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**Report of the New York County Lawyers Association for the
Establishment of a Task Force on Lieutenant Gubernatorial Succession**

Adopted April 27, 2022

The recent indictment and resignation of former New York Lieutenant Governor Brian Benjamin puts the spotlight on a critical flaw in New York's Constitution and its statutory regime: neither contains a provision explicitly dealing with the replacement of a Lieutenant Governor who is unable to complete his or her term.

It is notable that former Lieutenant Governor Benjamin was appointed by Governor Hochul who had herself been a Lieutenant Governor who succeeded Governor Andrew Cuomo upon his resignation. This is the second time in recent years that a Lieutenant Governor has succeeded a Governor and has then appointed a successor Lieutenant Governor with little, if any, transparency, and no advice and consent by the legislature or approval by the electorate. The time has come to address this serious flaw.

In light of the statewide ramifications, the New York County Lawyers Association (NYCLA) calls for the establishment of a blue-ribbon Task Force on Lieutenant Gubernatorial Succession consisting of respected leaders from bar associations around the state, as well as academics and stakeholders. The Task Force's mission would be to study, investigate and make appropriate recommendations which would provide a clear, reliable and transparent procedure and process for Lieutenant Gubernatorial succession. Among its charges, the Task Force would consider whether, New York's Lieutenant Gubernatorial succession procedure should be modified to:

- align with the procedure in the majority of states, similar to a procedure that tracks the Twenty-Fifth Amendment to the U.S. Constitution; or

- have a special election to permit the voters, instead of the sitting Governor, to choose the new Lieutenant Governor; or
- provide an alternate method for Lieutenant Gubernatorial Succession.

Since this is an issue of statewide significance, NYCLA believes that the New York State Bar Association (NYSBA) is uniquely situated to convene such a Task Force. Therefore, NYCLA proposes that NYSBA do so. NYCLA pledges full support of such efforts and would be pleased to participate in this important endeavor.

Background

There have been at least twelve vacancies in the office of Lieutenant Governor dating back to 1811. No Governor until July 2009 ever attempted to fill the office of Lieutenant Governor. 915 N.E.2d at 1152 (Pigott, J., dissenting).

No provision of the State Constitution governs Lieutenant Gubernatorial succession. Article IV, Section 6, of the New York State Constitution provides that in the event of a vacancy in the office of Lieutenant Governor, the temporary president of the Senate “shall perform all the duties of lieutenant governor during such vacancy.”

The Public Officers Law is the only statute that arguably covers lieutenant gubernatorial succession. Section 42 of the Public Officers Law provides generally for the filling of vacancies in elective office but specifically excludes the governor and lieutenant governor. Section 43 is a catchall appointment power typically included in state constitutions.

NYCLA urges that appropriate legislation be considered to provide for a clear statutory Lieutenant Gubernatorial succession procedure. The task force could consider such alternatives as the current system, a special election, or a procedure like that adopted in most states in which the governor nominates a replacement subject to legislative confirmation.

The Skelos Decision

In *Skelos v. Paterson*, 915 N.E.2d 1141, 1143 (N.Y. 2009), addressing Governor Paterson’s appointment of Richard Ravitch to fill a Lieutenant Gubernatorial vacancy, by a 4-3 majority, the New York State Court of Appeals held that the Governor may fill a vacancy in the office of Lieutenant Governor without any advice, counsel, consent or input from the legislature. However, that ruling rests upon a controversial argument of statutory interpretation that garnered a three-judge

dissent.¹ As the dissenters pointed out, the *Skelos* ruling raises the possibility that an unelected Governor could appoint a Lieutenant Governor who could later become Governor, without ever having received a single popular vote or been vetted and approved by the Legislature. 915 N.E. 2d at 1147.

Regardless of the merits of the *Skelos* decision, it is worthwhile for decisionmakers to study other possible approaches to the Lieutenant Gubernatorial succession issue. As the author of *Skelos*, former Chief Judge Lippman, acknowledged, the regime set out in the *Skelos* decision is not necessarily the best approach to the issue and is not necessarily one that would be adopted after research and analysis by a legislature or state constitutional convention. *Skelos*, 915 N.E.2d. at 1146 (Lippman, C.J.) (“Before us . . . is not the abstract question of whether it would be better [to have some other system].”).

