Executive Disability: A Void in State and Federal Law

Richard H. Hansen

University of Nebraska College of Law

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Executive Disability: A Void in State and Federal Law*

Richard H. Hansen†

I. INTRODUCTION

During its one hundred seventy-two years history the United States has been without the services of its chief executive because of illness for a total of at least a year.1 The dangers of lapse of executive power have been discussed in numerous articles, and at

*Unless otherwise indicated the recipient of letters referred to in the footnotes was the Editor-in-Chief of this Review. The letters, which were in reply to a general survey, are presently on file and available through the office of the Editor-in-Chief.
†B.S., 1953, LL.B., 1956, University of Nebraska; Member, Lincoln, Nebraska, and American Bar Associations; American Association of Law Librarians. Assistant Librarian, University of Nebraska College of Law. Gratitude is hereby expressed to Law Review Staff Members Charles M. Pallesen, Jr., and Richard A. Peterson, Class of '62, for their work as research assistants. Their attention to detail, application and interest contributed immeasurably to the scope of the article; without their help the author could not have completed the task outside of office hours.

1 Disability, for purposes of this article, means absence from regular duties. By this criterion, the following estimate is conservative: President Taylor—Bedridden for five days until his death; President Harrison—Bedridden for seven days until his death; President Garfield—Bedridden for eighty days from the time he was shot until his death; President McKinley—Bedridden eight days from the time he was shot until his death; President Wilson—Bedridden and convalescing for two hundred and eighty days from the time of his stroke until he resumed cabinet meetings; President Harding—Semi-invalid for four days from the time of his first attack until his death; President Eisenhower—One hundred and forty-three days from his heart attack until his announced recovery. These figures do not take note of the fact that President Wilson never fully recovered, nor do they reflect President Eisenhower's absenteeism for ileitis, his minor stroke or Cleveland's absence from the White House for an operation for cancer of the jaw. Also excluded are the nine hours and twenty-two minutes Lincoln was unconscious before his death and the two hours and fifteen minutes Franklin Roosevelt was comatose before his death. No attempt was made to determine the number of days away from work because of colds, sinus infections, gall bladder or intestinal disorders, and other illnesses of this type. Practically speaking, the figures on Presidential absenteeism would encompass three to four years of our history if figured cumulatively. See, e.g., MARX, THE HEALTH OF THE PRESIDENTS (1960); WOLD, MR. PRESIDENT,
least one book.² Former Attorney General Herbert Brownell has said:³

The realization has grown among the thoughtful people that our very survival in this age may rest on the capacity of the nation's chief executive to make swift and unquestioned decisions in an emergency. As a result, a major constitutional problem, previously glossed over, has been brought to the fore. The problem is that posed by temporary presidential inability to discharge the powers and duties of the presidency at a time when emergency action is required.

As Mr. Brownell points out, the problem of presidential disability⁴ has been "glossed over," but it has been recognized. President Eisenhower and Attorney General Brownell made a serious effort to fill the void which now exists in our law.⁵

Gubernatorial disability has been largely ignored, despite the fact that many governors have been incapacitated. Governor Horner of Illinois was ill and bedridden most of the time between November 8, 1938, and October 6, 1939.⁶ In 1959 Governor Earl Long of Louisiana was disabled. The unfortunate series of events which occurred there are without parallel in American state gov-

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² Supra note 2, at 212.

³ The word used is "disability," rather than "inability." This is for two reasons: 1) The use of both words in the Constitution (Art. II, § 1 cl. 6) has compounded the problem; 2) "inability" connotes to some a lack of intellectual as well as physical or mental capacity.


⁵ Note, 8 U. CHI. L. REV. 521 (1941).
ernment. It was also in 1959 that Nebraska's Governor Ralph G. Brooks suffered a stroke, the first of a series of illnesses leading to his death in office on September 9, 1960.

This article is an effort to explore some areas of constitutional law and legal history, as well as political thought, which have not previously been thoroughly examined. In the field of gubernatorial disability the aim is to present for the first time a definitive examination of the myriad problems involved. The concluding section will offer suggestions for dealing with the entire problem of executive disability.

II. INTER-RELATION OF STATE AND FEDERAL DISABILITY CLAUSES

What is the status of an alternate who exercises temporarily the powers of the executive? As a practical matter it makes no

7 WORLD ALMANAC 107 (1960), impartially describes the situation:
"After a week in which Louisiana Gov. Earl K. Long (D.) had burst into profanity on two occasions in the State Legislature, he was flown from Baton Rouge to Galveston, Tex., May 30 for mental observation in John Sealy Hospital. After medical testimony that Long was mentally ill and likely to injure himself or others, Probate Judge Hugh Gibson of Galveston, at the request of the Governor's wife, Blanche, ordered him held in protective custody at the hospital June 2 pending a court hearing. Long charged in a court petition in Galveston June 12 that he had been drugged in Louisiana, bound and taken to Galveston by force. He was released from John Healy Hospital June 17 and flown to New Orleans on his promise to enter Ochsner Foundation Hospital there, which he did. Long stormed out of the hospital June 18 and headed for Baton Rouge in a car but was intercepted at the Louisiana line by State Police armed with a court order requested by his wife; he was committed to Southeast Louisiana State Hospital in Mandeville. In a move that prevented his wife from opposing his discharge from the hospital, Long filed suit June 25 for a legal separation. Prior to a court hearing at Covington, La., June 26, Long discharged the director of state hospitals and the superintendent of the Mandeville institution and named two new officials, who declared him sane and a free man. The court then dismissed the proceedings."

8 Lincoln Star, Sept. 10, 1960, p. 1, col. 1. Brooks' prolonged absence from office provoked many comments, not unsympathetic, but concerned over the operation of state government. The Lincoln Evening Journal, April 28, 1960, p. 4, col. 1, remarked in an editorial: "The brief record of the 62-year old governor also has been plagued by serious illness. In his 17 months of office he has been hospitalized 47 days and off the job for health reasons for a total of about 3 months." Governor Brooks was hospitalized again on Aug. 24, 1960, for treatment of a virus infection, but this time he did not recover.

9 "Alternate" will be used to designate the second in command—the
difference if the executive dies; but the precedent established at the time of the first death in office of an American President has since been applied to cases of temporary disability. A problem has arisen from the assumption by John Tyler in 1841 that the Vice President becomes President when he assumes the powers and duties of the office. The tradition thus established has created the fear that if an alternate assumes office during a temporary disability, the President is barred from resuming the functions of the office upon recovery. Another historic question has been: Who determines disability? The legislative intent of the delegates to the federal Constitutional Convention becomes all important at this point.

The degree to which the national disability clause is based on similar clauses in colonial charters and state constitutions has never been thoroughly considered. Scholars have confined themselves to the proceedings of the federal Convention.

Alexander Hamilton alludes to state disability provisions in the Federalist. After discussing the reasons for electing a vice president and making him presiding officer of the Senate, Hamilton says:

The other consideration is, that as the Vice President may occasionally become a substitute for the President, in the supreme executive magistracy, all the reasons which recommend the mode of election prescribed for the one, apply with great if not with equal force to the manner of appointing the other. It is remarkable that in this, as in most other instances, the objection which is

...
made would lie against the constitution of this state [New York]. We have a Lieutenant-Governor, chosen by the people at large, who presides in the Senate, and is the constitutional substitute for the Governor, in casualties similar to those which would authorize the Vice-President to exercise the authorities and discharge the duties of the President.

David Beetle characterized the New York lieutenant governor as "a sort of stand-in for the colonial governor." 14

Colonial history has a multitude of examples of a "deputie governour" temporarily performing the governor's duties. The conditions of Eighteenth Century America were foremost in the minds of the delegates to the Constitutional Convention. They were well aware of the provisions established many years earlier to prevent a void in executive power. The practice of the colonialists in this respect was virtually the same from the first instance at Jamestown in 1617 until the adoption of the Constitution. 15

In 1689 it was necessary for William Penn, then governor of Pennsylvania, to report to the King on the status of the colony. He wrote to the Assembly: 16

And if you Desire a Deputy Governor rather, name three, or five, and I shall name one of them, so as you Consider of a Comfortable substance, that ye Government may not go a begging.

Seventeen of the colonial charters and constitutions in effect at various times before the adoption of the federal constitution provide for a lieutenant governor or his equivalent. 17 Fifteen of

15 Supra note 10, at 16; CHITWOOD, A HISTORY OF COLONIAL AMERICA 74, 77 (1948).
16 PENNSYLVANIA ARCHIVES, GOVERNOR'S PAPERS 1681-1747, 103 (1900).
17 The charters were usually granted to a person or persons and their "heires, deputyes, agents, commissioners and assigns." So executive power in early America transferred automatically by descent. As democracy grew, the lieutenant governor emerged as a "deputie" rather than an "heire." Pertinent sections of the charters and constitutions of the thirteen colonies and the states of the confederation appear in THORPE, AMERICAN CHARTERS, CONSTITUTIONS AND ORGANIC LAWS (1909). (Hereinafter cited by volume and page number).

Connecticut: COUNCIL FOR NEW ENGLAND (1620) (1 THORPE 1831); COMMISSION TO ANDROS (1688) (1 THORPE 1869); GOVERNMENT OF NEW HAVEN COLONY (1643) (1 THORPE 528); CHARTER OF CONNECTICUT (1662) (1 THORPE 531).

