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Gubernatorial Inability and Absence in the New York Constitution: Proposals and Arguments for Reform

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Executive Summary of Recommendations

The Rule of Law Clinic recommends the following reforms related to the gubernatorial inability and absence provisions of the New York constitution:

(1) Gubernatorial Inability
- 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 to the lieutenant governor, or whoever is next in the line of succession, and subsequently reclaim the powers and duties by written declaration;
- 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 inability by a majority of a committee comprised of the lieutenant governor, the attorney general, the comptroller, and six executive department heads designated by the Legislature via an amendment to the Public Officers Law; and
  (b) Upon written declaration by the governor contesting the inability declaration, the committee would have four days to reassert their determination that the governor is unable via their own written declaration, or they could choose not to reassert, and the powers and duties of the office would return to the governor;
  (c) Should there be a dispute between the committee and the governor, the dispute would be referred for resolution to the Legislature, requiring a two-thirds vote of both the Assembly and the Senate, acting separately, to keep the governor out of power.
- Adoption of procedures for declaring the lieutenant governor unable that mirror the procedures for gubernatorial inabilities.

(2) Gubernatorial Absence
- Removal of the constitutional provision that requires transfers of power whenever the governor and other officials in the line of succession are "absent from the state," to ensure:
  (a) Clarity on who is discharging the governor's powers and the legality of gubernatorial action;
  (b) Transfers of power only occur with cause;
  (c) The risk of confusion among the state's residents and the spread of misinformation is reduced;
  (d) The rule of law is not undermined;
  (e) Policy and partisan continuity are appropriately upheld; and
  (f) The governor is able to promote state interests out of state.

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Introduction

On July 31, 2023, New Jersey Governor Phil Murphy was on vacation with his family in Italy. Under the New Jersey Constitution, the duties of governor pass to the next official in the line of succession when the governor is "absent" from the state,[1] just as the New York constitution provides.[2] There was no formal announcement that the absence provision had been invoked and that Lieutenant Governor Sheila Oliver was serving as acting governor. Therefore, it must have taken many New Jerseyans by surprise when the governor's communications director issued a press release announcing that Oliver was "receiving medical care" and was "unable to discharge the duties of Acting Governor at this time."[3] Pursuant to the state constitution, he said the Senate president had become acting governor earlier that morning.[4] The next day, it was announced that Lieutenant Governor Oliver had passed away.[5] This news prompted Governor Murphy to end his trip early and return to New Jersey to take back the helm from the Senate president.[6]

These events in New Jersey illustrate how flawed policies for gubernatorial succession can cause needless disruption and confusion. The initial transfer of power when Governor Murphy left the state on vacation was pointless. The constitutional provision that initiated the transfer is an obsolete relic from a time when governors' "absence" from the state might have impaired their ability to discharge their responsibilities. Modern communications capabilities allow governors to effectively conduct state business while travelling.

Another problematic constitutional provision came into play when Lieutenant Governor Oliver fell ill while acting as governor. The constitution provides for transfers of power due to inabilities, but it does not supply a procedure for declaring inabilities. This left the state without answers to important questions: How long was Oliver "unable" to discharge the duties of acting governor before it was announced by the communications director? Who declared that she was unable? What led them to make that decision? Without clear procedures for declaring gubernatorial inabilities, the official who acts as governor might be deprived of an unambiguous claim to gubernatorial powers.

New York's neighbor was able to avoid any significant disruption to the inner workings of government, but this case study reveals serious inadequacies in the state's constitution. And New York's constitution shares all of the same flaws.

This memo explores how to fix the inadequacies in the New York Constitution's provisions on gubernatorial absence and inability. We propose eliminating the absence provision and adding provisions with procedures for determining gubernatorial inability. The inability procedures

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[1] N.J. CONST. art. V, § 1, para. 7.
[2] N.Y. CONST. art. IV, § 5, para. 3.
[3] Press Release, Statement from Communications Director Mahen Gunaratna (July 31, 2023), https://www.nj.gov/governor/news/news/562023/approved/20230731a.shtml.
[4] *Id.*
[5] Press Release, Statement from the Oliver Family (Aug. 1, 2023), https://www.nj.gov/governor/news/news/562023/approved/20230801a.shtml.
[6] Katie Sobko, *Gov. Phil Murphy to Return to NJ on Thursday After Death of Sheila Oliver*, NORTHJERSEY.COM (Aug. 2, 2023), https://www.northjersey.com/story/news/new-jersey/2023/08/02/phil-murphy-returning-nj-italy-vacation-sheila-oliver-death/70515051007/.

should be available for all contingencies that prevent a governor from ably serving, including rare situations when a governor's absence from the state might interfere with effectively discharging their powers. Accordingly, the creation of inability procedures will make the absence provision entirely unnecessary.

The inability procedures should include both a voluntary process for the governor to declare an inability themself, and an involuntary process for a designated committee to make the declaration in the event the governor is unable or unwilling to do so. This committee should be made up of the lieutenant governor, the attorney general, the comptroller, and six executive department heads confirmed by the Senate. The six department head on the committee would be designated by statute in the Public Officers Law. Should there be a dispute between the governor and the committee over the governor's inability, a final determination would be made by the Legislature via a two-thirds majority in both the Assembly and the Senate. Importantly, there should be a similar procedure for declaring the lieutenant governor unable.

Part I of this memo addresses our proposed inability provision. It begins with an overview of the current gubernatorial succession framework. Then, this Part discusses the drafting of the U.S. Constitution's 25th Amendment and how the 25th Amendment's ratification influenced reform of states' gubernatorial succession policies. The remainder of this Part explains each of the aspects of the proposal.

Part II addresses the removal of the absence provision. It explores the language and requirements of the absence provision while examining the historical justification of the provision. It then examines why the absence provision is not just obsolete but actively harmful to stability and good governance. First, this Part shows how the absence provision creates scenarios where two people might claim to be governor simultaneously. Next, it demonstrates the risk that the provision could create uncertainty regarding the legality of gubernatorial action taken when the governor is out of state. This Part moves on to discuss how the provision removes officials from power arbitrarily, creates confusion, leads to misinformation, makes it easier for governors to undermine the rule of law, harms policy and partisan continuity, and makes it harder for governors to promote state interests by travelling around the country and world. This Part concludes by discussing arguments for keeping an updated absence provision before concluding that an updated absence provision would be redundant if procedures for declaring gubernatorial inability are added to the constitution.

