

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

Rule of Law Clinic

Centers and Institutes

12-2023

Reforming the New York Lieutenant Governor Replacement Process: A Policy Recommendation

Fordham Law School Rule of Law Clinic

Spencer Shih

Fordham University School of Law

Chase Cooper

Fordham University School of Law

Harry Solomon

Fordham University School of Law

Follow this and additional works at: https://ir.lawnet.fordham.edu/rule_of_law_clinic

Recommended Citation

Fordham Law School Rule of Law Clinic; Shih, Spencer; Cooper, Chase; and Solomon, Harry, "Reforming the New York Lieutenant Governor Replacement Process: A Policy Recommendation" (2023). *Rule of Law Clinic*. 5.

https://ir.lawnet.fordham.edu/rule_of_law_clinic/5

This Book is brought to you for free and open access by the Centers and Institutes at FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Rule of Law Clinic by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

**Reforming the New York Lieutenant Governor Replacement Process:
A Policy Recommendation**

Fordham Law School Rule of Law Clinic
Spencer Shih, Chase Cooper, & Harry Solomon
December 2023

Executive Summary of Recommendations

Over the past three years, the position of New York lieutenant governor has increasingly gained attention, with the resignation of Governor Andrew Cuomo to Governor Kathy Hochul's subsequent appointment of two replacement lieutenant governors. Currently, when the lieutenant governor's office becomes vacant the governor has unilateral authority to appoint a replacement. This power is not derived from the New York state constitution. Rather, it stems from a judicial interpretation of a statute that does not explicitly include the lieutenant governor position in its statutory language.

The Fordham University School of Law Rule of Law Clinic believes replacing the lieutenant governor via unilateral appointment runs counter to democratic principles. Thus, reform is needed to explicitly provide a procedure for when the lieutenant governor's office becomes vacant. Those who serve in the state's highest office should reflect the will of New Yorkers. *To that end, we propose that when there is a vacancy in the lieutenant governor's office the governor should have the power to replace the lieutenant governor subject to legislative confirmation.*

The New York State Bar Association ("NYSBA") published a reform proposal requiring legislative confirmation of a lieutenant governor replacement, which we support. When there is a lieutenant governor vacancy, the governor shall have 60 days from the time of the vacancy to nominate a replacement. Thereafter, the Legislature shall have 60 days to confirm or reject the nominee. If the Legislature does not act, then the nominee is confirmed. However, if the Legislature rejects the nominee, the process will repeat itself with a 30-day timelines for both the governor and the Legislature.

However, if the Legislature rejects both nominees, this nomination/confirmation cycle should not just continue. *Therefore, we propose that if the Legislature rejects two nominees for lieutenant governor, then (and only then) will the governor be given unilateral appointment power to replace the lieutenant governor.* This unilateral appointment power is limited in one significant way: the governor will only be allowed to unilaterally appoint someone who has either already been confirmed by the Senate or has been elected to statewide office. In short, the governor will only be allowed to appoint either the head of an executive department, the attorney general, or the comptroller. We call this provision conditional unilateral appointment.

Conditional unilateral appointment serves multiple purposes. First, it provides democratic legitimacy to the replacement process by ensuring that whoever ascends to the lieutenant governor's office has been approved by the people's representatives or was previously elected by the people. Second, allowing the governor to unilaterally appoint a replacement helps ensure

policy and party continuity. Finally, this provision will encourage collaboration between the governor and Legislature to find consensus during the earlier rounds of the replacement process.

We propose that the New York state constitution be amended to incorporate these changes. Amending the constitution will provide more stability and certainty to the replacement process. With that said, however, we recognize the numerous procedural difficulties of amending the state constitution. Consequently, we are not opposed to a statutory change to the lieutenant governor replacement process. Ultimately, any change to the current framework that better reflects democratic processes is an improvement.

Table of Contents

Introduction.....	1
I. History of Lieutenant Governor Replacement, Recent Issues, and Current Law.....	2
A. Prior to the 2009 Crisis.....	2
B. 2009 Crisis.....	3
C. Recent Lieutenant Governor Appointments.....	4
II. NYSBA Reform Recommendations and Our Proposed Modifications.....	5
A. Summary of State Bar Association Recommendations and Our Support.....	5
B. Critique of NYSBA Recommendations.....	6
C. The Clinic’s Recommendation: Unilateral Appointment from a Slate of Democratically Accountable Officials.....	7
1. Unilateral Appointment, with Conditions.....	7
2. From a Predetermined Slate of Democratically Accountable Officials.....	8
III. General Principles that Support Our Recommendation.....	10
A. Political Principles—New Yorkers Have a Right to Qualified Government of Their Choosing.....	10
B. Structural Considerations—New Yorkers Have a Right to Predictable Government.....	12
C. Practical Considerations—New Yorkers Must Be Governed Proficiently.....	13
IV. Tying Loose Ends and Rebutting Counterarguments.....	14
A. Unitary Executive Counterargument.....	14
B. Comparison to Other States Counterargument—Unilateral Appointment Appears Uncontroversial Elsewhere.....	15
C. Comparison to Other States Counterargument—Why Our Conditional Unilateral Appointment is Preferable.....	16
D. Concerns About How Long Our Process Will Take.....	16
E. Withdrawal of Nomination by the Governor.....	17
Conclusion.....	18
Appendix—Draft Constitutional Language.....	19

Introduction

New York’s lieutenant governor is often considered an unimportant, largely ceremonial position, despite the officeholder being one heartbeat away from the governor’s mansion. Similarly, the process by which a lieutenant governor vacancy is filled has historically received little scrutiny and had never been invoked prior to 2009.¹ However, over the past fourteen years, two series of events underscored both the importance of the lieutenant governor’s office as well as the need to reform the process by which the lieutenant governor is replaced should a vacancy arise.

Typically, the lieutenant governor position in New York is filled through an election, whereby candidates for governor and lieutenant governor jointly run on the same ticket.² However, should the office of the lieutenant governor become vacant, the state constitution prohibits a special election to fill that vacancy.³ The only time a special election is permissible is when there is a dual vacancy in both the governor’s office and the lieutenant governor’s office. But there is a recognized process to fill a vacancy in the lieutenant governor’s office. The New York State Court of Appeals determined in 2009 that the governor can unilaterally appoint a replacement lieutenant governor.⁴

Unilateral gubernatorial appointment is undemocratic. As a basic principle of American political and legal canon, governments derive “their just powers from the consent of the governed.”⁵ This principle is most widely viewed as the elective principle and reflects the idea that those holding public office should be elected or at least be given a check of approval from other democratically elected entities.⁶ The governor’s unilateral power to appoint his or her successor runs counter to this principle. Having an individual so close to New York’s highest office without a significant democratic check is concerning. Moreover, this unilateral appointment mechanism raises political, structural, and practical concerns. It raises the possibility that someone who has not been elected by voters or confirmed by the Legislature could become governor. However, the lack of a democratic mandate is not the only problem. The current process risks elevating unqualified officials because the governor’s choice is not scrutinized by lawmakers or voters. New Yorkers deserve a legitimate, energetic, and efficient executive branch that is ready to serve whatever the circumstance. Fundamental reforms to the lieutenant governor replacement process are needed.