Delaware: DUTCH WEST INDIA COMPANY'S PATENT (1621) (1 THORPE 80); GRANT TO WILLIAM PENN (1681) (1 THORPE 3045); FRAMES OF GOVERNMENT (1682) (1 THORPE 3055); DEL. CONST. (1776) (1 THORPE 563).
these gave him status as "acting governor." Of these fifteen, four provide for these powers to be exercised during the absence of the governor, and ten for the inability or "sickness" of the governor.

Colonial precedent is clear. Only the Constitutions of South Carolina of 1776 and 1777 state that the lieutenant governor succeeds to the office of governor. The clauses did not specifically

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**Georgia:** PROPIETARY PROPOSALS (1663) (2 THORPE 2754); FUNDAMENTAL CONSTITUTIONS, CAROLINA (1669) (2 THORPE 2772, 2779); GA. CONST. (1777) (2 THORPE 777).

**Maryland:** MD. CONST. (1776) (3 THORPE 1686).

**Massachusetts:** CHARTER OF MASSACHUSETTS BAY (1629) (3 THORPE 1852); CHARTER OF MASSACHUSETTS BAY (1691) (3 THORPE 1877, 1884) MASS. CONST. (1780) (3 THORPE 1888).

**New Hampshire:** N.H. CONST. (1776) (4 THORPE 2451); N.H. CONST. (1784) (4 THORPE 2453).

**New Jersey:** N.J. CONST. (1776) (5 THORPE 2596).

**New York:** N.Y. CONST. (1777) (5 THORPE 2633).

**North Carolina:** N.C. CONST. (1776) (5 THORPE 2792).

**Pennsylvania:** PA. CONST. (1776) (5 THORPE 3087).

**Rhode Island:** CHARTER OF RHODE ISLAND AND PROVIDENCE PLANTATIONS (1663) (6 THORPE 3214).

**South Carolina:** S.C. CONST. (1776) (6 THORPE 3245); S.C. CONST. (1778) (6 THORPE 3249).

**Virginia:** VA. CONST. (1776) (7 THORPE 3817).

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18 Citations to THORPE, op. cit. supra note 17.

19 Citations to THORPE, op. cit. supra note 17.

20 Citations to THORPE, op. cit. supra note 17.

21 Supra note 17.
include inability or sickness of the executive. There was no provision for disability in the South Carolina Constitution until 1865. That document developed the "office" of governor on the lieutenant governor, thus recognizing and multiplying the error in constitutional interpretation made twenty-four years earlier by President Tyler. It is interesting to note that the South Carolina Constitution of 1868 reverted to the colonial practice by providing for the lieutenant governor only to "exercise the powers of the governor" and this provision has remained in effect to the present time. In April 1961, the constitutions of eleven of the original thirteen states adhered to colonial practice. Only Rhode Island and Virginia follow the "Tyler trend."

Who determined disability in the colonies? The governor "deputized" the lieutenant governor; otherwise the latter automatically made the determination. This custom of automatic transfer of power was merely a democratic adaptation of the very early charters which provided for succession from the proprietors by deputation, regency and descent.

The spirit and the letter of the law of the pre-federal period substantiates the interpretation placed on the disability clause of the federal constitution. Research of the Convention proceedings has been excellent, beginning with Mr. Davis' article at the time of President Garfield's illness and continuing through Mr. Brownell's evaluation in 1958. By the force of fact and logic Davis, Williams, Silva and Brownell have refuted the arguments advanced by lesser scholars, including Tyler. The United States Constitution, Article II, Section 1, clause 6, reads:

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties

26 See WILLIAMS, supra note 10; see also wording of charters and constitutions in note 18.
27 Supra note 2. Comparing the format of Mr. Brownell's article at page 191 with that of Mr. Davis' at page 11 it seems a fair inference that Mr. Brownell relied heavily on the earlier article.
28 Supra note 2.
29 U.S. CONST. art. II, § 1.
of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

The words "the same" have been the source of legal arguments since President Harrison's death on April 4, 1841. Historical controversy developed over the antecedent of "the same": Is the antecedent "powers and duties" or "the said office"? The experts have long since pointed out that this phraseology was the result of an attempt by the Committee on Style in: 

... bringing together and combining into one, without alteration of sense or intent, two cognate provisions found lying apart, by each of which provisions exercise of the presidential duties by a substitute was restricted to the period of actual inability. The committee had no authority to alter or amend; no objection was taken to their union of these provisions, which fact indicates that the revised form was not regarded as in any particular altering or amending "the articles agreed to by the House."

The Davis-Silva-Williams-Brownell school of thought has advanced several arguments which have not been refuted:

(1) The paucity of records made it extremely difficult for Tyler to determine legislative intent. Although no one seems to have checked before, Tyler could not have consulted any of the signers of the Constitution, for they were all dead by 1841. John Quincy Adams was still alive, however, and the former president disagreed completely with Tyler's interpretation. In addition,

31 DAVIS, supra note 2, at 11.
32 "[A] great deal more is now known about what went on at the Constitutional Convention of 1787 than was known in the past, even in the years immediately after the Convention. It was conducted in secrecy, and not until Madison's notes were published posthumously in 1840 was a fair picture available, although still not a complete one. Farrand's work, Records of the Federal Convention of 1787 the definitive source on the subject, did not appear until 1911. Other important data has come to light subsequently through the research of biographers and historians dealing with persons and actions of the time. Understandably, it has taken years for scholars to bring the information together." BROWNELL, supra note 2, at 192-93.
33 The Dictionary of American Biography and other reference works do not offer any information concerning Jacob Broom. However, all other signers died before Harrison. The last known survivor was former President Madison, who died in 1836.
34 "On April 16, 1841, Adams recorded in his journal that he had called on Mr. Tyler, 'who styles himself President of the United States, and not
the statement of Tyler's succession indicates that he himself was not altogether clear as to his actual status.\textsuperscript{35}

(2) Other sections of the Constitution conflict with the interpretation given by Tyler.\textsuperscript{36}

(3) If Tyler's view is correct, and a Vice President succeeds to the office of President, why is it that when election time arrives, every such "President" claims that he is running for his first term?\textsuperscript{37}

Considering the precedents of the colonial era and the research of the above-named scholars, these conclusions are beyond contention:\textsuperscript{38}

(1) One who acts as President because of the inability of a President or Vice President does so only until the disability of the President or Vice President is removed. (2) The term "inability" covers any \textit{de facto} inability, whatever the cause or duration, which occurs when there is urgent public business requiring Vice-President acting as President, which would be the correct style,'" Then Adams continued by saying that the whole affair violated the Constitution, which confers on a Vice President, not the Presidential Office, but the powers and duties of that office. SILVA, \textit{supra} note 2, at 21, citing 10 MEMOIRS OF JOHN QUINCY ADAMS 463-64 (Adams ed. 1874-77).

\textsuperscript{35} "District of Columbia,

City and County of Washington, ss.

I, William Cranch, chief judge of the circuit court of the District of Columbia, certify that the above-named John Tyler personally appeared before me this day, and although he deems himself qualified to perform the duties and exercise the powers and office of President on the death of William Henry Harrison, late President of the United States, without any other oath than that which he has taken as Vice-President, yet as doubts may arise, and for greater caution, took and subscribed the foregoing oath before me.

W. CRANCH

April 6, 1841."

4 RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 32 (1897). The implications of Tyler's assertion that he could take Harrison's place by virtue of the Vice Presidential oath are discussed in SILVA, \textit{op. cit. supra} note 2, at 37.

\textsuperscript{36} U.S. CONST. art. I, § 3, cl. 5; U.S. CONST. amend. XII; In art. II, § 1, cl. 1, the Constitution provides for the President to hold office for four years. Our seven "Presidents" have thus been cheated considerably for none of those succeeding held office for that period. Tyler came the closest when Harrison died a month after taking office.

\textsuperscript{37} President Truman states in his \textit{Memoirs}: "Therefore, to re-establish that custom [two terms], although by a quibble I could say I've only had one term, I am not a candidate and will not accept the nomination for another term." 2 TRUMAN, MEMOIRS 489 (1956).

\textsuperscript{38} SILVA, \textit{supra} note 2, at 173.
the President's personal attention. (3) The one on whom presi-
dential power devolves is to be judge of when an inability exists.

It is a fateful coincidence that most of our states have modeled
their executive disability clauses after the federal constitution. Tyler's misinterpretation and its ratification by his successors has
resulted in confusion in determining gubernatorial disability. What
began as a recognized custom in the colonies was adopted as wise
by the federal Convention. A period of fifty-four years passed
before the disability clause became operative. By then most people
had forgotten the original custom upon which it was based. Guided
only by awkward phraseology, Tyler made an erroneous interpreta-
tion. Dangerous lapses in executive power have resulted.

III. EXPERIENCE IN THE STATES SINCE 1789

Disability clauses in state constitutions, like the federal pro-
vision, are part of a general section dealing with succession. Dis-
ability is grouped with other contingencies, like impeachment or
death. The Nebraska Constitution furnishes an example:

In case of the death, impeachment and notice thereof to the
accused, failure to qualify, resignation, absence from the state, or
other disability of the governor, the powers, duties and emolu-
ments of the office for the residue of the term, or until the dis-
ability shall be removed, shall devolve upon the lieutenant
governor.

