In September 2003, Frank O’Bannon, the Democratic governor of Indiana, suffered a massive stroke. Early news stories reported that state officials had decided not to invoke the process for transferring authority to Lt. Gov. Joe Kernan (also a Democrat) until it became clear if there was any hope of O’Bannon recovering. The relevant language from Indiana’s constitution is found in Article 5, sections 10(a) and (d):

(a) …In case the Governor is unable to discharge the powers and duties of his office, the Lieutenant Governor shall discharge the powers and duties of the office as Acting Governor.

(d) Whenever the President pro tempore of the Senate and the Speaker of the House of Representatives file with the Supreme Court a written statement suggesting that the Governor is unable to discharge the powers and duties of his office, the Supreme Court shall meet within forty-eight hours to decide the question and such decision shall be final.

A day later, having consulted with the doctors treating O’Bannon, the Republican senate president pro tempore and Democratic house speaker wrote to the chief justice of the Indiana Supreme Court, and the court quickly ruled that Kernan should serve as acting governor, although O’Bannon would remain in office, entitled to salary and benefits. Five days later, O’Bannon passed away, and Kernan automatically succeeded him.

These unusual events, though traumatic for O’Bannon’s family, did not constitute a political crisis. The transfer of authority was dignified, without any aura of legal ambiguity or partisan controversy. Gubernatorial successions arise in many ways, and Indiana’s crisis was soon over-shadowed by the scandal-induced resignations of the governors of Connecticut and New Jersey. Every state except Hawaii has dealt with midterm gubernatorial vacancy, and succession at the apex of the executive branch is typically a smooth process, whether the precipitating event be a death, resignation under happy circumstance (e.g., following election or appointment to another office), forced resignation (e.g., following conviction of a crime or revelation of a scandal), or even impeachment, removal or recall. It is quite rare for a living governor to be too severely incapacitated to govern, but Indiana’s experience is a reminder that rare events sometimes happen. Surprisingly, a number of states have lacunae in their legal frameworks for dealing with such gubernatorial incapacity, notwithstanding the fact that controversy and near-misses with constitutional crisis have arisen at the federal level and in several states. Here, we briefly review provisions for gubernatorial succession due to incapacity across all 50 states, in an effort to determine which are well-equipped to deal with such events, and which are vulnerable to crisis.

Recognition of the frailty of officials is longstanding: the federal constitution juxtaposes “inability to discharge the Powers and Duties of [the presidency]” with death, resignation and removal when broaching the line of succession in Article II, Section 1. However, nearly two centuries passed before the 25th Amendment filled out procedures for establishing “inability,” the only inherently subjective condition of these four. The solution—also popular with states—was procedural rather than substantive. In lieu of any enumeration of conditions that constitute disability, most states (and the United States) specify procedures for replacement in the event of disability, thereby delegating discretion to individual decision-makers on a case-by-case basis. There are potential hazards in such discretion, particularly where natural partisan conflict can find its way into a determination of disability. Far more hazardous, though, is an absence of legal procedures for determining disability.

Table A lays out some key aspects of how the 50 states deal with incapacity in the governor. The first column lists constitutional provisions pertaining specifically to disability, and reveals that literally every...
state has at least some such language in its constitution. The word counts give a fairly crude indication of the level of detail in each state’s provisions: sometimes a large number of words is deceptive insofar as the provisions are wordy, but not very detailed, or the section in question actually includes discussion of some aspect of succession other than disability (where possible, we provide a second disability-specific count in such cases). By contrast, low word counts reliably signal lack of specificity. For instance, the 53 words in Article III, Section 12 of the Alaska Constitution read simply:

> Whenever for a period of six months, a governor has been continuously absent from office or has been unable to discharge the duties of his office by reason of mental or physical disability, the office shall be deemed vacant. The procedure for determining absence and disability shall be prescribed by law.

