

GUBERNATORIAL REMOVAL AND STATE SUPREME COURTS

William E. Raftery*

I. INTRODUCTION

Recent events in Illinois have drawn attention to a question that had lain relatively dormant for several decades: For what cause other than an impeachable offense may a governor be removed, and by whom? Ratification of the Twenty-Fifth Amendment to the United States Constitution—providing an orderly process for removal of a president “unable to discharge the powers and duties” of the office—ignited that discussion among the states fifty years ago,¹ but for half of the states, the power either to make the determination of incapacity or to review the determination made by another group has been constitutionally or statutorily vested in the state’s highest court or its chief justice. This article provides an overview of that little used and often overlooked power of the state supreme courts.

II. REGENCY, INCAPACITY, AND COURTS

The question of the incapacity of state executives or their inability to discharge their duties predates the ratification of the Constitution, and can be traced directly to questions about

* KIS Communications and Research Specialist, National Center for State Courts. Mr. Raftery can be reached at wraftery@ncsc.org or 757-259-1811.

1. *See* U.S. Const. amend. XXV, § 4 (providing that “[w]hensoever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President”).

colonial-era governorships² and regency in the United Kingdom. The records of the Committee on the Executive Department at the Alabama Constitutional Convention of 1901, for example, show a direct tie to the practice in then-current and former British colonies:

[T]he Committee considered with great care . . . the ascertainment of disability, which under the Constitution causes a succession in the power of the office of Governor. Governors, unfortunately, are subject to all the ills that flesh it [sic] heir to. We might have the case of an executive of unsound mind, declaring that he was of sound mind, exercising the powers of this great office, and no constitutional machinery or legal machinery provided, by which he could be legally declared incompetent and put out of office. So tremendous are the consequences in a change of executive power in all governments, that legislators and statesmen have hesitated to frame the details by which disability shall be ascertained and enforced in all cases; but it is the common practice in some countries, where the king or monarch becomes insane, for the Privy Council sometimes calling in the heir, to consult about it, and finally referred it to the government like parliament which is omnipotent, and thereupon parliament declares a regency.³

Alabama's modification to regency was the movement away from ad hoc procedures that were implemented on a sovereign-by-sovereign basis and instead a movement toward the use of a permanent institution, the Supreme Court, to serve

2. See Richard H. Hansen, *Executive Disability: A Void in State and Federal Law*, 40 Neb. L. Rev. 697, 700 (1961) (noting that the extent to which the federal provisions were based on colonial charters and the early state constitutions "has never been thoroughly considered," citing Irving G. Williams, *The Rise of the Vice Presidency* 16 (Pub. Affairs Press 1956), and noting that Williams considers "the colonial experience . . . with reference to secondary sources"). Hansen was of course writing before Amendment 25 to the federal constitution, which provides for succession in the case of presidential disability or incapacity, was ratified in 1967.

3. *Official Proceedings of the Constitutional Convention of the State of Alabama*, May 21, 1901, to Sept. 3, 1901, vol. 1, at 482, http://www.legislature.state.al.us/misc/history/constitutions/1901/proceedings/1901_proceedings_vol1/day17.html (accessed June 30, 2010; copy on file with Journal of Appellate Practice and Process) [hereinafter *Official Proceedings*].

as the determining body.⁴ The United Kingdom itself would not reach such a level of consistency until the Regency Act 1937 named five specific officials, any three of whom could declare in writing the sovereign's incapacity.⁵ Here in the United States, the late 1800s and early 1900s brought several proceedings that compelled state high courts to determine the proper holders of governors' offices.⁶ Even the United States Supreme Court

4. See *id.* (asserting that “[t]he 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,” and advising the convention that “[t]he further safeguard was provided, in case of the unsoundness of mind of the Governor, that the Supreme Court should not take cognizance of it, unless that question was brought before that body by some officer not next in the succession”).