This memo presents the Fordham University School of Law Rule of Law Clinic’s proposal for a new lieutenant governor replacement process. Our proposal supports the New York State Bar Association’s (“NYSBA”) proposal. NYSBA views unilateral appointment of the lieutenant governor as “an unsatisfactory devolution of the highest office in the state” and recommended changes to the process,⁷ including requiring that the Legislature confirm a lieutenant governor

¹ 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* (2023) [hereinafter NYSBA Recommendations].

² N.Y. CONST. art. IV.

³ N.Y. CONST. art. IV, § 6.

⁴ *Skelos v. Paterson*, 13 N.Y.3d 141 (2009).

⁵ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

⁶ *See Skelos*, 13 N.Y.3d at 151.

⁷ *See generally* NYSBA Recommendations, *supra* note 1.

nominee. The Rule of Law Clinic agrees. We additionally propose that if the Legislature rejects two nominees, then the governor will have unilateral power to appoint a lieutenant governor from a list of executive branch officials. These officials will either have been previously confirmed by the Legislature, or directly elected by New Yorkers. This addendum to the NYSBA proposal ensures that the process is not frustrated by legislative gridlock and ends with the appointment of a lieutenant governor.

Part I of this memo details the history of lieutenant governor replacement, the current law, and the need for reform. Part II describes the NYSBA recommendations and our proposed modification. Part III discusses the policy principles underpinning the need for reform, including political, structural, and practical considerations. Part IV addresses several outstanding issues with our proposal as well as address counterarguments. Following the conclusion, the appendix presents draft language for our proposal.

I. History of Lieutenant Governor Replacement, Recent Issues, and Current Law

A. Prior to the 2009 Crisis

In New York's history, there have been at least twelve vacancies in the lieutenant governor's office.⁸ Of these vacancies, all remained unfilled except for two: in 1847 the Legislature passed a statute allowing for a one-time special election; and in 1944 the state Democratic Party sued to force a special election.⁹ However, following this latter special election, the then-governor urged constitutional and legislative changes to preclude the possibility of a lieutenant governor from the opposition party being specially elected.¹⁰ Consequently, a 1953 constitutional amendment prohibited elections for lieutenant governor unless an election for governor also occurred.¹¹ Additionally, in this same period, another constitutional amendment clarified that the temporary president of the Senate discharges the powers of the lieutenant-governor if the position is vacant,¹² and an amendment to the Public Officers Law removed the governor and lieutenant governor from the list of elected offices that required special elections to fill vacancies.¹³

Thus, by the 1950s, the constitution and statutes made clear that a lieutenant governor could not be elected by special election and that the temporary president of the Senate discharged the powers of the lieutenant governor if that office became vacant. However, the process for filling a vacancy in the lieutenant governor's office remained unclear. This ambiguity did not cause any problems until 2009, when a unique confluence of events threw the state government into crisis.

⁸ NYSBA Recommendations, *supra* note 1, at 5.

⁹ *Id.*

¹⁰ *Id.*

¹¹ N.Y. CONST. art. IV, § 6.

¹² NYSBA Recommendations, *supra* note 1, at 5.

¹³ *Id.*

B. 2009 Crisis

In 2009, a leadership crisis struck New York, causing the state government to grind to a halt. After Governor Elliot Spitzer resigned from office on March 17, 2008 due to scandal,¹⁴ Lieutenant Governor David Paterson ascended to the state's highest office, leaving the lieutenant governor's office vacant. The state constitution provided that when there was no lieutenant governor, the temporary president of the Senate "shall perform all the duties of lieutenant-governor."¹⁵ The problem, however, arose the following year. After the defection of two Democratic senators from their party, there was no agreed upon temporary president of the Senate, as the chamber was divided 31-31 between Democrats and Republicans. Each group of senators claimed to control the Senate and, therefore, the temporary president position.¹⁶ The impasse persisted, and it became impossible for the Legislature to conduct business, as there was no tie-breaking vote to clear procedural hurdles.¹⁷

On July 8, 2009, after about a month of legislative deadlock and no resolution in sight, Governor Paterson took matters into his own hands, unilaterally appointing Richard Ravitch to be lieutenant governor.¹⁸ Since Paterson had no explicit statutory authority to fill the lieutenant governor position, he instead relied on Section 43 of New York's Public Officers Law.¹⁹ In relevant part, that statute provides that if a vacancy occurs in an elective office where no other provision controls, "the governor shall appoint a person to execute the duties thereof."²⁰ Paterson's use of this statutory catch-all provision, to circumvent an effective government shutdown, ignited a storm of controversy and triggered a lawsuit by Dean Skelos, the Republican leader in the Senate at the time, who challenged Paterson's unilateral appointment of Ravitch.²¹

In *Skelos v. Paterson*, the Court of Appeals upheld Paterson's appointment by a 4-3 vote. The court held that since there was no constitutional or statutory provision explicitly providing for filling a vacancy in the lieutenant governor's office, Section 43 controlled. The court said that Section 43 did not violate Article IV, Section 6 of the Constitution, which stated that the temporary president of the senate "perform all the duties of lieutenant governor" during a vacancy. Because the temporary president could fulfill those duties until the governor appointed someone under Section 43, the court held that unilateral appointment was constitutional.

In contrast, the dissent reasoned that Section 43 was never intended to be used to fill a lieutenant governor vacancy. The dissenting judges believed the Legislature, by excluding the lieutenant governor from the offices that required an intervening election under Section 42 of the Public Officers Law, made clear that the only recourse for filling a lieutenant governor vacancy was

¹⁴ *Spitzer Resigns After Sex Scandal, Pressure*, NPR (Mar. 18, 2008), <https://www.npr.org/2008/03/12/88134976/spitzer-resigns-after-sex-scandal-pressure>.

¹⁵ N.Y. CONST. art. IV.

¹⁶ *Skelos v. Paterson*, 915 N.E. 2d. 1141, 1142 (N.Y. 2009).

¹⁷ NYSBA Recommendations, *supra* note 1, at 5.

¹⁸ *Skelos*, 915 N.E. 2d. at 1142.

¹⁹ *Id.*

²⁰ N.Y. Public Officers Law § 43 (McKinney 2023).

²¹ *Skelos*, 915 N.E. 2d. at 1142.

found in the state constitution provision stating that the temporary president of the Senate should serve as acting lieutenant governor until the next gubernatorial election.²²

C. Recent Lieutenant Governor Appointments

The 2009 Crisis presented a unique confluence of factors, and arguably called for extraordinary action by Governor Paterson. Accordingly, it was conceivable that even after the *Skelos* decision, a future governor would revert to pre-2009 practice of leaving the lieutenant governor's office vacant should a lieutenant governor fail to finish their term. However, this was not to be the case.

In August 2021, Governor Andrew Cuomo resigned amidst sexual harassment allegations,²³ and his lieutenant governor, Kathy Hochul, assumed the governorship.²⁴ Governor Hochul then unilaterally appointed Brian Benjamin, a state senator, as lieutenant governor, only for him to resign shortly thereafter following an indictment on federal fraud and bribery charges.²⁵ Subsequently, in May 2022, Hochul unilaterally appointed Congressman Antonio Delgado²⁶ to be lieutenant governor.²⁷ In November 2022, Hochul and Delgado ran jointly and were elected, as governor and lieutenant governor respectively, by New York voters.²⁸

These recent events underscore the unsatisfactory nature of the current lieutenant governor replacement process. Hochul, who at the time had not been elected as governor, unilaterally appointed lieutenant governors twice. Had Brian Benjamin, who was on the verge of being indicted, been more thoroughly scrutinized, his appointment might have been avoided.²⁹ Instead, he became lieutenant governor, followed by Delgado. Consequently, if Hochul had left office between August 2021 and November 2022, an unelected lieutenant governor—appointed unilaterally by an unelected governor—would have become governor, without having stood for election to either office or having been confirmed by the Legislature. This possibility runs contrary to principles of democratic legitimacy and accountability. The state needs a reformed replacement process that better conforms with democratic principles.

