



The Nelson A. Rockefeller Institute of Government

Gubernatorial Succession and the Powers of the Lieutenant Governor

A Public Policy Forum



Presented by
Honorable Joseph L. Bruno
Honorable Robin Schimminger
Gerald Benjamin
Richard Briffault
Peter J. Galie

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Robert Ward:

Good morning. I'm Bob Ward, the deputy director of the Rockefeller Institute of Government. Thank you all for coming today. The Institute has a longstanding interest in the study of the New York State constitution. Some of you may have a copy of this book, *Decision 1997*, which came out as a prelude to the referendum a little over ten years ago on whether we should have a constitutional convention. Several of our speakers here today were key contributors to that volume and I recommend it to your attention.

We conceived of this discussion several weeks ago after the unfortunate and unexpected departure of Governor Spitzer. It's always a shock when the constitutional provisions regarding succession in high office come into play, but the odds tell us that it really shouldn't be.

At any one moment in time, it's very likely that whoever is the governor will stay the governor through the end of his or her term.

Over the long run, we can pretty much take it as a certainty that at some point there will come a time when the governor leaves office for one reason or another. He or she might move on to higher office, like Grover Cleveland and Charles Evans Hughes did many years ago, and as other New York governors have thought about doing. Or he or she might resign for other reasons as, again, we saw Governor Spitzer do very recently.

Compared to what we've seen at the presidential level, there has been little turnover among New York governors as the result of an incumbent dying in office. The only governor to vacate his office that way was DeWitt Clinton, who died of heart failure in February 1828 and was succeeded by Nathaniel Pitcher.

We certainly have had vacancies in recent years, not only in the governor's office, but in the lieutenant governor's office, as well as in the attorney general and the comptroller's offices. So this is a very timely discussion and Governor Spitzer's resignation took place at a time when the lieutenant governor's office is of particular interest because of the lieutenant governor's role regarding the operations of the Senate and because of the close partisan balance in the Senate at this time.

So we're very pleased that a little bit later this morning we'll be hearing from the acting lieutenant governor, Senator Bruno. We'll go over his thoughts on serving in his new role, the sort of questions that we all should be thinking about in relation to that and on the constitutional provisions that bear on all these issues.

After Senator Bruno's remarks, we'll hear from three of the ranking academic experts on the subject of New York State's constitution and its relationship to the way our state government works. I'll introduce them a little bit later on.

But now we're going to introduce our first speaker, who has been a leading advocate in the Legislature — and in recent years *the* leading advocate — for the types of reform proposals that we are here to talk about today. Robin Schimminger has served in the Assembly since 1977. He represents parts of Erie and Niagara counties. He is a graduate of Canisius College, where one of our academic experts is on the faculty. And Robin is the only member of the Legislature who has also studied at the William Butler Yeats International School of

Literature in Sligo, Ireland. And when you have a chance to talk to him, you'll find he'd be just as happy talking about that as he would about our constitution.

Assemblyman Schimminger holds a law degree from New York University School of Law and is well known as a champion of improving the business climate to help rebuild the Upstate economy. He has authored more than 300 state laws that are too numerous for me to describe today. But if you go to his Assembly web site, the top item is his headline, "Lieutenant Governor Reforms Long Overdue," and that's something that you don't see at the top of a lot of legislators' web sites.

So, it's a great pleasure to ask you to join me in welcoming Assemblyman Robin Schimminger.

Robin Schimminger:

Thank you very much, Bob, for the kind and gracious introduction. You could have stopped as soon as you got to the part where you referenced my bachelor of arts degree from Canisius College. That would have been more than sufficient.

Before the session began this morning, out in the hallway, I ran into Jerry Benjamin. Jerry and I were reminiscing about when we first met back in the 1980s. I was traveling abroad and accompanying Jerry Benjamin because of a role I then had as chair of the Commission on Economy and Efficiency in Government, created by then Speaker Stanley Fink.

Among the various activities of that commission was an in-depth look at the operation of state government generally, but more specifically at the operation of the Office of Lieutenant Governor. From that study came a report. It has been collecting dust on a variety of shelves across the State Capitol, perhaps across the state. The report, prepared by Mary Eileen Kirchgraber of the staff of the Commission, a Canisius College alumna, described some of the anomalies in our state constitution and laws with regard to the Office of Lieutenant Governor.

After that report, I filed legislation beginning in the late 1980s. I filed an election law change, consistent with one of the findings of the report, that the Offices of Governor and Lieutenant Governor should involve a little more teamwork. Presently, in terms of the election of lieutenant governor, as most of you know, he or she runs separately from the gover-

nor at the party convention and in the primary, and they are only “married” in the general election in November. Therefore, the result can be a mixed marriage between individuals who might have not been each other’s first choice early on in the process; we’ve seen that happen.

So, the election law change that we then proposed would have the governor and lieutenant governor aspirants select each other, pair with each other, early on in the process. Party conventions and primaries would select a pair of aspirants for the offices such that you have a greater level of teamwork and compatibility once they are elected. I still sponsor this legislation. And while this is not really the subject at hand here today, it’s a sidebar aspect to it all.

The constitutional amendment I filed contained three provisions that deal with some levels of general agreement and some levels of greater disagreement. The constitutional amendment embodied in a concurrent resolution now pending before the State Legislature, Assembly Bill 3121, has three provisions.

The first, which appears last in the resolution, deals with the issue of gubernatorial absence from the state. Back in the times of colonial government, the governor of New York State was also the head of the state military. When that governor left the state, it was important to have someone on the ground in charge. No telephones, no faxes, no cell phones.

And so, the original constitution of the state provided that when the governor was absent from the state, the lieutenant governor, the number two who was next in line, would serve as acting governor during that absence. This has become a bit of an historical anomaly now. A governor today can be governor wherever he travels. Modern telecommunications can keep him in immediate contact, whether he’s in Washington, DC, or Tokyo, Japan. He can be in immediate and constant contact with the state government.

So, the first provision of the constitutional amendment is to remove that so-called “absence” clause from the state constitution ensuring that the governor of New York is the governor wherever he or she travels outside the boundaries of New York State.

The second change contained in the constitutional amendment, which appears second in the bill, deals with the vacancies that occur from time-to-time in the Office of Lieutenant Governor. As our constitution stands now, there is no provision for filling a vacancy in the

Office of Lieutenant Governor. We are in that situation right now, today. A lieutenant governor, who acceded to the governorship on March 17th of this year, vacated the lieutenant governor's office, resulting in a permanent vacancy in that office until after the next election.

In this constitutional amendment, we provide that upon a vacancy in the Office of Lieutenant Governor, the governor shall nominate a person to take office as lieutenant governor, and that nomination will be subject to confirmation. And that confirmation would be, under the terms of the resolution, a confirmation by both houses of the Legislature together. You can read the language different ways, but our legislative intent at this time is both houses sitting together to confirm the governor's appointment of a new lieutenant governor.

Some might ask, "What do they do in Washington?" Well, the 25th Amendment to the United States Constitution provides in Section (2) that 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.

So, in Washington both houses are involved. So, too, in this constitutional amendment that I have advanced, both houses would be involved in the confirmation of the nominee for lieutenant governor.

Now some might say, "In New York State, it's the state Senate that does confirmations. It's the state Senate that confirms commissioners who are appointed by the governor." Well, that's true, but they are commissioners. The lieutenant governor is a statewide elected office, and we're filling a vacancy in that office. And so, to the greatest extent, the will of the people should be reflected in that confirmation and it is more achievable to accomplish that broad consent of the people through the involvement of two houses.

Some senators might say, "Well, wait a minute. We have a special role. We have a special relationship with the lieutenant governor. He or she presides over our house; therefore, we should be the ones, solely, who confirm."

It's true the lieutenant governor does have a special relationship with the state Senate, but that doesn't mean that the Senate picks the lieutenant governor; the lieutenant governor is elected statewide by the people of the state. He or she may not have compatibility with the state Senate. That's just the way it is.



So, the debate on filling the vacancy in the Office of Lieutenant Governor may revolve around who gets to confirm. I just wanted to bring that to your attention. You may hear more about it later.

A third provision in the constitutional amendment, which appears first in the text, deals with a lingering issue in New York State, which fortunately we

have never really had to confront; but you never know when it might happen. And that is in regard to the inability of the governor to govern, due to severe dementia, stroke, or major illness that affects his or her ability to govern. The constitution makes reference to gubernatorial inability, but makes no provision for who decides it and what the standards are for measuring it. So, this constitutional amendment deals with that question.

Let me read to you from an internal document that I received just the other day analyzing the situation in New York State. “Unlike the federal system, while the state constitution recognizes that there are times when a governor may not be able to discharge the powers and duties of the office, no formal procedure exists in New York State by which the governor may voluntarily declare an inability and temporarily transfer power, nor is there a procedure by which an involuntary declaration of an inability may be made.”

This constitutional amendment does just that; it provides that a governor, if he or she feels it necessary, may transmit to the chief judge, the lieutenant governor, the president of the Senate, speaker of the Assembly, and both minority leaders in both houses, a written declaration of his or her inability. And, when he makes that transmission, then the next in line of succession steps into the shoes of governor. That is the voluntary transmission by the governor. We do not have such a procedure now.

If the present governor, for example, was hospitalized and not able to govern, there is no established procedure now by which he transfers power to the next in charge. Now, it may well be that those two individuals, the governor and the next in line, have a wonderful relationship; they trust each other and they get along. Well, that’s nice, but that’s not always necessarily the case and this is a void in our state constitution that this constitutional amendment would address.