I. Gubernatorial Inability

A. The Current Law and Its Flaws

Article 4, Section 5 of the New York Constitution provides that the governor's powers and duties transfer to the lieutenant governor when the governor is "unable to discharge the powers and duties of the office."[7] This language leaves more questions than answers. "Unable" is undefined, and there is no guidance as to how inability is determined and who can make the determination. Constitutional ambiguities like this can lay dormant for decades, but they can lead to devastating instability when events suddenly make them relevant. The lack of clear processes for declaring

[7] N.Y. CONST. art. IV, § 5, para. 3.

gubernatorial inabilities could prevent transfer of the governor's power when it is necessary. Even when power is purportedly transferred, this deficiency in the constitution might lead to questions about the successor's legal entitlement to discharge the governor's powers and duties.

B. Executive Inability Reforms at the State and Federal Level

Until the mid-20th century, ambiguities in the U.S. Constitution made it challenging to handle situations where a president's ability to carry out their responsibilities was compromised. The Constitution recognized "inability" a cause for transferring presidential powers to a successor, but it did not define that word or provide a procedure of declaring a president unable. Significant ambiguity also existed regarding the status of a presidential successor: did they permanently take over the office of the president or were they merely discharging the powers and duties of the office?[8] Vice presidents worried that they could not temporarily discharge presidential powers during an inability without permanently supplanting a disabled president, regardless of whether the president recovered.[9] Presidents, vice presidents, and their staffs were hesitant to transfer presidential powers—even when it might have been necessary—due to the Constitution's lack of clarity on succession.[10] In the mid-1960s, after the tragic assassination of President John F. Kennedy, these deficiencies were finally addressed by the drafting and ratification of the 25th Amendment.[11]

Thirty-one states have established procedures for gubernatorial inability since the 25th Amendment's ratification.[12] Some of those states used the 25th Amendment as a model, while others created new approaches.[13] Nineteen states, including New York, have not established procedures. These states are inviting the possibility of chaos and instability should the governor become incapacitated.[14] There could be political infighting about who, exactly, is in charge, creating the risk of serious harm to the state and its people if timely decisions are needed. Procedures are necessary to provide predictability for the line of succession, ensure that the successor has a legitimate claim to power, and ensure that the state has a capable governor.

C. Reform Proposal

The Rule of Law Clinic's recommendations for gubernatorial inability procedures are based on the 25th Amendment model and a proposal advanced by the New York State Bar Association in their January 2023 report on gubernatorial succession.[15] While states have taken a variety of

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[8] *See* Joel K. Goldstein, *Taking from the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 FORDHAM L. REV. 959, 966 (2010).
[9] *See id.* at 967.
[10] *See id.*
[11] *See id.*
[12] Michael J. Hutter, *"Who's In Charge?": Proposals to Clarify Gubernatorial Inability to Govern and Succession*, 12 GOV'T L. & POL'Y J. 29, 30 (2010).
[13] *Id.* ("While most state constitutions provide for the highest court of the state to make the final determination of inability, others have delegated it to the state legislature, state executive officials, or a disability commission composed of public officials and medical experts.").
[14] S*ee id.*
[15] *See generally* New York State Bar Association Committee on the New York State Constitution, *Gubernatorial Succession in New York: Constitutional and Statutory Recommendations Regarding Gubernatorial Succession and Inability* (Jan. 2023) [hereinafter NYSBA Report].

approaches to gubernatorial inability, the federal model in the 25th Amendment sets out an effective and usable process that also guards against improper invocations.[16] We also recommend nearly identical procedures for the determination of inability of the lieutenant governor.

The voluntary inability declaration process we propose allows the governor to declare their own inability by transmitting a written declaration to the lieutenant-governor, the temporary president of the Senate, the Speaker of the Assembly, the minority leader of the Senate, and the minority leader of the Assembly. The powers and duties of the office of governor are then discharged by the lieutenant-governor, or another person next in the line of succession as provided by law, as acting governor. The governor retakes power when they transmit to the same group a written declaration that the inability has ended.

For involuntarily inability declarations, a committee on gubernatorial inability should be authorized to declare the governor unable when the governor is unable or unwilling to make such a declaration. The committee should be composed of the lieutenant-governor, attorney general, comptroller, and six heads of executive agencies who have been confirmed by the Senate for those respective positions. The three elected officials will be named in the text of the constitutional amendment, while the six executive agency heads will be designated via statute by an amendment to the Public Officers Law. If a majority of this committee declares the governor unable to discharge the powers and duties of the office via written declaration to the same officials the governor must notify for the voluntary process, the lieutenant governor assumes those responsibilities. If the committee is unable to collect the votes of all members to make the determination, the threshold for the declaration raises from a majority to two-thirds.

The governor can contest the declaration with their own written declaration that no inability exists, and the governor will resume their powers and duties on the fourth day after making such a declaration, provided that the committee does not transmit a second declaration affirming their original decision within those four days. Then, the Legislature would resolve the dispute. If not in session, the Legislature must assemble within 48 hours after the committee's second declaration. The Legislature then must decide within 21 days, by two-thirds vote of all members elected to each house, acting separately, that the governor is unable to discharge the powers and duties of the office. If such determination is made, the lieutenant governor shall continue to exercise the powers and duties of governor. If such a determination cannot be made by that two-thirds margin in both houses, the governor shall resume the powers and duties of the office.

1. Voluntary Inability

Section 3 of the 25th Amendment allows the president to voluntarily declare themself unable. This provision has been used four times by three presidents. President Ronald Reagan used it for slightly less than eight hours in 1985 to undergo surgery to treat colon cancer.[17] President George W. Bush used the provision twice during his presidency, in 2002 and 2007, for colonoscopies,

[16] *Id.* at 20.
[17] *List of Vice-Presidents Who Served as Acting President Under the 25th Amendment*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/statistics/data/list-vice-presidents-who-served-acting-president-under-the-25th-amendment.

totaling four hours between the two transfers.[18] President Joseph R. Biden also used the provision for a colonoscopy in 2021, transferring powers for less than an hour and a half.[19] These temporary transfers of power were important.[20] If there had been a complication during these procedures that resulted in a prolonged incapacitation or if an emergency required immediate presidential action, there would have been no need to use the more complicated involuntary inability process in the 25th Amendment's Section 4. In those cases, there would be no question that the vice president rightfully and legally held the powers of the presidency, protecting stability in the nation's highest office.

A voluntary inability process, and the normalization of its use, could encourage governors to be transparent about their health and wellness. Presidents in the modern era have regularly and voluntarily released the results of annual physicals,[21] and often are in the public eye participating in sports and recreation.[22] If governors had a clear way to transfer powers during health challenges, they might be more likely to tell the public about their condition. Furthermore, the voluntarily inability process we propose involves notification to several officials about transfers of gubernatorial powers, which itself is a part of such transparency.

