THE UNIVERSITY OF CHICAGO LAW REVIEW

VOLUME 8 APRIL 1941 NUMBER 3

NOTES

GUBERNATORIAL DISABILITY

Circumstances attending the long illness of the late Governor Henry Horner of Illinois illustrate the inadequacy of state constitutional provisions for the disposition of the powers and duties of the chief executive in case of his disability.[1] These provisions are deficient in that they fail to define disability or to provide an adequate means of determining whether the incumbent is incapable of performing his official duties because of physical or mental inability. Because of this constitutional inadequacy the citizens' interest in being assured that the governor's duties are performed by the proper elected official is poorly protected under most state constitutions.

On November 8, 1938, Governor Horner suffered a heart attack. Later that month when he was able to travel, the governor went to Florida to rest and recuperate, and he remained there for four and a half months. During this pe-

[1] Ill. Const. art. 5, § 17 provides, "In case of the death, conviction on impeachment, failure to qualify, resignation, absence from the state, or other disability of the governor, the powers, duties and emoluments of the office, for the residue of the term, or until the disability shall be removed, shall devolve upon the lieutenant governor."

riod Lieutenant-Governor Stelle acted as governor under the constitutional provision that the duties of the chief executive shall devolve upon the lieutenant-governor when the governor is absent from the state.[2] Upon his return to the state in April, 1939, Mr. Horner resumed the duties of governor, but during the months which followed there were periods of considerable length when he did not go to his state-house offices. During these periods the governor's functions were conducted from his office in the executive mansion; and, apparently, few persons other than his closest friends and advisers were permitted to see him.[3] Conflicting reports and rumors regarding the governor's actual condition were widespread. Mr. Horner's political opponents of both parties said that the governor was unable to perform the duties of his office and that these were being performed in his name by a "bedside cabinet." They urged that Governor Horner was disabled within the meaning of the constitution and that Lieutenant-Governor Stelle should be acting as chief executive. In contrast, the governor and his close political associates insisted that his seclusion was merely for the purpose of conserving his strength and hastening his recovery.[4] They said that although he was not physically strong, he was mentally alert and well able to make executive decisions. These conflicting reports left the people of Illinois uninformed as to whether an official elected by them was actually functioning as governor.

During the campaign preceding the primary election of April, 1940, the governor's physical condition became a political issue. Governor Horner supported a "regular" slate of candidates for the Democratic nomination; while Lieutenant-Governor Stelle, as candidate for the gubernatorial nomination, headed a "rebel" slate. On March 12, the Democratic minority leader in the Illinois house of representatives who was the "rebel" slate candidate for nomination for United States Senator, suggested the appointment of a committee of clergymen and physicians to examine the governor and report upon his condition.[5] A week later a Chicago lawyer threatened institution of quo warranto proceedings to determine Governor Horner's right to continue in office.[6] To a general charge that the Governor was incapacitated, the complainant added the specific charge that the state board of pardons and paroles had failed to function because of the

[2] It seems to be the practice in Illinois for the governor upon leaving the state and upon returning to file with the secretary of state a formal notice of his prospective absence or return which indicates the day, and sometimes even the hour, at which the duties of the gubernatorial office will devolve upon the lieutenant-governor or will be resumed by the governor. In the instant case a notice of absence was filed November 25, 1938, a notice of return on April 8, 1939.

[3] See Chicago Tribune, col. 7, p. 1 (March 12, 1940).

[4] See Chicago Tribune, col. 2, p. 8 (March 6, 1940); Chicago Tribune, col. 2, p. 9 (March 13, 1940); Chicago Tribune, col. 7, p. 1 (March 19, 1940); Champaign-Urbana (Ill.) News-Gazette, col. 2, p. 1 (March 13, 1940).

[5] Chicago Tribune, col. 2, p. 9 (March 13, 1940).

[6] Champaign-Urbana News-Gazette, col. 7, p. 1 (March 19, 1940).

governor's illness. Furthermore, the Republican speaker of the Illinois house of representatives suggested another means of securing a judicial determination of disability. He proposed that the state auditor, who was the candidate for renomination on the "rebel" slate, should refuse to approve warrants for Governor Horner's salary and household expenses and thus force him into court.[7] Although none of these proposals was acted upon, the pre-primary controversy reached a climax on the day preceding the election. Lieutenant-Governor Stelle, on April 8, proclaimed that he was acting governor.[8] He issued a call for a special session of the General Assembly, to meet on the same day named in a similar call issued two days earlier by Governor Horner.[9] He also wrote to the director of the department of finance dismissing that official from office. These actions met immediate rebuff. The director of finance refused to accept dismissal by Mr. Stelle. The secretary of state recognized Governor Horner's as the official call for the special session of the General Assembly by affixing the state seal to it. The attorney general advised other state officials that any action which Mr. Stelle might take as acting governor would be without legal effect because it would be unsupported by the constitution. Finally, Governor Horner, himself, in a statement issued from his office, declared that he was performing the duties of governor and would continue to do so.[10]

