

## EMERGING TRENDS &amp; FORESIGHT: Governors



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## Gubernatorial Incapacity: A Review of Succession Provisions

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*Some states have gaping holes in their gubernatorial succession provisions. Clarity in the grounds and procedures for replacing a governor who can no longer perform the duties of office is difficult to achieve, but worth pursuing, to avert avoidable crises.*

**N**early every state has dealt with midterm gubernatorial succession, and filling a vacancy at the apex of the executive branch is now typically a smooth process, whether the precipitating event is a death or resignation, election or appointment of the incumbent to another office, or even impeachment, removal, or recall. A closely related, though somewhat rarer, process is replacement of a living governor who has not resigned or been impeached, but who has become unable to fulfill the duties of the office for some reason (usually medical). Surprisingly, a number of states have gaping holes in their legal frameworks for dealing with such gubernatorial incapacity, notwithstanding the fact that controversy and near-misses with constitutional crisis have arisen at the federal level and in several states. This short review will not attempt a comprehensive analysis of the complete legal environments on this front for all 50 states; rather, it will endeavor to highlight some of the difficult issues involved in gubernatorial incapacity. To that end, it will focus on a select few states as case studies in procedures and problems.

### Recent Successions

Gubernatorial vacancies arise in a variety of manners. Four sitting governors (as of July 2004) originally succeeded to their offices, and in each case, the origin of the vacancy differed. Rick Perry of Texas was elevated from lieutenant governor in

December 2000, following then-Gov. George Bush's triumph in the presidential election. (Perry was re-elected at the top of the Texas ticket in 2002.) In September 2003, Indiana's Lt. Gov. Joe Kernan dropped the first half of his title shortly after the unexpected death of his predecessor, Frank O'Bannon. When President Bush appointed Utah Gov. Mike Leavitt to be head of the Environmental Protection Agency, he put in motion another succession—the first ever in that state—and Lt. Gov. Olene Walker eventually assumed the governorship in November 2003. Finally, in July 2004, M. Jodi Rell became governor of Connecticut under less happy circumstances, as the thrice-elected lieutenant governor replaced John Rowland upon his resignation for having violated ethics laws.

The incumbents in Texas and Utah stepped aside voluntarily, and thus controlled the timing and circumstances of their replacement. By contrast, O'Bannon briefly survived a stroke, though he was in no condition to govern. Kernan accordingly assumed gubernatorial power on a temporary basis before succeeding to the office for the duration of O'Bannon's term. Governor Rowland left office voluntarily, but under threat of impeachment, so that transition was also not sharp. Had he refused to resign, he might ultimately have been forced from office, and early steps in the impeachment process were underway when he threw in the towel. The Rowland and O'Bannon cases might seem worlds apart, since impeachment is generally

understood to be a tool for disposing of an official unfit to govern, rather than unable to do so. However, criteria for impeachment are frequently ambiguous, and grounds for replacement of an official no longer capable of leading are generally even less specific. The distinction between moral and medical incapacity is indistinct, insofar as both are often defined in procedural rather than substantive terms. More-over, in the federal context, some argue that the 25th Amendment's Section 3, which allows a president voluntarily to relinquish authority to the vice president, was intended to cover not just medical emergencies, but also situational disability, as might be created by the distraction of impeachment proceedings.

Determining what conditions render a governor unable to discharge the duties of office is one of the central difficulties in drafting disability provisions. Recognition of the frailty of officials is nothing new: the federal constitution juxtaposes "inability to discharge the Powers and Duties of [the presidency]" with death, resignation and removal when broaching the line of succession in Article II, Section 1. However, nearly two centuries passed before the 25th Amendment filled out procedures for establishing "inability," the only inherently subjective condition of these four. The solution—also popular with states—was not to enumerate conditions that constitute disability, but, instead, to specify procedures for replacement, thereby delegating discretion to individual decision makers, case by case.

### Examples of Provisions

Connecticut and Indiana are among those states having fairly detailed provisions for disability-based gubernatorial succession. Article V, Section 10(d) of Indiana's constitution divides authority between the legislative and judicial branches as follows:

Whenever the president pro tempore of the Senate and the speaker of the House of Representatives file with the Supreme Court a written statement suggesting that the governor is unable to discharge the powers and duties of his office, the Supreme Court shall meet within 48 hours to decide the question and such decision shall be final.