What if the governor is suddenly stricken and does not have time to make such a transmission? That's where the provisions in regard to involuntary declaration come in. The constitutional amendment provides that you can have a unanimous transmission by the lieutenant governor, the speaker, the president of the Senate, and the two minority leaders, requesting that the governor be temporarily removed because of his inability to discharge his or her duties. That transmission is made to the chief judge of the Court of Appeals, and the chief judge of the Court of Appeals convenes the court and makes a finding that the governor is indeed unable to govern, thereupon you have the involuntary, temporary removal of the governor.

There are procedures by which the governor can come back, as well. There is an automatic 30-day hearing by the Court of Appeals. The governor himself may make a declaration that now he is able to return. Also, those who made the original declaration, the five unanimous individuals, may by a majority vote, ask the court to reconvene and make a determination that the governor is able to govern.

So, those are the three provisions in this constitutional amendment. The amendment did pass in the Assembly, only quite a number of years ago. It has not seen much interest in recent years; but as Bob Ward said, interest in these kinds of things picks up when the circumstances of the day trigger an interest. And, unfortunately, when those circumstances trigger an interest, there tends to be a great deal of focus on whose ox will be gored and who will gain an advantage by such a change, even though the change does not occur, because it's a constitutional amendment until two separately elected legislatures act on it, and until voters approve it.

In closing, let me say that I do not have any partisan agenda with this proposal. I am motivated, believe it or not, by the good governance of the state. I sponsored this while Mario Cuomo was governor, while George Pataki was governor, and Eliot Spitzer, and now David Paterson. I think that the Office of Lieutenant Governor is an important one. He or she should be part of the governor's team. He or she is, after all, the next in line of succession and leaving that office vacant is not for the good of the state.

I'll conclude with that and I welcome and encourage any questions, any comments. Thank you.

Robert Ward:

Robin, you mentioned that your proposal did pass the Assembly. Was there any serious opposition, any serious debate over any provision that could be controversial, such as precisely how the declaration of disability would be made or other things? Is there any good argument against passing this proposal that we're seeing here?

Robin Schimminger:

It passed the Assembly and not the Senate. In the Assembly, there were some questions about the declaration of inability procedures. There was a fear that certain of the players involved might have personal agendas. I don't think that those personal agendas could readily come into play, because after all if there is to be a request by the five, lieutenant governor, president of the Senate, speaker, and the two minority leaders, you have great diversity there and it must be a unanimous transmission to the Court of Appeals. I suppose one or another player could balk at declaring a clearly stricken governor unable to govern. But, he or she would have to answer to the public for that, depending on the circumstances.

For the return of a governor, I think in the initial draft of this legislation, we required the same unanimity, and that's where you could have had some mischief. On the return, one person might balk at unanimity. "Well, I'm just as happy to keep him out. The lieutenant governor is doing a great job as governor now." So for the return, we don't require unanimity, we simply require a majority of those who made the initial transmission.

So, there was some concern about the process of declaration of inability. Interestingly, at the national level there is a provision, again in the 25th Amendment. But the players in that declaration process are the president's men and women, the cabinet members, who are involved in that process. So it's a little different at the federal level.

And why the bill didn't pass the Senate came down to that age-old question, "Who has to confirm?" And the language in this constitutional amendment, as it is now written, is purposely a little soft. I read it as both houses sitting together. Someone else would read it and say, "Well, it's really not clear as both houses sitting together." That's okay because it's only a proposal at this point.

I would think that if this were to be enacted, I would want to tighten that language to ensure that it's both houses sitting together, doing a confirmation together, because of all those reasons that I mentioned before. This is not a commissionership. This is a statewide elected office, number two in line of succession. Yes, it's true, the lieutenant governor presides over the Senate, but that doesn't mean the Senate gets a bigger role, necessarily. They don't have a bigger role in picking a lieutenant governor in the general election. There are a lot of arguments for both houses confirming, but there is one countervailing argument that may carry the day and that is that a constitutional amendment must get passed by both houses. So, we'll see.

Irene Lutenzion:

It sounds like what you are saying is that you are willing to compromise on the issue of who does the confirmation. Is that true?

Robin Schimminger:

I am a very flexible person. However, that decision would be made at the party conference levels of both houses. In my view we should require — and my legislation does require — both houses sitting together; that's the way to appoint a comptroller; that's the way we appoint an attorney general; that's the way we appoint regents.

But if it means having or not having an ability to appoint a lieutenant governor, I would yield to having one house do the confirmation. I don't think it's a good process, but it's better than not having a process at all.

Irene Lutenzion:

Would the Assembly, I mean, based on your sense of how the negotiations went before, would they be willing to compromise on that? It sounds like there may be an impasse like years ago.

Robin Schimminger:

You'll be hearing from another speaker very shortly. Whoever that speaker is may very well say, "You know, it's right. Schimminger's right, you know. This is a statewide elected of-

vice. It's not a commissionership. Both houses, sitting together to better ensure that the will of the people is reflected, should be involved in the confirmation process." I think you should pose that same question to a subsequent speaker.

Patty Salkin:

I'm from the Government Law Center at Albany Law School. Would your proposal have time frames for when the new governor would have to designate his or her intended for lieutenant governor? And a time frame for when the Legislature would have to take that up?

Robin Schimminger:

The constitutional language does not have time frames. There could well be statutes enacted to provide those time frames; but, no, there is not a time frame here. For offices such as attorney general and comptroller, I'm not sure that there is a time frame in the constitution or in the law for filling that vacancy, but yet actions are taken fairly promptly in that regard.

I know that there are certain dates spelled out for appointments of regents. No, we do not have time frames. Good question, Patty.

Bob Conner:

Hi, I'm from the *Daily Gazette*. Your amendment would, in the current circumstances in Albany, cut the Senate out completely, and the Senate confirmation would obviously cut the Assembly out completely. When you replied to the previous question, were you indicating that you personally would accept solely a Senate confirmation? Or is there any other kind of compromise that's possible?

Robert Ward:

You were talking about a two-house confirmation.

Robin Schimminger:

Yes.

Bob Conner:

Well, the two house means that ...

Robin Schimminger:

I don't want to cave too quickly on this, you know? Shelly Silver didn't teach me nothing, you know?

You contend that the proposal as it now stands involving that concurrent resolution of both houses sitting together, much like we appoint members of Board of Regents or the general comptroller, would cut out the Senate? It's true that there are more Assembly members than there are senators, but we are all constitutional officials of the state and the legislative body and have a role. I would argue that it doesn't cut the Senate out; the Senate is involved.

There are obviously several ways to do the confirmation. There are four ways. One is both together; one is Assembly only; one is Senate only; and one is each of them separately. In the latter, each house effectively has a veto. But at this point, it's my position that it should be both houses sitting together and that's why the bill is written the way it is.

Howard J. Shapiro:

Robin, let me suggest a fifth way. You made the point at the beginning that it was important to the governor and lieutenant governor to be on the same team together, and as long as you are proposing that the governor nominate, unlike the attorney general or the comptroller who is separately elected by the Legislature when there's a vacancy, why not eliminate any confirmation? Since you are going to have the governor in place, why not just have the governor select who he or she wants to work with them?

Robin Schimminger:

That's another alternative. This, however, is an otherwise elected office, not a commissionership, elected by the people, and an office held by the person first in line in succession. I believe that it is therefore appropriate for the people to somehow express their consent to that nomination. And that consent gets expressed through the elected representatives serving the state Legislature. It's an interesting suggestion, though.

Jay Gallagher:

I'm with Gannett News. Is it your sense that your amendment will pass the Assembly this year? And is there a competing proposal in the Senate? And I have another question. Obviously, the Senate will also be giving up having their top person to be next in line if something happened now to Governor Paterson. Joe Bruno would be governor. Is there some way to broaden your proposal to have a give for the Senate that might make this really viable idea?

Robin Schimminger:

You're a very insightful man, Jay. This constitutional amendment did pass the Assembly years and years ago. I would hope that it would pass this year. There is heightened interest and focus on it. But, as I said before, when you go through those periods of heightened interest, individual agendas come into play. I would hope that it would pass.

You make a very astute point, in terms of motivation of the other house and my hesitance to characterize those motivations, especially when the leader of that house may be coming through the door any minute. But, I hear what you're saying. Presently the leader of that other house is next in line to succession.

Institutionally, why would that house and that leader, the presiding officer of the state Senate, even though this would not take effect for a number of years, wish to put someone else between him and the governor in terms of succession? I would hope that good governance of the state would rule the day and I hope there would be a reflection by those involved that it is important that the will of the people, as expressed in a general election by which they select a governor and a lieutenant governor, is honored through the period of that term.

The problem with going down the line of succession is that the will of the people, as expressed in the last general election in which they elect the governor and lieutenant governor, does not get reflected once you go down the line of succession.

Peter Galie:

Robin and I had this discussion on the air, not in front of this audience. The case statement made is that the Senate has an exclusive role. There are significant constitutionally mandated roles for officers of the Senate in this process. So there's a constitutional reason to allow the Senate to act separately from the Assembly, but there's a political reason for doing so, as well. You want this amendment, and I know you do, and we want this amendment, you're not going to get through the Senate, unless we allow those two bodies to have joint decisions. Decision-making independently of one another, I think that's the best that could happen to have the amendment possibly passed.

Robin Schimminger:

Thank you, Dr. Peter Galie from Canisius College for predicting whether something will pass the state Senate or not.