History shows the difficulty this grouping has created in presi-
dential succession. Because of the tradition that the Vice President
becomes President on the death of the latter, the Garfield and
Wilson cabinets, and the Vice Presidents involved, hesitated to
take action, for fear that Garfield or Wilson would be precluded
from resuming the functions of the office on their recovery.

Since the state constitutions have been patterned after the

39 Forty-four state constitutions contain "inability" or "disability" clauses. See note 40, infra.
40 NEB. CONST. art. IV, § 16. Today forty-four state constitutions contain
"inability" or "disability" clauses. Of the six remaining, Maine, (ME.
CONST. art. V, § 14, which is also Amendment LXXXIV) New Hamp-
shire, (N.H. CONST. pt. 2, art. 49) and Massachusetts (MASS. CONST.
art. II, § 2) provide for succession in case of certain events "or other-
wise." Minnesota (MINN. CONST. art. V, § 6) provides for succession
in case of a vacancy "from any cause whatever"; Maryland, (MD.
CONST. art. II, § 6) "or other disqualifications"; and only Tennessee
has no provision regarding succession in event of "disability," "inability,"
"or otherwise."
federal constitution, the same dilemma has presented itself on the state level. In order to understand the interpretation given to the disability clause of the succession section, it is necessary to examine the cases dealing with the other contingencies mentioned.\textsuperscript{42}

A. Death

The cases concerned with succession consider the question of whether or not there is a “vacancy” in the governorship. The resolution of whether or not the lieutenant governor actually becomes governor, or acting governor, is often based upon the answer to this question. When the governor dies, the above questions arise most frequently with regard to the salary to be paid to the alternate. The decisions reflect the confusion which is the common denominator of nearly all succession situations.

The first two cases arising from the death of a governor occurred in Nevada. Governor Jones died April 10, 1896, whereupon Lieutenant Governor Reinhold Sadler succeeded him. The constitution provided that the “powers and duties” devolved upon the lieutenant governor. The court held that Sadler was acting governor and entitled to the salary of the governor for the remainder of the term.\textsuperscript{43} It is interesting to note that the decision was largely based on \textit{Chadwick v. Earhart},\textsuperscript{44} the leading case for the proposition that when a governor resigns the lieutenant governor actually becomes governor. Chief Justice Bigelow apparently had some reservations about the court’s reasoning, and in a concurring opinion attempted to “clarify” the situation by stating that Lieutenant Governor Sadler really was “permanent Acting Governor.”\textsuperscript{45}

The following year the court had to decide whether Sadler’s position as acting governor created a vacancy in the office of lieutenant governor.\textsuperscript{46} The court held that, “That officer remains lieutenant governor, but invested with the powers and duties of the governor.”

Five years later the Supreme Court of Washington considered the identical question. The opinion in \textit{State ex rel. Murphy v.}

\textsuperscript{42} For general text discussion and collection of cases see: 14 AM. & ENG. ENCY. LAW 1108 (2d ed. 1900); 12 R.C.L. \textit{Governor} § 12 (1929); 24 AM. JUR. \textit{Governor} §§ 8-10 (1939); 81 C.J.S. \textit{States} § 74 (1953).

\textsuperscript{43} \textit{State ex rel. Sadler v. La Grave}, 23 Nev. 216, 45 Pac. 243 (1896).

\textsuperscript{44} 11 Ore. 389, 4 Pac. 1180 (1884).

\textsuperscript{45} 23 Nev. 216, 223, 45 Pac. 243, 245 (1896).

\textsuperscript{46} \textit{State ex rel. Hardin v. Sadler}, 23 Nev. 356, 47 Pac. 450 (1897).
McBride\textsuperscript{47} evidences the reverence with which some state courts have viewed the "Tyler Tradition":\textsuperscript{48}

This provision of the constitution of this state is in effect the same as the provision of the constitution of the United States with reference to the succession of the vice president to the office of President of the United States. Upon the death or disability of the president, it has uniformly been held that the vice president holds the office of president until a successor to a deceased president comes to assume the office. . . .

The Washington court cited the Chadwick case, but then held:\textsuperscript{49}

When the lieutenant governor, by virtue of his office, and of the command of the constitution, assumed the duties of governor on the death of Governor Rogers, the office of lieutenant governor did not thereby become vacant, but the officer remained lieutenant governor, intrusted with the powers and duties of governor.

The court was concerned about the implications of the act of the lieutenant governor in signing bills he had already approved as lieutenant governor. The opinion concluded:\textsuperscript{50}

These duties are, no doubt, inconsistent; but this argument, we think is fully met by another provision of the constitution, which provides . . . that when the lieutenant governor shall act as governor the senate shall choose a temporary president. The lieutenant governor, therefore, when the duties of governor devolve upon him, is relieved of the duties of presiding officer of the senate.

Nebraska's Constitution provides:\textsuperscript{51}

The Legislature shall . . . chose its own officers, including a Speaker to preside when the Lieutenant Governor shall be absent, incapacitated, or shall act as Governor.

Construed in conjunction with Article II, Section 1, providing for separation of powers, and the McBride case, a strong argument can be made opposing the participation in any legislative activity of a lieutenant governor acting as governor.

The Arizona court decided in 1948 that the secretary of state was merely acting governor on the death of Governor Sidney P. Osborn. Speaking for the court, Justice La Prade said:\textsuperscript{52}

We do not consider the decision in Chadwick v. Earhart, supra, as persuasive or authoritative. The interpretation of that

\textsuperscript{47} 29 Wash. 335, 70 Pac. 25 (1902).
\textsuperscript{48} Merriam v. Clinch, 17 Fed. Cas. 68 (No. 9460) (C.C.S.D. N.Y. 1867).
\textsuperscript{49} 29 Wash. 335, 339, 70 Pac. 25, 26 (1902) (Emphasis added).
\textsuperscript{50} Id. at 340, 70 Pac. at 26.
\textsuperscript{51} NEB. CONST. art. III, § 10. (Emphasis added).
\textsuperscript{52} State ex rel. Concini v. Garvey, 67 Ariz. 304, 195 P.2d 153 (1948).
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case was based on the language of the constitutional provision, and we sincerely believe it was not justified.

The latest case arose in 1953. The Supreme Court of Florida advised the president of the senate, acting as governor, that he could sign warrants as “Acting Governor,” although he had signed them previously in his capacity as a legislator, the death of the governor having intervened.53

Contrary results have been reached in Oregon54 and Wyoming.55 The Wyoming case represents a unique situation indeed. The secretary of state, acting as governor, claimed both salaries and the court permitted it.56 Apparently the practice has been accepted, since it was followed as late as 1960 when Governor J. J. Hickey became United States Senator to fill a vacancy and the secretary of state collected salaries for the two positions.

B. IMPEACHMENT

The impeachment cases represent one area of gubernatorial succession where the rulings of the state courts have been uniform. The first reported case occurred in Nebraska in 1873.57 Governor Butler had been impeached and the legislature addressed the Supreme Court regarding Butler's status pending completion of the trial. Justices Lake and Crounse held that the functions of the governor are entirely suspended until his acquittal, when they again become operative, or until his conviction, when the suspension be-

53 Advisory Opinion to Acting Governor Johns, 67 So. 2d 413 (Fla. 1953).
54 Olcott v. Hoff, 92 Ore. 462, 181 Pac. 466 (1919). Governor James Withycombe died March 3, 1919. Olcott was secretary of state. Hoff, the state treasurer, refused to pay the governor's salary to Olcott, claiming that Olcott should be designated “Secretary of State, Acting as Governor.” The court followed Chadwick v. Earhart, 11 Ore. 389, 4 Pac. 1180 (1884), holding that Olcott was governor and distinguished the other cases on the basis of the different wording of constitutions involved.
A year later the same court went to the limit to avoid a lapse of executive power. In State ex rel. Roberts v. Olcott, 94 Ore. 683, 187 Pac. 286 (1920) the court held that although Olcott's term as secretary of state expired the first Monday in January 1920, he would hold office as governor until the end of Governor Withycombe's term in January 1923.
55 State ex rel. Chatterton v. Grant, 12 Wyo. 1, 73 Pac. 470 (1903).
56 “On the death of the governor during his term in office a vacancy in such office existed, to be filled by the Secretary of State, who during his incumbency was entitled to receive the salaries of both offices.” Id. at 2, 73 Pac. at 471.
57 Opinion of the Judges, 3 Neb. 463 (1873).
comes permanent. Similar holdings appear in New York, North Dakota, and Oklahoma. The uniform rulings in these cases create some uncertainty as to President Andrew Johnson’s status pending his impeachment trial.

C. Failure to Qualify

This phrase in the succession clause covers numerous situations concerning the governor-elect. The constitutions of the states do not provide for disability of a nominee, or for filling a vacancy in such a case. When there is any law at all relating to nominees it is statutory, and leaves the matter to the discretion of the party central committees.