5. 1 Edw 8 & 1 Geo 6 c 16 (providing in section 2(1) that “the following persons or any three or more of them, that is to say, the wife or husband of the Sovereign, the Lord Chancellor, the Speaker of the House of Commons, the Lord Chief Justice of England, and the Master of the Rolls” may “declare in writing that they are satisfied by evidence which shall include the evidence of physicians that the Sovereign is by reason of infirmity of mind or body incapable for the time being of performing the royal functions or that they are satisfied by evidence that the Sovereign is for some definite cause not available for the performance of those functions” and so institute a Regency during which the duties of the Sovereign “shall be performed in the name and on behalf of the Sovereign by a Regent”); see also C. d’O. Farran, *The Law of the Accession* 16 Modern L. Rev. 140, 143 (1953) (pointing out that the Act “directs a regency where ‘the Sovereign is for some definite cause not available for the performance of (the royal) functions’”). It should be noted that the disability or unavailability proceedings discussed here are separate and distinct from quo warranto actions. In the latter sort of proceeding, the question rests on whether the individual is a “usurper,” exercising the powers of an office that he or she does not properly hold. See generally e.g. Logan Scott Stafford, *Judicial Coup d’Etat: Mandamus, Quo Warranto and the Original Jurisdiction of the Supreme Court of Arkansas*, 20 U. Ark. L. Rock L.J. 891 (1998).

6. See *State ex rel. Moore v. Blake*, 142 So. 418, 419 (Ala. 1932) (“If the incumbent becomes ineligible to hold the office pending his incumbency, and continues to exercise its functions, he is a usurper, and may be ousted by quo warranto proceedings.”); see also *State ex rel. Sathre v. Moodie* 258 N.W. 558 (N.D. 1935) (quo warranto proceeding in which recently elected lieutenant governor was found to be appropriate holder of the office of governor when recently elected governor was found to be ineligible for the office because of failure to meet residency requirements); *State ex rel. Olson v. Langer*, 256 N.W. 377 (N.D. 1934) (governor’s conviction for a felony made him ineligible to remain in office under a provision of the state’s constitution requiring governors to be electors in the state); *State ex rel. Morris v. Bulkeley*, 23 A. 186 (Conn. 1892) (dismissing proceeding although trial court and Supreme Court of Connecticut had jurisdiction in quo warranto action where General Assembly refused to count the votes for governor and a candidate merely claimed he “appeared” to be governor but did not actually try to exercise the powers of office); *Attorney-General v. Taggart*, 29 A. 1027 (N.H. 1890) (holding that where there are two claimants for the office of governor, the courts may determine who properly holds the office via quo warranto); *Attorney Gen. ex rel. Bashford v. Barstow*, 4 Wis. 567 (1855) (similar); but see *State ex rel. Cyr v. Long*, 140 So. 13 (La. 1932) (declining to consider intrusion-into-office claim when governor, having been elected a

became involved in Nebraska's Thayer/Boyd controversy, eventually overruling the state Supreme Court's holding for Thayer.⁷

Nor was the Blagojevich corruption scandal of 2008 the first time Illinois was faced with a question of gubernatorial disability.⁸ Governor Henry Horner suffered from a long illness associated with a 1938 heart attack, making it an open question as to whether he could in fact serve as governor. A series of legal issues arose, including most importantly whether the lieutenant governor could unilaterally declare himself acting governor. A number of proceedings, including quo warranto, were threatened in order to force a judicial determination. The speaker of the Illinois House suggested that the state's auditor ignore the governor's signature on requests for his salary, forcing Horner into court for a mandamus proceeding against the auditor. No judicial decision was ever issued, however, because Horner's death mooted the judicial proceedings.

A decade later, the question of judicial involvement in declaring a governor incapacitated occurred in Louisiana where, in 1959, Governor Earl K. Long was forcibly committed to a state mental hospital. His attorneys filed a habeas proceeding, contending that by being committed he was being unconstitutionally removed from office. Whereas in Illinois the lieutenant governor sought to be named—and contended that he was—acting governor, Louisiana's lieutenant governor was vociferous in claiming he was not governor, acting or otherwise, despite an attorney general's opinion to the contrary. A mere hour prior to a judicial hearing on the habeas petition, Governor Long was released from the mental institution when his political

United States senator, continued using powers of governorship by appointing new lieutenant governor); *Taylor v. Beckham*, 56 S.W. 177 (Ky. 1900) (indicating that courts have no power to review results of duly held election for governor); *State v. Baxter*, 28 Ark. 129 (1873) (indicating that court had no power to grant writ of quo warranto regarding office of governor as state's constitution vested power to answer such questions exclusively in the legislature).

7. *State ex rel. Thayer v. Boyd*, 48 N.W. 739 (Neb. 1891), *rev'd sub nom Boyd v. Neb.*, 143 U.S. 135 (1891). For a detailed description of the case and surrounding events, see Louise Charlotte Wilke, Student Author, *Constitutional Law—Disability of Chief Executive—How to Determine*, 22 Neb. L. Rev. 20 (1943).