[Senator Bruno enters the room.]

I defer to authorities even higher than you.

Robert Ward:

Please join me in thanking Assemblyman Robin Schimminger.

Richard Nathan:

My name is Dick Nathan. As co-director of the Rockefeller Institute, I'm very proud of what we do here, and proud to have many good programs like this one.

I've been waiting a long time for a chance to introduce Senator Bruno. He's been in the Senate for 32 years, 12 years as majority leader, known and respected by all of us, a hard worker for jobs and particularly for good jobs for New York. I want to tell you something about him — he has a record that none of you know about. For 44 years, he's been listed in "Who's Who for Young Men in America."

I know from your youthful countenance that it is deserved. I won't take any more time, except to tell a story. I will make it quick. I was having breakfast one day with a very important elected official, unnamed, in New York State government. He'd been around; he'd done important things. He's somebody I really knew well and we were comparing ideas about government and all the hard and important things that we have to tackle in the public sector. And I said to this unnamed person, "You've been in government a long time. Who do you respect that you've worked with?"

And he looked at me and he couldn't think of anybody. I said, "That's incredible. You've been here all these years as one of our top public officials, and you don't have one person?" He looked back at me and he said, "Well, Joe."

So, here he is.

Joseph L. Bruno:

Thank you very much, Richard. Thanks for being gracious and kind in these very public times. And Robin said that he's not going to heckle me and he never does, let me tell you, even though he wants to dump me from my office.

But being a prophet, I will suggest to you that that legislation is not going to pass in the Senate.

Liz Benjamin and some others may have some differing opinions, but so be it. That's what the press is for. Do you know what? I'm glad to be here, and we're going to end up having to speak and leave. We're in session. We're then heading into New York City to do some other things that are very important in our lives.

What do you do as acting lieutenant governor? Presently, if the governor is incapacitated or sedated for a length of time, or out of the state, not able to function and operate in a productive way by his declaration or by observation... And in these fairly sophisticated times, things become apparent. When there's a vacancy and the governor leaves, this has happened twice I think in recent history. When Rockefeller vacated, right? I don't know how much of this you have covered earlier or will cover later, but I think that was in 1973 when Rocky left and Malcolm Wilson was elevated as governor. And I think, again, in 1985

and 1986, February 2nd, when Al DelBello vacated as the lieutenant governor, Warren Anderson was acting lieutenant governor.

So really what you have presently by constitution is in place of the governor, as I described, and you have the deciding vote as the presiding officer and acting president of the Senate.

Now in these times with the Senate majority at 32 with a one-vote majority that is very compelling. If you think about it, the most important vote in the Legislature in either house is the vote that elects the leader.

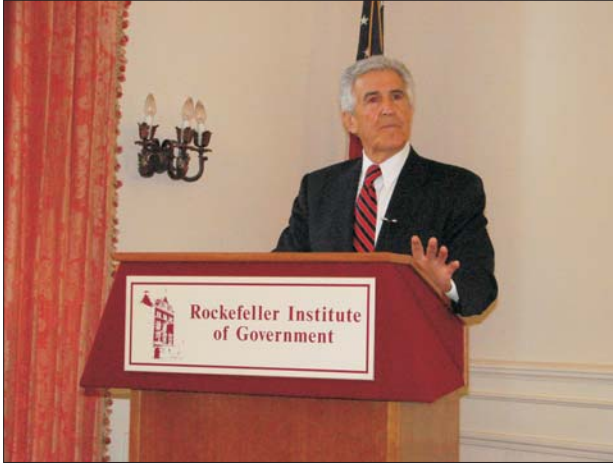
Constitutionally, the lieutenant governor in the Senate has the deciding vote. So, the scholars who study the constitution say as majority leader you have a vote. As acting lieutenant governor in certain times, you have a vote. You have two votes. I think the constitution is very clear, and it would be lovely if you would verify, the answer is “Yes.”

So, that’s really what it’s all about right now. So, I am here. I am happy to have two votes and I can manage. Because you just heard, I am still, after 44 years, a young man of America.

The constitution, we think, is pretty clear. Robin, by the way, really is about as objective a legislator as there is out of 211 presently serving lawmakers. He’s objective, partners, does the right kinds of things. And I thank you for that, Robin.

There aren’t enough good things that I can say about him here; we don’t have enough people like him in the Legislature — in the Assembly, Democrats; more specifically, because they tend to be very partisan, unlike the Senate, where we’re very open and nonpartisan, and we partner with this governor.

We’ve had a traumatic time. On March 17th, the former governor said what he said to the people of this state and left, right? The lieutenant governor, David Paterson, stepped in, with 14 days to get a budget done. How would that have happened if we all didn’t partner? We partnered and we got a budget done. And we got a budget that was \$121.6 billion versus \$124 billion that the former governor had submitted. The first time in anyone’s memory that we went under the governor’s submission. That was a partnership.



David Paterson gets it. This governor understands what negotiation is about, what partnering is about, what compromising is about, and what I'm about as acting lieutenant governor, as majority leader, are results. Governor Paterson wants results and he understands gridlock does not get you results. He understands that very clearly.

I will share this with you very objectively, because the press is always very objective when they report; my perception is that Governor Paterson understands balance. He understands a Republican majority in the Senate. We served together there and we had a friendship, a personal relationship, and a professional and political relationship. And we were close. He understands the dynamic of the Legislature as a separate branch, clearly gets it, understands checks and balances, and what that's all about.

But he gets pressured as the leader of his party to really be more political in these times. He's not going to be overtly political. He is going to govern, and he understands that to govern, the legislation has to pass both houses in identical form where he can sign it. He can't pass the bill; he can't pass the budget. It takes a partnership. He gets it more than any other governor that I've observed or had the pleasure or displeasure of serving with, depending on the time. That happens in this business where people, you know, these days face disagreement.

What is really unbelievable in this state that some people go to the extent that they go trying to eliminate a rival. And these are allegations that will prove out.

The subject here is, do you need a lieutenant governor? Should we change the constitution? My feeling is, no. It's worked pretty well. I mean, maybe in the history of the whole state, I don't know forever, maybe 12 times, things happened. But in recent history, it's twice. There's been a smooth transition, no interruptions, nothing going on.

Now, I don't know, but David called me a few weeks ago, and when I picked up the phone he said, "Hi, governor." It was the governor. I said, "What's going on?" He said, "I'm in Washington and I'm not sure my staff wanted you to know that but I'm calling you."

So, we had a good visit and laughed. I said, you know, “Relax, be comfortable. I’m glad to know you’re out of the state. Relax, take a long time. Stay there as long as you want. I know where your office is. I have a few things in mind. But you’ll find out when you get back. But don’t hurry.” He stayed overnight, I think. But, that’s been our relationship. And I’ve said to him, or I’ve said publicly if anything were to happen where he is incapacitated for any length of time, I wouldn’t be doing anything as acting lieutenant governor in an irresponsible way that wasn’t part of what was established as policy. In the unlikely event that anything becomes permanent, constitutionally, you know what happens? The governor resigns and gets out before August, there’s an election this year for governor.

The acting lieutenant governor becomes acting governor, you know that, until the election this November. If it’s after August, it’s a year from November when the majority leader is acting governor, and then there’s an election. And the lieutenant governor stays there until there’s a gubernatorial election.

That’s the constitution. Some pretty wise people put it together and I’m going to recommend to Robin that he take a look at changing the constitution in a very productive, positive way. We passed a resolution, you’ve got to know this, to cap government spending in this state at 4 percent or the Consumer Price Index (CPI), 120 percent of the CPI, whichever is lower. A constitutional amendment.

Had we done that, instead of looking at a \$5 billion deficit that looks catastrophic? Right now, if we had done it five years ago, we’d have a \$15.1 billion surplus. So, Rob, I offer you that resolution. I would expect you might want to introduce it. It’s already in?

Robin Schimminger:

Yes, I introduced it in the Assembly.

Joseph L. Bruno:

Is that so? Now, I can share this with you. We passed it; the Assembly hasn’t.

And when I brought it up, I can’t tell you that I heard any applause from my counterpart. He acted like it’s probably not necessary. I’m just sharing that with you.

As you all know, to move a constitutional amendment, you have to have two separate elected legislatures. So, if we do this now, you can do it again in January, go through a referendum of the people next November. And I can tell you this, is it 32 years? Fourteen years as leader this year. You will never contain spending with 212 legislators, each one trying to represent a constituency who have huge needs. Huge needs in a state like this, with the Island, Upstate, the City. We have huge needs. We have got to do something. The governor is well-intentioned. He's going to take billions out of the budget, you know? Saying it is one thing; getting it done is another.

I'm asking the governor to support this resolution to step out, use the bully pulpit, get this done. We're talking about the Suozzi Commission coming out with a report, moved now to June 3rd from, I guess, two weeks ago. He's going to recommend something having to do with school aid and local elections, and school budgets, and that kind of thing. That handles one part of the property tax. But we need something and what we're suggesting is the way to go to help poor people.

So lieutenant governor, necessary or unnecessary? You be the judge. I'd be interested in your discussion and your conclusions. But I'll share with you at the moment and I enjoy my two roles. I probably should have two paychecks.

I'm only kidding. But thank you. You've been very patient and thank you for all the good things that you do, as you said. Richard does a great job, as you know, for how many years now?

Richard Nathan:

Twenty years.

Joseph L. Bruno:

Twenty years. Upstanding guy. So, thank you, Robin, it's always great seeing you. Thank you all and God bless.