Although the "regular" slate of candidates supported by Mr. Horner won the democratic nomination in the primary election on April 9,[11] the controversy over the governorship continued until the special session of the General Assembly met on April 30. Mr. Stelle declared that he was still acting governor.[12] Moreover, when he left the state for a few hours, the president pro tem. of the senate, upon whom the duties of governor devolve next after the lieutenant governor, announced that he would be acting governor in Mr. Stelle's absence.[13] The issue of the governor's disability was indirectly raised in a protest against the certification by the State Canvassing Board of results in the primary election. This board is composed of the governor, the secretary of state, and the state treasurer, but the governor and the treasurer had both been represented by proxies at the canvassing and certification of the primary returns. The state auditor, who had been declared defeated for renomination on the "rebel" slate, filed a protest contending that the certification was invalid because the governor

[7] Chicago Tribune, col. 7, p. 1 (March 19, 1940).

[8] See Chicago Tribune, col. 7, p. 1 (April 8, 1940); Chicago Tribune, col. 1, p. 7 (April 9, 1940). The important role of the press in these events should not be overlooked.

[9] The lieutenant-governor took the position that a call issued by him would be necessary to make the legislative session legal, since the governor's disability rendered illegal any call issued in his name. Champaign-Urbana News-Gazette, col. 8, p. 1 (April 6, 1940).

[10] Chicago Tribune, col. 1, p. 1 (April 9, 1940); Chicago Tribune, col. 1, p. 7 (April 9, 1940).

[11] Chicago Tribune, col. 6, p. 1 (April 10, 1940).

[12] Champaign-Urbana News-Gazette, col. 4, p. 1 (April 12, 1940).

[13] Champaign-Urbana News-Gazette, col. 2, p. 1 (April 16, 1940).

and the treasurer had not attended the meeting in person.[14] He seemed to take the position that the duties of these officers as members of this board are non-delegable, which might be considered an attack, by analogy, upon the delegation of still other duties by the governor because of his illness. When the General Assembly convened, however, the senate and the house of representatives each appointed a committee to call upon Governor Horner and notify him that the legislature was in session in response to his call. The members of these committees reported that they found the governor in comparatively good health; most of them seem to have considered him capable of performing the duties of his office. Moreover, Mr. Stelle presided at the opening session of the senate.[15] Since this is a duty imposed by the constitution upon the lieutenant-governor, he thus seemed to have relinquished, at least temporarily, his claim that he was acting governor.

At this time an action for a writ of mandamus to compel Lieutenant-Governor Stelle to serve as acting governor was pending in the Circuit Court of McLean County.[16] The complaint in this action, filed in mid-April by a Chicago resident, had named both Mr. Stelle and Mr. Horner as defendants and had charged that they were permitting others to perform the duties of governor. The court had been asked to appoint a medical commission to determine Governor Horner's fitness for office. Summonses had been served on the governor and the lieutenant-governor on April 19 by a deputy sheriff's leaving copies at their Springfield offices. The governor's secretary had delivered his summons to the attorney general for appropriate action. Claiming exclusive authority to represent Mr. Stelle as lieutenant-governor, the attorney general had, on April 22, filed motions to quash the service of summons on both the governor and the lieutenant-governor and to dismiss the petition. The attorney general had contended that the petition failed to allege facts showing that the governor had not performed some legal duty or that he was disabled within the meaning of the constitution. Furthermore he had urged that the court was without jurisdiction because neither Mr. Horner nor Mr. Stelle had ever resided in McLean county. On the following day, however, Mr. Stelle had appeared by private counsel and voluntarily submitted to the jurisdiction of the court by filing an answer to the petition. He had denied the authority of the attorney general, merely by virtue of his official capacity, to represent the lieutenant-governor in the case and had moved to withdraw the motion to dismiss the petition. The lieutenant-governor had stated that he had "attempted at numerous times and

[14] Bloomington (Ill.) Daily Pantagraph, col. 1, p. 1 (April 27, 1940). This protest was followed by judicial proceedings to contest the primary results. Bloomington Daily Pantagraph, col. 1, p. 5 (May 1, 1940). These proceedings were eventually dropped. Chicago Tribune, col. 6, p. 4 (Oct. 6, 1940).

