



Staff Memorandum

HOUSE OF DELEGATES Agenda Item #6

REQUESTED ACTION: Approval of report and recommendations of the Committee on the New York State Constitution.

Attached is a report with recommendations entitled “Gubernatorial Selection in New York: Constitutional and Statutory Recommendations Regarding Gubernatorial Succession and Inability.”

In April 2022, the Committee on the New York State Constitution formed a Subcommittee on the Lieutenant Governor to review and make recommendations on amendments to the state constitution concerning the process by which a lieutenant governor could be appointed or otherwise selected.

The attached report surveys the constitutional and statutory provisions governing gubernatorial succession in New York State, including succession to the governorship by the lieutenant governor, replacement of the lieutenant governor, scenarios in which the Temporary President of the Senate or Speaker of the Assembly would succeed to the governorship, and the current constitutional mandate that the lieutenant governor acts as governor should the governor be absent from the state, and proposes a series of recommendations addressing these issues. The report also proposes a procedure to address gubernatorial inability to serve in office, comparable to the Twenty-Fifth Amendment to the U.S. Constitution.

The recommendations proposed in the report are summarized as follows:

- Absence from the state. The constitutional provision that the Lieutenant-Governor act as Governor when the Governor is absent from the state should be repealed.
- Filling a Lieutenant-Governor vacancy. In the event of a vacancy in the office of Lieutenant-Governor, the Governor should have the authority to appoint the Lieutenant-Governor, subject to confirmation by separate majority votes in each house of the Legislature.
- Timeline for filling vacancy. The Governor should have 60 days to nominate a successor Lieutenant-Governor, and the Legislature should have 60 days to vote on whether to confirm the nominee. If one house of the Legislature

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

- Whoever succeeds to governorship assumes the office. The constitution should provide that, when the Governor ceases to act as Governor, either temporarily or permanently, the officer who succeeds discharges the powers and duties of Governor during the time of that succession to the same extent as if that official had been elected Governor.
- Succession by Temporary President of the Senate or Speaker. The current order of succession to the governorship, namely Lieutenant-Governor, Temporary President of the Senate, and Speaker of the Assembly, should be continued. If the Temporary President of the Senate or Speaker of the Assembly permanently assumes the office of Governor, that official must resign from legislative office. However, if the succession is temporary due to an impeachment or inability of the Governor to serve, the Temporary President or Speaker need not relinquish legislative office until they have held the governorship for sixty consecutive days. During the sixty consecutive days of incumbency, that officer may not exercise his or her powers and duties as a legislator.
- If the Temporary President of the Senate and Speaker Decline to Serve. If the Temporary President of the Senate and Speaker of the Assembly both decline to assume the office of Governor, the Attorney-General, Comptroller and certain commissioners from executive departments who have been confirmed by the Senate, as provided by law, should be next in line to serve as Governor.
- Gubernatorial Inability to Serve. There should be a procedure to declare the inability of a Governor to serve which parallels the procedure in the federal Constitution's Twenty-Fifth Amendment. A Governor could voluntarily declare an inability to serve. In addition, a committee on gubernatorial inability, consisting of the Lieutenant-Governor, Attorney General, Comptroller and six executive department heads confirmed by the Senate, as provided by law, could declare an inability by a vote of a majority of the members designated to that committee. Each house of the Legislature must confirm the Governor's inability by a two-thirds vote of the

elected members of the house. A Governor could then declare at any time in the future an ability to resume the duties of office, unless the committee on gubernatorial disability declares otherwise and each house of the Legislature agrees by two-thirds vote.

Proposed draft language to effectuate these constitutional amendments may be found in the Appendix starting at page 25 of the report.

This report was submitted to the Reports Group in November 2022. No comments have been submitted concerning the report as of January 6, 2023.

The report will be presented by Christopher Bopst, chair of the Committee on the New York State Constitution, and Alan Rothstein, chair of the Committee's Subcommittee on the Lieutenant Governor.