There have been brief transfers of gubernatorial powers in New York before. In 2006, Governor George Pataki underwent intestinal surgery and transferred his powers to the lieutenant governor.[23] It is positive that there is a precedent for voluntary transfers of gubernatorial powers, but an explicit legal process for those transfer is preferrable. A voluntary inability process would further encourage such transfers and leave no question about their legality.

2. Involuntary Inability: Composition of the Inability Committee

The composition of the committee responsible for declaring gubernatorial inabilities when the governor is unable or unwilling to do so reflects the importance of empowering officials who are accountable to the public. The lieutenant governor, attorney general, and comptroller are elected, making them directly accountable to voters. The six executive department heads are appointed by the governor and confirmed by the Senate. All of these officials can be removed by the Legislature through the impeachment process.
The clinic recommends selecting the six executive department heads for the inability commission based on their expertise and the likelihood that they will have insight into the governor's condition. The commissioner of health and the commissioner of the Office of Mental Health should be included because they are likely to have medical expertise that could inform incapacity

[18] *Id.*
[19] *Id.*
[20] *See* John D. Feerick & John Rogan, *Invoking the 25th Amendment Should Be as Routine as a Colonoscopy*, WASH. POST (Nov. 21, 2021), https://www.washingtonpost.com/outlook/2021/11/21/25th-amendment-colonoscopy-president-biden/.
[21] *See, e.g.*, Press Release, Summary of the President's Physical Examination (Aug. 4, 2001), https://georgewbush-whitehouse.archives.gov/news/releases/2001/08/20010804-2.html.
[22] *See* Chris Mannix, *Inside the Iconic Obama Basketball Games at the White House*, N.Y. TIMES (Apr. 4, 2020), https://www.si.com/nba/2020/04/04/barack-obama-basketball-white-house-kobe-bryant.
[23] *See* Michael Cooper, *Transferred to Manhattan, Pataki Has Intestinal Surgery*, N.Y. TIMES (Feb. 22, 2006), https://www.nytimes.com/2006/02/22/nyregion/transferred-to-manhattan-pataki-has-intestinal-surgery.html.

determinations.[24] Additionally, we recommend the committee also include the heads of the Division of Criminal Justice Services, the Division of Human Rights, the Department of Labor, and the Department of State. These officials will probably have access to professionals and resources that would provide important insights relevant to inability determinations. These individuals also preside over large departments, making it likely that they interact directly with the governor. Interactions with the governor could provide insights into the governor's capacity. That the makeup of this committee is provided by statute allows the Legislature to change it as necessary, without having to use the lengthy constitutional amendment process.

Under our proposal, the department heads will have to have been confirmed by the Senate for the position they currently hold to be eligible to participate in an inability determination. This provision prevents acting department heads from participating in the process, including those who have been confirmed by the Senate but for a lower-ranked position in their department. Whether acting secretaries can participate in the 25th Amendment inability process is a point of debate.[25] Our proposal clarifies that ambiguity.

Medical experts from outside government should not be on the inability committee. Some members of the medical community have criticized the 25th Amendment for not giving doctors a formal role in determining presidential inability.[26] The advocacy for including medical experts has not stopped. In 2017, Congressman Jamie Raskin, a Democrat from Maryland, introduced the Oversight Commission on Presidential Capacity Act.[27] This bill would create an "other body" under the 25th Amendment to participate with the vice president in declaring presidential inabilities. This body would supplant the president's Cabinet in the process.[28] The proposed make-up of the commission has changed through iterations of the bill,[29] but the goal has remained the same. Physicians and psychiatrists, appointed by congressional leadership, including from the minority, would serve along with retired statespersons with knowledge of the inner workings of government. Together, they would examine the president and report their findings to Congress, and, if incapacity exists, the vice president would become acting president.[30]

Some might advocate for a similar amount of engagement by medical professionals in the determination of gubernatorial inabilities. As well-reasoned as these arguments may be, there are stronger arguments against the inclusion of medical professionals. In 1958, Attorney General

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[24] *See, e.g.*, *A History of New York State's Health Commissioners*, DEP'T OF HEALTH (Jan. 2023), https://www.health.ny.gov/commissioner/previous/.
[25] *See* BRIAN C. KALT, UNABLE: THE LAW, POLITICS, AND LIMITS OF SECTION 4 OF THE TWENTY-FIFTH AMENDMENT 180 (2019).
[26] *See* John D. Feerick, *The Twenty-Fifth Amendment: An Explanation and Defense*, 30 WAKE FOREST L. REV. 481, 482 (1995).
[27] Press Release, Raskin Introduces Bill to Establish Independent Commission on Presidential Capacity (May 12, 2017), https://raskin.house.gov/2017/5/raskin-introduces-bill-establish-independent-commission-presidential-capacity.
[28] *Id.*
[29] *See* Press Release, Raskin Reintroduces 25th Amendment Legislation Establishing Independent Commission on Presidential Capacity (Oct. 9, 2020), https://raskin.house.gov/2020/10/raskin-reintroduces-25th-amendment-legislation-establishing-independent (changing the number of members from 11 to 17).
[30] Press Release, Raskin Introduces Bill to Establish Independent Commission on Presidential Capacity, *supra* note 28.

William P. Rogers testified before the Senate Subcommittee on Presidential Inability, and warned that "elaborate legal machinery" that gives physical and mental examinations to the president would "give a hostile commission the power to harass the President constantly" and be an "affront to the President's personal dignity."[31] The New York State Bar Association explained that they "contemplate that the committee on gubernatorial inability will consult medical authorities as appropriate, though the exigencies of a situation should not compel them to do so."[32]

Gubernatorial inability is not purely a medical determination, and sometimes may have no medical element at all. There will always be political considerations that those in government are best suited to contemplate. Accordingly, medical professionals should not be making such subjective determinations while not being accountable to the public in the same way as government officials. The public might view determinations made by medical professionals from outside of government as illegitimate.

Officials employed in statutory offices in the executive branch, such as the secretary to the governor or the counsel to the governor, also should not be on the inability committee. These individuals work closely with the governor, making it likely that they could have insights on the governor's condition. But they are not accountable to the public to the same extent as the officials we recommended including on the committee. The comptroller and the attorney general are elected statewide, while the executive department heads are confirmed by the Senate. That those officials are nominated by the governor and work closely with her provides some of the benefits that might come from including statutory officeholders on the inability committee. Another reason to exclude the statutory officeholders is that the governor may prefer to be able to fully trust these individuals and not fear that they would use private information against her.