The *Skelos* court concluded that section 43 of the Public Officers Law applied to the Lieutenant Gubernatorial vacancy. It noted that a vacancy occurred and that there was no other provision for filling it, and therefore, that Governor Paterson had the power to fill the Lieutenant Gubernatorial vacancy. *Id.* at 153. According to the dissent in *Skelos*, “[u]ntil now [Public Officers Law section 43] had been used to fill vacancies in local offices but, in no instance, the second most important executive office in the state.” 915 N.E.2d at 1147 (Pigott, J., dissenting).

Lieutenant Gubernatorial Succession in Other States and the Twenty-Fifth Amendment

Twenty-one states have explicit lieutenant-gubernatorial replacement procedures. Almost all of these states have adopted a procedure akin to that contained in the Twenty-Fifth Amendment to the U.S. Constitution, the provision which governs the replacement of the Vice President.² In those states, the governor nominates a replacement Lieutenant Governor who must then confirmed by the Legislature (usually both chambers).

¹ Patrick A. Woods, Comment, Automatic Lieutenant Gubernatorial Succession: Preventing Legislative Gridlock Without Sacrificing the Elective Principle, 76 ALB. L. REV. 2301 (2012/2013) (arguing that *Skelos* was wrongly decided (<http://www.albanylawreview.org/issues/pages/article-information.aspx?volume=76&issue=4&page=2301>); Eric Lane & Laura Seago, Albany’s Dysfunction Denies Due Process, 30 PACE L. REV. 965, 965 (2010) [(describing the *Skelos* decision as being on “thin law”

²T. Yeargin, *Recasting the Second Fiddle: the Need for A Clear Line of Lieutenant Gubernatorial Succession*, 84 Albany Law Review (2021) The pertinent provision of the Twenty-Fifth Amendment reads as follows: “ Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.”

At least six states task state legislatures with the power of selecting Lieutenant Gubernatorial successors. And three states require special elections to fill such vacancies.³

Eight states fall in the same category as New York and implicitly give governors the power to replace lieutenant governors but not through any formal procedure set out by statute or in the states' Constitution.⁴

Difficulties with the *Skelos* Decision as Compared to the Regimes in Other States

There are three difficulties with maintaining the *Skelos* decision as the applicable rule for Lieutenant Gubernatorial replacement.

First, unlike the Twenty-Fifth Amendment, the *Skelos* decision provides no mechanism for legislative input or the input of any elected official other than the Governor, who might also be unelected. Under *Skelos*, the appointment is made by the Governor with no confirmation process whatsoever. As even the majority in *Skelos* conceded, the *Skelos* rule “does create the possibility that an unelected individual will, for a time, occupy the State's highest office.” 953 N.E.2d at 1151.

Second, the Twenty-Fifth Amendment provides that the President “shall” nominate a successor Vice President in the event of vacancy. Likewise, if a special election were held to fill the vacancy, this important state office would be filled in a timely fashion and in a manner consistent with the preference of the voters. By contrast, the *Skelos* decision contains nothing requiring the New York Governor to appoint a Lieutenant Governor – it merely permits the Governor to make such an appointment.

Third, the *Skelos* decision says nothing about the timing of any such gubernatorial appointment. This omission, too, creates the possibility of a long-term vacancy in the state's second highest office.

Conclusion

The citizens of the State of New York deserve a transparent, reliable process to replace a Lieutenant Governor who is unable to complete his or her term in office. NYCLA believes that a statutory framework to address Lieutenant Gubernatorial succession would be preferable to the current approach enshrined in the *Skelos* decision.

³ T. Yeargin, *Recasting the Second Fiddle: the Need for A Clear Line of Lieutenant Gubernatorial Succession*, Vol. 84 Albany Law Review (2021).

⁴ *Id.*

Therefore, as stated earlier, NYCLA urges the New York State Bar Association to establish a blue-ribbon Task Force on Lieutenant Gubernatorial Succession to study, investigate and make appropriate recommendations for a clear, reliable and transparent procedure and process for Lieutenant Gubernatorial succession.