NEW YORK STATE
BAR ASSOCIATION

Report and recommendations of the New York State Bar Association **Committee on the New York State Constitution**

January 2023

The views expressed in this report are solely those of the Committee and do not represent those of the New York State Bar Association unless and until adopted by the House of Delegates.

**New York State Bar Association
Committee on the New York State Constitution**

GUBERNATORIAL SUCCESSION IN NEW YORK

**Constitutional and Statutory Recommendations Regarding Gubernatorial Succession and
Inability**

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

TABLE OF CONTENTS	PAGE
INTRODUCTION	1
SUMMARY OF RECOMMENDATIONS	3
BACKGROUND	5
GOVERNOR’S ABSENCE FROM THE STATE	8
GOVERNOR/LIEUTENANT-GOVERNOR SUCCESSION	10
TEMPORARY PRESIDENT/SPEAKER SUCCESSION TO GOVERNORSHIP	16
INABILITY OF GOVERNOR TO SERVE	20
CONCLUSION	23
APPENDIX – LANGUAGE IMPLEMENTING RECOMMENDATIONS	25
SOURCES	33

1. INTRODUCTION

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

eight months later and resigned. Hochul again exercised unfettered discretion to appoint a Lieutenant-Governor, and appointed Congressman Anthony Delgado. Delgado won the Democratic primary, securing his place on the ballot with Governor Hochul in the general election.¹

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

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

¹ As the deadline for Benjamin to decline the nomination to be on the primary ballot had passed by the time of his resignation, a swift change in the law had to be adopted to allow him to remove his name from the ballot.

² Under New York law, the Lieutenant-Governor has a casting vote in the state senate on procedural matters.

This report will set forth its recommendations and the reasons supporting them, with an appendix proposing constitutional and statutory language changes.

2. SUMMARY OF RECOMMENDATIONS

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

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

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

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

³ This should be true even if the Governor who left office eventually returns to the position, as after an impeachment not resulting in removal from office or after an inability to serve ceases.

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

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

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

Draft language to effectuate these changes can be found in the Appendix. We recommend that these changes be made by constitutional amendment except for proposed statutes to create an order of gubernatorial succession and a committee on gubernatorial inability.

We recognize there is substantial complexity in these recommendations. We expect these recommendations to be submitted to the Legislature in several separate proposals.

3. BACKGROUND

New York has had a Lieutenant-Governor since before its first constitution was adopted in 1777.⁴ Although there have been at least twelve vacancies in that position over the decades, no Governor attempted to appoint a Lieutenant-Governor until 2009. Among the prior vacancies, all remained unfilled except for special elections held in 1847, for which the Legislature passed a special statute, and in 1944 when, after the death of Lieutenant-Governor Thomas Wallace, the state Democratic Party chair sued to force a special election. The courts agreed that the constitutional and statutory provisions then in effect required such an election.

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

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

⁴ NYS Law Revision Commission, Memorandum: Relating to Gubernatorial Inability and Succession, Absence from the State and Filling a Vacancy in the Office of Lieutenant Governor (Senate No. 8365; Assembly No. 10454) (1986) (hereinafter “1986 Law Revision Commission Report”) at 15. Found at HeinOnline.

would have had a tie-breaking vote on procedural matters, but that office was vacant.⁵ Governor Paterson appointed Richard Ravitch as Lieutenant-Governor in July of that year, relying on section 43 of the Public Officers Law, which provides:

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

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

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

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

⁵ For a discussion of the events of 2009, see Patrick A. Woods, Automatic Lieutenant Gubernatorial Succession: Preventing Legislative Gridlock Without Sacrificing the Elective Principle, 76 Albany Law Review 4 (2013) at 2301-2.