Five days passed between O'Bannon's stroke and his demise, and in the interim, Section (d) played out smoothly. The transfer of authority was dignified, without any hint of controversy, or any aura of constitutional confusion. At least four points stand out about the case. First, absence of detail on inability need not be problematic, though a less severe stroke might well have made the determination of the incumbent's capability much harder. Second, Indiana follows the federal example by requiring multiple actors to concur on the necessity of elevating an acting governor: not only are there two stages, but the first stage requires agreement of two officials. Third, in this instance the legislative leaders represented different parties, so it happened that there was bipartisan agreement on the need to elevate Kernan. Insofar as an agreement across parties seems to increase legitimacy, rules can easily be drafted explicitly to require bipartisan agreement. A related point is that Kernan and O'Bannon were both Democrats, not accidentally, but because they were elected as a slate. Of the four states already mentioned, only Texas presently elects governors and lieutenant governors separately, and since Perry won along with Bush in 1998 (albeit by a much smaller margin), in none of these cases was there partisan changeover. It is sometimes overlooked that almost all lines of succession allow for partisan changeover at some

depth, and a case can be made that it is preferable to render such accidental takeovers impossible by design. Indeed, in the event that an Indiana governor must be replaced while there is a vacancy in the lieutenant governorship, the legislature is required to elevate someone of the same party as the incumbent. Finally, a noteworthy difference between Indiana's provisions and the (older) federal rules is that the lieutenant governor, unlike the vice president, plays no part in assessing the fitness of his predecessor to continue in office. Arguably, this is an improvement, insofar as it puts another barrier in the way of any sort of coup, however unlikely that might seem in modern practice.

Indiana's requirement that two legislative leaders concur reflects a minimal embrace of safety-in-numbers, at the cost of a slight increase in logistical difficulty. Following the attempt on President Reagan's life in 1981, Vice President Bush could not immediately be reached, and there was a period during which the cabinet could not have invoked Section 4 of the 25th Amendment to make Bush acting president even if a majority had wanted to do so, since only the vice president and a majority of the cabinet, acting together, can render that decision. As long as succession requires agreement of multiple actors there is some danger that a decision will be temporarily impossible for logistical reasons, and there would seem to be a tradeoff between decreasing the possibility of a controversial action and increasing the possibility of transactional problems. Arguably, though, there is an extreme urgency about filling a void at the helm of the world's only superpower that is not commensurate for state governments.

Connecticut, like both Indiana and the United States, has explicit constitutional language describing both how a chief executive can step aside at his own discretion, and how others can determine that this individual is no longer capable of exercising power. Section d of Article XXII specifies:

In the absence of a written declaration of incapacity by the governor, whenever the lieutenant-governor or a

majority of the members of the Council on Gubernatorial Incapacity transmits to the Council...a written declaration...the Council shall convene ...to determine if the governor is unable to exercise the powers and perform the duties of his office. If the Council...determines by two-thirds vote that the governor is unable to exercise the powers and perform the duties of his office, it shall transmit a written declaration to that effect to the president pro tempore of the Senate and the speaker of the House of Representatives and to the lieutenant-governor and the lieutenant-governor, upon receipt of such declaration, shall exercise the powers and authority and discharge the duties appertaining to the office of the governor as acting governor; otherwise, the governor shall continue to exercise the powers and discharge the duties of his office. Upon receipt by the president pro tempore of the Senate and the speaker of the House of Representatives of such a written declaration from the Council, the General Assembly shall, in accordance with its rules, decide the issue, assembling... for that purpose if not in session. If the General Assembly... determines by two-thirds vote of each house that the governor is unable to exercise the powers and discharge the duties of his office, the lieutenant-governor shall continue to exercise the powers and authority and perform the duties appertaining to the office of governor; otherwise, the governor shall resume the powers and duties of his office. (Timing details omitted.)

Composition of the Council on Gubernatorial Incapacity is determined by statute. At present, it consists of the chief justice of the Supreme Court, the president pro tempore of the Senate, the speaker of the House of Representatives, the minority leader of the Senate, the minority leader of the House of Representatives, and four persons appointed by the governor (General Statutes of Connecticut, Vol.

1, Title 3, Sec. 3-1a). Connecticut's plan, it would seem, is more conservative than Indiana's in the sense that there are more decision makers involved, but less conservative insofar as the lieutenant governor can, alone, initiate the process.