[15] Champaign-Urbana News-Gazette, col. 1, p. 1 (April 30, 1940).

[16] Bloomington Daily Pantagraph, col. 5, p. 3 (April 20, 1940); Bloomington Daily Pantagraph, col. 1, p. 5 (April 23, 1940); Bloomington Daily Pantagraph, col. 1, p. 5 (April 24, 1940); Bloomington Daily Pantagraph, col. 1, p. 5 (May 9, 1940).

on various occasions to assume and exercise the duties of the office of governor .... but that in each instance his efforts .... [had] been ignored and thwarted by the attorney general and secretary of state and other officials and department heads." Since he had been thus thwarted, he urged, "it is essential and mandatory that a court of competent jurisdiction determine the facts and afford a proper relief and remedy .... so that the ends of justice may be served and the rights of the people as guaranteed by the constitution be accorded to them."[17] This effort was ineffectual, for on May 9 the court allowed the attorney general's motion to quash the service of summons on Governor Horner and dismissed the action. It held that the governor was a necessary party and since he was not a resident of McLean county he was not subject to the jurisdiction of the McLean Circuit Court.[18]

As the heat of summer approached, Governor Horner was moved by ambulance, on June 2, from the capital to a residence which he had leased in Winnetka, Illinois. During the months which followed his health continued to be a matter of grave public concern. At one time it was announced that he would return to Springfield on October 1, but the date was later postponed to October 15.[19] In early September a warrant for the extradition of a fugitive from Wisconsin issued from the governor's office. The validity of this warrant was challenged by petition for writ of habeas corpus in the Circuit Court of Carroll County. The fugitive contended that the warrant had not been signed by Governor Horner and that the power to sign such a warrant was non-delegable. The warrant was recalled, however, before hearing on this petition.[20] On October 4 the governor's condition became critical, and on the following day a "certificate of disability" signed by his secretary was filed in the office of the secretary of state. Under this certificate the powers of the office of governor devolved upon Lieutenant-Governor Stelle.[21] On October 6, Governor Horner died and later,

[17] Bloomington Daily Pantagraph, col. 1, p. 5 (April 24, 1940).

[18] Mandamus will lie to compel the designated official to perform the duties of governor when the chief executive is disabled by illness. Attorney-General v. Taggart, 66 N.H. 362, 29 Atl. 1027 (1890). In that case, however, the governor himself declared that he was unable to perform the duties of his office and requested the attorney-general to institute proceedings for a writ of mandamus to compel the president of the senate to act in his stead.

[19] Champaign-Urbana News-Gazette, col. 7, p. 1 (Oct. 5, 1940); Chicago Tribune, col. 8, p. 1 (Oct. 6, 1940).

[20] Letter to the writer from the clerk of the Circuit Court of Carroll County. See Chicago Tribune, col. 3, p. 14 (Sept. 26, 1940).

[21] Chicago Tribune, col. 7, p. 1 (Oct. 6, 1940). The "certificate of disability" quoted the bulletin of his physician that Governor Horner's condition was "most critical" and stated: "Because of this serious condition of the Governor, he is unable to exercise the powers and to perform the duties of the office of Governor of the State of Illinois and by virtue of the provisions of Section 17, Article V, of the Constitution of the State of Illinois, such powers and duties devolve upon Honorable John Stelle, the Lieutenant Governor of the State of Illinois, during the residue of Governor Horner's term or until such disability shall be removed."

on the same day, Lieutenant-Governor Stelle took the oath of office as governor.[22]

Without any attempt to determine whether Governor Horner was in fact disabled, it seems significant that for several months the people of Illinois did not know whether the powers and duties of the chief executive were being discharged by the elected official entitled to exercise them under the constitution. This difficulty resulted from the provision of the Illinois constitution that in case of the governor's "disability" the powers and duties of his office shall devolve upon the lieutenant-governor, without defining disability or providing a method of determining the capacity of the governor.[23] Unfortunately, few state constitutions are more explicit than that of Illinois in this respect.[24] Forty-three constitutions include the disability of the governor[25] among the circumstances under which some other official performs the governor's duties.[26] The constitutions of Maine, New Hampshire, and Massachusetts provide for succession in case of a vacancy in the office of governor resulting from the happening of certain specified events "or otherwise" and that of Minnesota, in case of a vacancy "from any cause whatever." Such provisions may be construed, as has that of New Hampshire,[27] as including vacancy resulting from physical

[22] Champaign-Urbana News-Gazette, col. 7, p. 1 (Oct. 5, 1940); Chicago Tribune, col. 8, p. 1 (Oct. 6, 1940); (Springfield) Illinois State Journal, col. 7, p. 1 (Oct. 7, 1940).