Richard Nathan:

Senator Bruno, thanks again. The senator is on a tight schedule. We're delighted and honored that he was here. New Jersey doesn't have a lieutenant governor.

Joseph L. Bruno:

New Jersey does not have a lieutenant governor?

Richard Nathan:

No, it does not.

Joseph L. Bruno:

Look at the shape they are in.

Robert Ward:

As always, we heard some stimulating comments from Senator Bruno. We certainly heard the same from Assemblyman Schimminger. And we are looking forward to the observations of our three long-time students of the New York State constitution and the structures that govern the top offices in our state.

I'll briefly introduce the three of them and then ask each of them to offer their comments. To my immediate left is Peter Galie, who is the chair of the department of political science at Canisius College. Peter, among other things, is the author of two books on the New York State constitution. One is *The New York State Constitution: A Reference Guide*. The other is *Ordered Liberty, A Constitutional History of New York*, which traces the development of our constitution right from the very beginning.

Next to Peter is Jerry Benjamin, who is finishing up his ten-year tenure as dean of the College of Liberal Arts and Sciences at SUNY New Paltz. He is a long-time student, teacher, and writer on a wide variety of topics related to New York State government. He has been honored by the SUNY trustees as a distinguished professor of the University. He also is a practitioner of politics and government, having served as a member of Ulster

County Legislature and as both majority leader and chairman, the latter role making him the top elected official in Ulster County. He led the commission that proposed the first charter for the county, which was adopted in 2006.

Finally, Richard Briffault of Columbia University School of Law has studied and written widely on constitutional issues at the state and national level. He has been with the Columbia faculty since 1982. He has served on a variety of commissions both in New York City and at the state level.

And, as I think I said earlier, all three of these gentlemen were significant contributors to our *Decision 1997*, which although it is more than ten years old, is still an excellent guide to the issues that are out there in terms of our constitution. And this may be a good time to point out that the next time the voters get to decide on whether we have a constitutional convention is barely nine years away. The next vote is approaching. So, these things do move over long periods of time, but if you are around for awhile, they come up again.

We're going to ask Peter to start off with some of the history that led us to our current state constitution, and then we'll ask Jerry and Richard to offer some comments. And then we'll hopefully have some dialogue and maybe Assemblyman Schimminger will join in the colloquy at that point, as well. So, Peter, you'll start us off.

Peter Galie:

Thank you, Bob. I have been asked to do this for about 10 or 12 minutes. Since there's not a great deal in the constitution on the lieutenant governor and succession, I think I can do that. I think the discussion will get back to some of the relationships and the problems that I had in connection with Robin's recommendations. I'm certain he has been way ahead of the curve, in terms of thinking about this problem before it came to a head, or at least a potential head, as we saw in the recent events in the last year or so.

We've had a lieutenant governor and a temporary president of the Senate since the first constitution. Indeed, all three offices — governor, lieutenant governor, and temporary president of the Senate — were colonial administration offices. Their existence predated the 1777 constitution. I also note that in the 1777 constitution, one of the requirements for the governor was that the governor and the lieutenant governor be wise and discreet. Unfortunately, we dropped that provision in 1821.

The 1777 constitution provides that the lieutenant governor was to be elected at every election for the governor, and, “As often as the lieutenant governor shall die, resign, or be removed from office.” He was ex officio president of the Senate, and given a casting vote therein. He would, and I quote again, “exercise all the powers and authority appertaining to the Office of the Governor until another be chose for the governor absent or impeached, shall return or be acquitted.” And that’s from Article 20 of the 1777 constitution.

“When both were unavailable, the president of the Senate would administer the government.” We use the term, “acting” today, “until others shall be elected by the suffrage of the people at the succeeding election.” That was Article 21 from the 1777 constitution.

Not a bad start. It said nothing about disability, but we took a long time getting around to putting that provision in.

The 1821 constitution omitted the provision for election of a temporary president of the Senate. Some of you may have a copy of the relevant passages of the 1777 constitution and the current one for comparison. But it continued the succession provision. “The temporary president” this constitution said, “would act as governor until the vacancy shall be filled or the disability shall cease.”

In 1846, the constitution added, “inability to discharge the powers and duties of the said office.” Here we have the first significant revision connecting the issue of the inability or incapacity to serve. And that was added to the list of conditions under which the powers and duties of the governor would devolve upon the lieutenant governor. A similar condition, “incapable of performing the duties of his office,” was added to those which would trigger assumption of the office of temporary president of the Senate. So, you have a disability provision for both the governor and for the lieutenant governor.

At this constitutional convention, interestingly enough, a motion was made to eliminate the office. I think Jerry Benjamin is going to talk a little bit about the number of states that don’t have a lieutenant governor, but I believe in the 1821 and 1846 conventions there were motions made to get rid of the office. And the person who made the motion said, “After all, the lieutenant governor has only two functions and these could be accomplished without having to pay \$6 a day for a contingency.”

In response to that claim, it was argued that the person who was potentially governor should be elected by the people and not the senators. And if the people elected the lieutenant governor they will have some notion as to who would be governor should anything happen to the governor. That provision did not pass.

At the 1894 convention, the line of succession was extended to include the speaker of the Assembly. That was the third and last line of succession added by the constitution.

When the amendment was offered, a motion was made to amend the amendment by placing the secretary of state in the line of succession before the temporary president of the Senate and the speaker on the grounds that the secretary of state was more likely to be of the same political party as the governor. In response to that, one of the delegates said that the secretary of state was only a “high-class, high-priced clerk.” And the temporary president and the speaker were men of great ability, so it didn’t get anywhere. Of course that would be not relevant today. I think in the 1920s we went to the short ballot and we no longer elect the secretary of state.

Charles Lincoln, who is probably unsurpassed as a scholar of the constitutional history of New York State, was a delegate to that convention and here is his comment on this issue: “The question of the speaker’s power to act as governor is not likely to arise very frequently for it does not often happen that three offices prior to him in the line of succession are all absent or incapable of acting as governor.”

In other words, anticipated the remarks of the acting lieutenant governor: “It’s not a big deal. We ought to get on with the business of dealing with more important issues like capping debt limits and spending, and things of that sort.”

The 1938 convention altered the succession procedure. In the event that the office of governor became vacant and no lieutenant governor was in office, the temporary president of the Senate or the speaker of the Assembly, if there were no temporary president, would serve as governor only until the next general election happened not less than three months after such a vacancy occurred. An election cannot be in less than three months because they want the state electorate to become aware, involved, and informed about what the new election is going to be about. Also entertained in 1938 was a motion to abolish the office.



In 1945, a significant change took place that directly affects the problem that we face today. The constitution was modified to preclude any election for lieutenant governor, except at the time of electing a governor. That's a result of something that happened in Governor Dewey's time. Dewey's lieutenant governor, Thomas Wallace, died six months after the inauguration and the Court of

Appeals ruled that an election must be held. Dewey was not happy. Here's what he said about it in supporting this dynamic: "With the administration less than a year old, with the nation at war and there being no other major contested elections, candidacies or state issues, it became necessary for the people of the State to choose a successor to their lieutenant governor." And in 1945 that possibility wasn't there. The temporary president of the Senate would perform the duties during the vacancy.

The 1949 amendment anticipated the death of the governor-elect, likely prompted by the similar death of the governor-elect in Georgia that year or the year before.

In 1953 and 1960 significant changes were made, not as a result of constitutional conventions, but as amendments passed by the Legislature. "When simultaneous vacancies occur in the office of the governor and lieutenant governor, a lieutenant governor and governor shall be elected for the remainder of the term." So, if they are both out simultaneously, an election is required, which is different from the situation governed by the 1945 amendment. It provided for a joint election of a governor and a lieutenant governor. Robin would like us to go one step further and make the nominations joint, as well.

These amendments authorized the Legislature to provide for the devolution of the duty of acting as governor in any case not provided by the constitution; that is, we can't possibly write in all contingencies, pass legislation to fill in the gaps, or deal with other contingencies. I don't think the Legislature has done that.

In 1963, the amendment clarified and differentiated between circumstances where the lieutenant governor becomes the governor and where the lieutenant governor acts as governor, temporarily.

And finally in 1963, we provided for a case where the governor-elect declines to serve or fails to take the oath of office. In that case, the lieutenant governor was to act as governor until the governor-elect does so.

In 2002, there was one other amendment (but it was amended) to make the language in the constitution gender neutral.

Let me conclude by just suggesting some activities that took place outside of the amendment process. There have been groups calling for reforms, and I'm just going to mention some of these groups. Professor and later Federal Judge Jack Weinstein wrote a model constitution for the National Municipal League and had it published in March 1967, a few months before the 1967 convention. He combined sections 5 and 6; he eliminated "absent from the state," and — something to chew on — also eliminated impeachment as the basis for disability, on the grounds that if you have not been convicted of anything, and the governor can say he'd continue to serve, why would you short-circuit the governor's role, simply because he was impeached? It would be similar to what we do at the federal level. He is the only one, as far as I can tell, who has made that recommendation.

The Law Revision Commission made recommendations to the 1984 Legislature relating to gubernatorial inability and succession that were fairly extensive recommendations. In 1997, the Association of Bar of the State of New York formed a task force in anticipation of a state constitutional convention, which they opposed.