²² For a compelling argument that *Skelos* was correctly decided, see Richard Briffault, *Skelos v. Paterson: The Surprisingly Strong Case for the Governor's Surprising Power to Appoint a Lieutenant Governor*, 73 ALB. L. REV. 675 (2010).

²³ Luis Ferré-Sandurní & J. David Goldman, *Cuomo Resigns Amid Scandals, Ending Decade-Long Run in Disgrace*, N.Y. TIMES (Aug. 10, 2021), <https://www.nytimes.com/2021/08/10/nyregion/andrew-cuomo-resigns.html>.

²⁴ Marina Villanueva, *Gov. Andrew Cuomo Resigns Over Sexual Harassment Allegations*, ASSOCIATED PRESS (Aug. 10, 2021), <https://apnews.com/article/andrew-cuomo-resigns-17161f546bb83c32a337036ecf8d2a34>.

²⁵ William K. Rushbaum et al., *Lt. Gov. Benjamin Resigns Following Campaign Finance Indictment*, N.Y. TIMES (Apr. 12, 2022), <https://www.nytimes.com/2022/04/12/nyregion/brian-benjamin-resigns-indicted.html>.

²⁶ Luis Ferré-Sandurní, *Hochul Picked a Running Mate. Now She Has to Pick Another One.*, N.Y. TIMES (Apr. 12, 2022), <https://www.nytimes.com/2022/04/12/nyregion/hochul-brian-benjamin.html>.

²⁷ Luis Ferré-Sandurní & Nick Fandos, *Hochul Chooses Antonio Delgado as New Lieutenant Governor*, N.Y. TIMES (May 3, 2022), <https://www.nytimes.com/2022/05/03/nyregion/antonio-delgado-new-york-lieutenant-governor-hochul>.

²⁸ Ian Pickus, *Democrat Kathy Hochul Wins Full Term as New York Governor Defeating Lee Zeldin*, NPR (Nov. 9, 2022), <https://www.npr.org/2022/11/09/1134203429/new-york-governor-election-results-kathy-hochul-lee-zeldin>.

²⁹ Luis Ferré-Sandurní, Nicholas Fandos, & Jeffrey C. Mays, *Inside the Flawed Vetting Process That Led Gov. Hochul to Brian Benjamin*, N.Y. TIMES (Apr. 30, 2022), <https://www.nytimes.com/2022/04/30/nyregion/brian-benjamin-kathy-hochul.html>.

II. NYSBA Reform Recommendations and Our Proposed Modifications

A. Summary of State Bar Association Recommendations and Our Support

In January of 2023, NYSBA published a report with recommendations for reforming the lieutenant governor replacement process.³⁰ Asserting that there must be some form of checks and balances for lieutenant governor replacement, the report begins with the premise that the office is “too important to leave to one person to fill.”³¹

Accordingly, NYSBA’s recommendation allows the governor “to fill a Lieutenant-Governor vacancy by appointing a person of the Governor’s choice, subject to checks and balances.”³² In the event of a vacancy, the recommendation would give the governor 60 days to nominate a replacement. This timeline is designed to provide enough time for the governor’s office, the state police, and others to properly vet potential lieutenant governor nominees.³³ Following the nomination, the Legislature would have 60 days to either confirm or reject the nominee.³⁴ Notably, approval in each house must be by a majority of the elected members, not just a majority of those voting.³⁵ If the Legislature does not act by either confirming or rejecting the nominee, the nominee is deemed confirmed for the remainder of the gubernatorial term.³⁶

However, should either chamber vote down the nominee in the 60-day window, the governor has another 30 days to nominate someone else and the Legislature has 30 days to act on the nomination. This second cycle is the same as the first, with the same constraints and potential outcomes, with the only difference being that the governor and Legislature now have 30 days each to fulfill their obligations. We interpret this shorter time frame as reflecting both a recognition of urgency—the state needs a lieutenant governor—as well as the fact that other candidates were likely vetted during the first round, making it easier for the governor to name a second nominee.

The Rule of Law Clinic supports the NYSBA recommendation because it seeks to balance several key interests: (1) allowing the governor to have an effective governing partner who shares similar policy views; (2) ensuring that the governor’s pick receives a democratic mandate and rigorous vetting; and (3) filling vacancies in a timely manner.

The NYSBA recommendation allows the governor to put forward the nominee of their choice. The governor should be able to work with a lieutenant governor of their choosing and, moreover, have confidence that should the governor leave office, the lieutenant governor will continue their policies. Importantly, while the governor has discretion to choose whomever they like, increasing the likelihood of policy and political continuity, the governor’s choice under the NYSBA recommendations is not unfettered.

³⁰ See NYSBA Recommendations, *supra* note 1.

³¹ *Id.* at 10–11.

³² *Id.*

³³ *Id.*

³⁴ See NYSBA Recommendations, *supra* note 1.

³⁵ *Id.* at 13–14.

³⁶ *Id.* at 15.

Indeed, the NYSBA recommendation correctly provides opportunities for legislative confirmation. As discussed, the status quo replacement process could result in an unelected governor and unelected lieutenant governor, neither of whom have stood for election or been confirmed by a democratic body, such as the Legislature. Consequently, it is important that the replacement process have a confirmation component; if two elected bodies review and approve the nominee, New Yorkers will have greater confidence that the governor's nominee is qualified and has been properly vetted, thus strengthening democratic legitimacy.

Lastly, the NYSBA recommendation's timelines make the replacement process efficient. An extended vacancy in the lieutenant governor's office can harm the state. Without the tie-breaking vote of a lieutenant governor during the 2009 crisis, the Senate was paralyzed and the state paid a significant economic price as important legislation languished. The NYSBA recommendations, establishing 60-day and 30-day cycles, minimizes the likelihood of legislative gridlock and political gamesmanship that could follow a vacancy, while also providing ample time to screen candidates properly.³⁷

B. Critique of NYSBA Recommendations

While we generally endorse the NYSBA recommendations, we have one critique. If the Legislature simply does not vote on the nominee then the NYSBA proposal is clear: that individual becomes lieutenant governor.³⁸ However, the drafters of the recommendation intended—although it is not necessarily clear from the text—that if the Legislature *does* act and affirmatively rejects the governor's nominee, then the process—nomination followed by confirmation—would keep repeating with 30-day periods until a new lieutenant governor was appointed.³⁹

The problem with this outcome—that the 30-day cycle just keeps repeating until a lieutenant governor is chosen—is that it creates the potential for endless deadlock in Albany. Thus, there is a chance for breakdown in NYSBA's proposed process, however slim. New Yorkers have a right to a fully operational and well-functioning government, and if confirmation proceedings for a lieutenant governor were to drag on for months and months, the people would be, at least partially, deprived of that right. For example, if the governor and the Legislature were in a constant battle over filling a lieutenant governor vacancy, then they would be unable to devote time and resources to other policy matters, from taxation to public health. There are only so many days in a legislative calendar and New Yorkers expect their government to legislate. In prolonged confirmation fights, that duty often takes full attention.⁴⁰ Given these concerns, the Rule of Law Clinic proposes the following modification to the NYSBA recommendation.