8. See generally Clyde F. Snider, *Gubernatorial Disability*, 8 U. Chi. L. Rev. 521 (1941).

allies dismissed the state's director of hospitals and immediately forced the successor to sign the release order.⁹

III. MODERN PRACTICE

In both the Illinois and Louisiana instances, the question was placed squarely into the hands of a trial judge. In the subsequent decades, states have separated the concept into two components. In the first, trial judges are still capable of declaring people mentally incapacitated and ordering their confinement under various mental health laws. In some cases, this is explicit, as in Alabama's statute¹⁰ that declares vacated the office of anyone "adjudged" by the probate courts "to be of unsound mind." The probate judge may at any time then return the person to office by revoking or annulling the order. These powers function as an extension of the trial courts' well-established power to exercise jurisdiction over the incompetent within their civil jurisdiction. But in the second iteration of the power to remove a governor, the question of incapacity is more a political one that requires the engagement of at least one, and in many states both, of the other branches of government.¹¹ Moreover, the voting threshold required to support a disability removal can vary from explicitly unanimous to ambiguously majority-rule. Table 1 summarizes these voting requirements.

Majority Vote Explicitly Required	CO, LA, ME, ¹² MI, MS, MO, UT
Majority Vote Implicitly Required	AL, CA, FL, GA, IL, IN, IA, ME, ¹³ MD, NH, NJ, OH, OK, SD

9. See generally Neil. F. Garvey, *The Amenability of the Governor to Court Processes*, 7 How. L.J. 120, 125 (1961).

10. Ala. Code § 36-9-3 (LEXIS 2010).

11. For details of similar provisions that exclude the courts, see Calvin Bellamy, *Presidential Disability: The Twenty-Fifth Amendment Still an Untried Tool*, 9 B.U. Pub. Int. L.J. 373, 386-90 (2000) (including a helpful table).

12. When suggested by the secretary of state.

13. When suggested by the legislature.

Table 1 (continued) Vote Required to Remove Governor	
Unanimous Vote Explicitly Required	DE, IA, KY (commission chaired by Chief Justice)
Supermajority Vote Explicitly Required	CT (2/3 of council chaired by Chief Justice), MA (Chief Justice and majority of Associate Justices), MN (four of five named persons), OR (four members of five-member panel chaired by Chief Justice) ¹⁴

A. Executive-Branch Suggestion

Similar to the Twenty-fifth Amendment, most state constitutions that provide a specific role for a state supreme court in gubernatorial removal rely on other executive branch officers to make the initial “suggestion” of incapacity, leaving the court tasked with making the actual determination that removes the governor. But two state constitutional provisions dealing with gubernatorial incapacity and the courts pre-date the 1965 submission of the Twenty-fifth Amendment to the states.

Mississippi’s 1890 constitution permits the secretary of state to submit to its supreme court the question of whether the office of governor is vacant due to the governor’s disability or absence from the state.¹⁵ In addition to being the oldest provision to include a state supreme court as part of the disability determination, this section has the distinction of being one of the few provisions whose scope and meaning have been litigated. In 1927, a state senator serving as acting lieutenant governor requested through the secretary of state a

14. Oregon’s practice changed in 2009 from a commission form to a panel form.

15. Miss. Const. art V. §131 (LEXIS 2009) (providing that “[s]hould a doubt arise as to whether a vacancy has occurred in the office of Governor or as to whether any one of the disabilities mentioned in this section exists or shall have ended, then the Secretary of State shall submit the question in doubt to the judges of the Supreme Court, who, or a majority of whom, shall investigate and determine the question and shall furnish to the Secretary of State an opinion, in writing, determining the question submitted to them, which opinion, when rendered as aforesaid, shall be final and conclusive”).

determination by the Mississippi Supreme Court as to whether he remained acting lieutenant governor, given that a recent election had resulted in a lieutenant governor-elect. The court held that its power was limited to determinations as to who held the office of governor.¹⁶ In a letter to the acting secretary of state, the court noted that

[t]he information here sought by you relates not to the discharge by [the senator] of the duties of Governor, but to the discharge by him of the duties of Lieutenant Governor, and, consequently, is not within the authority conferred upon us to answer questions propounded to us by you.¹⁷

Alabama's 1911 constitution permits any two of the seven executive branch officers in line for succession¹⁸ (unless they are in the particular situation themselves immediately next in line for succession), to submit affidavits to the Supreme Court, asking it to determine whether the governor is of "unsound mind."¹⁹ Recent proposals to expand the review to include physical disabilities have failed to progress.²⁰

Similarly, Georgia's 1976 constitution relies on any four of the state's seven other "elected constitutional executive officers"²¹ to petition the state's supreme court.²² Kentucky's

16. *In re Opinion of Justices*, 114 So. 887 (Miss. 1927).