3. "Other Body" Provision

One key difference between the 25th Amendment and our proposal is the omission of language allowing the Legislature to create a different body to determine inability.[33] The 25th Amendment's Section 4 authorizes "the Vice President and a majority of either the principal officers of the executive departments or … *such other body as Congress may by law provide*" to declare presidential inabilities. In other words, Congress has discretion to replace the Cabinet with an "other body." This is the provision that Representative Raskin relies on to support his Oversight Commission on Presidential Capacity Act.

Our proposal does not include an analogous provision, though the Legislature does have the power, by amending the Public Officers Law, to change what six heads of executive departments participate. Since it only takes a majority of the committee (five) to make a determination of inability, the Legislature retains strong power over the committee's makeup.

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[31] *Presidential Inability: Hearings Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 85th Cong., 2d Sess. 14 (1958).
[32] NYSBA Report, *supra* note 15.
[33] *See* U.S. CONST. amend. XXV, § 4 (emphasis added).

The omission of an "other body" provision in our proposal reflects several considerations. First, under the 25th Amendment, the vice president can solely defeat any inability declaration, regardless of the body making the decision. The lieutenant governor does not hold that veto power under our proposal, and so there is a heightened risk of the Legislature misusing power to create a new body. Second, the Legislature should not be able to solely determine the inability committee because the Legislature is the body that decides a dispute between the governor and the inability committee. This could lead to less faith in the secondary determination.

4. When the Governor Disputes an Inability Determination

Should the inability committee declare the governor unable, the governor can contest it via written declaration. The governor can then return to power after four days, provided that the committee does not submit another inability declaration within that four day period. If the inability committee does submit a counter declaration, then the Legislature must decide the dispute over the governor's capacity. A dispute may arise in situations where the inability falls in a gray area, like substance abuse[34] or a suspected case of dementia.[35]

A dispute would be unlikely in circumstances where the governor is unconscious or their inability is unambiguous. For example, in April 2007, New Jersey Governor John Corzine was involved in a serious car accident that left him in critical but stable condition. Power was transferred to Senate President Richard Codey, who remained acting governor during Corzine's surgery and while he was hospitalized.[36] A doctor treating the governor said it would be "days to weeks" until the governor would be lucid enough to conduct state business.[37]

Inconsistent with the federal, 25th Amendment model, most state constitutions provide for the highest court of the state to make the final determination of inability when there is a dispute between the governor and the declaring body.[38] Advocates for giving the judiciary this role assert that gubernatorial inability is a dispute which may "amount to a bench trial" and so should be resolved by a body that has the most experience in that area.[39] Additionally, they argue that the involvement of the court at the second stage "ensures that the full process of the provision includes each branch of government."[40]
Our proposal prioritizes insulating the judiciary from any part of the determination process. The Court of Appeals may need to decide legal questions that may arise during the process, and its credibility could be diminished if it made such decisions while also determining the governor's disability. Additionally, the Court of Appeals, as an appellate court, is not necessarily equipped

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[34] *See* Daniel J.T. Schuker, *Burden of Decision: Judging Presidential Disability Under the Twenty-Fifth Amendment*, 30 J. OF L. & POL. 97, 114 (2014) ("[Nixon] had gained a reputation among presidential aides for consuming late-night drinks and slurring his words in conversation after drinking only a moderate amount of alcohol.").
[35] *See id.* at 130 ("Following President Reagan's 1994 announcement of his diagnosis with Alzheimer's disease, questions arose whether early manifestations of the disease had affected his performance in the Oval Office.").
[36] *See* David Kocieniewski & David Chen, *New Jersey Governor Is Injured in Car Crash*, N.Y. TIMES (Apr. 13, 2007), https://www.nytimes.com/2007/04/13/nyregion/13corzine.html.
[37] *See id.*
[38] Hutter, *supra* note 12, at 30.
[39] *See* Fordham Law School Rule of Law Clinic, *Changing Hands: Recommendations to Improve New York's System of Gubernatorial Succession*, at 8-9 (June 2022).
[40] *See id.*

to make factual determinations that are inherent to assessing inability. Furthermore, the kinds of decisions the court would need to make do not involve interpretations of law. Rather, the decisions are of a factual and political nature, involving consideration of the whether the governor is capable of meeting the needs of the government and the people of New York. This is exacerbated by the reality that there is not and should not be a strict definition of inability.[41] Lastly, the judges of the Court of Appeals are appointed by the governor, and allowing them to make the determination, instead of locally elected legislators, could create a perception of partiality.[42]

The 25th Amendment provides a valuable model for gubernatorial inability procedures, but it is important to ensure that new procedures do not include features of the amendment that are ambiguous or have been misunderstood. One such feature relates to who holds the power of the presidency during the 25th Amendment's dispute period, specifically after a president disagrees with an inability declaration, but before the vice president and Cabinet or "other body" reassert their belief that an inability does, in fact, exist.[43] Some have read the amendment's text to potentially allow the president to retake power before the vice president and Cabinet or other body has a chance to reassert their declaration.

This is not what the framers of the amendment intended. An early draft of the 25th Amendment specified that the powers and duties of the office would not return to the president until "the seventh day after making such announcement, or at such earlier time after such announcement as he and the Vice President may determine."[44] (This was before the "waiting period" was changed from seven to four days.) Senate committee hearing transcripts also show that the intent was for the power not to return to the president until the dispute period was over.[45]

The drafters thought the intent was clear, and that the specificity could be cut for brevity.[46] However, because confusion still surrounds the provision,[47] and with the growing popularity of strict textual interpretation without regard to legislative history or intent, clarity is critical. By clarifying that the powers and duties of the office do not return to the governor until the fourth day after they make their declaration of no inability, there can be no question that the lieutenant governor, or whoever is next in the line of succession at the time, is in power.

5. Lieutenant Governor Inability

The 25th Amendment does not provide mechanisms to declare the vice president unable. This is a gap that is easily remedied in our proposal by applying the same procedures to the lieutenant governor as to the governor. This means that the lieutenant governor can declare their own

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[41] *See* NYSBA Report, *supra* note 15.
[42] *See id.*
[43] *See* BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES 61-82 (2012).
[44] JOHN D. FEERICK, THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS 303 (3d ed. 2014).
[45] KALT, CONSTITUTIONAL CLIFFHANGERS, *supra* note 43, at 69-70.
[46] *See id.* at 71.
[47] *See* John Rogan & Joseph J. Fins, *Why the Jan. 6 Committee Must Reinforce the 25th Amendment*, LAWFARE (Sept. 26, 2022), https://www.lawfaremedia.org/article/why-jan-6-committee-must-reinforce-25th-amendment.

inability, and the inability committee can declare the lieutenant governor unable with the governor filling the lieutenant governor's role on the committee. A key difference is that when the lieutenant governor gives up their powers temporarily for an inability, the position of lieutenant governor is left vacant. It does not invoke the line of succession. Should the office of governor become vacant and it becomes necessary for the line of succession to be invoked, the transition would fall to the next individual in line provided by law. The addition of lieutenant governor inability procedures is necessary because use of the voluntary and involuntary inability provisions for gubernatorial inability is frustrated if there is no way to declare an inability in the lieutenant governor's office. A governor will not use the voluntary inability process and the inability committee will not use the involuntary process if it would result in giving power to an unable lieutenant governor.