³⁷ *Id.* at 14.

³⁸ *Id.* at 3.

³⁹ Video Interview with Alan Rothstein, New York State Bar Association (Sept. 21, 2023).

⁴⁰ See Luis Ferré-Sandurní, *State Senate Rejects Nominee for Chief Judge in Defeat for Hochul*, N.Y. TIMES (Feb. 15, 2023), <https://www.nytimes.com/2023/02/15/nyregion/hector-lasalle-chief-judge-vote.html> (explaining the drawn-out process of confirmation a chief judge to the Court of Appeals and quoting legislators who would otherwise control policy agendas moving through the chambers).

C. The Clinic’s Recommendation: Unilateral Appointment from a Slate of Democratically Accountable Officials

1. Unilateral Appointment, with Conditions

Our proposal primarily operates as a *supplement* to the NYSBA recommendation. We propose that if the Legislature fails to confirm a lieutenant governor in the two opportunities provided, then the governor should be able to appoint his or her lieutenant governor without approval from the Legislature. However, this unilateral power is still limited and circumscribed. That is, the governor will only be allowed to appoint a lieutenant governor from a predetermined pool of officials from within the state government. Specifically, the governor would need to choose from the heads of the executive branch departments, who have been confirmed by the Legislature, as well as the attorney general and comptroller, who have been elected statewide. We believe this modification respects the elective principle and provides democratic legitimacy to the lieutenant governor replacement process.

This “Conditional Unilateral Appointment” provision serves a variety of purposes. As U.S. Senator Birch Bayh crafted the Constitution’s 25th Amendment, which includes a vice presidential replacement provision, he said it is important that the president be able to pick a vice president who they can work with and who will help them effectively govern.⁴¹ The same is true for the governor. That is why this proposal, like the 25th Amendment’s vice-presidential replacement process, ensures that ultimately the governor will have their choice of who becomes lieutenant governor when there is a vacancy. Ideally, the governor and Legislature will agree on one of the two nominees that the governor puts forth. However, should there be a breakdown where the two branches cannot agree, the governor still gets to have a lieutenant governor of their choosing in some respect. Our proposal recognizes that the Legislature should have a role in the replacement of a lieutenant governor. It is designed to encourage both sides to work together to find a suitable replacement, agreeable to both the executive and legislative branches. This unilateral appointment mechanism is seen as somewhat undesirable for all parties involved. Thus, hopefully it operates as an inducement for collaboration and compromise in the initial two stages of the replacement process.

Giving the Legislature input on replacing the lieutenant governor is consistent with democratic principles, and the possibility that the Legislature might have to work with this person should they become governor. The prospect of unilateral appointment by the governor will encourage the Legislature to work with the governor to confirm a suitable replacement. If the Legislature refuses to negotiate or confirm a reasonable nominee that the governor puts forward, then they will no longer have the option to stonewall the process.

Governors do not seem to look to the heads of executive departments for lieutenant governors. The last lieutenant governor of New York who had previously served as the head of an executive department agency was Mario Cuomo, who was Secretary of State from 1975-1978.⁴² It is not

⁴¹ John D. Feerick, *The Twenty-Fifth Amendment—In the Words of Birch Bayh, Its Principal*, 89 FORDHAM L. REV. 31 (2020).

⁴² Gov. Mario Matthew Cuomo, NAT. GOV. ASS’N, <https://www.nga.org/governor/mario-matthew-cuomo> (last visited Oct. 16, 2023).

likely that a governor will want to pick someone from their administration as their first, or even second, choice. When a governor first has 60 days, and then 30 days, to nominate a replacement, they can pick anyone. It can be a state legislator, a member of Congress, or someone with general government experience, such as Richard Ravitch, Governor Paterson's pick in 2009. The governor will want to have that flexibility to name anyone they like to be the next lieutenant governor. If they cannot put forward a nominee who is palatable to the Legislature, who represents the will of the people as their democratically elected representatives, then the governor will have to pick someone from a list of options who are likely not going to be their top choices.

This is not to say that the heads of New York's executive departments are not qualified to be lieutenant governor. On the contrary, they would be already integrated into the governor's administration and likely ready to step into the role. Conditional unilateral appointment is simply a way to incentivize both the Legislature and the governor to work together, while laying out a contingency should they fail. The worst-case scenario under our proposal is that New York state ends up with a unilaterally appointed lieutenant governor who has high level experience in the executive branch, rather than a potential long-standing vacancy that could cripple the functioning of state government, as occurred in 2009.

The list of officials the governor can unilaterally appoint is limited to the heads of the executive departments who have been nominated by the governor, and then confirmed by the Senate to their respective positions, as well as the other two statewide elected officials, the attorney general and comptroller. Furthermore, the list of officials does not include any acting heads of executive departments or holdovers from previous administrations. This will confer some level of democratic legitimacy on the replacement while also giving the governor a measure of choice. If the Legislature rejects anyone from this list in the first two rounds, they will no longer be eligible for unilateral appointment. This prevents a governor from forcing through a replacement lieutenant governor who has already been considered and rejected by the representatives of the people.

Limiting the list to heads of executive departments also ensures that the person chosen to fill the vacancy has experience in the state's executive branch. This is important for the continuity of the government should they ascend to the governorship. Having someone who has worked in the governor's administration with others in the executive branch puts them in a unique position to transition to the role of governor more seamlessly than others. This protects against potential dysfunction that can occur during a transition that might negatively impact the people of the state.

2. From a Predetermined Slate of Democratically Accountable Officials

The ability to unilaterally appoint a lieutenant governor is intentionally limited. The purpose of having a limited number of officials who the governor can unilaterally appoint is meant to ensure that should it become necessary, the governor cannot put someone one heartbeat away from the governorship who does not have some democratic imprimatur. Here, we focus on the two candidates for unilateral appointment who are statewide elected officials. Both candidates are unique and thus require an extended explanation.

The attorney general is included in the list of individuals who may be unilaterally appointed primarily because the attorney general is elected statewide.⁴³ Because our proposal calls for unilateral appointment for the lieutenant governor if the Legislature fails to confirm a nominee in two rounds, the unilateral appointment power must be limited in the sense that the appointee has some semblance of democratic approval.⁴⁴ That the attorney general is independently elected by New York voters satisfies this concern. Indeed, it is the *very definition* of democratic approval.

Our inclusion of the attorney general is not only intended to satisfy democratic principles. The attorney general also provides the gubernatorial administration an intimate knowledge of the state's statutory, common law, and regulatory schemes. This expertise would of course benefit the governor with his or her policy initiatives by providing a more in-depth legal background. Policy initiatives would presumably be less vulnerable to litigation, which would strengthen the administration. Of course, the governor already has the attorney general at his or her disposal for opinions on policy initiatives. After all, the attorney general routinely provides advisory opinions for the executive branch.⁴⁵ However, like how the United States attorney general is not the president's lawyer,⁴⁶ the New York attorney general is not the governor's lawyer. Rather, the attorney general is "the people's lawyer."⁴⁷ As an attorney, the attorney general advocates on the people's behalf and not that of the governor. However, if the governor were to appoint the attorney general as lieutenant governor, then he or she will be closer to the source of policy initiatives and will be freer to form cogent legal arguments in favor of the administration. In other words, if the attorney general is appointed as lieutenant governor, conflicts of interest will be limited while the governor's administration will be sharpened.

