Testimony to Pennsylvania Senate State Government Committee
July 18, 2022

Professor Brian J. Gaines, University of Illinois
and
Professor Brian D. Roberts, Principia College

We are pleased to have this opportunity to raise a few points in relation to the possibility of revising your state's "Governor and Lieutenant Governor Disability Procedure Law" Act of December 30, 1974 (P.L. 1072, No. 347 Cl. 71). We are both professors of political science who study American politics, and we collaborated in writing a chapter for the 2005 *Book of the States* concerning gubernatorial incapacity. That study consisted of a brief description of each state's legal provisions (constitutional and statutory) bearing on continuance of office given disability (or inability or incapacity) of a sitting governor. Our first aim was to describe what seem to be key choices and how American states have taken a few different paths. Our second goal was to highlight possible dangers or risks, particularly associated with sparse or ambiguous legal provisions. We did not offer our own preferred model or claim to have a catalogue of best practices. Hereafter, we will likewise strive to discuss, briefly, a few important decisions, with sundry pros and cons, rather than to advocate for a particular statute or statutory provision.

We will note at the outset that our 2005 study neglected the obviously related subject of incapacity in Lieutenant Governors. Because Pennsylvania is a state that addresses both topics in one act, with closely parallel provisions, we will comment on both subjects here. We have not undertaken a systematic update of our 2005 review, and will, therefore, offer selective examples without providing a new, complete table describing the present-day status quo in all 50 states. Finally, our understanding is that these hearings bear only on Pennsylvania's Disability Procedure Law, and not on the broader question of executive succession in all forms. Most states follow the federal example insofar as their lines of succession and the conditions for succession are set forth through a mixture of constitutional provisions and statutes. We assume that you are taking Pennsylvania's constitutional framework as given or fixed.

Article IV, Section 13 establishes that the Lieutenant Governor both: (a) becomes Governor for the balance of the ongoing term given an irreversible vacancy (death, resignation, etc.) in that office; and (b) temporarily acts as Governor in the event of a temporary disability. Slightly more complicated provisions in Section 14 of that article likewise stipulate that the President pro tempore of the Senate: (a) becomes Lieutenant Governor for the balance of the term given an irreversible vacancy (death, resignation, etc.) in that office; (b) temporarily acts as Lieutenant Governor in the event of a temporary disability in that individual; (c) becomes Governor for the remainder of the term in the event of vacancies in both the offices of Governor and Lieutenant Governor; and, (d) becomes acting Governor in the event of both of those officials experiencing temporary disabilities, or the Governor experiencing disability and the office of the Lieutenant Governor being vacant. That section elaborates that in the event of this Senator becoming Governor (scenario (c) immediately above), "His seat as Senator shall become vacant….and shall be filled by election as any other vacancy in the Senate." That provision appears to preserve

separation of powers, but it covers only one of the four replacement scenarios listed. In Section 2 below, we discuss some implications of this design.

1. What is disability?

A small point about terminology is that we slightly prefer "incapacity" to "disability" to describe a possibly temporary inability to discharge duties. The latter term has, in popular usage, become strongly associated with conditions such as requiring the use of a wheelchair or being blind, that clearly need not impede one's ability to serve in public office. States employ different terminology, as does the small academic literature on the subject. But "disability" is the term used not only in Pennsylvania's relevant statute but also in its Constitution, and so we would recommend that any revised statute maintain consistency of language and continue to use "disability."

Pennsylvania, following the federal model, stipulates exactly how an irreversible vacancy can occur in the governorship and lieutenant governorship: Article IV, Sections 13 and 14 catalogue "death, conviction on impeachment, failure to qualify or resignation." By contrast, there is no elaboration on what constitutes temporary "disability" of the kind that requires short-term substitution of an acting governor or lieutenant governor.

Recent history has witnessed some debate over whether Executive "disability" ought to be understood strictly in medical terms or, more broadly, to mean "situational disability." The broadest reading equates inability to perform with unfitness. For instance, many critics of President Trump made arguments urging the Cabinet to act under the provisions of the 25th Amendment because of his allegedly erratic behavior. A representative example was Senator Elizabeth Warren, formerly a law professor at multiple universities including Harvard. In 2018, after an anonymous op-ed in the *New York Times* claimed that White House staffers loyal to Trump stealthily worked to undermine his worst plans and ambitions, Warren asserted, "…if senior administration officials think that the president of the United States is not able to do his job then they should invoke the 25th Amendment…" (see, e.g., https://www.youtube.com/watch?v=gHUkMUpAgT0).

One of us argued that this claim flouted ample legislative history clarifying that the 25th Amendment was never intended to address incompetence, laziness, or unpopularity, but only literal inability to govern (Gaines 2018).