⁶ 13 N.Y. 3d 141; 915 N.E. 2d 1141 (NY 2009). <https://casetext.com/case/skelos-v-paterson-7>

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

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

- Article IV, Section 5 of the constitution provides that the Lieutenant-Governor, in addition to succeeding the Governor if impeached or otherwise unable to serve, shall act as Governor if the Governor “is absent from the state.” This appears to be an anachronistic rule in the current age of worldwide, instant communication, and has been a source of mischief in other states.
- The constitution does not clarify the role of a successor to the Governor. For example, Article IV, Section 6, provides that the Temporary President of the Senate or Speaker of the Assembly shall “act as governor” if there be no Governor or Lieutenant-Governor. What does that mean? The same language is found in Section 5, where the Lieutenant-Governor acts as Governor during a Governor’s impeachment, absence from the state, or when the Governor is unable to discharge the office’s duties. The status of the person serving as Governor should be clarified.
- Though the Temporary President of the Senate or the Speaker of the Assembly may “act as governor” or “perform the duties of lieutenant-governor,” nothing in the constitution or statute appears to bar them from simultaneously exercising their duties as a legislator. Thus, a Temporary President might be able vote on a measure as a senator and then, if there were a tie vote, vote to break that tie as acting Lieutenant-Governor. Holding executive and legislative positions simultaneously poses a serious separation of powers issue.
- There is lack of clarity as to who succeeds to the governorship if the Lieutenant-Governor, Temporary President and Speaker are unable or unwilling to serve, which may become more of a

distinct possibility if the Temporary President and Speaker cannot hold executive and legislative positions simultaneously.

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

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

4. GOVERNOR'S ABSENCE FROM THE STATE

Article IV, Section 5 of the constitution provides:

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

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

This provision is not harmless. While there is no reported instance in New York of a Lieutenant-Governor using the Governor's absence to make decisions that run counter to the

Governor’s policies, such as has happened in other states.⁷ Most recently, in Idaho, Lieutenant Governor Janice McGeachin used Governor Brad Little’s absence from the state as an opportunity to issue an order banning COVID-19 mask mandates in schools, reversing Governor Little’s order.⁸ Although members of the same political party, McGeachin was a political rival of Governor Little; a similar situation could arise in New York, because the Lieutenant-Governor runs separately from the Governor in party primaries. In the 2022 election, Lieutenant-Governor Delgado, preferred by Governor Hochul, could have lost the primary to one of two challengers who had been critical of the Governor. Having a Lieutenant-Governor at odds with the Governor has happened before in New York⁹ and even a Lieutenant-Governor elected with a Governor’s support could become disaffected. It is better to remove an unnecessary provision of the constitution than to retain a superfluous provision that could lead to political mischief and a governing crisis.

Admittedly, there may be instances in which a Governor is absent and out of communication. One well-publicized incident involved Governor Mark Sanford of South Carolina, who disappeared for nearly six days in 2009, not responding to communications, reportedly involving a personal matter.¹⁰ If a Governor does not want to be found, the Governor could also disappear within the state, though this would be an exceedingly rare occurrence. This situation can be addressed through the language in Article IV, Section 5, as the Governor would be “unable to discharge the powers and duties” of the office. Here, if necessary, the use of a declaration of inability that we propose [see section 7 of this report] would allow for a temporary transition of power.

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

⁷ See Fordham Law School Rule of Law Clinic (Ian Bollag-Miller, Stevenson Jean, Maryam Sheikh, & Frank Tamberino), *Changing Hands: Recommendations to Improve New York’s System of Gubernatorial Succession*, at 8-9 (June 2022) (hereinafter “Fordham Rule of Law Clinic Report”). https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1000&context=rule_of_law_clinic

⁸ *Id.* at 9.

⁹ See Peter J. Galie and Christopher Bopst, *Cleaning the New York Constitution, Part I*, in Peter J. Galie, Christopher Bopst and Gerald Benjamin (eds.), *New York’s Broken Constitution: The Governance Crisis and the Path to Renewed Greatness* (SUNY Press 2016) at 56, n. 40.

¹⁰ Fordham Rule of Law Clinic Report, *supra* note 5, at 9.