[23] Note 1 supra. Although present consideration is limited to disability resulting from physical or mental infirmity, the term as used in constitutions has been construed to cover other causes of incapacity. State ex rel. Olson v. Langer, 65 N.D. 68, 256 N.W. 377 (1934), noted in 2 Univ. Chi. L. Rev. 333 (1935) (conviction of a federal felony); State ex rel. Sathre v. Moodie, 65 N.D. 340, 258 N.W. 558 (1935) (failure to satisfy residence requirement); cf. Markham v. Cornell, 136 Kan. 884, 18 P. (2d) 158 (1933) (temporary absence from the state not disability).

[24] Cf. U.S. Const. art. 2, § 1. During the period between the wounding and the death of President Garfield in 1881 and during the serious illness of President Wilson in 1919, the problem of whether the President was disabled within the meaning of this section arose. See Mathews and Berdahl, Documents and Readings in American Government 211 (rev. ed. 1940).

[25] The language of the constitutional provisions varies somewhat from state to state. With slight variations twenty states (Ariz., Ark., Cal., Conn., Del., Fla., Ind., Ky., La., Mont., Nev., N.J., N.M., N.Y., N.C., Okla., Ore., Utah, Vt., and Va.) provide for the contingency of the governor's "inability to perform the duties of his office." Eleven states (Ala., Colo., Ill., Iowa, Kan., Mo., Neb., Ohio, Pa., S.D., and W.Va.) add to listed circumstances the inclusive term "or other disability." In other states the provision is in the case of the governor's "disability" (Ga., N.D., S.C., and Wash.), "inability" (Md., Mich., and Tex.), "inability from mental or physical disease" (Wis. and Wyo.), "incapacity" (R.I.), "protracted illness," (Miss.), or "disqualification from any cause" (Idaho).

[26] In the thirty-six states having the office of lieutenant-governor that official is first in line of succession to the governor's duties. In the twelve states which have no lieutenant-governor, the president of the senate succeeds the governor in nine states (Fla., Ga., Me., Md., N.H., N.J., Ore., Tenn., and W.Va.) and the secretary of state in three (Ariz., Utah, and Wyo.).

[27] Attorney-General v. Taggart, 66 N.H. 362, 29 Atl. 1027 (1890).

disability. The Tennessee constitution seems to be alone in its failure to provide, expressly or by implication, for succession in case of the disability of the governor.[28] Some constitutions provide that the designated official becomes governor, while others, like that of Illinois, state that the powers and duties of the chief executive shall devolve upon him.[29] For present consideration this difference is unimportant since it does not seem significant in the determination of the existence of disability whether the governor's successor be called governor or merely acting governor.[30]

Only two states have made constitutional provision for determination of the governor's disability. The constitution of Mississippi alone provides a method for investigating whether a disability "exists or shall have ended" in any case of doubt.[31] The secretary of state is empowered to submit the question to the judges of the supreme court who investigate and make a determination. They then file with the secretary of state a written opinion which is "final and conclusive." The method outlined in the constitution of Alabama, on the other hand, is limited to the determination of the governor's "unsoundness of mind."[32] There, too, the issue is determined by the supreme court but the institution of proceedings is not limited to one official. Such determination is to be made by the court upon written request, verified by affidavit, of any two of the following officers: president pro tem. of the senate, speaker of the house of representatives, attorney general, state auditor, secretary of state, and state treasurer. The determination by the court of restoration of mental competency, after the chief executive has been declared of unsound mind, may be instigated by petition of any one of these officers or by the governor or the lieutenant governor.

Because of the closely analogous problems involved, it is of interest that the British Parliament has recently provided a method for determining the disability of the Sovereign to perform the regnal functions.[33] The Regency Act of 1937 provides that a regent is to act when three or more of five designated persons—the wife or husband of the Sovereign, the Lord Chancellor, the Speaker of the House of Commons, the Lord Chief Justice, and the Master of the Rolls—declare in writing that they are satisfied by evidence, including evidence of physicians, that the Sovereign is incapacitated by reason of infirmity of mind or body. By a certificate of recovery similarly executed, the regency can be brought to an end and the Sovereign restored.

[28] Tenn. Const. art. 3, § 12 provides for succession only in case of the governor's removal from office, death, or resignation.

[29] See Isom, The Office of Lieutenant-Governor in the States, 32 Am. Pol. Sci. Rev. 921 (1938).

[30] The difference may assume significance when the issue is whether a vacancy has been created in the office of lieutenant-governor. See New York Times, col. 6, p. 23 (Nov. 20, 1940).

[31] Miss. Const. art. 5, § 131. [32] Ala. Const. art. 5, §§ 127, 128.