The second column of the table lists statutory provisions that elaborate on the constitutional language about gubernatorial disability, and Alaska’s cell is empty. The state Legislative Affairs Agency explains:

> To avoid a tedious recitation of procedures similar to those found in the 25th Amendment to the U.S. Constitution, the drafters of the constitution assigned to the legislature responsibility for specifying how the office of governor could be declared vacant. The legislature has not yet done so, which may be unfortunate if the task became complicated by the circumstances of a particular situation warranting the use of this section.¹

“Unfortunate” seems an understatement, and Alaska is not alone; as Table A shows, by our count, about a third of the states similarly suffer from having “unclear” legal provisions on determination of gubernatorial disability.² Illinois is a surprising member of this club, since it has already weathered one political crisis stemming from the prolonged ill-health of a governor, and has dodged a bullet in recent memory. Gov. Henry Horner suffered a heart attack in November 1938, but clung to office through an extended convalescence rather than allow Lt. Gov. John Stelle, a fellow Democrat but also a hated rival, to take power. Unable to work for more than a few hours per day, Horner relied on a regency of unelected advisors, even as his foes launched an array of challenges.³ In 1994, the possibility of a sudden gubernatorial transition again loomed. Just days after Lt. Gov. Bob Kustra had announced plans to resign, Gov. Jim Edgar underwent unscheduled, emergency heart surgery. Kustra then acted as Edgar’s proxy in budget negotiations, though, happily, the governor recovered quickly enough to sign the final spending bill from his hospital bed. Had Kustra resigned before chest pains seized Edgar, according to Article V, Section 6(a), that vacancy in the lieutenant governorship would have placed Democratic Attorney General Roland Burris first in the line of succession. In that event, a less speedy recovery by the governor might have precipitated a messy tussle for control.

A catalogue of all crises and near misses for all states would be very long indeed. At the dramatic end of the spectrum, in 1900, Kentucky saw William Goebel, the Democratic candidate for governor in a disputed election, shot, declared elected by the legislature, and then sworn in while hospitalized, only to pass away days later. In a more recent and more mundane case, Massachusetts Gov. Jane Swift—who had succeeded to the governorship when Paul Cellucci resigned to become ambassador to Canada—came under scrutiny while bedridden, awaiting the arrival of twins. Swift, a Republican, had to fend off allegations from Democrats serving on the Governor’s Council that her physical absence from council meetings rendered her incapable of performing her constitutional duties.⁴

Given the many borderline or contested disability cases that did not result in succession, and many more near misses, determination of whether a chief executive is genuinely unable to perform duties is the crux of the matter, and the key column in Table A is the middle one, which identifies what actors take part in such determination. At a glance, one notes much variety. Indeed, this brief schematic cannot do justice to the diversity of procedures found across the nation. A few aspects seem particularly important.

**How Many Actors (and Which ones) are Involved?**

In most states, governors may designate themselves unfit to govern (presumably in anticipation of an expected medical crisis, or in the midst of a rapidly worsening condition). When others must make the declaration, one of the main protections against controversy is involvement of many actors, often representing all three branches of state government. Supreme courts are frequently included, more often as arbiters (as in Indiana) than as precipitators. South Dakota’s constitution, though, provides its supreme court with “original and exclusive jurisdiction” to determine the question of disability. In justifying the designation of the supreme court as the body to “ascertain the truth” about any allegation of inabil-
ity “unsound(ness of) mind,” the drafters of Alabama’s 1901 constitution explained, “The Committee can conceive of no safer body, no more august body, no body less liable to temptation to use the power for political gain or any other improper motive, than the Supreme Court of Alabama.”

**Must the Designation be Bi-partisan?**

In addition to being multi-member, supreme courts often (but not always) enjoy the appearance of non-partisanship. An alternative to ceding determination power to non-partisan actors is to ensure that the procedure used to determine disability involves a bipartisan group of actors. Requiring the involvement of a large array of actors has the effect of making it more likely that both major parties will take part, though numbers alone provide no guarantee of bipartisanship. In Pennsylvania, state statute stipulates that the lieutenant governor and a majority of the governor’s 26-member (as of 2004) cabinet make a determination of disability, but the cabinet is comprised of individuals appointed by the governor and confirmed by the state senate. The legislature enters the picture only in the event of a dispute about the governor’s capacity to resume the power and duties of the office.