Jointly, we made a similar argument in 2008, when Lisa Madigan, then Attorney General of Illinois, filed a motion with the Illinois Supreme Court challenging the fitness to serve of scandal-ridden Governor Rod Blagojevich (Gaines and Roberts 2008). Blagojevich was ultimately impeached by the General Assembly, before being indicted, convicted of multiple crimes, and then imprisoned. (Four of his 18 convictions were much later overturned, and his sentence was commuted by President Trump after he had served about 8 years.) Illinois law is frustratingly vague on the correct procedures to address gubernatorial incapacity, but we argued that

Blagojevich's removal by the Supreme Court as "unfit" would have badly distorted the meaning of the term, and that impeachment was, instead, the correct route.

Whether one agrees with Warren and Madigan or with us, the general point is that there might be some merit in any revised Disability statute clarifying to some degree what constitutes "disability." Most states emphasize detailed procedures for addressing executive disability rather than elaborating on precipitating conditions as such. But several states (including Georgia, Iowa, Nebraska, and Oregon) at least implicitly frame the matter in medical terms by empowering medical officials to take part in the determination of disability. There might be some fuzziness in distinguishing between advanced senility or genuine insanity and low competence, but we would advocate for carefully defining bad performance out of disability in any statutory revision. Nonetheless, our view is that a strictly medical interpretation of "disability" is probably also too narrow, excluding important if unlikely possibilities such as a kidnapping or hostage-taking scenario.

2. Separation of Powers, or Lack Thereof

American federal and state governments all depart from the usual parliamentary ("Westminster") model by employing "separation of powers," with executive, legislative, and judicial power vested in distinct institutions. Nonetheless, Section 3 of Article I of the federal constitution provides that "The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided." The executive-legislative separation is thus not strictly absolute.

Many states likewise link their executive and legislative branches through the office of the Lieutenant Governor, at least conditionally. West Virginia and Tennessee mark one extreme, where there is no office of Lieutenant Governor as such, but the title of Lieutenant Governor is attached to the President of the Senate (WV) or Speaker of the Senate (TN), so that a legislative leader automatically gains a small foothold in the executive branch and is first in the line of succession to the governorship. Two other states lacking a Lieutenant Governor, Maine and New Hampshire, likewise place their Senate presidents first in the line of succession, but do not give that individual any executive role subordinate to governor in the absence of succession. Arizona, Oregon, and Wyoming, the other states to lack a Lieutenant Governor, instead place their secretaries of state first in the gubernatorial line of succession, and thus separate powers more cleanly.

The remaining 43 states, including Pennsylvania, have an elected Lieutenant Governor. Pennsylvania roughly parallels the federal example, as Article IV, Section 4 makes this individual President of the Senate, who may "vote in case of a tie on any question except the final passage of a bill or joint resolution, the adoption of a conference report or the concurrence in amendments made by the House of Representatives." The details of Article IV, Sections 13 and 14, reviewed above, permit some further linking of the executive and legislative branches. The stipulation that the President pro tempore must yield his or her Senate seat applies only to full

succession to the governorship. By contrast, a Senate President pro tempore who acts as Lieutenant Governor, who becomes Lieutenant Governor, or who acts as Governor during a period of gubernatorial disability, may retain his or her position in the Senate.

Recent history has seen some of these scenarios play out. In 2001, Robert Jubelirer, Senate President pro tempore, became Lieutenant Governor when that office was vacated by Mark Schweiker, who had become Governor upon the resignation of Governor Tom Ridge (to accept a federal cabinet position). Following a legal challenge, the state Supreme Court confirmed that a single individual could act both as Senate President pro tempore and Lieutenant Governor (*Lawless v. Jubelirer*, 811 A.2d 974 (Pa. 2002)). A second instance occurred in 2008, when the death of Lieutenant Governor Catherine Baker Knoll propelled Senate President pro tempore Joe Scarnati into the Lieutenant Governorship. So, Pennsylvania can, for extended periods, follow the Tennessee-and-West-Virginia precedent of less separated powers.

New Jersey probably stands out as having tolerated the *least* separated powers in modern American history. In 2001, New Jersey Governor Christine Todd Whitman resigned to join the administration of President George W. Bush. Under the New Jersey Constitution then in place, Senate president Donald DiFrancesco became acting Governor without having to relinquish his Senate position. Subsequently, other Senate presidents also held both positions, though for shorter periods. Then in 2004, Governor Jim McGreevy timed his resignation to prevent a special election to fill the vacancy, making Senate president Richard Codey acting Governor for nearly two years. In 2006, new legislation stipulated that anyone acting as governor for more than 180 days automatically became full Governor, but this change was more of an alteration of title than powers (https://law.justia.com/codes/new-jersey/2009/title-52/section-52-15/52-15-5/). Of greater significance, a 2005 constitutional amendment created an office of Lieutenant Governor, pushing the Senate president back in the line of succession.