A governor's protection against being ousted by some cabal on political grounds, under the cover of a spurious claim of disability, lies in the multiple stages of the process. Insofar as medical science changes rapidly, and exhaustive lists are inherently difficult to compile, not defining disabilities provides clear flexibility. Constitutions are intended to be difficult to change, so broaching the issue of severe gubernatorial disability at the constitutional level and simultaneously relegating details of the procedure for addressing this problem to statute might seem an ideal way to ensure flexibility. Beyond the generic problem of ambiguity, an attendant danger, however, is that the difficult issues set aside for statutory resolution might remain set aside.

### Some States at Risk

Indiana's neighbor to the west provides a case in point. Illinois Gov. Henry Horner suffered a heart attack in November 1938, but clung to office through a long convalescence rather than allow Lt. Gov. John Stelle, a fellow Democrat but also a hated rival, to take power. Unable to do work for more than a few hours per day, Horner relied on a regency of unelected advisors, and conspicuously failed to perform normal duties. Because neither the state constitution nor statutes dictated who could determine if a governor was fit to remain in office, Horner's foes launched a wide array of attacks. A Chicago lawyer filed quo warrant proceedings to remove him from office because he had allegedly caused the State Board of Pardons and Paroles not to function. The Republican speaker of the House asked the auditor to refuse approval on warrants for Horner's salary and official expenses. Lt. Gov. Stelle declared himself acting governor on multiple occasions, even while other officials declined to acknowledge these pronouncements. Some of the losers in the 1940 primary challenged the results on the grounds that the governor had not attended the meeting of the State

Canvassing Board at which results were certified. A writ of mandamus to compel Stelle to serve as acting governor resulted in summonses to both Stelle and Horner, which were fended off by the attorney general, a Horner ally.<sup>1</sup> Although Horner initially went to Florida to recuperate, he was forced to return to Illinois by a provision that the lieutenant governor became acting governor whenever the governor was absent from the state—indeed, Horner returned barely on time to prevent Stelle from making an appointment to the U.S. Senate to replace the deceased James Lewis.<sup>2</sup>

The case raises an important distinction, between physical and mental health. Vigor is an asset in a job demanding travel, long hours, and frequent changes of schedule, but it seems inconsistent with modern political culture for officials other than a governor (or president) to force a transfer of power away from a mentally sharp, but physically incapacitated individual, however severe the ailments. Mental disabilities, however, are difficult to quantify and document. No state has yet attempted to catalogue precise ailments (e.g. schizophrenia, dementia, depression) or tests (medical, psychological or otherwise) which can separate the fit from the unfit leader.

In July 1994, the possibility of a sudden gubernatorial transition again loomed large in the Land of Lincoln. Just days after Lt. Gov. Bob Kustra had announced plans to resign in order to pursue a career in radio, Gov. Jim Edgar underwent unscheduled, emergency heart surgery. Kustra then acted as Edgar's proxy in budget negotiations, though, happily, the governor recovered quickly enough to sign the final spending bill from his hospital room. Edgar and Kustra would romp to easy re-election a few months later, and serve out another full term in their respective offices. While not a true political crisis, the incident was surely a near miss. Had Kustra resigned before chest pains seized Edgar, according to Article V, Section 6(a), that vacancy in the lieutenant governorship would have placed Democratic Attorney General Roland Burris first in the line of succession. In that event, a less speedy recovery by the governor could easily have precipitated a dramatic donnybrook in which the parties tussled

for control. Again, a partisan switch, ostensibly a natural route to political controversy, can arise in almost every American case at some point in the line of succession.

The Horner and Edgar cases demonstrate some of the changes that were made and some that were not made in the 1970 Illinois Constitution. The provision that whenever a governor is out of state, another official becomes acting governor seems plainly anachronistic in this age of rapid travel and easy communication, and it appropriately has been dropped (though it lives on in other states). The line of gubernatorial succession is clearly laid out in Article V, Section 6(a), and by elaboration in statute. The procedure for a governor ceding power to his lieutenant governor (or whoever is next in line) is outlined in Section 6(c). But Section 6(b), which allows for involuntary transfers of authority, does not specify a procedure, and Section (d) simply relegates the delineation of such procedure to statute. The statutory provisions (15 ILCS 5/0.01) remain vague on who may evaluate disability in an incumbent governor, and by what standard such evaluations be made. Neither the state constitution nor the statutes drafted in accordance with Section 6(d) define a procedure whereby some body can determine if the governor of Illinois is unable to discharge his duties. Illinois is roughly in the position of the United States before ratification of the 25th Amendment.