Fifteen state constitutions specifically deal with death or disability of a governor-elect. They uniformly provide that the lieutenant governor-elect assumes the gubernatorial office. When there is no constitutional provision, the courts often decide in favor of the incumbent, rather than the lieutenant governor-elect. The cases are split fairly evenly on the question. Five leave the incumbent in office and four install the lieutenant governor-elect

58 Chief Justice Mason did not feel that the matter, as presented, constituted a judicial question.
60 State ex rel. Olson v. Langer, 65 N.D. 68, 256 N.W. 377 (1934).
61 Fitzpatrick v. McAlister, 121 Okla. 83, 248 Pac. 569 (1926). This decision was reached only after the court carefully distinguished the case from two earlier cases dealing with the absence of the governor from the state.
62 A survey of governors and national committeemen, undertaken as part of the research for this article, asked: (1) Is there any provision in your laws for determining disability of nominees? (2) Is there any procedure for filling a vacancy if the nominee dies or is disabled? In response to the first question, of those replying, eighteen men indicated there was no procedure for determining disability, in three states the party central committee made the determination according to its party rules, and three men were uncertain about the procedure. The replies to the second query revealed that, of those replying, in nineteen states the state central committee or a convention filled the vacancy. In three of the states which replied there is no procedure of any kind and both the governor and the Republican National Committeeman in Florida were uncertain of the procedure to be followed in such cases.
63 ALA. CONST. art. V, § 128; ALASKA CONST. art. II, § 10; CALIF. CONST. art. V, § 16; CONN. CONST. art. IV, § 20; DEL. CONST. art. III, § 20; IOWA CONST. art. IV, § 4; MASS. CONST. amend. LXXX; MICH. CONST. art. VI, § 16; MISS. CONST. art. IV, § 11; N.J. CONST. art. V, § 1; R.I. CONST. amend. XI, § 3; TEX. CONST. art. IV, § 32; WASH. CONST. art. III, § 10 and amend. VI.
as governor. In Ex parte Lawhorn, the incumbent was required to serve until his successor qualified. Carr v. Wilson followed the Lawhorn case, in spite of a clause in the constitution limiting the governor to one term.

The Nebraska Court considered the question in 1890. James E. Boyd was elected governor in November 1888. After he had assumed office, his predecessor, James M. Thayer, brought an action of quo warranto, disputing the validity of Boyd's election by asserting that Boyd was not a citizen of the United States. Our Court found for Thayer and said that he, as predecessor, and not the lieutenant governor-elect, was entitled to the office of governor. The United States Supreme Court reversed the decision, determining that Boyd was not an alien, but the precedent as to succession is still cited. While Connecticut reached a conclusion similar to that of the Nebraska Court in 1892, the North Dakota Supreme Court in 1935 found that failure to meet residence requirements constituted a disability and declared the duly elected lieutenant governor Walter Welford, governor.

A 1947 opinion by the Ohio attorney general said the term "governor" as it appears in the Ohio Constitution does not include the governor-elect, so that when that person dies, the office cannot be assumed by the lieutenant governor-elect. Nevertheless there are contrary court decisions in Kentucky, Wisconsin, and Georgia. This area of succession law needs clarification.

D. Resignation

Many American politicians have resigned from high public office. Vice President John C. Calhoun did so because of a dif-

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64 18 Grat. 85 (Va. 1868).
65 32 W. Va. 419, 9 S.E. 31 (1889).
68 81 C.J.S. States § 74, n. 64 (1953).
69 State v. Bulkeley, 61 Conn. 287, 23 Atl. 186 (1892).
71 OPS. ATT'Y GEN. (Nos. 1562, 1947).
72 OHIO CONST. art. III, § 15.
73 Taylor v. Beckham, 108 Ky. 278, 56 S.W. 177 (1900).
74 State v. Heil, 242 Wis. 41, 7 N.W.2d 375 (1942).
75 Thompson v. Talmadge, 41 S.E. 883 (Ga. 1947).
ference in political philosophy with President Andrew Jackson. The majority of courts interpreting this segment of the succession clause have reached the same conclusion as in impeachment cases, that is, that resignation vacates the governorship, but that the alternate is only acting governor, and that the vacancy continues until a successor is elected. The confusing aspect is that some courts have held that while the vacancy in the governorship continues, the lieutenant governor becomes “acting governor,” but not as one of the contingent duties of lieutenant governor. This anomaly has resulted from the influence of the early case of People v. Hopkins.

In the Hopkins case controversy developed when Church, deputy insurance superintendent, and acting superintendent, claimed the salary of the superintendent, who had resigned. The statute involved provided for appointment of one of the departmental clerks as deputy, but specified that the deputy should possess the powers and perform the duties of the superintendent during the latter’s absence or inability. The analogy to gubernatorial succession is apparent, so it was logical for Justice Grover to refer to the experience of the governors of New York:

On the eleventh of February, 1828, the office of governor became vacant by the death of DeWitt Clinton, the then incumbent of the office, and its power and duties . . . devolved upon Nathaniel Pritcher, then lieutenant governor. The question arose as to whether he was to be regarded . . . as acting governor, or in the case of the contingent duties of the lieutenant governor, and, as a consequence, whether he was entitled to the salary of the former office . . . . It was held by William M. Marcy, then comptroller, that he was to be regarded as the acting governor, and entitled to the salary given by law to that officer. The same question and the same provision, again arose in 1829 upon the resignation of the office of Martin Van Buren, and the powers and duties devolving upon Enos T. Throop, then lieutenant governor, and were decided the same way by Silas Wright, then comptroller. We surely shall not go far astray in following the precedents established by these able jurists, wise statesmen, and rigid economists. The court determined that the deputy was entitled to the superintendent’s salary, but that his powers were limited to necessary actions. Note should be taken of the fact that nowhere in this paragraph does the court speak of either Pritcher or Throop as

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76 Calhoun had been Vice President under Jackson’s predecessor, John Quincy Adams (1824-28). After his resignation in 1832 he served in the Senate until 1843. In 1844 he was appointed Secretary of State by John Tyler, but resigned to run for the Senate the following year.

77 55 N.Y. 74 (1873).

78 Id. at 78.
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governor. They are carefully designated acting governors, but at the same time not regarded as exercising the contingent duties of lieutenant governor. This distinction has been ignored in later cases.

Subsequent cases developed from a variety of situations, but the courts have adhered to the majority rule. A notable exception is In re Moore. This case was decided ten years before State ex rel. Chatterton v. Grant, and developed from a dispute over the duration of the alternate's term when he succeeded Governor Francis Warren. The court held that the alternate was governor until January, 1893, although Warren's term did not expire until 1894. By stating that the alternate was governor the court by dictum gave the decision in Chatterton a basis in precedent.

Governor Griggs of New Jersey resigned January 31, 1898. Foster M. Vorhees, president of the senate, qualified as his successor, but the court held that when Vorhees resigned as president of the senate, he also relinquished the right to serve as governor, the office of governor having been vacant since Griggs' resignation. Here we find the majority rule, although the unique facts of the case tend to obscure it.

Colorado lost its "Acting Lieutenant Governor" by a similar operation of law according to the rule in People ex rel. Parks v. Cornforth. The governor there resigned and the lieutenant governor "acted as such." The case is novel because the president pro tem of the senate, third in the line of succession, claimed that he then moved into second place and became "Acting Lieutenant Governor." Apparently his claim was not disputed until the legislature elected another president pro tem of the senate who asserted his right to the title. Justice Gunter, speaking for the court, said that the position was not held de jure, so that when the new president pro tem was elected he automatically became "Acting Lieutenant Governor."

Futrell v. Oldham is often cited in support of the majority view. Governor Joe T. Robinson resigned March 8, 1913, and the

70 4 Wyo. 98, 31 Pac. 980 (1892).
80 12 Wyo. 1, 73 Pac. 470 (1903). The governor died in the Chatterton case and the court held that the secretary of state could receive the salary of both the governor and secretary of state.
81 Secretary of State Amos Barber.
83 34 Colo. 107, 81 Pac. 871 (1905).
84 107 Ark. 386, 155 S.W. 502 (1913).
defendant, who was president of the senate, succeeded to his duties. The legislative session ended March 13th. Futrell was elected president of the senate before adjournment and the court had to decide if he succeeded to the governorship itself, or only its duties. It was held that the vacancy in the governorship continued, with the duties exercised by Futrell, who still held office as president of the senate. The court analyzed Chadwick v. Earhart,\footnote{11 Ore. 389, 4 Pac. 1180 (1884).} considered the leading case for the minority view: The language of the constitution (of Oregon) is different from ours, and the opinion was based upon the language, which the court construed to amount to the devolution of the office itself upon another. The court then referred to the fact that the Oregon Constitution was based on the federal constitution, and said that the decision was therefore “correct, but not applicable.”\footnote{Id. at 389, 155 S.W. at 507.}

Paul Narcisse Cyr, a foe of Governor Huey Long, was lieutenant governor at the time of Long's election to the United States Senate in 1930. Cyr took the governor's oath before a notary public on the theory that Long's election to the Senate vacated the governor's office. Long called out the national guard to prevent Cyr from taking office. Long maintained that since Cyr took the oath as governor, he was no longer lieutenant governor and A. O. King, president pro tem of the state senate was sworn in as lieutenant governor. Subsequently the Supreme Court of Louisiana ruled in favor of King on the theory that Cyr had pressed an unconstitutional claim to the office of governor.\footnote{State ex rel. Cyr v. Long, 174 La. 169, 140 So. 13 (1932). The reasoning of the opinion is summarized in the concurring opinion of Justice St. Paul: “This court has no more authority to inquire into the title of Huey P. Long . . . than would a court of the United States be authorized to inquire into the title of Herbert Hoover, to the office of President of the United States.”}

The Cornforth and Futrell cases, in addition to illustrating the majority view, represent a preoccupation with mechanics of the law. They do emphasize the necessity for eliminating gaps in the line of succession.\footnote{See also: State v. Ekern, 228 Wis. 645, 280 N.W. 393 (1938) and Weeks v. Gamble, 13 Fla. 9 (1870). These cases are examples of attempts to fill vacancies in the lieutenant governorship, when none existed in the office of governor. In the Wisconsin case the lieutenant governor resigned. The constitution provided for filling the office of lieutenant governor only if there was a vacancy in both the office of governor and}
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of the separation of powers doctrine inasmuch as the “acting” executive continued also in a legislative capacity. The Supreme Court of Montana recognized this possibility in State ex rel. Lamey v. Mitchell. The court equivocated on the question of whether a vacancy in the governorship existed, but held that the act of the lieutenant governor in exercising the powers of the governor relieved him of his duties as presiding officer of the senate.