We believe that an anomalous de-separation of powers akin to the New Jersey examples could take place in Pennsylvania, under an odd set of circumstances. Consider some additional, slightly less recent Pennsylvania history. In 1993, Pennsylvania Governor Bob Casey Sr. invoked Article IV, Section 13 to transfer authority to Lieutenant Governor Mark Singel, while he underwent a double-organ (heart and liver) transplant. Singel was acting Governor for exactly six months before Casey recovered sufficiently to resume his official duties. Had Singel experienced disability in that period, the Senate President pro tempore, Robert Mellow, would have become an acting Governor not required to relinquish his Senate post.

Allowing one individual simultaneously to act as both Governor and a legislative leader is not unprecedented in the US, and is not necessarily objectionable, depending on how important one regards the separation of powers. We do not raise this possibility to suggest that it is intolerable, only unusual. That an episode of gubernatorial disability might occur simultaneously with either disability or vacancy in the office of Lieutenant Governor might seem far-fetched. It is easier to imagine a hypothetical for simultaneous vacancies occurring, as in a tragic accident or terrorist incident claiming both individuals. But a recurring theme in provisions for disability is that plans ought to cover even highly unusual or rare eventualities, to prevent ad hoc improvisation in the

throes of an emergency. The present COVID pandemic is a vivid illustration of a surprise shock for which many governments were ill-prepared. With modern technology, a lengthy quarantine is probably not necessarily a disability of the sort requiring temporarily relinquishing power. But other emergencies, short of death, could be correlated.

We do not here offer a specific recommendation for statutory provisions, but if the prospect of a single individual leading the Senate and exercising the powers of Governor is deemed undesirable, we think that statutory remedies could perhaps suffice, without Constitutional amendment. Requiring the Senate President pro tempore to resign upon becoming acting governor would seem too extreme given that an episode of disability, and the resulting transfer of gubernatorial powers, can be quite brief. But, following the New Jersey example, a statute might set a maximum period for anyone to act as Governor so that after the given duration, full succession to the office occurs. An obvious complication from such a rule would be that a living Governor incapacitated for a long period would thereby be stripped of authority and, perhaps, of health-care coverage accrued by virtue of office holding.

3. Partisan Changeovers

In our 2005 review, we highlighted the issue of whether states' mechanisms for addressing gubernatorial disability permit changes in the party that holds the office. Only a few states forbid such switches, but many make them unlikely. Colorado requires partisan consistency, while Indiana permits very short-term switches, but with a further stipulation that the legislature must choose a same-party replacement promptly.(https://codes.findlaw.com/co/colorado-constitution-of-1876/co-const-art-iv-sect-13.html; https://codes.findlaw.com/in/constitution-of-the-state-of-indiana/in-const-art-5-sect-10.html). A bare majority of states (26) elect Governor and Lieutenant Governor as a slate (on a single ticket), so any party switch would take place further down the line, requiring multiple vacancies or disabilities. In our 2005 analysis, we largely ignored the distinction between temporary succession in light of temporary disability and succession for the balance of a term in response to vacancy, because all states employed the same lines of succession for these two scenarios. Logically, however, states could specify different lines for short-term and full-term succession. Again, we merely noted that states vary in this regard, and did not praise or condemn either option.

Because Pennsylvania's successions, both temporary and full-term, are constitutionally set, this subject is perhaps inapt for present purposes. Currently, only four states have someone from a different party than the Governor first in line of succession: Arizona (which, as noted above, has no Lieutenant Governor), Louisiana, North Carolina, and Vermont (all of which elect Governor and Lieutenant Governor separately). Pennsylvania has been in the same position, for the roughly two years that Democrat Ed Rendell was Governor and Republican Joe Scarnati was both Lieutenant Governor and Senate President pro tempore. Whatever one thinks of this situation, however, we suspect that statutory provisions effectively over-riding the constitutional allowance of party switching would be infeasible.

4. Who Decides?

Pennsylvania, like every other state, allows both for self-designation by governors and lieutenant governors as imminently incapacitated and for such designation to be done by others. As we noted in our 2005 article, when other constitutional officers are concerned that physical or mental incapacity has rendered a governor or lieutenant governor incapable of carrying out the duties of their respective offices, one of the main protections against controversy is involvement of many actors, often representing all three branches of government.