Alabama was a pioneer in addressing gubernatorial incapacity: decades before the 25th Amendment, its 1901 constitution spells out a multi-stage procedure wherein elected executive branch officials not next in line to succeed the governor can ask the State Supreme Court to evaluate a governor. Its procedure is not quite as complex as that of Connecticut, though the broad outlines are similar: a number of officials can initiate proceedings, but the next successor to the office may not do so, and the Supreme Court holds final say. The most anachronistic touch, and a clear contrast with Indiana and Connecticut, is the language describing what makes an official unfit, namely "[appearing] to be of unsound mind." In explaining the clause, the chairman of Committee on Executive Department at the constitution convention used

slightly broader terms: "Governors, unfortunately, are subject to all the ills that flesh it [sic] heir to."<sup>3</sup>

Alabama's alphabetical neighbor, by contrast, is in the same precarious situation as Illinois. Article III, Section 12 of the Alaska constitution declares, succinctly: "Whenever for a period of six months, a governor has been continuously absent from office or has been unable to discharge the duties of his office by reason of mental or physical disability, the office shall be deemed vacant. *The procedure for determining absence and disability shall be prescribed by law.*" The brevity of the passage would be admirable, were it not for the fact that almost 50 years after Alaska attained statehood, there is still not legislative elaboration of procedure and or conditions. The state Legislative Affairs Agency in its guide to the constitution, wryly observes:

To avoid a tedious recitation of procedures similar to those found in the 25th Amendment to the U.S. Constitution, the drafters of the constitution assigned to the legislature responsibility for specifying how the office of governor could be declared vacant. The legislature has not yet done so, which may be unfortunate if the task became complicated by the circum-

stances of a particular situation warranting the use of this section.<sup>4</sup>

### Conclusion

"Inability," whether strictly medical or understood more broadly, is ambiguous and subjective in a way that death, resignation and removal are not. Some states have neither substantive nor procedural rules controlling when a governor has become incapable of retaining office, and are plainly vulnerable to chaos. Those states that do have rules have, in many cases, passed a few trials. But the number of empirical data points is small, and it is not difficult to identify bothersome or problematic scenarios even in the states with detailed, modern constitutional and statutory provisions. Inability is rare, but it should nonetheless be a live issue. In the aftermath of September 11, the Continuity Commission has been exploring weaknesses and flaws in provisions for handling emergencies and crises in all branches of the federal government. Every state could profit from making similar assessments.

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### Endnotes

<sup>1</sup>Clyde F. Snider. "Gubernatorial Diability," *The University of Chicago Law Review*, 8, 3 (April 1941): 521-29.

<sup>2</sup>Thomas B. Littlewood, *Horner of Illinois*, (Evanston, IL: Northwestern University Press, 1969).

<sup>3</sup>*Official Proceedings of the Constitutional Convention of the State of Alabama, May 21st, 1901, to September 3rd, 1901*, Vol. 1 (Wetumpka, AL: Wetumpka Printing Co., Printers and Publishers, 1940).

<sup>4</sup>*Ibid.*

### Bio

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## Homeland Security: Interstate Mutual Aid Agreement Continued from page 17

The purpose of EMAC is to supplement the capabilities of a state to respond to and recover from disasters with the resources of another. As such, it leverages the assets of an entire nation to respond to a disaster, no matter how regional or isolated. The response to Hurricanes Charley, Frances, Ivan and Jeanne is the most expansive use of state to state mutual aid in the 12 year history of the compact.

### Endnotes

<sup>1</sup>Federal Emergency Management Agency, New Archives, 2004.

<sup>2</sup>*The Emergency Management Assistance Compact Guidebook and Standard Operating Procedures*, (Lexington, KY: The National Emergency Management Association, September 2003).

<sup>3</sup>*Ibid.*

<sup>4</sup>National Strategy for Homeland Security, (Office of Homeland Security, July 2002).

<sup>5</sup>Letter from James Lee Witt, Federal Emergency Management Agency, Dated February 23, 1996.

### Bio

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