The task force recommended filling a vacancy of the office of lieutenant governor by authorizing the governor following, I think, Robin's proposal, to nominate a lieutenant governor subject to confirmation by each chamber of the Legislature. The task force also addressed an area not dealt with in the New York State constitution, namely the situation in which a disabled governor is unable or unwilling to declare his or her inability to serve. They recommended something along the lines of the 25th Amendment.

Finally, let me conclude by making mention of the book *Decision 1997*, where Jerry Benjamin suggested some areas for discussion, as well.

Well, that's my job to give you that brief general history and I think I've pretty much covered it. Thank you.

Gerald Benjamin:

Thank you very much. I'm delighted to be here. I worked here in some distant past day; it's always nice to visit. I have a few, very brief, preliminary remarks.

Regarding Robin, when we studied the constitutional convention process in the 1990s as part of the Revision Commission's work, we cataloged all the constitutional changes introduced in the modern history of New York, and as a result invented the category of a legislator called a "Constitutional Entrepreneur." The idea was to identify who was interested in the constitution, who was interested in the structure of government, and who was thinking about issues like this in New York.

Robin is in that category. He does an extraordinary public service by being in that category. As you know, these issues are not always attended to. And yet we know that the occasion arises where they can become very compelling, as is the case as we speak.

As a result of this constitutional entrepreneurship, we are prepared to consider this sort of matter in a relatively informed way. Somebody has studied the question and has produced legislation, has thought through the issues, whether or not we agree with every line he or she has proposed. That's very important and may go unrecognized without being mentioned.

Second, I must say that the majority leader mentioned something that my introducer missed and that is my proudest credential. And that is that my daughter was in the room. I don't know where she has gone to now, but I regard as a great achievement having come to be known as her father as my primary credential in this state. I found that confirmed in Majority Leader Bruno's recognition of her presence.

So anyway, for next time, Bob. Now, back to my outline.

First, I must note that we are not the only state recently preoccupied by the question of succession to the governorship. Our neighboring states have been similarly interested in the matter. That's a point that I am going to come back to, because I think that although what New Jersey has done is not perfect, it's very interesting. New Jersey's constitution represents the best post-World War II thinking on state constitutional design. It eliminated the lieutenant governor there. Now there will very shortly be a lieutenant governor in New Jer-

sey. It may be that whatever arrangements you have institutionally, you aspire to the alternative when you get into trouble; that is, there may be no greater merit in one approach than in another. But we do have a constitutional amendment adopted in our neighbor, New Jersey, in 2006 that addresses the very questions we have under consideration. I hesitate before a New York audience to advocate for New Jersey as a model — but I think they have acted there and adopted a very thoughtfully considered draft.

I told Bob, at some risk of upsetting him, that I was going to approach this a little differently. He was most concerned about repetition in this panel. I said that I'd approach it by treating lieutenant governor succession as a subset of the general issue of succession to vacancies in elective office. After talking about the principles involved in thinking about this general question in designing a constitutional approach, we can then consider our arrangements against those principles in our discussion today.

Filling vacancies in elective office is a very important thing, little attended to outside of immediate crises. When I worked for the New York City Charter Commission in the late 1980s, I approximated, based on the number of elected offices that there are estimated to be in the United States, and the mortality rates of people of different ages, men and women, that there are a minimum of 2,000 vacancies in elected office annually. We notice only the most prominent ones.

The Citizens Union recently studied the New York State Legislature and documented that about one-third of the seats are filled initially by special election. So, our processes for filling those elected offices are very consequential. We recently noticed, of course, with the debate over the filling of the comptrollership, some concern about the method that Assemblyman Schimminger described briefly for filling that elective office when a vacancy occurs — election by the Legislature — especially when the vacancy will persist over a long period of time. And also, we've experienced the use of that method relatively recently for filling the vacancy in our attorney general's position.

So, election by the Legislature is one methodology to deal with the general problem of lieutenant governorship. And I think it's important to think about that, because we can draw examples from our other methods perhaps, or perhaps not, to the degree that we find them appropriate.

What are the alternatives? We can appoint to an office, and we have to think about who the appointing authority will be. Will it be a person, a committee, or an elected body? We can do popular election, as we saw for the governorship. There is some provision for popular election under certain circumstances should a vacancy occur in both positions. Then we have concerns also about timing.

I had the assignment, when I worked for the Charter Commission in the late 1980s, of drafting the filling vacancies provision for the New York City Council. The complexity of that in the context of state laws is extraordinary. The timing of elections, the timing of nominations when a vacancy occurs, when the elections occur, those are complex considerations.

Regarding election by the legislative body, I would correct Assemblyman Schimminger slightly. The election of the comptroller and the attorney general is not an appointment, and that's consequential. It's an election by the Legislature. And it's consequential because conceptually the surrogates of the people are doing the election, because the people can't easily be mobilized to do the election. So, elected officials are in a sense the secondary electorate. This method is conceptually distinct from an appointment. And then, of course, we can leave the vacancy blank.

So those are the options.

Our consideration of the options is based upon how and when we consider that vacancy will occur. Sometimes vacancies occur in a relatively planned way. We heard about how Malcolm Wilson succeeded to the governorship. Sometimes they arise on the death of an elected official, another kind of circumstance, or removal. Or sometimes they can be anticipated. As the scandal grew concerning our former governor, we certainly anticipated succession and discussed it, although we didn't know precisely that it would, or when it would, occur. So, it may be for a long time or a short time; it can be planned, it can be unplanned.

Can we construct an institutional arrangement that can accommodate all these alternatives? I would suggest to you as we consider this, that we are going to come to the conclusion that it's going to be very hard to find perfection in our institutional design because of the contextual differences and circumstances, and the range of values that have to be satisfied.



There must something special about the lieutenant governorship to us because of all the offices that I can think of for which we must fill vacancies, this is the only one that's automatic. So we must think that being automatic is important to this office.

You know, I would easily agree that automaticity in succession (which I practiced saying six times in the mirror this morning and which underlines itself in red on my computer, so I have some suspicion that it's not a word, or maybe I'm smarter than my computer) for the presidency is essential. We need to ask the question whether this automatic succession is essential for the governorship. I would call to your attention the argument that somebody must be at the helm of the state is the essential argument to make for automaticity. And yet — without prejudice to our new governor, for whom I have high regard — we are still in the transitional phase that we would be in were the person acting as governor rather than being governor for a period of time.

So the need to have succession to this office automatic as a constraint in institutional design is at least worthy of discussion. Is this exceptional arrangement for what we regard as an exceptional problem within the general category of succession to elected office when vacancies arise?

Now what do we try to accomplish in this process? Well, very clearly we're trying to accomplish legitimacy. The assemblyman mentioned several times that this is an elected office elected by the entire state as a fundamental dimension of choice of succession method. But I would suggest to you that's a fiction, because the lieutenant governor is not elected by the entire state. The governor is elected by the entire state; the lieutenant governor simultaneously receives those votes received by the governor.

Now that fiction serves us because it legitimizes succession. In reality, insofar as the lieutenant governor is independently elected, that is, insofar as the nomination to that office is independent of the nomination of the governor, we regard that as a problem. At least I do, and the general discourse on constitutional design regards it as a problem, because there's a potential problem as a result of this process of disconnect between the governor and lieuten-

ant governor. Actually, we have seen a number of examples in recent history of the problem realized in relationships between governors and the lieutenant governors. Al DelBello, a good friend, comes to mind as a person who didn't get along with the governor with whom he served. Mary Anne Krupsak comes to mind. Betsy McCaughey Ross, a more recent example, in 2002 wrote an op-ed piece calling for the abolition of lieutenant governorship. Some of you might have read it. Just type "New York lieutenant governor" into Google and it will come right up and your fond memory of that lieutenant governor will be called to mind.

So we are worried about legitimacy, but is the job really elected? Now, New Jersey in their draft has provided, and I quote, "The candidate of each political party for election to the office of lieutenant governor shall be selected by the candidate that that party nominated for election to the office of governor." And then provides a time line.

Now, the range of choice may be practically limited to elected officials. But the New Jersey provision essentially validates the practice in many places and what we might regard as best practice in selecting a running mate. In an article I wrote about Nelson Rockefeller's vice presidency (in ancient times), after studying the federal constitutional process for filling vacancies in that office, I suggested we might want to do that process prior to the presidential election, but following the nomination of the president, so that we would have a selection vetted by the legislative bodies that would be essentially validating the appointment, but also creating legitimization. So legitimacy is one thing we're looking at.

Another thing we're looking for is continuity. What kind of continuity do we want? We want partisan continuity and that's why some concerns might be expressed about the majority leader becoming the governor, or even acting as governor, because he is a Republican and the governor is a Democrat. He has suggested that he would act responsibly and I have no doubt that he would, but relying upon good will, we know, from states where the lieutenant governors are separately elected from governors, it's not always the best practice.

Also, we want administrative continuity. It's interesting that we haven't had absolute administrative continuity through the recent succession process. We've seen some major state officials have been replaced and some major staff persons have been replaced. That's probably a good thing; the person who's governor needs persons to rely upon in whom he or she places confidence.

So our notion that lieutenant governor succession under the current design gives us continuity is worthy of consideration.

We want functionality: What does a lieutenant governor do? My colleague, Louis Roper, a very fine colonial historian, and I happened to be on the way to a meeting. I asked for some background. He told me the lieutenant governors ran the colonies because the governor was a patronage position and governors stayed in England, collecting the salaries but not doing the work. So the lieutenant governors were really important and present colonial officials. (I have done no great research beyond this 30-second conversation, seeking to know what I would have to know for today.)