D. Defining "Unable"

What it means to be "unable" would, of course, be central to any dispute over gubernatorial inability. It is important not to define inability in constitutional or statutory text. During the 25th Amendment's drafting, the framers worried that providing a definition may inadvertently exclude contingencies that would merit transfers of power.[48] They decided to trust future decision-makers with the "broad parameters of the constitutional language" believing that they would "act conscientiously" and follow the intent of the provision.[49]

But the amendment's framers did not leave future decision-makers with nothing. There is extensive guidance across legislative materials that show where the framers believed Section 3 and Section 4 of the 25th Amendment should be employed.[50] Circumstances spanned a range of physical and mental inabilities. Professor Joel K. Goldstein, a leading scholar on presidential succession, explains:

> The clauses include a wide range of physical and mental inabilities. These situations could be produced by trauma, attack, injury, illness, surgery (whether elective or not), or emotional factors or could result from a degenerative process. These included situations in which the President was conscious, as well as unconscious, and where he was unwilling to acknowledge a disability, as well as when he was unable to do so. They could be permanent or transient. They included disabilities created by logistical problems, such as a missing Air Force One or a kidnapped chief executive or one lacking communication with government.[51]

Professor John D. Feerick, one of the amendment's framers, said Sections 3 and 4 "are intended to cover all cases in which some condition or circumstance prevents the President from discharging his powers and duties and the public business requires that the Vice President discharge them."[52] New York should employ the same approach as the 25th Amendment's

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[48] Joel K. Goldstein, *Celebrating the Presidential Inability Provisions of the Twenty-Fifth Amendment*, 10 CONLAWNOW 119, 132 (2019).
[49] *Id.* at 132-33.
[50] *See id.* at 133.
[51] *Id.*
[52] FEERICK, THE TWENTY-FIFTH AMENDMENT, *supra* note 44, at 104, 112.

framers, leaving inability undefined, but creating an extensive legislative record to guide future generations and preserve the intent of the provision: that the state of New York has a capable leader, with a legal claim to power, and that the people have a reliable and clear process to ensure it.

E. Inability Procedures Cover "Absence"

The inability procedures serve another purpose in the grand scheme of this proposal. As the next Part elaborates, the removal of the absence provision in the constitution leaves a gap for times when the governor is out of the state and cannot perform the duties of the office due to their absence from the state. In those cases, the inability provisions should be employed. The 25th Amendment was designed to cover all cases where the president became unable to serve, even if due to circumstances and not a medical condition.[53] If a governor plans to, for example, attend an overseas conference where they will often be away from reliable communication, it would be sensible for them to transfer powers to the lieutenant governor during their absence. The procedure is built to be simple, and the governor can take the power back as easily as they transferred it away through a written declaration.

Governors should not fear the word "inability" or view using the voluntary inability provision as an acknowledgement of a deficiency in their leadership. Appropriate use of the inability procedures should be encouraged and normalized. This closes a crucial gap that would come with removing the absence provision.

II. Gubernatorial Absence

The Rule of Law Clinic recommends removing the absence provision from the New York constitution.[54] Currently, whenever the governor leaves the state, the lieutenant-governor automatically becomes acting governor until the governor returns. Given modern telecommunications, this provision is obsolete.[55] Additionally, the provision's automatic removal of the governor from power has led to destabilizing political outcomes in New York and other states. From competing claims to the governor's powers to rule of law issues, the absence provision undermines stability and the common good. While there may be benefits of a self-executing provision in cases where absence does prevent the governor from serving, such a provision would still be difficult to use and largely redundant with the inability procedures we recommend.

A. The Absence Provision and Its Historical Justification

1. Absence Generally

Article IV, Section 5 of the New York constitution provides: "In case the governor is… absent from the state… the lieutenant-governor shall act as governor until the inability shall cease or

[53] *See id.*
[54] NYSBA Report, *supra* note 15, at 3.
[55] *Id*. at 8.

until the term of the governor shall expire."[56] This absence procedure also applies to lieutenant governors, with the Senate temporary president discharging the powers of the lieutenant governor when the lieutenant governor leaves the state.[57] Should a governor and lieutenant governor be absent from the state at the same time, then the governor's power passes down the line of succession, with the Senate temporary president followed by the Speaker of the Assembly. Various executive department heads follow the speaker, all of whom are subject to the requirements of the provision.[58] However, due to ambiguity in the line of succession statute, it is possible department heads may only be able to fill a gubernatorial vacancy if it results from an attack or natural disaster.[59]

Additionally, there is a question surrounding what it means to be absent from the state. Some argue for a "strict absence" application, while others argue for an application of "effective absence." Strict absence means the absence provision kicks in whenever the governor is physically outside of the state.[60] For example, the governor would lose power as soon as she is halfway across the George Washington Bridge. On the other hand, effective absence would only divest power whenever the governor is incommunicado.[61] For example, even if the governor was in New Jersey, she would still have gubernatorial powers if she can remain in contact with the rest of the government. However, if a natural disaster caused communications to go down, she would be unreachable, and power would transfer to the next eligible official.[62] Advocates for an effective absence interpretation point to the provision's language for support.[63] The text provides: "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…"[64] Here, absence is referred to in conjunction with an inability to serve. This would suggest that simply being outside the state is not in itself an inability.[65] Rather, it becomes an inability when the absence prevents the governor from discharging the duties of the office.[66] In other words, the governor is unable when they are effectively absent from the state.

2. The Historical Justification for the Absence Provision

Historically, absence provisions served an important purpose. In the days of horse and buggy, a governor who left New York could not execute the duties of their office. For example, in the year 1800, it could take approximately one week to travel between Albany and Washington, D.C. This kind of communications delay would make daily operations impossible, not to mention cripple the state's ability to respond to emergencies. To deal with this issue, the constitution

[56] N.Y. CONST. art. IV, § 5.
[57] N.Y. CONST. art. IV, § 6.
[58] *Id*.
[59] N.Y. Defense Emergency Act of 1951 §§ 5–6.
[60] Hutter, *supra* note 12, at 29.
[61] *Id*.
[62] *Id*.
[63] *Id*.
[64] N.Y. CONST. art. IV, § 5 (emphasis added).
[65] Hutter, *supra* note 12, at 29.
[66] *Id*.

transfers power automatically down the line of succession whenever the governor or acting governor is outside New York.