17. *Id.* at 888.

18. In order of succession, these are lieutenant governor, president pro tempore of the senate, speaker of the house of representatives, attorney general, state auditor, secretary of state, and state treasurer. Ala. Const. § 127; *see also Official Proceedings, supra* n. 3, at 482 (noting that the committee of the constitutional convention charged with drafting the provisions for succession "provided in this article not only for the case of the death of the Lieutenant Governor, President of the Senate and Speaker of the House, but we have added to the offices who shall succeed to the Governorship, the Attorney General, Secretary of State, State Treasurer and State Auditor")

19. Ala. Const. art. V, § 128 (LEXIS 2010). Thus, the lieutenant governor could never be among the two officers submitting affidavits, because should the Supreme Court find that the governor suffers from an "unsound mind," the lieutenant governor would be first in line to succeed to the office of governor.

20. *See* William H. Stewart, *Possible Changes in the Alabama Executive Branch: Points For Consideration By the Citizens' Constitutional Commission*, 33 *Cumb. L. Rev.* 297, 312 (2002) (indicating that a new state constitution proposed in 1979 had included such a provision).

21. The other executive officers are the lieutenant governor, the secretary of state, the attorney general, the state school superintendent, the commissioner of insurance, the commissioner of agriculture, and the commissioner of labor. Ga. Const. art. V, § IV para. I (LEXIS 2009).

22. Ga. Const. art. V, § IV para. II (LEXIS 2009).

constitution, as amended in 1992, empowers a unanimous supreme court to remove the governor based on a petition alleging gubernatorial disability filed by the attorney general.²³ All three members of Florida's cabinet are required to submit their suggestion of the governor's "incapacity" to that state's supreme court for determination.²⁴

New Hampshire's 1984 constitutional amendment is unique in its specificity with respect to evidentiary standards for the courts and the executive branch officers. When it "reasonably appears" to the state's attorney general and a majority of the five-member Council both that the governor is suffering from a physical or mental incapacity and that the governor is unwilling or unable to agree with that determination, the attorney general may file a petition for declaratory judgment with the state's supreme court. The court must then decide, using a preponderance of the evidence standard, whether the evidence associated with the petition supports removal of the governor. The governor may petition the court and be restored to office if the court, again specifically using a preponderance of the evidence standard, finds the governor able to discharge the duties of the office. However, there is a time limit: If the governor's disability remains for longer than six months after the initial judgment by the court, the legislature may declare the office permanently vacant.²⁵

Maine operates in a similar fashion under a provision added to its constitution in 1975.²⁶ Relating to temporary removal of the governor, it requires only that the secretary of state have "reason to believe" that the governor is unable to discharge the duties of office. Upon the secretary of state's certifying that reason to the Supreme Judicial Court, a hearing is held and a simple majority vote of the court is required to remove the governor.

23. Ky. Const. § 84 (LEXIS 2009).

24. Fla. Const. art. IV, § 3 (LEXIS 2010).

25. N.H. Const. art. 49-a (LEXIS 2010).

26. Me. Const. art. V, part 1 § 15 (LEXIS 2009).

B. Legislative Suggestion

1. Legislative Action

Maine's second method of permanent gubernatorial removal is similar to that of many other states in that the legislature makes the initial suggestion of incapacity.²⁷ If the governor is incapacitated for at least six months, the legislature, meeting in convention, may adopt a joint resolution by a two-thirds vote to have the matter sent to the Supreme Judicial Court. After a hearing, a simple majority of the court may find that grounds exist to declare the office permanently vacant.

Maryland's 1970 constitutional amendment²⁸ too requires a supermajority (three-fifths) of the legislature in joint session to adopt a resolution declaring the governor unable to perform the duties of the office. If adopted, the resolution is delivered to the Court of Appeals (the state's highest court), which determines whether the governor is permanently unable to discharge the office, yielding a vacancy. If the court instead finds the incapacity to be temporary, it retains jurisdiction to determine when the governor may resume office, although it is not specified if the court may act *sua sponte* or must await a request from the governor.