The Chadwick case remains the leading case for the minority view that the alternate actually becomes governor on the resignation of that officer; and, as already indicated, the case has had direct influence upon the interpretation of other phrases in the succession clause. Because it is so often quoted and misquoted, the case deserves close scrutiny. After the governor’s resignation, the secretary of state discharged the duties of the office. His term as secretary of state expired before the end of the governor’s term and the question of the length of his tenure and right to compensation was raised. The court held that he was entitled to the salary of governor until the next governor qualified, because he became governor by right of succession.

lieutenant governor. In this respect the Wisconsin Constitution is like the United States Constitution. But the court allowed the governor, under a general statutory proviso for filling vacancies, to appoint a lieutenant governor. In the Weeks case, the lieutenant governor had been impeached and convicted. The Florida court upheld the validity of an appointment by the governor. The provision allowing the president of the senate to act as lieutenant governor during the latter’s “inability” was not considered applicable to a case of permanent removal. State ex rel. Marr v. Stearns, 72 Minn. 200, 75 N.W. 210 (1898), could be interpreted as an extension of the majority rule to the lieutenant governor. Governor Nelson resigned and Lieutenant Governor Clough acted in his stead. Frank Day, president pro temp of the Senate, proceeded to act as lieutenant governor. Exercising his right as senator, he cast the deciding vote for certain legislation, the subject of the case. In Minnesota, the lieutenant governor, although presiding officer of the senate, could not vote, even to break a tie. Nevertheless, the court upheld the law, declaring that Day did not cease to be senator when he acted as lieutenant governor.

90 97 Mont. 252, 34 P.2d 369 (1934).
91 "[T]here is no vacancy in the office . . . in the sense that there is no one left without power to discharge the duties . . . ." The court then cited State ex rel. McGowan v. Sedgwick, 46 Mont. 187, 127 Pac. 94 (1912) as stating that upon the resignation of the governor, there is a vacancy in the office, " . . . but we do not consider it binding, for the reason that that was not the question under consideration in that case." State ex rel. Lamey v. Mitchell, 97 Mont. 252, 34 P.2d 369 (1934).
92 97 Mont. 252, 258, 34 P.2d 369, 372 (1934).
93 See note 85, supra.
Chief Justice Waldo explains the Chadwick doctrine as follows: 94

In the first place, it is not shown how an office can be vacant, and yet there be a person, not deputy, or locum tenens of another, empowered by law to discharge the duties of the office, and who does in fact, discharge them. It is not explained how, in such a case, the duties can be separated from the office so that he who discharges them does not become an incumbent of the office. And, in the second place, how a person can fill the office of governor, without being governor. It is the function of a public officer to discharge public duties. Such duties constitute his office. Hence, given a public office, and one who, duly empowered, discharges its duties, and we have an incumbent in that office.***

Nor does the language of the section, grammatically considered, bear the interpretation counsel have put upon it. Leaving out the co-ordinate clauses following the first clause, the sentence reads: "In case of the removal of the governor, from office, the same shall devolve upon the secretary of state." That is, the office shall devolve. So, taken with each of the succeeding clauses, the word "same" stands for "office."

The constitution of the United States . . . is nearly the same with the provision of our state constitution. . . . The only difference conceivably material is that the constitution of the United States has the words "power and duties" where the constitution of Oregon has only the word "duties." But it is conceived that duties necessarily imply powers, and that in legal effect the language of the two constitutions is the same.

The Chief Justice then cited dictum in the federal case of Merriam v. Clinch 95 to show that the same reasoning had prevailed in interpreting the federal disability clause: 96

The provision, in this section of the constitution, that the powers and duties of the office of president shall devolve on the vice president is identical, in legal effect, with the provision

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94 11 Ore. 389, 4 Pac. 1180 (1884). (Emphasis added). The actual wording of the Oregon Constitution (art. 5, § 8) is as follows: "In case of the removal of the governor from office, or of his death, resignation, or inability to discharge the duties of the office, the same shall devolve on the secretary of state. . . ." Thus, the wording of the federal constitution, conveying an intent never intended by its framers, multiplied the error when it was perpetuated in the Oregon Constitution.

This is the reasoning of Speaker of the House of Representatives, Sam Rayburn, in regard to presidential disability: "If the president is sick the vice president does not take over the powers of the presidency because the only person who can do that is the President himself. A man must be President to take over these powers." Letter from Hon. Sam Rayburn to Richard A. Peterson, October 12, 1960.

95 17 Fed. Cas. 68 (No. 9460) (C.C.S.D. N.Y. 1867).

96 Id. at 70.
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of the 22d section of the act of 1799, that the authorities and duties vested in the collector of customs of the Port of New York shall devolve on his deputy. Three times, since the adoption of the constitution, the president has died, and under the provision referred to, the powers and duties of president have devolved on the vice president. All branches of the government have, under such circumstances, recognized the vice president as holding the office of president, as authorized to assume its title, and as entitled to its emoluments. The vice president holds the office of president until a successor to the deceased president comes to assume the office, at the expiration of the term for which the deceased president and the vice president were elected. . . . It has never been supposed that, under the provision of the constitution, the vice president, in acting as president, acted as the servant, or agent, or locum tenens of the deceased president, or in any other capacity than as holding the office of president fully, for the time being, by virtue of express authority emanating from the United States.

Justice Waldo then cites People v. Hopkins,97 overlooking the fact that the governors mentioned in those cases were considered “acting governor,” while Tyler repudiated the title.

The Chadwick case stands by itself in the cases interpreting the “resignation” phrase of the succession clause. But it has influenced the decision of other succession situations, and symbolizes also the effect of the Tyler tradition on state law.

E. Absence From The State

When the governor leaves the state the operation of the succession clause assumes a different aspect than in the preceding cases. “Absence” differs materially from death, impeachment, or resignation, for the governor can return from a trip, while the other contingencies have a finality denied by no one.

People ex rel. Tennant v. Parker,98 presents a factual situation which exemplifies the unquestioned acceptance of colonial precedent. After the impeachment conviction of Governor Butler in 1872, W. H. James, Secretary of State, exercised the powers of the governor.99 During this same period Isaac S. Hascall, a state senator, was elected president of the senate. James left Nebraska in February, 1872, to attend to state business in Washington. Learning of James’ absence, Hascall, who lived in Omaha, hurried to Lincoln.

97 55 N.Y. 74 (1873).
98 3 Neb. 409 (1872).
99 The Nebraska Constitution of 1866-67 did not provide for a lieutenant governor.
At the capitol he obtained the Great Seal from James' secretary on the pretense of certifying that some person was a notary public. Actually, he put its impress on a proclamation convening the legislature. When James heard of Hascall's action he returned *post haste* to Lincoln and issued a second proclamation, rescinding the first. Hascall's friends, a minority of the legislature, disregarded the second proclamation, came to Lincoln on the appointed day, and after using violence to overcome James' resistance at the doors of the legislature, proceeded to organize for the session. Parker, the defendant, was appointed sergeant at arms, and immediately arrested Senator Tennant, the plaintiff, who had chosen to honor the second proclamation. The court, in ultimately deciding that Tennant should be released on habeas corpus proceedings, had to determine if the legislature was in session, which required a conclusion regarding the extent of the powers of an alternate during the absence of the acting governor. Justices Crounse and Lake held that the second proclamation was valid, but for different reasons. Chief Justice Oliver Mason dissented on the basis that the legislature is the sole determinant of when it is in session. Justice Lake's opinion is worthy of note, because it distinguished between temporary and permanent disability; it also illustrates the constancy of our state courts in avoiding any lapse of executive power:

> When the question was first presented to me I was strongly inclined to the opinion . . . that so soon as the governor sets his foot beyond the limits of our state, the officer next in succession therein, may at once assume all the authority, and exercise all or any of the duties pertaining to the executive department of government. But when I reflect upon the possible consequences of such a construction of the constitution, upon the disgraceful tricks, strifes and exhibitions, which might be entailed upon the people of the state, of which our present situation presents a sad and humiliating commentary, I am induced to hesitate and cast about me for a more salutary rule . . . if, for any good and sufficient reason, the executive shall become satisfied that the necessity which induced the call has passed, or that it was unadvisedly made, it is not only his right, but his duty, to revoke the same, that the people may be saved the expense which otherwise would be laid upon them.

> Nor does it matter whether the revocation be by the same person who issued the proclamation or not, so long as he is for the time being in the legitimate exercise of the executive functions of government.

> It is not the act of the individual, strictly speaking, but of the executive, in which there is, in one sense, no interregnum.