But the argument now is lieutenant governors have nothing to do except wait for the governor to die or be removed. This is mischievous. We know who Jodi Rell is. She succeeded to the governorship on the resignation of the governor there under fire for corrupt behavior, but who is the current lieutenant governor of Connecticut? Anybody know? I had to write it down. It's Michael Fedele, okay? So it is not a prominent person; it is not a person with great experience in executive office; it is not a person with great responsibility.

The New Jersey draft interestingly requires the governor to appoint the lieutenant governor as head of a department or agency of state government, trying to find some functionality.

We want confidence. "There's no civil service description for an elected office," former Assembly Speaker Stanley Fink was fond of saying. And certainly he was right. The governor is vetted by the electorate, with confidence (I hope) a consideration.

The lieutenant governor would be vetted by the governor and under an alternative plan, as I have intimated, confidence might be a larger consideration than under the current arrangements, and that's without prejudice to the current governor or any lieutenant governor who succeeded in the job.

Our concern about confidence, by the way, is linked to the proximity of our most recent problem. You know, it diminishes the more distant we are for having used the procedure. We're interested in confidence if we just have a replacement. We're not so interested in confidence if it hasn't happened for long in political dialogue.

We need a political opportunity structure. This is very important. This is the best argument for the lieutenant governorship in New York today. There are only four statewide elected offices. Political opportunity is closed off because we have no term limitation for governor. By having a lieutenant governor, we at least give prominence to, we give a target for somebody who aspires to be governor. We provide an office that will allow that person to get some statewide visibility.

According to the Lieutenant Governors Association, which has met or is going to be in Buffalo soon, of the 255 governors who have served in the last 30 years, 26 percent have been lieutenant governors at some time in the past. So it is a political opportunity that's important. And we have some examples, of course, of lieutenant governors who become governor in New York. Governor Mario Cuomo is one. Lieutenant Governor Malcolm Wilson succeeded to the governorship on the resignation of Nelson Rockefeller and was nominated for governor but not elected.

I'll leave for discussion whether our current institutional design, which has been well described by others, meets these criteria or not. But I would raise for your consideration the idea that when we really think it through and take away some of the underbrush, we think this office is doing things for us that it might not be doing well. Thank you.

Richard Briffault:

Thanks very much. Usually being the third person on the panel following two distinguished public officials means that everything valuable has already been said. But just like in a faculty meeting when everyone has already said what you're going to say, if you are a good academic you say it again anyway.

Like Jerry, I would like to broaden the question before us beyond gubernatorial succession, but I don't want to go as far as he did and discuss the replacement of all vacancies in elective office. I will take an intermediate position and focus on successions to elected executive branch positions, because we really should think about how we replace attorney general and comptroller, as well as the governor and lieutenant governor. Each of these offices has had vacancies recently. The Hevesi resignation was only a year before the Spitzer one. Robert Abrams resigned as attorney general about 15 years ago. These vacancies also occur in other states. Ohio just had a resignation of an attorney general, and a gubernatorial appointment on a temporary basis until a special election could be held in the fall.

We've had a lot of familiarity with our neighboring states New Jersey, Connecticut, and Massachusetts, with replacing governors, as well as our own recent experience. We need to think about the structure for filling vacancies in the offices of attorney general and comptroller, as well as the lieutenant governor and the governor.

To begin with the current system, filling a vacancy in the governorship is straightforward. The lieutenant governor, who is elected with the governor, succeeds. This meets Jerry's notion of automaticity. This worked very smoothly in the most recent case.

Succession to the office of lieutenant governor is more problematic. There actually isn't a succession unless both the governor and the lieutenant governor are gone. If the governor leaves office, the lieutenant governor becomes governor, but if the lieutenant governor leaves office, the president pro tempore of the Senate shall act as governor. Senator Bruno was very careful to call himself acting lieutenant governor, not lieutenant governor. That's because that's what he is — the acting lieutenant governor, not the lieutenant governor.

This is similar to what most states do. Before coming here today, I checked the constitutions of about half the states and about two-thirds of those do something very much like what we do. They have the lieutenant governor replace the governor and then have the president pro tempore of the Senate act as lieutenant governor.

This follows the formal logic of the lieutenant governor position. The lieutenant governor's only official duty is to preside over the Senate and vote in case of ties. So there's a certain logic to having the president pro tempore of the Senate preside over the Senate and vote in case of ties. There's not a lot of logic in his having two votes, but we'll get to that later.

So there is a certain sort of formal consistency with having the president pro tempore of the Senate act as lieutenant governor. There is also a certain functional logic. The president pro tempore, the majority leader, is one of the two top legislative leaders. He is somebody already deeply knowledgeable about state issues and about state government. It makes sense to use someone with competence, to have somebody who is actually quite experienced and deeply immersed in the day-to-day the issues of the state, to be ready to take over should there be a need.

On the other hand, it is also very problematic. For one thing, the majority leader of the Senate can be of the opposite party of the governor, much as is the case today, and that can

be a source of conflict. There may not be a case of conflict at this moment, but it could be a source of conflict. It is also inconsistent with the idea of joint election of the governor and lieutenant governor. The two are elected together on a joint ticket to make sure they are of the same party. The current arrangement with a majority leader of the opposite party acting as lieutenant governor and potentially succeeding as governor is completely inconsistent with that.

In addition, the majority leader of the Senate comes from a narrow constituency, a single Senate district. That seems to be in some tension with the idea that a statewide elected official should be elected statewide, either by a statewide electorate or by a surrogate from the statewide electorate, such as the whole Legislature.

It's also problematic that there is not an outright succession. This oddity of the majority leader acting as lieutenant governor without becoming lieutenant governor creates a situation of dual office-holding, and across the two branches of government, the executive and the legislative. You also have the possibility that the acting lieutenant governor would change if there's a change in the majority in the Senate, which could happen before the next gubernatorial election. You could have one acting lieutenant governor on December 31st and a different acting lieutenant governor on January 2nd. If that should be during the period of time when the acting lieutenant governor is acting as a governor, I don't know what would happen. Under the constitution, the acting lieutenant governor can act as governor if the office of governor becomes vacant again, but he is only "acting" and only until a special election, although if the vacancy occurs too close to the next general election, then the special election is deferred a year. So what happens if the acting lieutenant governor has to act as governor starting late one year, and then the Senate changes hands so there is a new majority party. Does the new majority leader replace the old one as acting governor? I honestly don't know.

So we have this dilemma that we don't actually have a lieutenant governor. We have somebody acting as lieutenant governor, who would not become governor in case the governor leaves, but would simply act as governor until a special election, which could be in three months or it could be in about 15 months, depending on when the vacancy actually occurs.

So, there are some problems with the current situation.



I should also mention the attorney general and comptroller. The constitution doesn't address succession in the event of vacancy in the office of the attorney general or comptroller, but leaves that to the Legislature. The law currently provides for filling vacancies in these offices by election by a joint session of the Legislature acting as a single body. Now I am only an academic, and what I know

about politics is only what I read in the newspapers. But the Assembly is 2.5 times the size of the Senate and each person votes as an individual, and not as part of a chamber or in proportion to the size of his or her chamber. Not surprisingly, the Assembly tends to dominate this process, which may explain why the last vacancy in the office of attorney general and the last vacancy in the office of comptroller were each filled by members of the Assembly.

This is in some tension with the idea that the attorney general and the comptroller are supposed to be independent elected officials, independent of the governor, independent of the Legislature. It lacks even the checks and balances of some kind of separate two-house election. There's no role for the governor, and there's no role for the people.

So, what should we do? I want to put the question of whether we should even have a lieutenant governor at all at the end. Assuming that we keep something like the current set of statewide offices, what should we do? I think I buy most of Assemblyman Schimminger's proposal, which is similar to the federal 25th Amendment, although I would follow the federal model more closely. When there is a vacancy in the office of lieutenant governor — either when he or she has become governor, or has simply stepped out, as Lieutenant Governor DelBello did, the governor would nominate a new lieutenant governor, who would take office subject to confirmation by the Senate and the Assembly separately. We would then have a full lieutenant governor, somebody capable of succeeding, and this would be consistent with the model of the governor and lieutenant governor as a team. It would also have the benefit of combining the governor, the Senate, and the Assembly to participate in the process, which would be the best substitute we could have for an outright election.

At least two states — California and Colorado — have this procedure of gubernatorial nomination and separate approval by the two houses of the Legislature of the governor's nominee.

I would do the same thing to fill vacancies in the offices of attorney general and comptroller. The governor should nominate, subject to confirmation by both houses, separately. Once again, if we're going to have independently elected positions as we do for comptroller and attorney general, then instead of having those positions filled de facto by one chamber of the Legislature, we should have something that more closely resembles the checks and balances of having all three institutions — Senate, Assembly, and governor — each play a role.

Another thing to think about would be special elections for some of these positions, particularly attorney general and comptroller. Some states do this if the vacancy occurs not too close to the next election. We should be wary of too many elections. We already have what comes close to a permanent campaign for many positions, so I'm not somebody who thinks we need a lot more elections. On the other hand, there is something a little bit troubling about having an independently elected position that has been filled by an appointee from the day after the start of the term, or effectively a few weeks after the start of the term, as we have with our current comptroller. I don't think Comptroller Hevesi ever actually served any of the term for which he was elected. Instead, we have an Assembly-elected comptroller who will be serving for something like 3 years and 11 months or more of the current term.

