

EXECUTIVE BRANCH SUCCESSORS & THE LINE OF SUCCESSION

By Julia Nienaber Hurst

Summary: Crises demand leadership. The time to address an orderly succession of executive branch power is before a crisis occurs. This decade offers states examples of questions and legal challenges which may arise if Constitutional language or statute on executive branch succession is incomplete, unclear, or in conflict with other statutes. The governor's office may be vacated before the official completion of a term due to death, resignation, incapacitation, impeachment, or recall. State law should define a clear and sufficiently deep line of gubernatorial succession. State leaders should consider establishing a specific process to declare a governor incapacitated, either temporarily or permanently. States may also review to ensure statute surrounding impeachment and recall provisions are not in conflict with Constitutional and other statutory language on succession.

Executive Branch Succession

“This is the first wartime transition (of United States executive branch power) in 40 years, and it’s probably the first transition in a couple of centuries in which our homeland itself has been under threat,” said former White House chief of staff Joshua Bolten of the transition of the Presidency from George Bush to Barack Obama this January. To prepare, homeland security exercises were conducted by officials, appointees, and aspirants of the former and incoming administrations to ensure the smoothest possible transition. Smooth transitions of government leadership are required for nations and states to be strong, prosperous, and safe, according to government experts.

Government transitions of power may occur after democratic elections, as a result of uprising, or upon the death, resignation or incapacitation of a leader. The succession of executive branch power is often focused on only during a crisis transition – the time when succession most needs to go smoothly. Experts at the Continuity of Government Commission say existing federal succession laws and traditions are inadequate to assure an orderly succession. This year, they will promote debate on federal continuity of government.

Likewise, this decade provides many examples of needs states have to revisit their succession laws and continuity of government planning. When executive branch succession is not thoroughly addressed in law, problems can ensue. The issues may include predominant control of two branches by one person, lack of checks and balances, a question of one state senator with two votes in the senate, that the governor is not a statewide elected official, or related legal challenges.

Generally, every state should address which officials constitute the line of gubernatorial succession, in what order they form the line, how deep the line is, and under what circumstances a person succeeds, with specificity. Gubernatorial succession may begin when the office is vacated prior to completion of a person’s official term. The office may be vacated as a result of death, resignation, incapacitation, impeachment, or recall. A

leader may be incapacitated due to location, physical ailment, unconscious state (anesthetized or in a coma), or the inability to effectively function. State law should also specify if incapacitation may be temporary, how incapacitation is determined, and when and how a succession due to incapacitation is enacted.

Once a line of succession has activated, state law should also be clear as to whether successors become “acting” officials or whether they assume the title and office. Lawmakers are well advised to carefully consider whether resulting vacancies should be filled, and if so, how. And, depending on which officials step into executive roles and under what circumstances, law should specify whether the succeeding official retains any part or power of their previous position.

Line of Succession

While not every state must or even should address gubernatorial succession the same way, there are some tenets which arguably should be consistent across states and other tenets which must be clearly addressed, even if not uniformly. Each state should establish, before it is needed, a clear line of succession of sufficient depth. This year, New Jersey voters will elect the state’s first lieutenant governor bringing to forty-three the number of states which have a lieutenant governor first in line of gubernatorial succession. Arizona, Oregon, and Wyoming designate the Secretary of State first in line while four states rely on the Senate President as first in line. These include Maine, New Hampshire, Tennessee, and West Virginia.

Among the states without a lieutenant governor, several legislatures have debated the merits of creating the office. Most Americans know the Vice President acts as successor to the Presidency in the event of office vacancy. The governor and lieutenant governor successor line most closely model the federal line of executive succession. One Arizona newspaper further noted that in today’s mobile society, voters who have recently moved may not realize they are voting for a gubernatorial successor if that successor does not hold the title lieutenant governor. Others point out the succession of a Senate President leaves an official who was not elected statewide in the office of governor, and s/he may end up with significant powers over two branches of state government, such as the case in New Jersey this decade. .

Death or Resignation

In November of 2004, New Jersey Governor Jim McGreevey resigned. It was the second time in less than four years a New Jersey governor had left office early. State Legislatures magazine noted that both resulting Acting Governors, Richard Codey and Donald DiFrancesco, became Governor assuming those powers while retaining their senate seat and all powers of the senate presidency. Both men gavelled in each senate session and often led session voting while simultaneously acting as governor. State executive succession law should be specific as to the role and powers of an official who has succeeded.

