	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...  <b>Note:</b> There is no absence provision pertaining to absence of the Governor.
<b>South Carolina</b>	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....
<b>South Dakota</b>	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.
<b>Texas</b>	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.



<b>Vermont</b>	Ch. 2, § 20	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].
<b>Wisconsin</b>	Art. V, § 7(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.
<b>Wyoming</b>	Art. IV, § 6	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.

## Appendix D: New York Election Law Committee Proposal

NEW YORK  
CITY BAR

### COMMITTEE ON ELECTION LAW

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July 1, 2008

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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.<sup>1</sup>

#### 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.<sup>2</sup>

<sup>1</sup> 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.

<sup>2</sup> The timing of the Hevesi "resignation" itself raised complicating questions implicating § 43 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 1<sup>st</sup>. 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.

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,<sup>3</sup> fills a gubernatorial vacancy.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> 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.<sup>7</sup>

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<sup>3</sup> N.Y. Const. art. IV, § 1.

<sup>4</sup> 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.

<sup>5</sup> 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.

<sup>6</sup> N.Y. Const. art. IV, Sec. 6.

<sup>7</sup> 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.<sup>12</sup> 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<sup>th</sup>. If the vacancy occurs on or after September 20<sup>th</sup>, 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.<sup>13</sup> 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.<sup>14</sup>

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

<sup>12</sup> 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.

<sup>13</sup> N.Y. Pub. Off. Law § 42.

<sup>14</sup> 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."<sup>8</sup>

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.<sup>9</sup>

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.<sup>10</sup>

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."<sup>11</sup>

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<sup>8</sup> 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.

<sup>9</sup> 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.

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

<sup>11</sup> This language is derived from § 41 of the New York Public Officers Law.

## Appendix F: Alaska-Woods Proposal

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.