We might want to think about having a special election, at least for the attorney general and comptroller if those vacancies occur within something like the first 18 months of the term. Let's say by June 30th of this year, which would give us enough time to run the electoral calendar for the November general election and then have whoever is elected serve the remaining two years before the regular general election.

In terms of the issue of inability to serve, I agree that the absence from the state provision makes no sense at all in light of current communication and transportation technology. It's only a source of potential mischief, as other states have recognized. A few states have moved to get rid of this. Hopefully we won't have that mischief now, but it does seem to do no good and could do some harm.

In terms of the voluntary declaration of inability, I don't know that we have much of a problem. Certainly the Legislature could take care of this by statute. You don't need a constitutional amendment for this. The constitution provides for a lieutenant governor acting in the case of inability. The real question is the process. I'm not sure you need a constitutional amendment for voluntary declaration of inability. The compulsory determination is much more problematic. Something like the structure in the proposed amendment makes a lot of sense. I'm a little dubious about the role of the court in this. Whether or not the governor is unable, this doesn't strike me as a legal question. But something involving the participation of all the major figures of the state seems to make a lot of sense.

Two last thoughts. One is on this question of the casting vote that Senator Bruno raised. It is a product of the current arrangement that the president pro tempore of the Senate acts as a lieutenant governor; "acts as," does not "become." If the majority leader became lieutenant governor, then he would no longer be a senator, and the question would disappear. The question arises because he actually does have this double position.

The more you look at it, it does seem anomalous to have somebody able to cast two votes on the same issue, which is what would happen. He would vote once as a senator and once as president pro tempore of the Senate. But unless there is some learning that I haven't come across on this, and it is quite possible there is and Peter may be able to illuminate this question, it does seem that he's got a good argument that he can vote twice, that he can vote in each of his capacities. I would like to say that it would be unwise for him to do so, because it does seem inconsistent with the idea that nobody should vote twice on the same issue. But, I think he's got a pretty plausible case that he should be able to do this, as would the next majority leader, who could be of a different party, have the same plausible case.

Finally, there's the question about the lieutenant governorship itself. It's a question that Jerry focused on. Is it important? It is important to have a system for succession and temporary coverage in place? I do think that the automaticity is valuable. The first reaction is, "Why do we care?" Yes, it's the governor, but it's only the governor and he doesn't have nuclear weapons under his control. So, why should we worry?

On the other hand, things like 9/11 happen. Things like major emergencies and disasters happen. It is important to know who is going to be there to marshal the relief forces, to deal with questions of law and order, and public health and public safety, and to deal with the White House, as we saw with the Katrina disaster. Part of the problem with the Katrina

disaster was the lack of clear lines of communication affecting the mayor, the governor, and the White House. That would surely be compounded if it wasn't clear who was in charge at the state level.

So while my first reaction is the governor doesn't have a military anymore, the governor is not going to war with Iran, I think there probably is a lot of value given the capacity for either natural disasters, terrorism disasters, or other things to have somebody in charge, somebody who can make those basic decisions.

What are our options? One is to not have a lieutenant governor position like this, but to have somebody else who has a full-time job as the successor. I think about seven states use the president pro tem of the Senate, the Senate majority leader. About two or three states use the secretary of state. The secretary of state is not an elected position in New York now, but it is in some states.

We could use the two jobs that nobody else in this room seems to mention much, and I guess I'm the first person to suggest it, that the attorney general or the comptroller become governor should a vacancy occur. They are statewide elected officials who have some knowledge about state government issues. The comptroller knows something about the budget and the attorney general knows something about state legal issues. They've already been elected statewide. There's some argument that we might want to have one of them take over. The problem with that is that you could lose the continuity of political values. When people vote for a governor, they are voting for a person, but they are also voting for a position on a set of issues — fiscal issues, personal liberty issues, social issues. And it's quite possible they have chosen a person, the attorney general or comptroller from a different party than the governor for different reasons. They might want that person as attorney general or comptroller, but not as governor.

So there might be a problem with this succession proposal. But you would at least not have somebody hanging around waiting for the governor to leave office.

Another way to do this is to give the lieutenant governor specific, independent authority. Jerry mentioned the New Jersey proposal, the lieutenant governor being the secretary of a state agency. Other states do this. The state of Texas gives its lieutenant governor considerable authority. Many of the other states give the lieutenant governor power to make certain appointments and sit on certain boards, independently of the governor's decisions.

But giving the lieutenant governor independent authority might be in tension with the idea that we want to have the governor and lieutenant governor as a team, with the governor in charge. It might make a lot of sense for the governor to give the lieutenant governor real authority, as a matter of his or her discretion. We've seen this in the growth of the vice presidency of the United States, from Carter giving Mondale some real authority to Clinton giving Gore a lot of authority, and to Bush and Cheney where some people question where the lines of authority run. We've had the emergence of a powerful, policymaking vice president. It might be wise for the governor, at least as a matter of discretion, to make the job of lieutenant governor more attractive and more worthwhile by giving the lieutenant governor a real position. It hasn't happened yet. And it's not clear we should want to mandate it.

None of these alternatives is perfect. Having no designated successor means a lack of automatic coverage. Having somebody else who has been elected to a real job creates the problem of policy change, a bigger change in policy than is normally the case when somebody is succeeded by somebody he or she has chosen. Combining the job of lieutenant governor with enough other duties to make it attractive may be in some tension with the governor's control. And finally there is the situation we now have, which is having somebody on standby, who we would hope a governor would be willing to use more than I think has been the pattern with most of our governors. The governor could plug the lieutenant governor (who, after all, the governor has chosen) into a more substantive position.

But on that one, I think it's time to stop.

Robert Ward:

Thank you very much, Richard. We've had a lot of very interesting and informative comments. I'm going to ask the panelists a couple of questions, then I'll invite Assemblyman Schimminger to tell our experts where they are wrong and/or ask them further questions, and then we will take some questions from the audience.

Let me start, Richard, with the question that you already raised and answered that flowed from Senator Bruno's remarks about the two votes for one man issue. And I'll ask Jerry and Peter to comment on that. And then I'll ask each of you to talk about another issue, which has been talked about a little bit in recent weeks, and that is the question of whether the speaker of the Assembly ever actually would accede to become acting governor or if, let's say we got to a point where the leader of the Senate is the acting governor and becomes

unable to serve, or dies, or resigns. Does the Senate just elect a new leader and then that person becomes the acting governor? And that's pretty far-fetched, but I was listening to Senator Bruno explain why we don't need to change the constitution. He's always very persuasive and I was thinking, whenever you do enact major changes, sometimes you do have unexpected results, so you need to be careful and not always rush ahead and make changes that you think maybe you should.

And then what you said, Richard, that in certain circumstances we don't know what would happen. Well, that's a pretty strong argument for doing something, because one thing we certainly want is to know what would happen, who would be in charge of the government under various circumstances.

So, let me first ask Jerry and Peter to talk about this issue of whether the Senate leader gets two votes in case of a tie. If the Senate leader is the acting lieutenant governor, as he now is, if there were a tie, does an individual senator who also happens to be the acting lieutenant governor get to vote once as a member of the Senate and then to break it, use the casting vote, as Senator Bruno outlined? Does that comport with your understanding of the constitution?

Gerald Benjamin:

Well, I'm going to defer to Richard, as he's looked at it specifically.

Richard Briffault:

Peter, because I think he's really looked at it.

Gerald Benjamin:

I haven't studied that. I would be very interested in seeing if there is any example in American history of a person who has voted twice on this sort of decision. In my limited attention over 40 years to the Legislature, I've never heard of that. And that would mitigate against it, as a practical matter. As a legal matter, apparently, it's more ambiguous.

Peter Galie:

There are some examples of local officials where that has happened. But I agree here, although in my reading of the constitution is that however anomalous it might seem, Bruno's got a case. It's somewhat mitigated by this fact.

Robert Ward:

I'm sorry, you said Bruno has a case?

Peter Galie:

Yes, that he does get both votes. And that seems to be quite a good reason why we might want to change the constitution. But it's mitigated by this fact: I read the casting vote as being limited to procedural and organizational matters, because you have to read this provision in connection with Article 3, Section 14, which says, "Nor shall any bill be passed or become law, except by the assent of a majority of the members elected to each branch of the Legislature."

If we were to read it as being able to cast a vote on substantive policy issue, you could violate this provision. So I read this provision along with Lincoln as limiting the extent to which that second vote matters. So, he does have two votes, but the second vote is limited to procedural issues. That's the first point.

Robert Ward:

Including election of the Senate leader?

Peter Galie:

Including election. Now let me suggest a scenario very quickly about this. You mentioned that it is 32-30. Now, you people know more about this than I do. This is an abstract composition in my mind.

At the end of the session, I believe it is the case that the majority leader needs to be re-elected when the session starts again. Now, let's suppose as a result of a November elec-

tion the Senate splits 31-31. Now comes time to elect a majority leader. There is none. If there is none, then there's no acting lieutenant governor, and there's no way to resolve that, unless somebody in the Senate agrees by some compromise to resolve that problem. Does that mean that Shelly Silver walks across the aisle and casts the vote, allowing a temporary president to be selected and then walks back to his place as leader of the Assembly?

I mean, it's a very real possibility. I don't think Bruno would lose his seat, but I would have asked him, "What happens if you are tied? You disappear like the Cheshire cat in *Alice in Wonderland*."

Robert Ward:

Richard, I see you nodding your head at this idea that, as of January 1st, there is no majority leader until one is elected.

Richard Briffault:

Yes.