Some courts have construed “absent from the state” to mean physical non presence within the boundaries of the state, and others to mean presence outside the state to the extent there is an inability to govern.¹¹

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

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

5. GOVERNOR/LIEUTENANT-GOVERNOR SUCCESSION

a. Replacing a Lieutenant-Governor

For close to a year and a half immediately preceding the swearing in on January 1, 2023, of the Lieutenant-Governor elected in November 2022, the Lieutenant-Governor of the state was neither elected by the people to that position nor confirmed by any government body. Yet, he could have had all the enormous power of the Governor if Kathy Hochul were to have resigned or otherwise been unable to serve. We believe that giving the Governor sole authority to install anyone the Governor wants as Lieutenant-Governor, with no checks, is unwise. We are joined in this view by the New York Law Revision Commission¹⁵ and others.¹⁶ This office is too important

¹¹ 1986 Law Revision Commission Report, *supra* note 1, at 12.

¹² *In re Governorship*, 26 Cal. 3d 110, 113 (1979).

¹³ *Sawyer v. First Judicial District Court*, 82 Nev. 53, [410 P.2d 748](#) (1966).

¹⁴ 1986 Law Revision Commission Report at 46. See also Fordham Rule of Law Clinic Report at 8-10.

¹⁵ See 1986 NYS Law Revision Commission Report. *supra* note 1, at 95.

¹⁶ See, e.g., New York City Bar Association, Committee on Election Law, Letter to the Governor’s Office urging reforms to the succession rules in New York State (July 2008) <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/succession-rules-for-new-york-state-governors-office>; New York County Lawyers Association, Report of the New York County Lawyers Association for the Establishment of a Task Force on Lieutenant Gubernatorial Succession (April 27, 2022),

to leave to one person to fill, a view underscored by the events of the last few years, when substantial powers were placed in the Governor's hands, or otherwise invoked, to deal with the COVID-19 pandemic.

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

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

A Lieutenant-Governor, in contrast to a legislator, must be ready to succeed the Governor in acting on behalf of the entire state. By virtue of serving as second-in-command, a Lieutenant-

<https://www.nycla.org/pdf/NYCLA%20Report%20on%20Lt.%20Gubernatorial%20Succession%20Task%20Force.pdf>.

Governor will have been directly exposed at some level to the administration's decision-making and governing strategy. In the case of David Paterson, he had virtually no notice that he would be taking on the responsibilities of governing and he was confronted with a governance crisis soon after taking office. Doubtless his ability to observe up close the inner workings of the Governor's office helped him when he assumed the office of Governor.

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

b. Other States and Territories

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

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

¹⁷ Information on other states and territories is from T. Quinn Yeagain, *Recasting the Second Fiddle: The Need for a Clear Line of Lieutenant-Gubernatorial Succession*, 84 *Albany Law Review* ____ (2021) at 20. (Hereinafter "Recasting the Second Fiddle")

¹⁸ *Recasting the Second Fiddle*, supra note 15, at 19-27.

position become vacant. The Fordham Rule of Law Clinic report suggests that procedure for New York, with such person then subject to legislative confirmation.

c. Our Recommendation

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

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

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

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

¹⁹ We note that the majority in *Skelos* made clear they were not favoring gubernatorial appointment without review as a policy: "Before us, however, is not the abstract question of whether it would be better in the case of a vacancy in the office of the Lieutenant Governor to fill the vacancy by election or by

pass legislation, approval in each house must be by a majority of the elected members of that house (as opposed to a majority of those voting on the nomination).

In choosing the process, we have considered and specifically reject changing the law to require filling a vacancy in the office of Lieutenant-Governor by a special election. Three states fill Lieutenant-Governor vacancies through special elections.²⁰ While using a special election to fill a vacancy involves the voters, such an election does not enhance the state’s governance. The voters may elect someone from a different party than the Governor or someone who is at odds with the Governor. Indeed, concern about this possibility in New York after the court-ordered special election for Lieutenant-Governor in 1943 led to the amendment eliminating the possibility of a Lieutenant-Governor special election.²¹ A special election would also likely draw a low turnout of voters to select someone who might eventually be Governor. We believe gubernatorial appointment and legislative confirmation will provide the Governor with someone the Governor can work with, subject to scrutiny by two bodies of duly elected representatives. If, however, both the Governor and Lieutenant-Governor positions are vacant, then an election should be held at the earliest feasible general election, as the constitution currently requires.

d. Timeline

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

gubernatorial appointment subject to legislative confirmation or by gubernatorial appointment alone.” 13 N.Y.3d at 153.