B. Why the Absence Provision is Harmful

In the 1800s, the absence provision was logical and straightforward. However, the communication challenges governors faced when out of state no longer exist. Today, orders and directives can be issued instantaneously, whether over an email, phone call, or video conference. The governor may be physically absent from the state, but they can do their jobs. This raises the question: is there any place for an absence provision today? The answer is clearly no. It is obsolete.

The provision's obsolescence leads to further problems pointing to the importance of reform. First, the absence provision creates situations where a state could have two people simultaneously claiming to be governor. Second, the provision raises questions about the legality of gubernatorial action taken outside of the state. Third, the provision automatically removes elected officials without cause, violating key principles of governance. Fourth, the provision's automatic power transfer has led to confusion and misinformation, in the eyes of the public and the media. Fifth, this confusion has led to rule of law issues, with governors flouting the requirements of the absence provision. Sixth, there is value in maintaining policy and partisan continuity down the line of succession. Finally, governors must be able to travel outside the state to advance state interests without fear of losing power.

1. Dueling Governors and the Legality of Gubernatorial Action

In 2021, Idaho Governor Brad Little left the state to visit Texas on state business.[67] Like New York's constitution, Idaho's constitution divests power from the governor when the governor is absent from the state.[68] Power transferred to Lieutenant Governor Janice McGeachin, a political rival of Little.[69] Upon assuming power, McGeachin issued executive orders banning COVID-19 testing and vaccination requirements in public schools and state agencies (contrary to Governor Little's policies).[70] On issuing the orders, McGeachin stated: "Today as acting governor I fixed Gov. Little's executive order on 'vaccine passports' to make sure that K-12 schools and universities cannot require vaccinations or require mandatory testing."[71] While Little was absent, McGeachin also inquired about sending national guard troops to the southern border.[72] In response to the executive actions taken by McGeachin, Little argued that Idaho's absence provision should be interpreted as effective absence rather than strict absence, meaning he would

[67] Clark Corbin, *Idaho Gov. Challenges McGeachin's Attempts to Govern While He's Out of State*, IDAHO CAP. SUN (Oct. 7, 2023), https://idahocapitalsun.com/2021/10/07/idaho-gov-challenges-mcgeachins-attempts-to-govern-while-hes-out-of-state/.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*

still be governor.[73] Citing this theory, he purportedly repealed the executive actions McGeachin took while he was still outside the state.[74]

The meaning of absence is not settled law in Idaho—or New York.[75] This uncertainty allowed Little and McGeachin to both claim to be governor at the same time.[76] Two people claiming to be governor at the same time is not the result of an outdated but harmless provision. Harmless provisions do not lead to constitutional crises over something as trivial as an out of state gubernatorial visit. Rather, it is an example of the absence provisions' insidious power to undermine governance.

2. Uncertainty Regarding the Legality of Gubernatorial Actions

In addition to dueling governors, there is also the subsidiary issue of the legal validity of actions a governor might take while out of state. When the definition of absence is uncertain, out-of-state gubernatorial action could be challenged as illegal. Plaintiffs could allege the governor lacked the authority to act because their lieutenant-governor was in charge (or vice-versa in the case of a governor following effective absence). While this issue is most apparent when two people claim to hold the governor's powers, such a legal challenge could arise even when the governor and lieutenant governor are in agreement. For example, the governor and lieutenant governor could agree to follow an effective absence interpretation, meaning the governor would not automatically lose power when they left the state, but a third party could still challenge an out of state action by the governor. In response, a court could rule that a strict absence definition applies, calling into a question a litany of gubernatorial actions.[77]

While Idaho is the most recent case of dueling governors or legal questions regarding gubernatorial action, the legal framework for such an incident is present in New York. Again, the meaning of "absence" is not settled law in New York.[78] The constitution's absence provision could be interpreted to mean effective absence rather than strict absence.[79] Nothing is stopping a New York governor from changing the definition of absence that the executive branch uses, from one day to the next. Additionally, New York's primary process for electing lieutenant governors could lead to a governor having a political rival running the state while they are away on business. Governors and lieutenant-governors are elected separately during the primaries, and the governor's chosen running mates have lost before.[80] Therefore, what happened in Idaho can happen in New York. To prevent this startling outcome, New York should eliminate the absence provision.

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[73] *Id*.
[74] *Id*.
[75] *Id*.
[76] *Id*.
[77] *See* Hutter, *supra* note 12, at 29 (showing that courts in various states have interpreted the definition of absence differently).
[78] *Id*. at 28.
[79] *Id*. at 29.
[80] *See* Frank Lynn, *Cuomo Beats Koch in Democratic Primary*, N.Y TIMES, Sept. 24, 1982, at A1 (reporting that gubernatorial candidate Mario Cuomo won his primary while his running mate, H. Carl McCall, lost to Alfred DelBello).

3. Removal Without Cause

As a rule, elected officials should not be removed from office arbitrarily. Elected officials have a qualified right to govern, derived from the will of the people who chose them.[81] This mandate cannot be taken away without a good reason. Doing so would necessarily infringe upon both the governor's right to govern and the right of the people to grant power to those they deem fit. Of course, these rights are not absolute, which is why New York has impeachment procedures. However, those mechanisms require that the governor's removal be justified.[82] The absence procedure lacks this feature. Instead, the provision's obsolescence means that whenever the provision takes the governor's power, they have, in practice, been arbitrarily denied their right to govern. This outcome undermines the principles of governance that New York's constitutional republic was founded upon. While this claim may seem hyperbolic, either the will of the people matters, or it does not. Either a governor's legitimate claim to power is respected, or it is not. The absence provision fails to obey either of these principles.