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100 People *ex rel.* Tennant v. Parker, 3 Neb. 409, 423 (1872).
One of the most intriguing aspects of the case is that both Hascall and James signed the proclamations "Acting Governor." Neither asserted, at any time during the controversy, that the Tyler tradition applied. Under analogous conditions, however, the Kentucky court declared a similar second proclamation invalid, for the same reason advanced by Chief Justice Mason in the *Parker* case: the legislature is the sole judge of when it is in session.\(^{101}\)

Although the *Parker* case is the first recorded case on "absence," the courts have relied chiefly on *State ex rel. Warmoth v. Graham*.\(^{102}\) In that case the Governor was absent from the state at two intervals in 1871. The lieutenant governor claimed the governor's salary for these periods. As in *Parker*, no claim was made to the office of governor, and all parties spoke in terms of the lieutenant governor assuming the "powers and duties of the governor." The court held that the governor was not "absent" within the meaning of the constitution, such absence being defined as "such as would injuriously affect the public interest."\(^{103}\) Chief Justice Ludeling spoke, however, of the necessity of: \(^{104}\)

> ... certain proof, accessible to the public, from which they may with certainty derive the knowledge as to who is authorized to act as governor, of the State. As the law makes no provision for the mode in which the governor shall manifest to the public his absence from the State, it necessarily is left to his discretion subject to his responsibility to the people, and if the interests of the State should suffer in consequence of his prolonged absence, he would be amenable to public sentiment and to the control of the impeaching power of the State.

The colonial precedent of the lieutenant governor as a "deputy" is apparent. Nine years later the Missouri Supreme Court followed the *Graham* case in a similar situation.\(^{105}\)

No further cases were recorded until 1913 when the Oklahoma Criminal Court formulated the minority rule by interpreting "absence" literally in two cases involving pardons. *Ex parte Crump*,\(^{106}\) decided in October, 1913, upheld a pardon granted by Lieutenant Governor McAlister when Governor Cruce was out of the State. In doing so the court stressed the necessity for continuity of execu-

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\(^{101}\) *Royster v. Brock*, 258 Ky. 146, 79 S.W.2d 707 (1935).


\(^{103}\) *Am. Rep. 551*, 552 (1874).

\(^{104}\) *Ibid.*

\(^{105}\) *State ex rel. Crittenden v. Walker*, 78 Mo. 139 (1883). *People ex rel. Tennant v. Parker*, 3 Neb. 409 (1872), was not cited.

\(^{106}\) *10 Okla. Crim. 133*, 135 Pac. 428 (1913).
tive power, looking beyond American colonial experience to English history for precedents: 107

In all regular governments there is no interregnum, and there should always be someone capable of administering the laws at the head of the government. The de facto doctrine originated in England centuries ago and was carried so far with respect to the English crown that treasons committed under Henry VI (a King "in deed and not in right"), not in the aid of the lawful claimant, were punished under Edward IV. Bacon says that "it hath been settled that all judicial acts done by Henry VI, while he was king, and also all pardons of felony and characters of designation granted by him, were valid." . . . On the same principle when the power of Cromwell was overturned and Charles II restored, the judicial decisions under the former remained unmolested and the judiciary went on as before, still looking only to the de facto government for the time being. . . .

In December, 1913, the court, in effect followed the Crump case in Ex parte Hawkins. 108

The strength of the holdings in these two cases was somewhat vitiated by the Supreme Court of Oklahoma in 1926 when the decision in Fitzpatrick v. McAlister 109 was announced. Governor J. C. Walton was convicted in impeachment proceedings and the court had to decide whether Lieutenant Governor Trapp became governor, and as such, was ineligible to succeed himself. The Oklahoma Court made the logical distinction: 110

In the Crump case the court was dealing with an occasion of temporary absence of the Governor from the state . . . under the conditions here presented, the impeached Governor has no right to return and oust the present Governor and assume the powers of the office of Governor. . . . We are dealing with a condition where the disability cannot be removed; the law provides no means for its removal; it has become final; and it is our duty to avoid speculations and deal with the actual condition which confronts us.

The court then drew a parallel between the Oklahoma and United States Constitutions: "Said section of the federal constitution is identical with ours, with the exception that ours is the stronger and more definite. . . ." 111 Most courts have adhered to the broad interpretation given in the Tennant case and in State v. Graham. 112

10710 Okla. Crim. 133, 137, 135 Pac. 428, 433 (1913).
109121 Okla. 83, 248 Pac. 569 (1926). Supra note 61.
110121 Okla. 83, 88, 248 Pac. 569, 575 (1926).
111Id. at 89, 248 Pac. at 576.
112Markham v. Cornell, 136 Kan. 884, 18 P.2d 158 (1933); Johnson v. Johnson, 141 Neb. 239, 3 N.W.2d 414 (1942). The lieutenant governor sued
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F. Disability

There are only two reported cases on the problem of gubernatorial disability. On March 31, 1890, Governor David H. Goodell of New Hampshire sent the following letter to the attorney general:

Please take such steps as you think necessary to cause the president of the senate to exercise the powers of the office of governor during the vacancy caused by my illness. I am not able to perform the duties of the office, and the public service should not suffer from my inability.

Upon receipt of the letter the attorney general petitioned the Supreme Court for a writ of mandamus to compel the president of the senate to exercise the executive power and duties. Chief Justice Charles Doe's opinion in this case, is the classic one in this field:

From 1784 to 1792 the governor (then styled President of the State of New Hampshire) was president of the senate. Instead of his present power of vetoing or approving bills passed by the senate and house, he had "a vote equal with any other member" of the senate, and also "a casting vote in case of a tie," and when his office was vacant all his powers were exercised by "the senior senator." When the constitution took effect, and the legislature met for the inauguration of the new government, June 2, 1784, Meshech Weare, the governor-elect was unable to be present. In brief periods of his illness and absence, in June, 1784, and February, 1785, his duties were performed by Woodbury Langdon, senior senator, acting as governor pro tem. On both occasions Langdon presided in the senate, by virtue of his provisional tenure of the governor's office; and on the 8th of June, 1784, as governor, he sat with the council, and exercised the governor's power (with the required advice and consent of the council) of signing warrants for the payment of money. . . . The authority of this precedent has not been shaken, and it does not appear that the soundness of the contemporaneous construction has even been doubted. . . .

The mischief designed to be prevented was the suspension of executive government by the governor's death, absence from the state, or disability. . . . The prescribed remedy is the duty of a substitute to act in cases of necessity. The services of a substitute may be necessary when the governor's absence or inability is for the governor's salary during the latter's absence; In re an Act Concerning Alcoholic Beverages, 130 N.J. 123, 31 A.2d 837 (1943), the court held the governor must notify the lieutenant governor of his return; In re Advisory Opinion to the Governor, 112 So. 2d 843 (Fla. 1959).

Barnard v. Taggart, 66 N.H. 362, 29 Atl. 1027 (1890); Wrede v. Richardson, 77 Ohio St. 182, 82 N.E. 1072 (1907).

Barnard v. Taggart, 66 N.H. 362, 29 Atl. 1027 (1890).

Id. at 363, 29 Atl. at 1028.
temporary as well as when it is permanent. . . . In article 49, "vacant by reason of his death, absence from the state, or other-" has a broader significance if due weight is given to the evidentiary force of the primary and leading purpose that the executive work shall go on without interruption. An intermittent vacancy, such as occurred in the time of Governor Weare, may occur again; and the evils of an interregnum, which article 49 was intended to prevent, are not to be introduced by technical reasoning or arbitrary rules. . . .

The New Hampshire court, without direct reference to Hamilton's characterization of the Vice President, spoke of the alternate consistently throughout the opinion as a "substitute." The references to early New Hampshire history evidence the court's understanding and recognition of the precedents of the pre-federal era. For all of these reasons the decision is sound constitutionally and practical in effect. Since the governor himself had announced his disability, the court was not faced with a decision regarding determination of that condition. But Chief Justice Doe discussed that problem:

There might be a case in which the attorney general would intervene without such request. While a determination of the question of vacancy on a petition of this kind is not legally requisite to call the president of the senate to the executive chair, it may be a convenient mode of avoiding embarrassment that might sometimes arise from doubt and controversy in regard to his authority, and the validity of his acts. The existence of an executive vacancy is a question of law and fact within the judicial jurisdiction. If the defendant exercised executive power without a previous judgment on that question, the legality of his acts could be contested and determined in subsequent litigation, and the judicial character of the question does not depend upon the time when it is brought into court. With adequate legal process, the consideration and decision of such a question may be prospective as well as retrospective.

The Ohio Supreme Court reached a contrary decision in the Wrede case. The extreme illness of the governor did not cause the powers and duties of the office to devolve upon the lieutenant governor; said the court, because the governor "had not voluntarily relinquished the office." Contrary to the interpretation scholars have put on the federal constitution, the court continued: "A self-contained Lieutenant Governor could not be expected to assume the functions of the Governor upon his own initiative."

As late as 1935 the New Hampshire Court indicated its support

116 Id. at 368, 29 Atl. at 1031.
117 77 Ohio St. 182, 190, 82 N.E. 1072, 1075.
118 Ibid.
of the Taggart case. In Opinion of the Judges,\textsuperscript{119} a unanimous decision by the court made the distinction between temporary and permanent disability and permitted the president pro tem of the senate to act as governor when that officer was absent from the state.