We have included the New York comptroller on the list of candidates for the governor to select for the same reasons. New Yorkers elect the comptroller to office,⁴⁸ and the comptroller provides wide-ranging knowledge of the state's financial health that could benefit the governor. With a former comptroller as lieutenant governor, the governor's spending initiatives and other funding allocation will likely be more economically efficient. Indeed, the comptroller is responsible for managing the state's pension fund, providing fiscal oversight over localities, and managing the state's accounting system and payroll.⁴⁹ If a comptroller were to transition from managing these policy areas to being closer to the governor, the state's fiscal vitality could benefit.⁵⁰ Further, New York is an economically vibrant state.⁵¹ New York is a financial center for the world, and

⁴³ N.Y. CONST. art. V (stating that the "attorney-general shall be chosen at the same general election as the governor and hold office for the same term").

⁴⁴ Once again, this is the reason that our list of candidates includes executive department heads who have been confirmed by the Legislature.

⁴⁵ *Introduction to Opinions*, OFF. OF THE N. Y. ST. ATT'Y GEN., <https://ag.ny.gov/libraries-documents/opinions/appeals-opinions-resource-center/introduction-opinions> (last visited Nov. 3, 2023).

⁴⁶ William R. Dailey, *Who is the Attorney General's Client?*, 87 NOTRE DAME L. REV. 1113, 1152 (2012).

⁴⁷ *Id.*

⁴⁸ N.Y. CONST. art. V, § 1.

⁴⁹ *About the New York State Comptroller's Office*, OFF. OF THE N.Y. ST. COMPTROLLER, <https://www.osc.state.ny.us/about/about-comptrollers-office> (last visited Oct. 16, 2023).

⁵⁰ As Alexander Hamilton once wrote, "Money is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion and enables it to perform its most essential functions." THE FEDERALIST NO. 30 (Alexander Hamilton).

⁵¹ *Infra*, note 76.

the state of New York's economy affects not just the country, but the world as well. The comptroller, like the attorney general, is therefore a prime candidate to fill a vacancy in the lieutenant governor's office.

We are acutely aware of the possibility that the attorney general and the comptroller may be of a different party than the governor. With that in mind, we must emphasize that although these two officials are particularly strong candidates to be a lieutenant governor, the governor does not have to choose them as a replacement lieutenant governor. The governor *may* choose them or choose from among the heads of executive departments. We highlight their positions here simply to emphasize their suitability as replacements for the lieutenant governor in the case of a vacancy.

III. General Principles that Support Our Recommendation

A. Political Principles—New Yorkers Have a Right to Qualified Government of Their Choosing

As a basic rule of American governance, New Yorkers have a right to a government that they choose.⁵² Or, alternatively, New Yorkers at the very least have a right to have a government composed of people who have been vetted in some quasi-democratic fashion. For these reasons, the governor's current power to unilaterally fill a lieutenant governor vacancy is inappropriate. Given that the New York governor holds an immense amount of power,⁵³ the person in line to become governor must have some sort of democratic legitimacy supporting their mandate to govern. This is why the Legislature should have a role in filling vacancies in the lieutenant governors' office. By providing the governor with the power to nominate a replacement lieutenant governor subject to the Legislature's approval, the NYSBA recommendations provide a chance for the people's representatives to have their say. This process ultimately creates confidence for New Yorkers in who runs their state. Moreover, NYSBA's recommendation represents a long line in American political tradition of entrusting a legislative body to provide democratic legitimacy to executive action. For example, when a president fills a vacancy in the vice president's office both chambers of Congress must confirm the nomination.⁵⁴ Further, when a president nominates a Supreme Court justice, the Senate must give its consent.⁵⁵ In short, the recommendation is a new formulation of a tried-and-true practice in American governance.

On top of providing confidence in the nomination process, NYSBA's recommendation provides a check on the governor's power. Because New York's governor is quite powerful,⁵⁶ the

⁵² See *Skelos v. Paterson*, 13 N.Y.3d 141, 151 (2009).

⁵³ ROBERT B. WARD, *NEW YORK STATE GOVERNMENT* 56 (2d ed. 2006) ("In terms of its formal power within the state government, New York's chief executive office today is consistently ranked among the most powerful in the country.").

⁵⁴ U.S. CONST. amend. XXV, § 2 ("Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon *confirmation by a majority vote of both Houses of Congress.*" (emphasis added)).

⁵⁵ See U.S. CONST. art. II, § 2, cl. 2 (stating the president has the power to nominate "Ambassadors, other public Ministers and Consuls, *judges of the supreme Court*, and all other officers of the United States" with the "*Advice and Consent of the Senate*" (emphasis added)).

⁵⁶ WARD, *supra* note 53, at 56.

Legislature should check the power to choose a potential successor. If the current *Skelos* regime were to continue, the abuse of gubernatorial abuse of power is quite possible. Again, as another fundamental rule of American political tradition, each branch of government must serve as a check on the others in one form or another.⁵⁷ The NYSBA recommendations serve and reaffirm this principle, whereas the current *Skelos* regime does not.

The NYSBA recommendation, combined with our supplemental provision, also serves other underlying principles of good governance. Voters are not just electing a person as governor. Governors run on a platform of policies that voters generally want implemented. If a governor leaves office during their term, that does not mean that people suddenly want a change in the policies in the executive branch. The NYSBA recommendation and our supplement will keep party and policy continuity in place, should the replacement lieutenant governor ascend to the governorship.

Our proposal also ensures that the person unilaterally appointed lieutenant governor has executive experience, and familiarity with the administration at the time. This would make them prepared to take over as governor on day one. Any time a duly elected governor does not finish a term it is on some level a potential crisis. Qualified, high-caliber leaders are not a dime a dozen. Having someone familiar with the workings of an administration step into the role of leader of the administration allows them to hit the ground running and keep the government moving effectively. This is imperative if there is an ongoing crisis that requires capable leadership.

Our proposal also supports the elective principle and provides democratic legitimacy. These two vital political principles are closely related but distinguishable. As discussed, the elective principle reflects the idea that those holding public office should be elected, or be approved by other democratically elected officials.⁵⁸ Further, democratic legitimacy as a principle reflects the idea that the people recognize their government as an accepted ruler and therefore have confidence in the political process because of democratic means.⁵⁹ In other words, New Yorkers must view governmental processes (such as a replacement mechanism for lieutenant governors) as legitimate in order to have any form of recognized power.

Our proposal to supplement the NYSBA recommendation with unilateral power to choose from a list of candidates supports the elective principle because all the candidates that the governor may choose already have been Senate-confirmed. Accordingly, the people, through their representatives, have already given their stamp of approval on the individual. Of course, at the time of these officials' confirmations, the Legislature may not have anticipated that they would be one heartbeat away from the state's highest office. But as the *Skelos* decision stated, succession rules are "inevitably imperfect" and, at some point, will "compromise elective principles."⁶⁰ Therefore, the question becomes how to ameliorate the effects of potentially

⁵⁷ THE FEDERALIST NO. 47 (James Madison) ("The accumulation of all powers [...] in the same hands, whether of one, a few, or many, and whether hereditary, [*self appointed*], or elective, may justly be pronounced the very definition of tyranny." (emphasis added)).

⁵⁸ See generally *Skelos v. Paterson*, 915 N.E. 2d. 1141, 1147 (N.Y. 2009) (Pigott, J., dissenting); see also Briffault, *Skelos v. Paterson*, *supra* note 22 (arguing that *Skelos* was rightly decided and that the elective principle should not have played a factor in the decision).