²⁰ Recasting the Second Fiddle, *supra* note 15, at 27.

²¹ 1986 Law Revision Commission Report, *supra* note 1, at 19. A special election would in principle be in conflict with the constitutional requirement that the governor and lieutenant-governor run jointly in the general election.

his fitness for office. He was eventually indicted and resigned. More rigorous vetting may have avoided such a blunder.²²

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

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

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

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

²² See, e.g., Gothamist, “Hochul: We were told Benjamin’s background check came up ‘clean’”, April 13, 2022. <https://gothamist.com/news/hochul-we-were-told-benjamins-background-check-came-up-clean>.

²³ NY Public Officers Law §41.

²⁴ See Recasting the Second Fiddle, supra note 15, at 59.

of the Assembly, shall assume the duties of Lieutenant-Governor when the latter office is vacant. There is a possibility that one of these legislative leaders may become Acting Governor during that time. We believe the importance of having a Lieutenant-Governor who is vetted in a significant way by the Legislature outweighs the small risk of a legislative leader serving as Governor. And, as noted in Article IV, Section 6(c), in the event the Governor and Lieutenant-Governor positions both become vacant, there would be a general election be held as soon as feasible to fill both positions.

6. TEMPORARY PRESIDENT/SPEAKER SUCCESSION TO GOVERNORSHIP

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

Article IV, Section 6 provides:

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

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

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

There are two problems posed by the current language. First, what does it mean that the Temporary President “shall act as governor”? Does this mean the Temporary President *is* the Governor? What authority, if any, is missing if the Temporary President simply “acts” as Governor? If the Temporary President simply acts as Governor, and during that period the Senate elects another Temporary President, does the Temporary President then serving as Governor lose the position because that individual no longer serves as Temporary President? In other words,

does the source of the power rest with the person or the office? A similar issue has arisen in other states.²⁵

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

b. Holding Gubernatorial and Legislative Positions Simultaneously

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

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

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

²⁵ See Fordham Rule of Law Clinic Report, *supra* note 5, at 18.

exercise the powers and duties of any legislative position. In addition, a Temporary President serving as Lieutenant-Governor should not also be able to have a casting vote in the Senate.²⁶

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

c. Who Should be Next in Line?

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

²⁶ Other than removing the authority to vote as Lieutenant-Governor, we do not recommend any changes in the current constitutional framework for the Temporary President of the Senate or Speaker of the Assembly assuming the duties of Lieutenant-Governor. Therefore, these legislative leaders would retain their seats and leadership positions while assuming the duties of the Lieutenant-Governor.

The Legislature has already provided for succession involving heads of departments in the Defense Emergency Act of 1951.²⁷ This statute was enacted in the early years of the Atomic Age, out of concern that an attack could severely disable the ability to govern. Therefore, the statute only applies “as a result of an attack or a natural or peacetime disaster.” We propose to have a succession statute that covers all situations and suggest in the Appendix a different line-up than in the Defense Emergency Act, which currently includes heads of departments that no longer exist. A proposed succession order is provided, but we do not express a strong position about which Senate-confirmed heads of departments are in the line of succession, or their ordering; the most important thing is that the Legislature establish a line of succession.

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

²⁷ Unconsolidated Laws 9105-6, Defense Emergency Act of 1951 (section 5): <https://www.nysenate.gov/legislation/laws/DEA>

7. INABILITY OF GOVERNOR TO SERVE

a. The Twenty-Fifth Amendment

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

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

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

b. A Procedure for New York

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

²⁸ The text of the Twenty-Fifth Amendment can be found here: <https://www.govinfo.gov/content/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-26.pdf>.

²⁹ NYS Law Revision Commission, Memorandum: Relating to Gubernatorial Inability and Succession (Senate No. 3619; Assembly No. 5669) (1985) at 3. (Found at HeinOnline).

as well as the Legislature. The model also should provide for a relatively smooth transition of power in what would certainly be a fraught situation, maintaining public credibility and having the court system available to resolve legal issues.