In Pennsylvania, the Lieutenant Governor and a majority of the Governor's Cabinet make this determination where the Governor is concerned (71 P.S. State Government §784.2), and the President pro tempore and a majority of the Governor's Cabinet do so where the Lieutenant Governor is concerned (71 P.S. State Government §784.5). While two branches of government are involved in either instance, as the Governor's Cabinet is appointed by the Governor (subject to the confirmation by the Senate), the collection of decision makers is not, save for odd circumstances as described above in section 3, bipartisan. Per §784.3 and §784.6, the full General Assembly enters the process only if there is a dispute following the declaration by the Governor/Lt. Governor that an incapacity no longer exists. The 21 days established in the law for the General Assembly to resolve the dispute, and the 2/3 majority in both houses who must agree that an incapacity still exists, are arbitrary and could be adjusted, but are consistent with other states that require the legislature to play determining roles at different stages of the process (initial determination of an incapacity, or like Pennsylvania, the resolution of disputes between other actors).

In addressing the number of actors involved, and their actual or perceived partisanship, we are not suggesting that having more actors, particularly at the stage of initial determination of incapacity, results in more accurate, efficient, or less controversial decisions. A number of states involve their state supreme court in the determination. And, as we have noted earlier, some states require the involvement of medical professionals. Georgia involves both, charging its Supreme Court to hold public hearings that includes "testimony from not fewer than three qualified physicians in private practice, one of whom must be a psychiatrist" (Constitution of the State of Georgia Art. V, § 4. https://codes.findlaw.com/ga/constitution-of-the-state-of-georgia/ga-const-art-5-sect-4-ii/). The initial claim that results in such action, however, need only be brought by any four of the state's constitutional executive officers. A handful of states have commissions or boards populated by a variety of officers that are involved at points in the determination of incapacity. California, for instance, allocates "exclusive authority to petition the Supreme Court to decide any questions relating to the termination of the temporary disability of the Governor" to a Commission on the Governorship consisting of "the President pro tempore of the Senate, the Speaker of the Assembly, the President of the University of California, the Chancellor of the California State Colleges, and the Director of Finance" (California Code, Government Code §§ 12070, 12073 https://codes.findlaw.com/ca/government-code/gov-sect-12070.html; https://codes.findlaw.com/ca/government-code/gov-sect-12073/).

A majority of the Governor's Cabinet in Pennsylvania does exceed the number of actors designated by many states. An instance of the successor and Cabinet acting to address a reluctant (i.e. unwilling to acknowledge incapacity) fellow partisan serving in executive office would never be a purely partisan conflict. Any changes to the composition of actors involved in the disability designation or resolution or the time in which decisions must be made should mitigate against prolonged periods of "acting" governors. Alaska, while one of the states we labeled in 2005 as having a lack of clarity about disability designations, does stipulate that after a period of six months when a governor has "been unable to discharge the duties of his office by reason of mental or physical disability, the office shall be deemed vacant," that is, procedures for actual succession are initiated (The Constitution of the State of Alaska, Article III, § 12. https://codes.findlaw.com/ak/the-constitution-of-the-state-of-alaska/ak-const-art-3-sect-12.html).

Finally, as our testimony has addressed, to at least some extent, all other sections of the current Governor and Lieutenant Governor Disability Procedure Law, we will close with a more mundane observation. The language in Section 7 (second paragraph) referencing the mode of communication used to distribute the written declaration of disability to the clerks of each legislative chamber could be updated to be as general as possible so as to not appear as antiquated either currently (see reference to "by a telegram") or many years from now.

Thank you for the invitation to address your committee. We hope our analysis proves helpful to your consideration of possible revisions to this law.

References

Gaines, Brian J. 2005. Gubernatorial Incapacity: A Review of Succession Provisions. *Spectrum: The Journal of State Government* 8, 4 (Winter): 699-701.

Gaines, Brian J. 2018. "No Time for A Coup: Incivility is Not Inability." *State Journal-Register*, Friday September 21 (also *News-Gazette*, Sunday September 23, 2018: C-6.) https://www.sj-r.com/story/opinion/columns/2018/09/22/no-time-for-coup-incivility/10235767007/

Gaines, Brian J. and Brian D. Roberts. 2005. "Gubernatorial Incapacity and Succession Provisions." In *The Book of the States 2005 (Vol. 37)*, Keon S. Chi, ed. Lexington, KY: Council of State Governments, 208–214. https://issuu.com/csg.publications/docs/bos_2005

Gaines, Brian J. and Brian D. Roberts. 2008. "Leave Blagojevich Case to Legislature, Not Courts." *News-Gazette*, Wednesday December 17: A-6.