⁵⁹ *Legitimacy*, BRITANNICA.COM, <https://www.britannica.com/topic/legitimacy> (last visited Oct. 15, 2023).

⁶⁰ *Skelos*, 915 N.E. 2d. at 1146.

undemocratic succession procedures. The answer is our recommendation: the governor is appointing a lieutenant governor who has already been approved by a majority of the Senate.

B. Structural Considerations—New Yorkers Have a Right to Predictable Government

Structural principles also support our recommendation. By structural principles, we mean that there must be a clearly defined process to replace the lieutenant governor that is consistent with democratic values, predictability, and separation of powers.

The current process to replace a lieutenant governor is provided by the Public Officers Law,⁶¹ as well as the *Skelos* decision’s interpretation of that law,⁶² but those sources of law are not foundational enough or fixed enough given the importance of the lieutenant governor’s office. Because the lieutenant governor is a constitutionally mandated office,⁶³ the state constitution should provide a process to fill vacancies in the office.

Our recommendation, therefore, should be enacted through a constitutional amendment. A constitutional amendment is the ideal way to create an improved lieutenant governor replacement process. Although reform by amending the Public Officers Law is a plausible option (and the Rule of Law Clinic is not necessarily opposed to that option), the drawback is that a subsequent Legislature can easily change the statute again. This would invite political gamesmanship.

When it comes to the importance of the Lieutenant Governor’s Office, the relative ease of changing the replacement law is worrisome as it creates unpredictability. At its core, law must be predictable as “uncertainty [is] regarded as incompatible with the Rule of Law.”⁶⁴ In this context, providing a mechanism to replace the lieutenant governor that is not subject to legislative whim or a democratically unaccountable judiciary creates a more predictable system for New Yorkers. Amendments are difficult to undo. The New York Constitution provides that whenever an amendment is proposed and approved by the Legislature in successive legislative sessions, “it shall be the duty of the legislature to submit each proposed amendment or amendments to the people for approval.”⁶⁵ The permanence of an amendment will provide a more stable system of governance that is less susceptible to political gamesmanship and vexatious litigation.

The final structural argument in favor of our proposal is based on principles of separation of powers. The state constitution provides that when there is a “vacancy in the office of the lieutenant governor alone” the temporary president of the Senate “shall perform the duties of lieutenant-governor during such vacancy.”⁶⁶ Our proposal guarantees that the replacement process ends with the successful appointment of a new lieutenant governor. Without that guarantee, the temporary president might discharge the lieutenant governor’s power for an extended period, creating a separation of powers issue because a legislative officer would be exercising the duties of an executive officer *simultaneously*. This is a problem because, as a basic

⁶¹ See *supra* notes 18–21 and accompanying text.

⁶² *Skelos v. Paterson*, 915 N.E.2d. 1141 (N.Y. 2009).

⁶³ N.Y. CONST. art. IV, § 5 (explaining the conditions upon which the lieutenant governor shall serve as governor).

⁶⁴ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. OF CHICAGO L. REV. 1175, 1179 (1989).

⁶⁵ N.Y. CONST. art. XIX, § 1.

⁶⁶ N.Y. CONST. art. IV, § 6.

principle of government structure, the powers of “the *legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time.*”⁶⁷ The reason for this is, of course, to prevent abuse of power by one government official.⁶⁸

The potential abuse of power is not just a theoretical concern. The temporary president of the Senate may have the power to cast *two* votes when they “perform the duties of lieutenant-governor.”⁶⁹ One of the lieutenant governor’s primary powers is to cast a tie-breaking vote in the Senate.⁷⁰ While this tie-breaking vote power is confined to procedural issues and nominations,⁷¹ a circumstance could still arise where the temporary president of the Senate votes on, say, a nomination, the vote is tied, and then this senator, performing the duties of the lieutenant governor, votes a second time, as the tie-breaker. Thus, if there were a situation where the confirmation vote for a lieutenant governor were tied, and the temporary president of the Senate was performing the duties thereof, then the temporary president of the Senate could conceivably be empowered to cast two votes: one as a member of the Senate, and one as acting lieutenant governor.

C. Practical Considerations—New Yorkers Must Be Governed Proficiently

The case for having a more defined process for lieutenant governor replacement is not merely an academic exercise. There are practical concerns that support the need for reform. Simply put, New York is an important and powerful state. For example, there are only nine countries with a larger GDP than New York.⁷² Further underscoring New York’s importance is the fact that during the COVID-19 pandemic, New York state was looked to daily, both nationally and internationally, as the frontlines of the battle against the pandemic.⁷³ What happens in our state not only affects New Yorkers, but also has profound implications for the country and the world. Accordingly, New Yorkers must have the ability to govern in a proficient manner. In an emergency, it must be clear who is in charge if something were to happen to the governor. Having a more defined process for replacing the lieutenant governor addresses this practical concern as it prepares the state’s government to function even in the direst circumstances.

⁶⁷ THE FEDERALIST NO. 48 (James Madison) (emphasis added).

⁶⁸ THE FEDERALIST NO. 47 (James Madison) (“*The accumulation of all powers [...] in the same hands, whether of one, a few, or many, and whether hereditary, [self appointed], or elective, may justly be pronounced the very definition of tyranny.*” (emphasis added)).

⁶⁹ See N.Y. CONST. art. IV, § 6.

⁷⁰ N.Y. CONST. art. IV, § 6.

⁷¹ See Bennett Liebman, *Past as Present: The Last Dead Heat in the State Senate, 100 Years Ago*, 81 N.Y. ST. B.A. J. 33, 35 (2009) (“To the extent that scholars have written on this subject, the conundrum has been resolved *against true tie-breaking power in legislation*, because the lieutenant governor has not been considered a member of the Senate... the lieutenant governor cannot vote on the final passage of legislation.” (emphasis added)).

⁷² *Countries With A Larger GDP Than New York*, WORLDATLAS, <https://www.worldatlas.com/articles/countries-with-a-bigger-gdp-than-new-york.html> (last visited Oct. 15, 2023).

⁷³ Ray Sanchez, *New York Governor Gives Final Coronavirus Briefing After ‘111 days of hell’*, CNN (June 19, 2020), <https://www.cnn.com/2020/06/19/us/andrew-cuomo-final-coronavirus-briefing/index.html> (“New York Gov. Andrew Cuomo’s daily coronavirus briefings have drawn comparisons to President Franklin D. Roosevelt’s fireside chats during the Great Depression and World War II.”).

Another practical benefit of our supplemental proposal to the NYSBA recommendation is that it would avoid a prolonged confirmation fight. Just last year, New York witnessed a contentious confirmation battle when Governor Hochul nominated Judge Hector LaSalle to be chief judge of the Court of Appeals.⁷⁴ It took three months for the Senate to reject LaSalle's nomination. After his nomination failed, Hochul and the Senate had to start the process all over again, and it took an additional two months for Chief Justice Rowan Wilson to be confirmed.⁷⁵ In that five-month time span, New York's highest court was without a Chief Judge, which demonstrates that the possibility persists for an important high-ranking office to remain vacant. Conceivably, the lieutenant governor's office could be vacant for an extended period of time and if that were the case, then the NYSBA proposal without our supplement would have the entire confirmation process start over again. The implications of such a scenario are clear as well, namely that confirmation battles are likely to capture the attention of legislators which means that the legislative agenda and governing process is put on hold.⁷⁶

IV. Tying Loose Ends and Rebutting Counterarguments

Our supplement to the NYSBA recommendation assumes that anyone who is provided on the list of potential replacements for the lieutenant governor is indeed eligible to become governor himself. The New York constitution provides that a governor and lieutenant governor must be a United States citizen, who is at least 30 years old, and has been a New York resident for at least five years.⁷⁷ To leave no room for constitutional questions of eligibility, our proposal will include specific language stating that any lieutenant governor replacement must comply with the constitutional requirements to hold office.