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

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

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

³⁰ See Ballotpedia, Vacancy Procedures by State: https://ballotpedia.org/How_gubernatorial_vacancies_are_filled#:~:text=Whenever%20the%20governor%20is%20unable,or%20until%20the%20next%20election.

proposed a process in which the legislative leaders and Lieutenant-Governor would declare an inability and the Court of Appeals would make the determination on inability.³¹

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

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

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

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

³² We also note that the Court of Appeals sits on the court for the trial of impeachment, along with the State Senate, which could add a further complication. (N.Y. Const., Art. VI, §24).

Our approach does not include a definition of “inability” or of being “unable to exercise the powers and duties of the office.” The Twenty-Fifth Amendment does not include such a definition, nor has Congress enacted one. As explained by John Feerick, who was instrumental in drafting the Twenty-Fifth Amendment:

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

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

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

8. CONCLUSION

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

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

³³ John D. Feerick, *The Twenty-Fifth Amendment: Its Complete History and Applications*, Third Edition (Fordham University Press 2014), at 278.

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

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

APPENDIX

Language Implementing Lieutenant-Governor Recommendations

New language is in bold; deleted language is in brackets

I. **Removing Provision re: Absence from the State**

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

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

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

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

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

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

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

Text of Section 6:

Duties and Compensation of Lieutenant-Governor; Succession to the Governorship

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

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

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

In case of vacancy in the offices of both governor and lieutenant-governor, a governor and lieutenant-governor shall be elected for the remainder of the term at the next general election

happening not less than three months after both offices shall have become vacant. No election of a lieutenant-governor shall be had in any event except at the time of electing a governor.

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

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

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

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

consecutive days, that officer shall then be required to vacate that officer's seat in the legislature and the temporary president or speaker position.

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

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

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

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

Persons eligible to succeed governor.

- 1. For the purposes of sections six and nine of article IV of the constitution, if the office of governor becomes vacant and each of the lieutenant governor, the temporary president of the senate and the speaker of the assembly is unable to act as governor, then the officer of the state who is highest in order of the following list shall assume the office of governor: attorney general, comptroller, commissioner of transportation, commissioner of health, commissioner of financial services, secretary of state, commissioner of labor and commissioner of agriculture, provided that such officer otherwise meet the criteria set forth in this constitution to serve as governor.**
- 2. In the event any officer listed in paragraph one of this section declines to act as governor or does not meet the criteria set forth in this constitution to serve as governor, the officer next highest in order who does meet the criteria set forth in this constitution to serve as governor shall act as governor until the earlier of the cessation of the vacancy/inability or**

the election of a new governor. **Any official acting as governor under this section shall discharge all the powers and duties of the office of governor as if the individual had been elected governor.**

.

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

III. Gubernatorial Disability

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

1. Governor's Declaration of Inability

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

2. Committee on Gubernatorial Disability

A committee on gubernatorial inability shall be comprised of the lieutenant-governor, the attorney general, comptroller and six commissioners of executive departments, divisions or offices, as provided by law, who shall have been confirmed by the senate.

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

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

4. Governor's Declaration of No Inability

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

5. Legislative Determination of Gubernatorial Inability

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

house of the legislature that the governor is unable to discharge the powers and duties of the office of governor, the lieutenant-governor shall continue to exercise the powers and duties of the office of governor; otherwise, the governor shall resume the powers and duties of that office.