Other states have the Senate President third in line of succession. In that role, the official may become Acting Lieutenant Governor when a vacancy occurs in that office. These

situations may create additional questions of clarity. In March of 2008, New York Lt. Governor David Paterson succeeded to governor. From March of 2008 to January of 2009, New York had four different lieutenant or acting lieutenant governors. Paterson succeeded to governor, the next Senate President resigned his senate seat, the following senate president was voted out when the majority changed in the November election, and a new Senate President was seated in January. Some note this method of succession has led to instability in the second position of gubernatorial succession.

Likewise in New York, when the office of lieutenant governor is vacant, the Senate President Pro Tem retains his/her senate seat, the senate presidency, and also assumes all duties and powers of the lieutenant governor. Since a lieutenant governor may cast tie-breaking votes in the senate in New York, the question has arisen whether or not a Senate President Pro Tem acting as lieutenant governor could potentially cast two votes on a question – one as Senator and a second as lieutenant governor in the event of a tie. Legal experts differ. Some say it is clear one official may vote once. Others argue the lieutenant governor votes only on procedural matters in the event of a tie, not on legislation, so the acting lieutenant governor could vote on procedural ties. Since the voting issue has yet to occur, no definitive precedent has been set. However, states may learn from this circumstance in determining the order of the line of gubernatorial succession and in determining the best ways to fill resulting vacancies and power transfers.

The 2001 attacks on the United States showed the need for states to plan gubernatorial succession and continuity of government for a deeper line of succession. Some states convened commissions to study and report on succession and government continuity. In 2004, both Indiana and Virginia voters passed Constitutional amendments clarifying and deepening lines of gubernatorial succession, some as deep as fourteen officials.

In November of 2008, the Pennsylvania lieutenant governor died while in office. Like New York, the state has the Senate President Pro Tem retain his senate seat and leadership power while also assuming the role and power of acting lieutenant governor. Senate President Pro Tem Joe Scarnati, a Republican, is now first in line of succession to the sitting Democratic governor bringing to light another consideration in succession planning, the potential for cross party succession.

Gubernatorial resignation may occur for a variety of personal or professional reasons and they may occur with or without notice. As a result of the 2008 presidential election, several governors announced the intent to resign their seats to take positions in Washington D.C. One issue states may address is the availability of transition planning funds for the successor. The unusual issue of a postponed succession also arose in 2009. New Mexico Governor Bill Richardson withdrew his name from consideration from a Cabinet post after gubernatorial transition planning had begun.

Incapacitation

A governor may become permanently or temporarily incapacitated through location, physical affliction, or the inability to effectively function.

Location Incapacitation

In 1979 in the Petition of the Commission on the Governorship of California (Brown vs. Curb), the state supreme court ruled the lieutenant governor becomes acting governor each time the governor is out of state, a position other states also hold. One basis of the ruling was that a leader must ideally be physically present to address issues of immediate concern and emergency. These may be natural disaster, mass violence, or other crises. Other states, though, adopted the opinion that modern communication devices make location irrelevant in regard to governance. But new issues have arisen since 2003. The Iraq war has provided examples of governors who have yielded authority while in dark communication zones or while in the war zone generally. In determining whether location can “incapacitate” a governor, state leaders should consider physical presence, availability of immediate and reliable communication, and the safety of the governor wherever he or she may be.

Physical Incapacitation

Physical incapacitation of a governor may range from sedation or questionable lucidity to anesthetized unconsciousness or coma. In 2006, Kentucky Governor Ernie Fletcher was hospitalized. News reports indicated he would continue to govern with assistance from designees of his Cabinet and leadership team, none of which was the lieutenant governor. Some public debate ensued. In subsequent hospitalizations, the governor prepared formal transfers of power to the lieutenant governor, which may or may not have been activated based on the seriousness of the diagnosis and treatment.