Additionally, we must note that when a governor unilaterally appoints a replacement lieutenant governor from the list of candidates, that individual must resign from his or her current position. They may not serve two roles simultaneously. This is common sense. We must, however, be abundantly clear and leave no room for ambiguity that could create undue confusion or be exploited for political advantage.

A. Unitary Executive Counterargument

First among the counterarguments to our proposal is that the governor has an absolute right to choose those who work as the second highest official in their administration. We do not deny the proposition that the governor has the right to fill his or her administration with like-minded individuals.⁷⁸ That proposition is of course true for positions such as chief of staff and secretary to the governor. But the governor does not have unfettered discretion to choose his or her

⁷⁴ Luis Ferré-Sandurní, *State Senate Rejects Nominee for Chief Judge in Defeat for Hochul*, N.Y. TIMES (Feb. 15, 2023), <https://www.nytimes.com/2023/02/15/nyregion/hector-lasalle-chief-judge-vote.html>.

⁷⁵ Luis Ferré-Sandurní, *Rowan Wilson is Confirmed as New York's Chief Judge*, N.Y. TIMES (Apr. 18, 2023), <https://www.nytimes.com/2023/04/18/nyregion/rowan-wilson-ny-chief-judge.html>.

⁷⁶ See Anne Gronewold, *Hochul's Chief Judge Pick Rejected by Her Own Party in Stunning Defeat*, POLITICO (Jan. 18, 2023), <https://www.politico.com/news/2023/01/18/hochul-chief-judge-pick-rejected-00078443> (quoting legislative leaders who would otherwise have controlled the Senate policy agenda).

⁷⁷ N.Y. CONST. art. IV, § 2.

⁷⁸ See Patrick A. Woods, *Automatic Lieutenant Gubernatorial Succession: Preventing Legislative Gridlock without Sacrificing the Elective Principle*, 76 ALB. L. REV. 2301 (2014).

lieutenant governor. There must be checks and balances. That both the governor and the lieutenant governor are elected at the same time, and on the same ticket,⁷⁹ indicates that there are limits on who may occupy the highest offices in the state. It therefore follows that when there is a vacancy in the lieutenant governor's office, there must be limits on who may fill that vacancy for the sake of consistency. The NYSBA proposal properly creates a limit by subjecting a nominee to legislative confirmation, and our supplemental provision creates a limit by only allowing the governor to unilaterally pick certain officials who have already been vetted democratically.

Limiting the governor's selection power also reduces the possibility of political gamesmanship and abuse. It ensures that the individual slated to become lieutenant governor is qualified and did not just get the position through political connections. Practically, such considerations will inevitably influence who the governor selects to serve in the executive branch to some extent, but the need for an effective government demands that this effect be constrained by strict and clearly defined processes.

B. Comparison to Other States Counterargument—Unilateral Appointment Appears Uncontroversial Elsewhere

One counterargument to limiting the governor's appointment power is that unilateral appointment is already an effective policy. It is the current law under the *Skelos* precedent. Though it has been messy at times, it ultimately provides the governor with the lieutenant governor of their choice and has not created long standing vacancies. Unilateral appointment of a replacement lieutenant governor has also very recently proven effective in New Jersey during the recent sudden vacancy in the summer of 2023.

On August 1, 2023, New Jersey Lieutenant Governor Sheila Oliver suddenly passed away while serving as acting governor (Governor Phil Murphy was out of the country).⁸⁰ When there is a vacancy caused by the death, removal, or resignation of the lieutenant governor, New Jersey's constitution provides that the governor has 45 days to appoint a replacement.⁸¹ There is no check, by the state Legislature or anyone else. Governor Murphy named Tahesha Way as the replacement lieutenant governor, and there was no outcry from the public, no suggestion that Lieutenant Governor Way was not right for the job, or that her appointment was inappropriate because the Legislature or voters did not approve it. In part, this could be because the position of lieutenant governor in New Jersey is relatively new, and the voters created this position and its subsequent replacement method by referendum in 2005. However, these events demonstrate that a unilateral appointment of a replacement lieutenant governor can be achieved responsibly and popularly and be viewed as democratically legitimate.

But this example is not applicable to New York. New Jersey voters decided recently to create the position and the mechanism for filling vacancies. The lieutenant governor of New Jersey also has

⁷⁹ N.Y. CONST. art. IV, § 1.

⁸⁰ Summer Conception, *N.J. Lt. Gov. Sheila Oliver Dies After Hospitalization for Unspecified 'Medical Care'*, NBC NEWS (Aug. 1, 2023), <https://www.nbcnews.com/politics/politics-news/new-jersey-lt-gov-sheila-oliver-dies-hospitalization-unspecified-medic-rcna97564>.

⁸¹ See N.J. CONST. art. V.

a purely executive role. By comparison, the New York lieutenant governor is the potential deciding vote on legislation when the Senate is tied. This function, effectively as a legislator, would violate democratic norms if that tie-breaking vote came from an unelected and unconfirmed official. New Yorkers have yet to have a democratic say in how vacancies are filled, and a unilateral appointment by the governor denies the people a voice in their elected governance.

C. Comparison to Other States Counterargument—Why Our Conditional Unilateral Appointment is Preferable

Our proposal is not the only approach to lieutenant governor replacement that involves the governor choosing from a predetermined list.⁸² In Alaska, when a new governor is elected, he or she is given a deadline to choose an official “who would become lieutenant governor in the event of a lieutenant governor vacancy” based on “a limited pool of elected officials.”⁸³ While the Alaska model is laudable for its limitation to a list of elected officials (the attorney general, comptroller, the most recently elected temporary president of the Senate, and the most recently elected Speaker of the Assembly),⁸⁴ we are concerned with the timing of that model.

Circumstances and political alliances change during a governor’s term. If a governor were to choose a lieutenant governor replacement at the outset of the administration, and circumstances change such that the replacement is no longer held in esteem, then the governor’s administration could be diminished. We have granted that a governor has the right to choose like-minded individuals to populate his or her administration. So, if a governor is forced to choose a lieutenant governor at the outset of the administration and political alliances shift, then the lieutenant governor replacement jeopardizes the governor’s administrative right. Additionally, the challenges facing a state can change over time, such that expertise of certain officials may become more relevant as a replacement lieutenant governor. Lastly, the timing may further jeopardize the people’s right to policy and political continuity given changes in an individual’s policy stances and even political affiliations. With that in mind, *we recommend that a governor choose a lieutenant governor replacement when the vacancy occurs*, rather than at the outset of the administration.