**Can Succession Following from Disability Result in Partisan Changeover?**

Almost all state lines of succession allow for party changeover at some depth. Although this is not a point inherently about disability, the prospect of a partisan turnover surely complicates consideration of an incumbent governor’s fitness to stay on, given a dispute over disability. Accordingly, Table A includes a column showing the line of succession (and whether it is constitutionally or statutorily determined). The final column indicates how far down the line of succession party changeover can occur, and also provides examples in those states that have seen such party-switching successions. (To be clear, these cases did not necessarily involve disability, and all Civil War/Reconstruction switches were ignored). Indiana is unusual in the degree to which its laws mitigate against a change in gubernatorial party. First, the governor and lieutenant governor are elected on a common ticket. That is an increasingly common arrangement, and a clear insulation against partisan changeover, except in unusual circumstance. Furthermore, in the event of dual vacancies, Indiana requires the legislature to elect a replacement of the same party as the incumbent. It is only brand new changes in the constitution as of 2004—which broach a line of succession for an interim governor while the legislature makes this choice—that permit a very temporary change of gubernatorial party stemming from disability.

In Pennsylvania, where the lieutenant governor also serves as president pro tempore of the senate, the potential for change in partisan control of the governorship has become more salient as two of the last three governors have either resigned (Tom Ridge) or temporarily relinquished their power (Bob Casey). The question of separation of powers is also raised, since the constitution requires the lieutenant governor to vote in the event of a tie vote in the Senate. Concern over potential partisan shifts even further down the line of succession has recently prompted the Massachusetts legislature to consider a proposed constitutional amendment that would allow a governor who succeeded to the post from the office of lieutenant governor the capacity to appoint a new lieutenant governor subject to the confirmation of both legislative chambers. In short, the shadow of partisan switches complicates every aspect of succession, including what mechanism for assessing gubernatorial incapacity is optimal.

**Does the Successor Play a Role?**

Section four of the 25th Amendment to the U.S. Constitution provides a role for the president’s immediate successor, the vice president, in the determination of disability. Several states follow a similar practice. In Delaware, the immediate successor, while not in a position to make the determination unilaterally, could be a member of the opposite political party. There would appear to be some merit in excluding immediate successors from this process, so as to decrease the possibility of cabal. Alabama, for one, deliberately excludes the individual next in line to become governor from playing any part in rendering judgment on the fitness of the incumbent, a decision that the constitutional convention viewed as a “safeguard.”

**Is There Medical Involvement?**

Another notable distinction among those states having clear provisions for the determination of disability is whether they require the involvement of individuals with medical expertise. States in this category include Georgia, Iowa, Nebraska and Oregon. As an example, Nebraska statutes designate the dean of the College of Medicine of the University of Nebraska and the chairperson of the Department of Psychiatry at the University of Nebraska Medical center as members of a three-person team who examine the
governor and determine the issue of disability—a decision that requires unanimity among the examiners. Iowa similarly lodges power to evaluate a seemingly disabled governor in a three-member body including “the person who is chief justice, the person who is director of mental health, and the person who is the dean of medicine at the state university of Iowa” and even elaborates, “Provided, if either the director or dean is not a physician...the director or dean may assign a member of the director’s or dean’s staff so licensed to assist and advise on the conference.”

Acting or Actual?

In Table A, for brevity, we finesse the discrepancy between an “acting” (where powers and duties, but not the office devolve) and “actual” governor (where both the powers and the office devolve). In many cases the distinction is far from trivial; and it can be an especially important consideration in the event of disability insofar as a living, but incapacitated governor might require health benefits. In Utah, a state that has a rather detailed process for determining disability, but very limited experience with midterm succession, considerable ambiguity on the acting-versus-actual point surrounded the transition from Gov. Mike Leavitt to Lt. Gov. Olene Walker upon Leavitt’s acceptance of the office of administrator of the federal EPA in 2003. As of late 2004, the state’s Constitutional Revision Commission was considering recommendations to clarify succession procedures.