Colorado's constitution²⁹ allows two-thirds of all members of the General Assembly to submit to the Supreme Court a joint request that the court conduct a hearing as to the physical or mental disability of the governor or governor-elect. The court's determination is "final and conclusive" and the court alone, "upon its own initiative" determines when the disability has ceased.³⁰

Ohio's 1976 constitutional amendment³¹ states that a joint resolution of the legislature passed by two-thirds of each house may declare a governor unable to discharge the office, with the resolution to be presented to the Supreme Court, which has

27. *Id.* at § 14.

28. Md. Const. art. II, § 6(c) (LEXIS 2010).

29. Colo. Const. art. IV, § 13(6) (LEXIS 2009).

30. *Id.*

31. Ohio Const. art. III, §22 (LEXIS 2010).

“original, exclusive, and final jurisdiction to determine [the] disability of the governor.”³² The court has twenty-one days after presentment of the resolution to hold hearings and make a determination. If removed, the governor may request reinstatement by declaration to the Court, which must conduct another hearing and render a decision, again within twenty-one days.³³

A 2006 amendment to New Jersey’s constitution³⁴ allows the legislature by two-thirds vote to suggest that the governor suffers from a mental or physical disability and that the office is vacant. The actual determination of vacancy rests with the Supreme Court, which must give notice to the governor and conduct a hearing at which the legislature must provide proof of the existence of the vacancy.

2. Action by Legislative Leaders

A second formulation requires legislative leaders, rather than the legislature as a whole, to suggest that the high court remove the governor. Michigan’s 1963 constitution³⁵ demonstrates this in its simplest form. While substantially vague in terms of the court’s process and procedures in removal, it does state that a person’s inability to continue to serve as governor is to be determined by a majority of the Supreme Court when the president pro tempore of the Senate and the speaker of the House of Representatives jointly request that the court make such a determination. While the Court’s determination “shall be final and conclusive,” the Court on its own initiative alone may determine if and when the governor may resume office. Similar but more detailed is a 1979 amendment to the Utah constitution³⁶ providing that a disability can be determined by a majority of the Supreme Court on the joint request of the president of the Senate and the speaker of the House of Representatives. The governor can then resume office by filing a declaration with the Supreme Court, but the Court can reject the

32. *Id.*

33. *Id.*

34. N.J. Const. art. V, §1 ¶ 8 (LEXIS 2010).

35. Mich. Const. art. V, § 26 (6)(a)(ii) (LEXIS 2010).

36. Utah Const. art. VII, §11 (LEXIS 2009).

declaration either on the joint request of the senate president and house speaker or the Court itself “upon its own initiative.”³⁷

Of particular note is a 1978 amendment to the Indiana constitution³⁸ that added a provision very similar to the Twenty-Fifth Amendment, with the initial suggestion of inability to be made to the Indiana Supreme Court by the president pro tempore of the Senate and the speaker of the House of Representatives. It is very detailed in its description of the Supreme Court’s processes and procedures. The court is required to meet within forty-eight hours after the suggestion and make its determination. A governor so removed may reclaim the office with a letter to the Supreme Court declaring his or her ability to serve, which must again make a determination within forty-eight hours. Indiana’s provision appears to be the only such mechanism by which a court-directed removal has ever occurred. On September 8, 2003, Governor Frank O’Bannon suffered a stroke. Two days later, the president pro tempore and speaker submitted a letter to the Supreme Court suggesting that the governor was unable to fulfill his duties, a sentiment concurred in by both the governor’s counsel and his family. That same day, the Court found him unable to discharge his powers as of September 8, 2003, at 9:30 a.m., and “ratified” all the actions of the lieutenant governor from that moment to the issuance of the decision.³⁹ O’Bannon never attempted to resume office, as he died on September 13.⁴⁰

V. OTHER MECHANISMS

1. State Supreme Court as Appellate Court

Oklahoma makes use of a statutory process in which the court of last resort functions more as an appellate court reviewing the determination of a lower tribunal rather than as an

37. Utah Const. art. VII § 11(6)(b) (LEXIS 2009). Note that an amendment to the Utah constitution effective January 2009 slightly alters the original procedure, expanding it to allow an “acting” Senate president or “acting” House speaker to make the joint request.

38. Ind. Const. art. 5, § 10(d) (LEXIS 2010).

39. *In re O’Bannon*, 798 N.E.2d 838, 838 (Ind. 2003).