Actual practice has given additional weight to Taggart. Governor John S. Little of Arkansas suffered a nervous breakdown in 1907. Although Little did not resign and was considered governor for the balance of the term, the president and president pro tem of the senate exercised the powers and duties of the office. Governor Chamberlain of Oregon died in 1910 and was succeeded by Frank M. Benson, who then became governor under the ruling in the Chadwick case. But even in Oregon, practicality superseded constitutional law and when Benson became incapacitated, Jay Bowerman, president of the senate, acted as governor the balance of the term.\textsuperscript{120}

One of the most extended cases of disability occurred in Illinois in the late 1930's.\textsuperscript{121} Following a heart attack in November, 1938, Governor Henry Horner spent several months in Florida to regain his health, returning to Illinois in April, 1939. Despite his illness he would not surrender his office. On April 8, 1939, just prior to the state primary, Lieutenant Governor Stelle proclaimed himself acting governor and called for a special session of the legislature to meet on the same day Governor Horner had convened the legislature. The official seal was affixed on Governor Horner's call\textsuperscript{122} and Stelle took his position as presiding officer of the senate when it met. On October 5, 1939, Governor Horner's secretary signed a "disability certificate" and filed it with the secretary of state. The next day the governor died.

The legal ramifications attendant to the illness of Governor Earl K. Long in 1959 illustrate the technicalities encountered in this area. Under Louisiana law, Long could not be involuntarily committed while governor. Impeachment was required first. This was the reason he was taken to Texas. Long was released from the hospital at Galveston only after he agreed to enter a Louisiana institution voluntarily. After signing in at a New Orleans hospital

\textsuperscript{119}87 N.H. 489, 177 Atl. 655 (1935).

\textsuperscript{120}STAFF OF SPECIAL SUBCOMM. TO STUDY PRESIDENTIAL INABILITY, HOUSE COMM. ON THE JUDICIARY, 84th CONG. 2D SESS., PRESIDENTIAL INABILITY 42 (1956).

\textsuperscript{121}Note, 8 U. CHI. L. REV. 521 (1941).

\textsuperscript{122}Apparently Stelle was not as ingenious as Nebraska's Isaac Hascall in Tennant v. Parker, 3 Neb. 409 (1872).
he left by car. Lieutenant Governor Lether Frazer took over the gubernatorial duties hesitantly—"until I learn something else." The Attorney General, Jack Gremillion, declared Frazer was "acting governor" until Long could resume his duties.123

Nebraska's Governor Charles Bryan was incapacitated due to illness, but he continued to direct the state government, in some degree, from his bed for a period of two months.124 During Governor Ralph G. Brooks' last illness no one could agree on the procedure for determining disability. The attorney general's office issued no official opinion, although that officer commented to the press that "it was up to the Governor." The Republican lieutenant governor said that any citizen could call a hearing before the attorney general. The attorney general denied this. The Governor's administrative assistant said the whole problem was a medical question.125 The 72nd session of the Nebraska legislature passed a bill in 1961 which clarifies the situation by creating a board to determine disability.126

The constitutions of only three states mention the method of determining disability: Alabama, Mississippi, and New Jersey. In Alabama the supreme court makes the determination, but can act only in cases of "unsoundness of mind." The secretary of state submits the question to the supreme court in Mississippi, while in New Jersey the supreme court decides, but the legislature instigates the action. Texas and Alaska constitutions provide that the procedure shall be prescribed by law, but no laws have been passed on the subject.

Although Oregon has no constitutional provision to this effect, the legislature has passed a law creating a disability board composed

124Lincoln Star, Sept. 1, 1960, p. 38, col. 1. Governor Bryan was to begin a new term in January 1933. Walter Jurgensen (D), the retiring lieutenant governor asserted that he, and not Theodore Metcalfe (R), the lieutenant governor-elect, would act as governor if Bryan had not recovered by inauguration day. While Bryan was not sufficiently recovered to take part in the official ceremonies he took the oath privately and thus blocked Jurgensen's move. See 22 NEB. L. REV. 20 (1943).
126L.B. 221, 72d Neb. Leg. Sess. (1961). This bill was passed by the Legislature on May 2, 1961, and signed by the Governor on May 5, 1961.
127ALA. CONST. art. V, § 128.
128MISS. CONST. art. V, § 131.
129N.J. CONST. art. V, § 1, para. 8.
130TEX. CONST. art. IV, § 3(a).
131ALASKA CONST. art. III, § 12.
of the Chief Justice, the Superintendent of the State Hospital at Salem, and the Dean of the University of Oregon Medical College. Governor Hatfield says: "These statutes were not passed under any constitutional authority nor, in my opinion; were they prevented by any constitutional provision." However, it could be argued that the law is authorized by the Oregon Constitution which gives the legislature "all powers necessary for a branch of the Legislative Department, of a free and independant [sic] state." Nevertheless, the law is open to question on the basis of the separation of powers doctrine.

As previously mentioned the Nebraska legislature passed a similar law. This state has an "all laws necessary" provision in the constitution, but it also has a section limiting the power of the legislature to fill vacancies relating to "the death of the incumbent . . . removal from the state, resignation, conviction of a felony, impeachment, or becoming of unsound mind." The constitution says nothing about physical disability. It could be argued that this section applies only to filling and not to determining vacancies, but this seems an artificial distinction. The constitutionality of this law, considering the possible violation of the separation of powers doctrine, is doubtful.

A void in state law is indicated, and legislation would seem eminently desirable to clarify procedure and thus avoid prolonged litigation in time of crisis.

IV. CONCLUSIONS

1. Temporary and permanent disability. The wide range of thought found in the opinions on succession reflects diversity of phrasing in the constitutions. More significantly, these cases indicate the struggle of the state judiciary to adapt one clause to a number of situations inherently different. The decisions are inconsistent when succession is regarded as a single problem, rather than the result of any one of a series of circumstances. Conversely, the cases are a tribute to the tenacity of our state judges in adhering to a principle which predated our legal system, dominated our colonial law,
and influenced the composition of the federal constitution: There must be no lapse in executive power.

The effect of the Tyler tradition is self-evident. Though that custom may not be good constitutional law, it is a 119 year old tradition, ratified by six presidents, and it cannot be ignored. Nor should it be. The words of Justice Blatchford in *Merriam v. Clinch*,\(^{137}\) although dictum, have a solid basis in logic. When a president dies, the vice president cannot be considered the “servant, or agent, or locum tenens of the deceased president.” The essence of the colonial practice was that the alternate was a deputy, but no one ever suggested that he was a deputy for a dead man.

All of these cases lead to the inescapable conclusion that our state and national constitutions must be amended to recognize the basic difference between temporary and permanent disability. In other words, instead of arguing about the Tyler tradition, it should be embodied in the constitution: “In cases of permanent disability, the alternate succeeds to the office of chief executive.” This was the substance of the legislation proposed by President Eisenhower.\(^{138}\) It follows that in cases of temporary disability the colonial precedent should be followed and the alternate should be considered as a “substitute” or “deputy” until the disability shall be removed or become permanent.

The intriguing legal question suggested in the *Chadwick* case has not been answered in any of the succeeding cases. Chief Justice Waldo commented: “It is not explained how . . . the duties can be separated from the office so that he who discharges them does not become an incumbent of the office.”\(^{139}\) It is a different way of stating the question which perplexed the Garfield, Wilson, and Eisenhower cabinets: What is the legal status of the disabled executive when the alternate is exercising the powers of the office? Is he in a “legal limbo” until the disability is removed? It would be reassuring to have a lucid explanation in the constitution, in addition to the distinction between temporary and permanent disability.

The legal rationale could be explained simply, thus dispelling the question raised by *Chadwick*: Upon inauguration the executive is vested with two rights. The first is the right to his term of office, and such right is subject to termination only by death, resignation, conviction by impeachment, or permanent disability. The

\(^{137}\) 17 Fed. Cas. 68 (No. 9460) (C.C.S.D. N.Y. 1867).


\(^{139}\) Chadwick v. Earhart, 11 Ore. 389, 4 Pac. 1180 (1884).
second right is that of exercising the powers and duties of the office. This is a contingent right, subject to temporary suspension in the national interest, in case of temporary inability, or pending the determination of impeachment proceedings.

2. Determination of Disability. Merriman Smith, veteran White House correspondent, describes the ideal plan for determining disability as one which is "trustworthy, but it must also be swift, small and uncomplicated." Few of the proposals offered to date on either the state or federal level meet this standard. Most of the plans offered have suggested that the determination of disability be made by the legislative branch, the Supreme Court, or a combination of the two with officials from the executive branch. Mr. Brownell's evaluation becomes pertinent at this point:

Many earnest people have suggested that the prestige and impartiality of members of the Supreme Court be enlisted to head or staff an inability commission, but the letter of Chief Justice Warren of January, 1958, would seem to have removed — and wisely so — all possibility of the Justices' participation in such a group. Various officers of legal and medical societies have also been suggested for membership. Since they are not publicly elected officials and have no public responsibility, however, a better plan would be to ask these worthy persons to serve, if at all, in an advisory capacity.

If the power of initial determination is diverted from the executive branch, or even is shared in some fashion with those outside the executive, a way is opened for harassment of a president for political motives. A major shift in the checks and balances among the three divisions of the federal government could well result.