Former Indiana Governor Frank O’ Bannon unexpectedly suffered a stroke on September 8, 2003, and reportedly remained unconscious. Indiana law spells out how gubernatorial incapacitation is determined. The House Speaker and Senate President must file a letter with the Supreme Court suggesting the governor is incapacitated. The Supreme Court must meet within 48 hours to rule on the question. On September 10, 2003, such a letter was filed and the court declared the governor incapacitated making the lieutenant governor acting governor. The governor died September 13, 2008. Senate President Pro Tem Bob Garton was quoted saying, “If anyone has ever questioned the importance of the office of lieutenant governor, that question has now been answered.”

Functional Incapacitation

In December of 2008, Illinois Governor Rod Blagojevich was arrested on federal corruption charges involving the office of governor. Unlike Indiana, Illinois lacked a specific statutory process for declaring a governor incapacitated. In that vacuum, the Attorney General filed an incapacitation motion with the Supreme Court which would have granted temporary incapacitation pending the federal trial. However, the court rejected the effort. Nearly one month to the day after his arrest, the legislature voted to impeach him. Some papers opined the state should consider adopting a clear, statutory process for declaring incapacitation.

Temporary Incapacitation

At least one Tennessee body made a similar declaration in 2008. In January of 2008, a Tennessee state task force recommended the state adopt a process by which a governor could temporarily transfer his or her duties due to temporary incapacitation. In 2006, Tennessee Governor Phil Bredesen had been seriously ill for three weeks from a tick borne illness doctors were unable to specifically diagnose and the state learned it lacked such provision.

Recall or Impeachment

Recall and impeachment are processes citizens or legislators may follow to forcibly remove a governor from office before his or her term has officially ended. Most states have provisions in law for one or both processes. Typically a recall involves a petition process which results in a vote of the people to remove a person from office. An impeachment is a vote of the legislature typically to have hearings and a vote on the removal of an official. A recall this decade showed that a state's line of gubernatorial succession provisions and the state's statute governing a recall can be in conflict.

In 2003, a petition in California was certified to hold a recall election on Governor Grey Davis. A question was raised whether a recall would elevate the lieutenant governor to the vacant position or whether voters would get to choose a new governor from among a slate. In *Frankel vs. Shelley*, the California Supreme Court ruled since the state's recall statute indicated voters should elect a successor, if appropriate, simultaneous to the recall vote, the Constitutional provisions regarding a lieutenant governor succeeding did not apply because the office would never be vacant. The simultaneous recall and gubernatorial replacement election took place October 7, 2003. In reviewing succession law, state leaders may review recall and impeachment statutes for congruity with gubernatorial succession lines and planning.

Acting

Acting Governor

State law should be clear about whether, and under what circumstances, a gubernatorial successor is stepping into the governor role permanently or temporarily. In Utah, language which indicated a lieutenant governor would be "acting as governor" opened the question of whether that meant the person was "Acting Governor" or was "Governor" acting in that role. In 2003, former Utah Governor Michael Leavitt announced he would join the President's Cabinet. Preparations began for the succession of Lieutenant Governor Olene Walker. At the governor's request, the Utah Attorney General released opinion 03-001 on August 18, 2003, regarding this question. It found the state's Constitutional language that upon a vacancy in the office of governor the powers and duties of the Governor "shall devolve" to the Lieutenant Governor indicated permanent succession. The Attorney General noted the intent of the Constitutional language was to model Presidential succession.

Filling Vacancies

Some states have no provisions for filling a vacancy in the office of lieutenant governor. As noted above, this can result in lines of succession which yield top officials of opposite parties, one official who arguably has two votes in the legislature, or one official who

maintains significant powers across two branches of government. New Mexico is among the states to address that issue this decade. The state passed a law in 2008 which allows a governor to fill a vacancy in the office of lieutenant governor.

Smooth Transitions

Smooth and seamless transitions of executive leadership are essential to a stable society pillared on strength, prosperity and safety. The U.S. Department of Homeland Security itself recognized the importance of clear lines of leadership succession during times of change and crises. On August 13, 2007, the President signed an Executive Order amending the line of leadership succession within the Department of Homeland Security. In Congressional testimony in April of 2008, the Department Deputy Secretary noted this review and amendment of the lines of executive succession was part of the Department's preparation for this year's presidential administration transition. States, too, should act now to provide clear and well-reviewed lines of executive leadership succession.

About the Author

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