Robert Ward:

You're agreeing with that?

Richard Briffault:

I don't think anyone would worry if there was continuity in the partisan structure. I don't think anyone thinks the majority leader disappears. But there is a gap when one legislative session, before the next session starts and a new majority leader is sworn in and ...

Gerald Benjamin:

You can't be the majority leader, because there's a new body. And so the new body has to elect a new boss.

Robert Ward:

Ben Liebman at Albany Law School has written on the subject. I see you nodding your head also.

Bennett Liebman:

In addition, you have that issue all the time. There's nothing that prevents, let's say, the Senate Democrats to get together with a member of Senate Republicans tomorrow and say, "We're going to select a new, temporary president of the Senate." This is not just an issue for January 1st, it's an issue that's with us all the time.

Richard Briffault:

That's how I think Willie Brown became speaker of the California Assembly. There was a narrow Republican majority, but he got some Republican votes and got himself, a Democrat, elected, so technically that's always possible.

I looked up this phrase, "the casting vote" in various state constitutions, and a couple of state constitutions are ever so slightly clearer when they state the lieutenant governor's power is to participate in debates in the committee as a whole, and when the Senate is equally divided to cast the casting vote. A casting vote when they are divided. These constitutions don't distinguish sharply between substantive and procedural matters.

I was thinking about when this could ever be challenged. That is to say, if the effect of the majority leader/ acting lieutenant governor, is to vote "No" and block something from passing, there would be no one standing to challenge it, I don't think. It's possible that if he gets it passed by breaking the tie in favor of the measure maybe there could be a legal challenge. But even then, I'm not completely sure. I guess that really matches what you said in terms of challenging it, something that became law. But if something fails to become law because it wouldn't have passed anyway if the Senate was equally divided and there was no casting vote.

Robert Ward:

I'm sorry, just to make sure I understand. Your understanding, Richard, of the casting vote is that it's only a procedural matter in New York?

Richard Briffault:

I don't have a clear understanding. I mean, I see the argument ... of Article 3, that legislation has got to be voted by members. I do wonder whether somebody might treat the lieutenant governor as a member of the Legislature.

Peter Galie:

It says, "elected member."

Richard Briffault:

Yes.

Peter Galie:

"Members elected to each branch of the Legislature" That to me is the operative term.

Gerald Benjamin:

I agree with you.

Robert Ward:

My understanding is that Senator Bruno also agrees with Peter or that Peter agrees with Senator Bruno on being able to make the casting vote. I think I've seen him quoted on that.

Assemblyman Schimminger, do you want to clarify all of this with your wisdom?

Robin Schimminger:

Yes, as to whether or not Joe Bruno or the Senate majority leader as the acting lieutenant governor would have two votes, the question has been raised: Have there ever been any situations of someone having two votes? Let me tell you, when I was in fifth grade I organized a club, the Smokey Bear Club it was called. And because I organized the club, I gave myself two votes. That's the only incidence I know of where someone had two votes.

Peter Galie:

There was a practice in England where people who attained a certain education or status in general elections got to have more than one vote; for example, graduates of Oxford. Since you studied abroad, perhaps you are qualified for two votes.

Robin Schimminger:

I will ask one question of Professor Briffault. In regard to the voluntary declaration by a governor of his or her inability, I believe you mentioned that we could provide for this statutorily, and I wanted to ask if you embellish a little bit on that because you got me thinking.

Richard Briffault:

Okay, as I read it, the constitution is pretty straightforward. It really is just a simple phrase in Article 4, Section 5. "In case the governor is impeached, is absent from the state or is otherwise, unable to discharge the powers and duties of governor, the lieutenant governor shall act as governor."

I would think that since it's already established in the constitution that on gubernatorial inability, the lieutenant governor shall act as governor, well, what you are talking about is clarifying that and providing a procedure for what the governor has to do. He has to fill out a form; he has to say certain things; he's got to transmit it a certain way with a copy to the Senate and the Assembly. It's sort of like having it notarized, as far as I'm concerned.

Constitutionally, it's already provided for. So I think it's about the technique whereby the governor hands over power is made clearer or sharper, or transparent, I don't see that as changing anybody's powers; it's just clarifying it. So, I think that can be done by statute.

Just as I think the idea of requiring the governor and lieutenant governor to run as a team in the primary could be done by statute. I don't think we need a constitutional amendment for that.

Peter Galie:

I agree. I think the provision encourages that, because it is until the inability shall cease that it cries out for some clarity.

Richard Briffault:

Yes. It's the second half that's more important. How does the governor say the inability is over? What does the governor have to do to get his power back? But I think that can all be done by statute. On the other hand, the compulsory inability, the involuntary inability, that, I think, does require an amendment.

Gerald Benjamin:

Just one note. If there were no lieutenant governor, had we an acting provision that would say, "designate the attorney general as acting," the succession provision that we've got now would serve very well.

In the case of vacancy in the office of governor, the governor shall be elected for the remainder of the term. The next general election happening no less than three months after both offices shall have been vacant, "the office shall be vacant."

So I favor filling elected offices by election; that's what I tried to advance and did advance for the City Charter. I favor an instant succession by some competent, elected official, or presumed competent or legitimate elected official for that interim who could deal with the emergencies that would arise, acting as governor. I think that the attorney general could do that legitimately, and I favor the most immediate election to fill the remainder of the term.

If there were no lieutenant governor, we could do that pretty easily, adapting current provisions, and we could use those provisions similarly for comptroller and attorney general; except that the person acting in those jobs, as we have experienced, would not be an

elected person. We'd have to be able to tolerate that interim and that would be okay with me.

Robert Ward:

So, you would favor an amendment that says in the absence of a lieutenant governor and a vacancy in the governor's office, the attorney general becomes acting governor?

Gerald Benjamin:

Would act as governor until the next possible election, another general election day.

Robert Ward:

While remaining attorney general?

Gerald Benjamin:

I would say yes, because it would be defined in limited time.

Robert Ward:

Why the attorney general rather than the controller?

Gerald Benjamin:

Because the comptroller is an auditor and should be independent of executive operations, as auditor. The attorney general represents the state, so is the agent of the state. His assertion of independence as an attorney has been a point of issue and difference in relatively few and marginal matters that have to do with differences on policy.

Robert Ward:

Richard, Peter, anything else on that?

Peter Galie:

I'm in waters now that are making me troubled, and I'd have to think a lot more about those before I made any recommendations.

Richard Briffault:

I haven't thought about attorney general versus comptroller as to who would make a more appropriate successor. I know that the National Association of Attorneys General (NAAG) is sometimes known as the National Association of Aspiring Governors.

As for what happens if the attorney general becomes governor, we might want to have a provision that has the attorney general designate a successor or somebody temporarily hold his old position, or something like that. I think these are, leaving aside the question of conflict of interest, both incredibly difficult jobs. It's hard to imagine somebody doing both, even if it's for six months.

So I would imagine you would want to have some person stepping in to the attorney general's office. My preference would probably be someone more like a senior staff person, rather than having somebody new brought in. But you could have somebody brought in until there's an election. But again, as with all these things you shouldn't amend the constitution on the fly. This requires a lot of thought, but that would be one way to go. If you want to have a full-time standby position in case of a gubernatorial vacancy, my preference would be one of the two statewide electives, rather than a legislative leader, because they have been elected statewide.

You could also have somebody holding the job just temporarily — on a short-term basis, and then have an election. The problem with having an election is, I think, this constitution and most state constitutions provide for special elections often on a very truncated calendar and it may be that it's unrealistic to even think about it in that way.

The current constitution says there shall be a special election in three months when both the governor and the lieutenant governor have left office. And in that three months you have to go through a primary and a general election process. Three months seems too truncated, which is why the idea I spun while standing there was that the deadline had to be by June 30th if the vacancy came up. You could have something like the two-step process, with

a temporary successor and then a special election. We probably need more time to get that special election and, therefore, we need to have a more substantial person to hold the fort, until then.

Gerald Benjamin:

My visceral reaction is elections go on for so long now, that the shorter the better. That's just an uninformed citizen's disgust.

Robert Ward:

A final question for Assemblyman Schimminger. I would ask you, Robin, whether there is anything you would like to say in rebuttal to Senator Bruno's opinion that we don't really need to change the constitution, that things pretty well work as they are. We did have a lieutenant governor's office vacant, as he said, back in the 1980s. We have it now.

Certainly your argument is that, if I can paraphrase, we have to be prepared for eventualities. As a practical matter, if you were trying to explain this to a typical voter in your district, how would you bring it down to a layman's explanation of why all this matters? Would it really matter to anyone in your district?

Robin Schimminger:

To the extent I think the people in my district care about and should care about who governs them, and to the extent that we live in a representative democracy in which the people select who governs, the person who serves as governor or lieutenant governor in case of a vacancy and appointment to the lieutenant governor's office should be someone who is not merely appointed by the governor, but somebody who is nominated and then confirmed by the two houses of the state Legislature, standing in the shoes of the people acting on their behalf.

I pretty much anticipated what Senator Bruno would say, as did Peter Galie. Very timely, Dr. Galie.

Peter Galie:

I didn't know he was there.

Robin Schimminger:

I could see him. You know, this is not about Joe Bruno, this is not about David Paterson; this is about how our state gets governed. And I think that's really it in a nutshell.

Robert Ward:

We'll make that the last word. Thank you for coming, Assemblyman Schimminger, Professor Galie, Professor Benjamin, and Professor Briffault.