[33] 1 Edw. VIII & 1 Geo. VI, c. 16 (1937). See Ridge, Constitutional Law of England 128–30 (Keith's ed. 1939).

These methods suggest possible devices for the determination of gubernatorial disability. Following the Mississippi and Alabama plans, the power of determination might be conferred upon the supreme court of the state. On the other hand the English plan might be followed by designating certain officials in the legislative, administrative, and judicial branches of the state government as a determining body. Another possibility is authorization of some state official to call a special session of the state legislature which, in joint session of the two houses or by some other appropriate technique, should determine the question of disability. Conceivably a special court of experts might be constituted with power to examine the governor and make a conclusive finding as to his capacity. Placing responsibility for instituting such proceedings upon a single official as in Mississippi seems less desirable than the Alabama plan of initiation by a specified number of designated officials. As in England the determining body might be empowered to act upon its own initiative. Another possible solution would be to permit any citizen to institute such an investigation. This latter suggestion is subject to the objection that it might open the chief executive to the harassing actions of his political opponents, but these might be avoided by requiring a waiting period of several months between any two such actions.

Initiation by a citizen probably should be made possible under any of the other methods by making available an action for a writ of mandamus compelling the designated official or officials to act. From these suggestions, various plans might be formulated, any one of which would make possible avoidance of such unfortunate uncertainty as Illinois experienced during Governor Horner's illness.

The difficulties commonly encountered in attempts to amend state constitutions would seem to recommend statutory enactment for the solution of the problem of determining the governor's disability. It is probable, however, that in most states such legislation would be held unconstitutional. For example, the power to call a special session of the legislature is limited to the governor by the typical constitutional provision. The other methods would probably be found contrary to constitutional provisions defining the jurisdiction of the supreme court and requiring separation of powers. The Illinois Constitution confers upon the state supreme court original jurisdiction "in cases relating to the revenue, in mandamus, and habeas corpus."[34] The court has construed this section as exclusive, so that it cannot exercise additional original jurisdiction even pursuant to statute.[35] Moreover, distributive clauses in state constitutions have been held to prevent the rendering of advisory opinions by the judiciary or the imposition upon any department of government of any duty not within

[34] Ill. Const. art. 6, § 2.

[35] Canby v. Hartzell, 167 Ill. 628, 48 N.E. 687 (1897); Courter v. Simpson Construction Co., 264 Ill. 488, 106 N.E. 350 (1914).

the scope of its jurisdiction as defined in the constitution.[36] Similarly, the Supreme Court of Mississippi has construed very strictly its authority under the disability provision.[37] It has never been asked to determine the question of a governor's disability but has declined to render an opinion under this section upon the question of the disability of the lieutenant-governor, holding that this technique could apply only to the governor or acting governor mentioned specifically in the section. Such an opinion seems to indicate that without this constitutional provision, the duty to determine gubernatorial disability could not have been imposed upon the Mississippi court by statute. Thus in most states a constitutional amendment would seem to be necessary in order to provide a method for avoiding the experience of Illinois between November 8, 1938 and October 6, 1940.

The adoption of any plan suggested by this discussion should not be expected to provide a panacea since the mere supplying of a procedure for the solution of a problem cannot solve every individual situation which may arise. The fact that the Mississippi supreme court has never been asked to determine the capacity of any governor indicates either that no Mississippi governor has ever been incapacitated by physical or mental affliction or that if a doubtful case has developed the responsible official has been reluctant to start proceedings. Such reluctance on the part of the latter would be easily understandable when his own political future might depend upon the outcome of that investigation. With some procedure available, however, public spirited citizens or a vigorous opposition could force a determination of the capability of the chief executive and thus guarantee that the person entitled under the constitution to do so shall actually exercise the powers and perform the duties of governor.

CLYDE F. SNIDER*

[36] Rottschaefer, Constitutional Law 58–59 (1939). Construing Ill. Const. (1870) art. 3 and art. 6, § 31, the judges of the Supreme Court of Illinois have refused to give advisory opinions at the request of the governor. Correspondence between the Governor and the Judges of the Supreme Court, 243 Ill. 9 (1909). It seems that the court construed Ill. Const. (1848) art. 2 as permitting them to render an advisory opinion on matters of the governor's duties when the matter was voluntarily submitted to them by the chief executive. See People ex rel. Akin v. Matteson, 17 Ill. 167 (1855); People ex rel. Billings v. Bissell, 19 Ill. 229 (1857).

[37] In re Opinion of the Justices, 148 Miss. 427, 114 So. 887 (1927).

* Associate in Political Science, University of Illinois.