Conclusion

As we write, late in 2004, New Jersey’s unusual gubernatorial succession law is making news. By most accounts the governor of New Jersey is among the strongest of the nation’s chief executives. Excluding U.S. senators, the governor is the only statewide elected official. Vast appointment power allows the governor to select heads of executive departments, members of state and certain county commissions, judges and prosecutors. The reaches of power extend even into the legislative arena, where the governor is endowed not only with veto authority that requires a two-thirds majority in both chambers to counteract, but the capacity to request legislation for executive action in a manner that is favorable to pocket vetoes. The extensive powers of the New Jersey governor are compounded by the state’s succession laws. One of eight states without a separate lieutenant governor, New Jersey flouts traditional separation of powers principles by allowing (in the event of the absence, death or disability of the governor) the power of the governor to devolve upon the president of the Senate without requiring this individual to relinquish his legislative post. This scenario played out in 2001, as Senate President Donald DiFrancesco became acting governor following Gov. Christine Todd Whitman’s departure to the Bush administration. The transition from DiFrancesco’s acting governorship to the swearing-in of governor-elect Jim McGreevey in 2002 saw a week with an unprecedented four acting governors, including a farcical six-day stretch with both Republican and Democrat acting governors. In the summer of 2004, McGreevey, in the midst of a scandal, precipitated another chaotic transition by announcing his resignation, but delaying it to prevent a special election for his successor. We would quickly concur that New Jersey’s laws can use an overhaul; but, to give credit where due, it is not especially remiss in detailing how a stricken governor be evaluated. By contrast, many states simply have not dealt seriously with the issue.

Finally, we note that a special case of gubernatorial disability might occur in the course of a large-scale emergency wherein many other state officials are also afflicted. Since September 11, 2001, there has been renewed discussion of how American governments (federal and state) would cope with an attack or other disaster that disabled numerous officials simultaneously. Many states already have fairly specific provisions to allow continuity in the operations of state government in the event of some catastrophic event (terrorist attack, natural disaster, etc.). Most statutes of this nature have their origins in the cold war era, but a few states have enacted new statutes since the 9/11 attacks. Nevada offers one example, and post-9/11 concern played a direct role when Virginia voters recently overwhelmingly supported a constitutional amendment adding an additional 14 potential successors to a line previously containing only three. As officials and scholars revisit the question of how to handle the unthinkable in many states, they would do well also to re-examine their rules for handling an isolated emergency.

Inability, whether strictly medical or understood more broadly, is ambiguous and subjective in a way that death, resignation and removal are not, so clear provisions controlling how to determine when a governor should not retain office are critical. Those states that do have rules have, in many cases, passed a few trials. But the number of empirical data points is small, and it is not difficult to identify bothersome or problematic scenarios even in the states with detailed, modern constitutional and statutory provisions. Though rare, gubernatorial inability merits close attention.
Notes

2 We assembled Table A using LexisNexis and hardcopies of state codes and constitutions as well as interviews with officials in a number of states. Since constitutions and codes are constantly changing, we may have missed some provisions even with this multi-stage screening.
8 R.R.S. Neb. § 84-127.
10 Nicole Warburton, “Guv’s Succession May be Clarified,” Salt Lake Tribune, 9 July 2004, B5. A determination was made that Walker assumed the full control of the power and responsibilities of the office.
13 Mike Kelly, “Just Make us Proud; We’re Longing for Return to Normalcy,” The Record (Bergen County, NJ), 14 November 2004.
15 Michael Hardy, “Changes Secure Approval; Virginia Voters Back Two Amendments to State’s Constitution,” Richmond Times-Dispatch, 3 November 2004, A25. The previous list included only the lieutenant governor, attorney general and the speaker of the House. The amendment added the chairmen of the 14 standing committees in the Virginia House of Delegates.

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