D. Concerns About How Long Our Process Will Take

To those who say that the process as proposed will take too long, potentially six months if the governor and Legislature use the maximum time, a look to recent history shows that this timeline is functional. Governor Cuomo resigned on August 10, 2021,⁸⁵ and on August 26, 2021 Governor Hochul named Brian Benjamin to become the new lieutenant governor.⁸⁶ After Brian Benjamin resigned, it took Hochul three weeks to announce Antonio Delgado as the replacement

⁸² Fordham Law School Rule of Law Clinic, *Changing Hands: Recommendations to Improve New York’s System of Gubernatorial Succession*, at 1, 12 (2022).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Marina Villanueva, *Gov. Andrew Cuomo Resigns Over Sexual Harassment Allegations*, ASSOCIATED PRESS (Aug. 10, 2021), <https://apnews.com/article/andrew-cuomo-resigns-17161f546bb83c32a337036ecf8d2a34>.

⁸⁶ Luis Ferré-Sandurní, *Hochul Picked a Running Mate. Now She Has to Pick Another One.*, N.Y. TIMES (Apr. 12, 2022), <https://www.nytimes.com/2022/04/12/nyregion/hochul-brian-benjamin.html>.

lieutenant governor.⁸⁷ Based upon this recent history, it appears unlikely that a governor would take the full 60 days to announce a nominee for lieutenant governor, let alone the full 30 days.

The process may be more like uses the 25th Amendment to fill vice presidential vacancies, which happened with the confirmations Gerald Ford and Nelson Rockefeller. President Richard Nixon nominated Ford to become vice president two days after Vice President Spiro Agnew resigned in 1973.⁸⁸ It took Congress almost two months to confirm Ford to become vice president through both houses.⁸⁹ After Nixon resigned and Ford became president, it only took him eleven days to nominate Rockefeller to fill the vacancy in the vice presidency.⁹⁰ Congress took nearly twice as long to confirm Rockefeller to the vice presidency, but that would not be an issue with our proposal because of the limit on how long the Legislature has to vote on a nominee. Once again, history underscores that executives tend to quickly fill vacancies in the offices of the lieutenant governor and vice president.

E. Withdrawal of Nomination by the Governor

The governor must be able to withdraw a nominee from consideration if new circumstances require it. For example, if during the confirmation process the governor discovers that his or her nominee is under investigation or misled the governor, then the governor must have the discretion to withdraw the nomination. Because one purpose of our reform is to ensure that a lieutenant governor replacement is properly vetted,⁹¹ it follows that the governor must be given this discretion if new information comes to light.

When a withdrawal occurs, the question remains as to whether the timeframe for a new nomination resets, or whether the process moves on to the next stage. In other words, if a governor withdraws a lieutenant governor nomination during the 60-day period, does the 60-day period reset giving the governor *another* 60 days to nominate a new replacement? Or, does the nomination process move on to the 30-day timeframe? Likewise, if a withdrawal occurs in the 30-day time frame, does the conditional unilateral appointment stage commence? Or, does the 30-day time frame reset? The answer here lies in balancing the necessity of thorough vetting with a speedy and efficient replacement process. To provide the governor enough time to properly research and nominate a new lieutenant governor replacement when a withdrawal occurs, the timeframe should reset instead of moving on to the next stage in the process. However, repeated withdrawals could cause excessive delay. Because New Yorkers have a right to a well-functioning government, the prospect of such undue delay must be limited. *To that end, we propose that the governor only be allowed to use his or her withdrawal power once.*

The first withdrawal of a nominee is the only point where the time period for naming a new nominee resets. For example, if the governor withdraws a nominee during the 60-day period, the time will reset to give the governor another 60 days to nominate a new person. However, if the governor wants to withdraw the second nominee, he or she may not do so, and if the Legislature

⁸⁷ Ferré-Sandurní & Fandos, *supra* note 27.

⁸⁸ *The Establishment and First Uses of the 25th Amendment*, GERALD R. FORD PRESIDENTIAL LIBR. & MUSEUM, <https://www.fordlibrarymuseum.gov/library/exhibits/amendment25/25thamendment.asp> (last visited Nov. 25, 2023).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See Ferré-Sandurní, Fandos, & Mays, *supra* note 29.

rejects the second nominee, then the 30-day time period will begin. This limited reset procedure incentivizes good governance. By providing only one reset, the governor is incentivized to conform with good faith nomination procedures, and correct a past mistake. This limited reset also preserves the Legislature's power as a stakeholder. If the nomination process simply moves on to the next phase after a withdrawal, then the governor can essentially reduce the time the Legislature has to hold confirmation votes. In other words, if withdrawal resulted in moving to the next phase, then the process could be more easily exploited for political gain and thus undercut the Legislature's role.

Conclusion

The lieutenant governor of New York is an important position. The lieutenant governor is always one heartbeat, or resignation, away from ascending to the governorship. It is therefore important that New York has a lieutenant governor who is capable, ready to serve on day one, and someone who New Yorkers view as democratically legitimate to represent them at the highest level of state government.

Recent history shows this is not a position where one serves idly. Nor is it a position that can be left vacant indefinitely. Under the current NYSBA proposal to fill vacancies there is a possibility that a stalemate could create an indefinite lieutenant governor vacancy. The breakdown of democratic norms seen in the United States over the last decade shows that relying on these norms creates the possibility of large-scale government dysfunction. Thus, the Fordham University School of Law Rule of Law Clinic endorses the NYSBA recommendations, with a modification. We believe this will ensure a functioning, predictable process by which the lieutenant governor can be replaced and comports with values of democratic legitimacy and elective principle, as well as structural and practical considerations.

We, along with the NYSBA, are not the only ones supporting reform in this area. Former Governor Paterson, who first deployed the unilateral appointment power, also supports efforts for reform.⁹² Given this fact, we believe that the time is right for change, and support from various stakeholders underscores both the viability and necessity of our proposal.

⁹² See Susan DeSantis, *Ex-Gov. David Paterson Supports NYSBA Report on Gubernatorial Succession but With Caveats*, N.Y. ST. B. ASS'N (Nov. 6, 2023), <https://nysba.org/ex-gov-david-paterson-supports-nysba-report-on-gubernatorial-succession-but-with-caveats>; Erin DeGregorio, *At Fordham Law Program, Former New York Gov. David Paterson Voices Support for Gubernatorial Reform*, FORDHAM LAW NEWS (Nov. 27, 2023), <https://news.law.fordham.edu/blog/2023/11/27/gubernatorial-succession-in-new-york>.

Appendix—Draft Constitutional 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, 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.

During the sixty-day and thirty-day periods, the governor shall have the power to withdraw a nomination for a replacement lieutenant governor. If a governor withdraws a nomination in either time period, then the next time period shall not commence, unless the withdrawal power has already been exercised once. Where the governor exercises the withdrawal power in the first and only instance he or she shall have the same amount of time as he or she previously had to nominate another candidate, and the legislature shall have the same amount of time as previously conferred to confirm or reject the nomination. If a governor chooses to withdraw a nominee and nominate a new person, any change in nomination thereafter shall result in the next time period or replacement mechanism commencing.

If the legislature rejects the governor's nominations in both the sixty-day and thirty-day time periods, then the governor shall immediately have unilateral power to appoint a lieutenant-

governor from a list comprising of heads of executive departments who have been confirmed by the legislature for their current position, excluding acting heads of executive departments, as well as the State Attorney General and the State Comptroller.

The governor may not unilaterally appoint anyone for lieutenant governor who was previously nominated and rejected by the legislature during the sixty day and thirty-day time period.

When the governor unilaterally appoints a lieutenant governor from the aforementioned list of candidates, the chosen candidate must immediately resign from his or her former position should they choose to accept the appointment and may not at any point serve in more than one government office at the same time.

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.