During the Hayes-Tilden election dispute an Associate Justice of the Supreme Court served on the commission to decide the election. The court was criticized for years for taking part in the controversy. At the time of the Nebraska Constitutional Convention of 1919-1920 it was proposed that the Chief Justice of the Nebraska Supreme Court sit as a member of the Board of Pardons. Chief Jus-

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142 The letter from Chief Justice Warren is as follows: "... It has been the belief of all of us that because of the separation of powers in our Government, the nature of the judicial process, the possibility of a controversy of this character coming to the Court, and the danger of disqualification which might result in the lack of a quorum, it would be inadvisable for any member of the Court to serve on such a Commission. ..." Id. at 199 n.22.
Morrissey quickly discountenanced such a plan as imposing a non-judicial function on the Court.

Former President Truman believes the matter should be determined by a vote of the Congress. This proposal would hardly assure swift and decisive action. Nor would the public place confidence in a non-political decision by a Congress which, by its very nature, is political. After the experience with Congress during the impeachment trial of Andrew Johnson few support this proposal.

Former President Hoover and certain influential members of the Eisenhower official family favor determination by the cabinet. Merriman Smith says the cabinet "would be sure to play a house game for fear of losing their jobs." The fact that Wilson fired Secretary of State Lansing for suggesting a disability existed, lends credence to the correspondent's opinion.

Experience with chief executives, state and national, reveals two fundamental misconceptions in the law. These fallacies have not been fully recognized or formulated to date. They are: (1) the executive will recognize and admit his disability and voluntarily relinquish the office; (2) the alternate will be kept informed of the executive's condition so he can make an intelligent determination. Time after time experience has proved that these theories do not hold up in practice. During periods of executive incapacity, doctors, not the alternate, have determined what business the executive should transact and when. The Eisenhower and Brooks' illnesses offer the latest proof for this contention: 

On his arrival in Denver, Adams made it clear to the physicians that he would defer to their judgment on bringing matters to the President's attention during the crucial seven days ahead.

When the question of Governor Brooks' capacity to conduct executive affairs was raised the press was told the matter was "a medical question."

Yet in all cases to date the constitution involved has placed the responsibility for determining disability on the alternate, and in most cases the alternate had no access to the executive.

Perhaps our failure to solve the problem has resulted from an

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143 During Garfield's illness "the physicians forbade him to discuss public affairs." SILVA, PRESIDENTIAL SUCCESSION 54-55, University of Michigan Press, Ann Arbor, (1951), Copyright by the University of Michigan; Mrs. Wilson submitted papers to Doctor Grayson. "If Grayson thought that the President could pass judgment on the matter without excitement, the paper was shown to him." Id. at 59-60.

unwillingness to accept the facts of history. The problem we are dealing with is really one of the general health of the executive, not merely a series of isolated illnesses. The state cases reviewed have spoken of the public interest in a vigorous executive. Why not recognize the public interest in the health of our chief executives and make the deference to the medical profession prospective as well as retrospective? So much depends upon the good health of our governors and the president that preventive medicine for them should be required by our constitutions. When our chief executives are sick the public interest should not also suffer. Such a situation could be avoided prospectively by requiring periodic physicals by an impartial board of physicians (not the executive’s personal physician) with the stipulation that the findings be made public. If the health of the executive were in danger through overwork or otherwise, the board could make a recommendation to the “cabinet” that a state of temporary disability existed. Public opinion would force action by the cabinet. This idea is not revolutionary. Presidents Truman, Eisenhower and Kennedy have made a practice of having regular physicals, so the requirement would make a situation de jure which has been de facto, while at the same time removing the physicians from the immediate control and influence of the executive.

Immediately the argument is raised: The board will act from political motives, harass the executive, and deprive him of his privacy. The ironic fact is that the same people who advance this view are the same ones who are willing to defer to the judgment of the physicians when the executive is ill. The public interest is then secondary; politics is somewhere in between. Furthermore, election to public office automatically curtails privacy, at least insofar as the public interest is concerned.

Certainly every precaution should be taken to see that the examining physicians are not subject to political influence—from outside or inside the executive department. The Civil Service Commission lists on its rosters thousands of doctors. The Cabinet or the Secretary of Health, Education and Welfare could find five men qualified to staff the board. Personnel could be changed yearly as a precaution against political pressure; and the board could call in specialists as needed. They would no doubt wish to consult with the President’s personal doctor, but his opinions would be advisory only.

Similar procedures could be adopted by the states. The compo-

145The term “cabinet” as applied to state government encompasses the appointive heads of the executive departments.
sition of the board now existing in the state of Oregon could serve as a model, although the law would have to be amended so that it would be prospective as well as retrospective. Oregon and Nebraska have already recognized the medical nature of the problem by making two of the three board members doctors. Such a law would also eliminate the alternate from the determination, thus avoiding the embarassment and criticism attendant in deciding upon his own advancement. There would be no conflict of interest and he would assume office under more favorable circumstances.

3. Associated problems.

(a) Election of governor and lieutenant governor as a team. Much litigation has developed from the deeds of acting governors when the chief executive has been absent from the state. Governor Edwin L. Mechem of New Mexico cites such an incident from his own experience: 146

One term the lieutenant governor went to the United States House of Representatives, and left me with a Democrat Secretary of state. I left the state one time and she pardoned a vicious criminal in my absence. I never left again.

Nearly every state has had a similar situation develop at some time or other in its history, but Kentucky has had more than its share: 147

One example in the past is a situation where the Governor was out of the state, the Lt. Governor called a special session of the Legislature. In another administration, it was impossible for the governor to leave the state even to dedicate a bridge between Kentucky and another state for fear of actions that would be taken by the Lt. Governor who was not in accord with his program. In addition, the Lt. Governor being president of the senate is in a position to completely cripple or destroy the legislative program of a governor with whose program he is not in sympathy.

There is another excellent reason for electing the governor and lieutenant governor by this method: 148

If the people select a member of one party as the chief executive it would seem that they have placed faith in the man and his political party and if the incumbent dies in office and is replaced by an opposite party member it is at least to some extent disavowing the action of the people.

The usual rebuttal to this argument is that the electorate is

aware of the difference in party affiliation; they are designated by party on the ballot. "Splitting the ticket," say the advocates of separate election, is laudable for it represents voting for the "man" and not the "party." The answer to this premise is another question: How many people have the problems of succession in mind when they "split" their ticket? Whether we like it or not, parties adopt a platform and their members enact it into law, even when the legislature is supposedly non-partisan.

Only Alaska and New York elect their governor and lieutenant governor as a team. Joseph Martin, Jr., Republican National Committeeman from California, says that election by a similar method may not eliminate personality conflicts, but it will certainly minimize them.149

(b) Vacancy in the alternate's office. When a permanent disability exists and the alternate succeeds to the office of chief executive, provision should be made for filling the vacancy. The same reasons supporting the election of the chief executive and alternate as a team apply to this situation. The cases where the president of the senate has acted as governor prove that the same distressing circumstances develop. For that reason the decisions have permitted the governor to appoint a lieutenant governor, thus keeping the line of succession intact. Federal nominating practice offers an interesting analogy. Since the adoption of the national convention system for selecting candidates, the presidential nominees, with the exception of Adlai Stevenson in 1956, have chosen their running mates. The national convention, as a practical matter, merely ratifies a vice presidential nomination already made by the presidential nominee.

There are similar and serious reasons why a successor President, like Mr. Truman, should be permitted by the constitution to fill a Vice Presidential vacancy. The Presidential Succession Act of 1948150 was an improvement over previous legislation. But in the event of the temporary or permanent disability of both the president and vice president, the present law could place another party in control of the executive department. If Eisenhower and Nixon had been disabled, Democrat Sam Rayburn would have become presi-

149"We have had examples in California where a governor has been distrustful of, or antagonistic to, a lieutenant governor of his own party to the point where he hesitated to leave the state, and certainly the possibility of such a situation existing would be far more likely in the event the two were of opposite parties." Letter, Mar. 28, 1961.

dent. The vast powers of federal patronage would pass from one party to another in the middle of a term.

A solution to this problem would be to word the Act in the alternative, so that either the Speaker of the House or the House Minority Leader, whichever is of the same party as the president, would succeed to the presidency. If this were done throughout the line of succession, in state and national legislation, an "orderly transition" would be more than a quadrennial occasion.

(c) Elimination of legislative duties of the alternate. Provision should be made to relieve an alternate of legislative duties while he fills a temporary vacancy in the executive office.

(d) Salary. Existing clauses regarding the "emoluments of the office" should be clarified where necessary, so that an alternate acting as executive receives the executive's salary temporarily, or continues to receive the alternate's salary. But the constitution should be clear.

(e) Absence. Case law should be formalized by an amendment stating that "absence" means only such absence as will "injuriously affect the interests of the state."

(f) Disability of the executive-elect and of nominees. The constitution should stipulate that upon the death or disability of the governor-elect, the lieutenant governor-elect assumes the office. Disability could be determined by the same method applicable to the incumbent. Similarly, statutes should codify the informal rules of the parties which now govern in the case of death or disability of a nominee.

These proposals are dictated by history, common sense, and the pressure of our time. Continuity of government means more than passing a succession law to cover nuclear disasters. It must also mean an orderly transition in case of executive disability. When constitutional revision is proposed, these matters are worthy of the most serious consideration.\textsuperscript{151}

\textsuperscript{151}For examples of proposals to revise the state constitutions, see COMMISSION ON REORGANIZATION OF STATE GOVERNMENT, SUCCESSION TO ELECTIVE OFFICES AND DISABILITY OF OFFICERS 1-15 (First report, June 1960); FLA. SEC. OF STATE, REVISED FLORIDA CONSTITUTION PROPOSED BY THE LEGISLATURE § 9.