6. Procedure if Office of Lieutenant-Governor is Vacant

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

7. Composition of Committee on Gubernatorial Inability

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

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

Division of Criminal Justice Services

Department of Health

Division of Human Rights

Department of Labor

Office of Mental Hygiene

Department of State

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

SOURCES

NY Constitution, Article IV: https://ballotpedia.org/Article_IV,_New_York_Constitution

NY Public Officers Law Section 42: <https://nlga.us/research/methods-of-election/>

Unconsolidated Laws 9105-6, Defense Emergency Act of 1951 (section 5): <https://www.nysenate.gov/legislation/laws/DEA>

Senate Bill 1666 (2021-22 session) (re: replacing Lieutenant-Governor):
[file:///C:/Users/rothh/Downloads/S1666%20of%202022%20appt%20of%20LG%20\(1\).pdf](file:///C:/Users/rothh/Downloads/S1666%20of%202022%20appt%20of%20LG%20(1).pdf)

Assembly Bill 9917 (2021-22 session) (re: replacing Lieutenant-Governor):
[file:///C:/Users/rothh/Downloads/A9917.S3774%20of%202022%20\(2\).pdf](file:///C:/Users/rothh/Downloads/A9917.S3774%20of%202022%20(2).pdf)

Senate Bill 8243 (2021-22 session) (re: inability): [file:///C:/Users/rothh/Downloads/A8243.S1503-%20Lt%20Gov.%20leg%20\(1\).pdf](file:///C:/Users/rothh/Downloads/A8243.S1503-%20Lt%20Gov.%20leg%20(1).pdf)

Skelos v. Paterson, 13 N.Y. 3d 141; 915 N.E. 2d 1141 (NY 2009). <https://casetext.com/case/skelos-v-paterson-7>

NYS Law Revision Commission, Memorandum: Relating to Gubernatorial Inability and Succession, Absence from the State and Filling a Vacancy in the Office of Lieutenant Governor (Senate No. 8365; Assembly No. 10454) (1986) (found at HeinOnline).

NYS Law Revision Commission, Memorandum: Relating to Gubernatorial Inability and Succession (Senate No. 3619; Assembly No. 5669) (1985) (found at

Ballotpedia, Vacancy Procedures by State:
https://ballotpedia.org/How_gubernatorial_vacancies_are_filled#:~:text=Whenever%20the%20governor%20is%20unable,or%20until%20the%20next%20election.

John D. Feerick, *The Twenty-Fifth Amendment: Its Complete History and Applications*, Third Edition (Fordham University Press 2014).

Fordham Law School Rule of Law Clinic (Ian Bollag-Miller, Stevenson Jean, Maryam Sheikh, & Frank Tamberino), *Changing Hands: Recommendations to Improve New York's System of Gubernatorial Succession* (June 2022) Peter J. Galie and Christopher Bopst. *Cleaning the New York Constitution, Part I*, in Peter J. Galie, Christopher Bopst and Gerald Benjamin (eds.), *New York's Broken Constitution: The Governance Crisis and the Path to Renewed Greatness* (SUNY Press 2016).

National Lieutenant Governors Association, Methods of Election (no date specified)

<https://nlga.us/research/methods-of-election/>

New York County Lawyers Association, Report of the New York County Lawyers Association for the Establishment of a Task Force on Lieutenant Gubernatorial Succession (April 27, <https://www.nycla.org/pdf/NYCLA%20Report%20on%20Lt.%20Gubernatorial%20Succession%20Task%20Force.pdf>).

New York City Bar Association, Committee on Election Law, Letter to the Governor's Office urging reforms to the succession rules in New York State (July 2008) <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/succession-rules-for-new-york-state-governors-office>

Kristin Sullivan, Methods of Electing Lieutenant Governors (OLR Research Report; no date specified)

<https://www.cga.ct.gov/2015/rpt/2015-R-0021.htm>

Patrick A. Woods, Automatic Lieutenant Gubernatorial Succession: Preventing Legislative Gridlock Without Sacrificing the Elective Principle, 76 Albany Law Review 4 (2013).

T. Quinn Yeagain, One Vote, Two Winners: Team-Ticket Gubernatorial Elections and the Need for Further Reform, 75 U. Miami Law Review 3 (2021) – which surveys the history of New York's 1945 and 1953 constitutional amendments and the special election during Governor Dewey's T. Quinn Yeagain, Recasting the Second Fiddle: The Need for a Clear Line of Lieutenant- T Gubernatorial Succession, 84 Albany Law Review ___ (2021).