4. Confusion and Misinformation

The absence provision's automatic transfer of power has led to confusion among the public and media, especially when governors are not communicative with the public. In September 2023, Arizona Governor Katie Hobbs took a brief trip to Washington, D.C.[83] Arizona's constitution, like New York's constitution, has an absence provision.[84] Both the secretary of state and attorney general—the next successors to the governor's office—were also out of state.[85] Accordingly, Arizona Treasurer Kimberly Yee assumed the position of acting governor.[86] Yee publicly announced on X, formerly Twitter, that she would be assuming the duties of governor until Hobbs returned.[87] Hobbs had not previously announced that power would transfer. Media outlets, most notably Fox News, began speculating about where Hobbs had "disappeared" to.[88] As it became clear that Hobbs was simply in Washington, D.C., for a meeting, Fox updated their headline from discussing Hobb's disappearance to noting she had "stepped down for a short absence."[89] The traditional media was not alone in speculating about Hobbs' location. Shortly after Yee's announcement, the Facebook page *50 States News* carried a post claiming: "BREAKING: Katie Hobbs NO LONGER Governor of Arizona, Republican Taken Over | Kari

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[81] *See* John C. Rager, *The Blessed Cardinal Bellarmine's Defense of Popular Government in the Sixteenth Century*, 10 CATHOLIC HIST. REV. 504, 509-10 (1964) (arguing that because humans are born equal, the right to govern is held by the people and delegated to leaders for the common good).
[82] See N.Y. CONST. art. VI, § 24 (outlining the due process requirements for impeachment and removal from office, including the presentation of evidence, which implies that cause is necessary for impeachment and removal).
[83] Howard Fischer, *Hobbs: Area codes don't change being Arizona Governor*, TUCSON.COM (Oct. 2, 2023), https://tucson.com/news/state-regional/government-politics/hobbs-arizona-governor-line-of-succession/article_f65a9e70-616c-11ee-aa45-1b655aa97a60.html.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] Sarah Rumpf-Whitten, *Arizona Governor Mysteriously Steps Down for One Day*, FOX NEWS (Sept. 28, 2023), https://archive.ph/trmhE#selection-1253.0-1255.1.
[89] Reuters Fact Check, *Fact Check: Katie Hobbs Did Not Step Down as Governor of Arizona*, REUTERS (Oct. 10, 2023), https://www.reuters.com/fact-check/katie-hobbs-did-not-step-down-governor-arizona-2023-10-10/.

Lake Announces."[90] Facebook fact checkers eventually assessed that the post was false. However, it managed to get 1,400 reactions, 262 comments and 216 shares from a page with 48,000 followers.[91]

Misinformation and disinformation continue to be among the biggest challenges facing American political discourse and civic life.[92] The uncertainty and confusion created when old and outdated provisions are executed provides ample ammunition to bad actors. This is doubly so if a gubernatorial absence occurs during a crisis. Increased fact checking, education, and training in critical thinking can counter misinformation. However, it is also wise to eliminate unnecessary constitutional provisions whose use causes confusion, especially if bad actors can exploit those provisions. Using constitutional provisions should not be needlessly destabilizing for government, but this is all the absence provision does.

5. Undermining the Rule of Law

Beyond confusion in the media and misinformation, the absence provision undermines the rule of law. The provision's obsolescence causes some governors to not recognize its binding authority. Upon returning to Arizona and speaking to the media, Governor Hobbs claimed she does not stop being governor when she is outside the state and stays actively engaged in state business.[93] She added that the Arizona constitution is outdated because it was written in 1912, prior to modern telecommunications.[94] While she recognized that an acting governor could issue executive actions, she stated she would undue everything the acting governor did.[95] While Hobbs blamed the confusion on a lack of civic education in Arizona, her refusal to recognize the binding nature of the absence provision raises larger concerns.

When governors refuse to follow constitutional provisions, the rule of law is undermined. Therefore, reformers should protect the rule of law by removing provisions that are easily ignored. The American Bar Association states that the rule of law requires that "no one is above the law, everyone is treated equally under the law, [and] everyone is held accountable to the same laws."[96] When a governor refuses to follow a binding provision because it is outdated, she is undermining the idea that no one is above the law. Her position as head of the executive branch, the branch charged with enforcing the law, makes flouting the law more serious. While it would be better for governors to follow the law, even if it is obsolete, removing the provision would provide fewer opportunities to undermine the rule of law.

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[90] 50 States.News, FACEBOOK (Sept. 29, 2023), https://www.facebook.com/50states.news1/posts/2254992051358361/.
[91] *Id*.
[92] *See* Gabriel R. Sanchez & Keesha Middlemass, *Misinformation is Eroding the Public's Confidence in Democracy*, BROOKINGS INST. (July 26, 2022), https://www.brookings.edu/articles/misinformation-is-eroding-the-publics-confidence-in-democracy/ (arguing that misinformation aimed at undermining democratic processes is eroding public confidence in democracy).
[93] Fischer, *supra* note 83.
[94] *Id*.
[95] *Id*.
[96] *Rule of Law*, AMER. B. ASS'N, https://www.americanbar.org/groups/public_education/resources/rule-of-law/.

6. Policy and Partisan Continuity

The disruption of partisan continuity is another issue created by the absence provision. While the first successor to the New York governor's office, the lieutenant governor, is likely from the same party as the governor, other successors further down the line of succession might not be. When Arizona Governor Hobbs, a Democrat, left her state in the episode discussed previously, party control of the governor's powers switched because Treasurer Yee was a Republican.[97] Something similar could happen in New York. After the lieutenant governor, the next officials in the line of succession are the temporary president of the Senate and the Speaker of the Assembly.[98] Both positions can be filled by members of a governor's opposing party. The possibility of a politician from a rival party becoming acting governor is increased by the nature of the absence provision. Under a strict absence interpretation, large sections of the line of succession can become ineligible to be acting governor when they travel out of state.

There is value in preserving policy and partisan continuity. Governors should not have to worry about successors wreaking havoc every time they leave the state. Ensuring stability and reducing uncertainty have always been functions of the law; this is why judges are bound by prior judicial decisions.[99] Likewise, with executive action, stability and the reduction of uncertainty is important. Citizens deserve to know what the law is. In the case of Idaho, citizens needed to know whether they had to get vaccinated or not, whether they needed to mask or not, and whether they needed to get tested or not. Having policies change over the course of 48 hours makes citizens' decisions harder. Additionally, given the power of the modern executive and administrative state, there is ample opportunity for policy chaos if partisans briefly step foot in an opponent's office. Whether that is filling executive department and judicial vacancies, terminating employees who can be fired without cause, directing regulatory bodies to take certain measures, or summoning the national guard, much discord can be sown. Accordingly, the absence provision should be removed, to prevent the instability, confusion and uncertainty that could be caused by discontinuity in the governor's office.

7. Promoting State Interests Out of State

Finally, the absence provision can prevent governors from leaving the state to conduct important business and further state interests. Governors often leave the state to promote New York's economic and policy interests, such as by visiting Washington, D.C., to lobby the federal government. For example, Governor Kathy Hochul left New York to visit Israel in the wake of the October 7th attacks. The governor should not have to worry that leaving the state to carry out important business could result in an obsolete provision stripping her of her powers.

Additionally, in 2009 when control of the state Senate was dispute, the lieutenant governor's office was vacant, meaning the next successor to the governor's office was the temporary president of the Senate. However, it was not clear who the temporary president was because both

[97] Fischer, *supra* note 83.
[98] N.Y. CONST. art. IV, § 6.
[99] Vasquez v. Hillery, 474 U.S. 254 (1986).

parties claimed to control the Senate.[100] As such, the line of succession was unclear.[101] Governor David Paterson was forced to stay in New York for one month because of the absence provision and gaps in the line of succession.[102] He did not know who would have the governor's powers if he left the state.[103] His decision to stay in the state while the crisis played out made him cancel state business that would have forced him to leave New York.[104] All the while, he was perfectly capable of executing the duties of governor if he were outside the state. Out of state business is a duty of the governor's office. If governors can further the state's interests by traveling to other states or countries, they should not be dissuaded by a provision without a purpose.

C. An Updated Absence Provision?

While there are many reasons for eliminating the absence provision, some may argue reform is better than elimination. Advocates for keeping an absence provision could recommend defining absence to mean "effective absence" rather than "strict absence." On its face, this provision would allow governments to effectively respond in cases where the governor is unavailable and there is a need for quick action. Examples could include a natural disaster, a mass casualty event, or a missing governor.[105] However, even an updated absence provision would face challenges that make it undesirable.

First, even though an updated absence provision would be procedurally leaner than our proposed inability procedure, there would still have to be some procedure. Reformers would need to answer difficult questions like: Who decides if the governor is absent? How long must the governor be unavailable to be absent? What methods of reaching the governor are acceptable before deciding they are absent? Even though the provision is technically self-executing, there still must be someone in place to decide and pronounce that the provision has been triggered. Lean procedure does not necessarily mean simple procedure.

Additionally, an updated absence provision would be largely redundant with inability procedures. While an updated absence procedure would be quick to execute, the updated inability procedure we propose could conceivably transfer power as soon as a majority of the inability committee cast their votes. This could be done quickly. Some might argue that the inability procedure is vulnerable to breakdowns in communication, but such issues would probably also complicate transfers of power for effective absence. Additionally, both procedures have the same policy outcome: the governor is removed from power until they can discharge the duties of the office again. Absence counts as an inability, allowing the inability procedure to handle an absence. An updated absence procedure would be largely redundant with the updated inability procedure.

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[100] 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.
[101] *Id*.
[102] *Id*.
[103] *Id*.
[104] *Id*.
[105] *Id.* (using Governor Mark Sanford's disappearance from South Carolina as an example of effective absence).

Conclusion

The New York Constitution's absence provision must be removed and its provisions for gubernatorial inability must be supplemented. These reforms will ensure that gubernatorial powers will only transfer when necessary and guarantee that those transfers will have an adequate legal basis.

Appendix—Draft Constitutional and Statutory Language

The draft language that follows includes the NYSBA proposal *verbatim*, except for the language reflecting our supplement. The language changes that are proposed by NYSBA are in **bold,** while *our* language for *our* addendum is underlined in *italics*.

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

1. Governor's Declaration of Inability

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

2. Lieutenant-Governor's Declaration of Inability

Whenever the lieutenant-governor transmits to the governor, the temporary president of the senate, the speaker of the assembly, the minority leader of the senate and the minority leader of the assembly a written declaration of inability to discharge the powers and duties of the office of lieutenant-governor, and until the lieutenant-governor thereafter transmits to them a written declaration to the contrary, the line of succession to the governor's office will exclude the lieutenant governor, and the person next in line of succession as provided by law shall serve as acting governor if the line of succession is invoked.

3. Committee on Gubernatorial Disability

A committee on gubernatorial inability shall be comprised of the lieutenant-governor, the attorney general, comptroller and six commissioners of executive departments, divisions or offices, as provided by law, who shall have been confirmed by the senate *for the commissioner position. The governor shall serve in the role of the lieutenant-governor in a determination of lieutenant-governor inability.*

4. Lieutenant-Governor and Committee on Gubernatorial Inability's Declaration of Inability

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

5. Governor and Committee on Gubernatorial Inability's Declaration of Inability

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

6. Governor's Declaration of No Inability

When, following a declaration of inability as provided in *paragraph 4***, the governor transmits to the lieutenant-governor, the temporary president of the senate, the speaker of the assembly, the minority leader of the senate and the minority leader of the assembly a written declaration that no inability exists, the governor shall resume the powers and duties of the office of governor** *on the fourth day after making such announcement or at such earlier time after such announcement as may be determined by the committee* **unless a majority of the committee on gubernatorial inability shall transmit within four days to the temporary president of the senate, the speaker of the assembly, the minority leader of the senate and the minority leader of the assembly their written declaration that the governor is unable to discharge the powers and duties of the office of governor.**

7. Lieutenant-Governor's Declaration of No Inability

When, following a declaration of inability as provided in paragraph 5, the lieutenant-governor transmits to the governor, the temporary president of the senate, the speaker of the assembly, the minority leader of the senate and the minority leader of the assembly a written declaration that no inability exists, the lieutenant-governor shall resume the powers and duties of the office of governor on the fourth day after making such announcement or at such earlier time after such announcement as may be determined by the committee unless a majority of the committee on gubernatorial inability shall transmit within four days to the temporary president of the senate, the speaker of the assembly, the minority leader of the senate and the minority leader of the assembly their written declaration that the lieutenant-governor is unable to discharge the powers and duties of the office of lieutenant-governor.

8. Legislative Determination of Gubernatorial Inability

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

shall continue to exercise the powers and duties of the office of governor; otherwise, the governor shall resume the powers and duties of that office.

9. Legislative Determination of Lieutenant-Gubernatorial Inability

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

6. Procedure if Office of Lieutenant-Governor is Vacant

If there is a vacancy in the office of lieutenant-governor when the legislature makes its determination under paragraph 8 of this section, the person next in line of succession as determined by law shall act as governor under the procedures set forth in this Section. For the purposes of paragraphs 4, 5, 6 and 7 of this Section, should there be a vacancy in the committee on gubernatorial inability, a written declaration required under those sections shall require a two-thirds vote of the committee on gubernatorial inability. Should the temporary president of the senate or speaker of the assembly decline to serve as acting governor under this section and if as the result of such a declination, there is a vacancy in the office of governor, the legislature shall provide for an order of succession to the office of governor from either statewide elected officers or heads of state executive departments who have been confirmed by the senate, or a combination thereof.

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

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

Division of Criminal Justice Services

Department of Health

Division of Human Rights

Department of Labor

Office of Mental Hygiene

Department of State

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

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

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

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

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

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