40. Monica Davey, *Indiana Governor’s Death Leaves Ally in Command*, 153 N.Y. Times A31 (Sept. 14, 2003).

initial or primary determiner of incapacity, in a process that involves all three branches.⁴¹ If a committee consisting of five executive-branch officials⁴² declares the governor unable to discharge the duties of office, the office devolves to the lieutenant governor. Should the governor contest the committee's determination, and should the committee continue to insist on the inability, the legislature is required to meet within seventy-two hours and adopt by a two-thirds majority a resolution that "probable justification" exists to conclude that an inability exists. The resolution is then forwarded to the Supreme Court which, under such rules as it may adopt, must hear the matter, placing the resolution above all other matters on its docket. Interestingly, while the committee alone may remove the governor (the legislature and Supreme Court become involved only if the governor contests the removal), the committee *and* the Supreme Court must concur to restore the governor to office once the inability has been removed.⁴³

Louisiana's process functions similarly,⁴⁴ with the initial determination of disability made by a majority of the state's six statewide elected officials⁴⁵ and the governor temporarily removed after their finding. If the governor contests this finding,

41. Okla. Stat. Ann. title 74, ch. 1, § 8(C), (D) (LEXIS 2010).

42. The officials named are the state auditor and inspector, state treasurer, state superintendent of public instruction, chairman of the Corporation Commission, and insurance commissioner. Okla. Stat. Ann. title 74, ch. 1, § 8(B) (LEXIS 2010).

43. Okla. Stat. Ann. tit. 74, ch. 1, § 8(B) (LEXIS 2010).

44. La. Const. art. IV, §18 (LEXIS 2009).

45. The list includes the lieutenant governor, secretary of state, attorney general, treasurer, commissioner of agriculture, and commissioner of insurance. *See* La. Const. Art. IV, §3(A) (LEXIS 2010) (providing, that "the governor, lieutenant governor, secretary of state, attorney general, treasurer, commissioner of agriculture, commissioner of insurance, superintendent of education, and commissioner of elections each shall be elected for a term of four years by the electors of the state"); La. Rev. Stat. §17:21(C) (LEXIS 2010) (providing, pursuant to La. Const. Art. IV § 20, that superintendant of education "shall be appointed by a two-thirds vote of the total membership of the State Board of Elementary and Secondary Education," thus removing him or her from the category of statewide elected officials empowered to determine gubernatorial disability); La. Rev. Stat. § 18:18 (LEXIS 2010) (providing, pursuant to La. Const. Art. IV § 20, that commissioner of elections "shall be appointed by the secretary of state subject to Senate confirmation," thus removing him or her from the category of statewide elected officials empowered to determine gubernatorial disability); *see also* http://www.sos.louisiana.gov/Portals/0/elections/pdf/Gub_Summary_rev_10-07.pdf (listing statewide executive offices to be filled in 2011 elections) (accessed Aug. 24, 2010; copy on file with Journal of Appellate Practice and Process).

the legislature then must pass a resolution by two thirds finding “probable justification for the determination that inability exists.” That resolution is then sent to the Supreme Court, which must put all other matters aside and render a decision after due notice and a hearing by a simple majority of “members elected to the court” under whatever rules the court may provide.⁴⁶ The Court may then review its determination either on request or on its own motion, with a majority required to return the governor to office.⁴⁷

A 1968 amendment to Missouri’s constitution⁴⁸ creates a process similar to that in Louisiana, but one that bypasses the legislature. The relevant provision names the state’s nine top elected officials other than the governor as “a disability board,” a majority of whose members may find the governor unable to discharge the duties of office.⁴⁹ Once the board makes the determination, the governor is temporarily removed from office and must transmit a letter to the disability board declaring no inability exists. If a majority of the board continues to believe that the governor is unable, it may forward a declaration to that effect to the Supreme Court. The court then has twenty-one days to deliberate and by majority vote may find either that the disability continues or return the governor to office.

California’s constitution⁵⁰ specifies that a lieutenant governor acts as governor when the current occupant of that office suffers from a temporary disability and that, while the Supreme Court has exclusive jurisdiction to determine all questions arising under the section, “[s]tanding to raise questions of vacancy or temporary disability is vested exclusively in a body provided by statute.”⁵¹ By majority vote,

46. La. Const. art. IV § 18(D) (LEXIS 2010).

47. La. Const. art. IV § 18(E) (LEXIS 2010).

48. Mo. Const. art. IV, §11(b) (LEXIS 2009).

49. The members of the group are the lieutenant governor, secretary of state, state auditor, state treasurer, attorney general, president pro tempore of the Senate, speaker of the House of Representatives, majority floor leader of the Senate, and majority floor leader of the House. *Id.*

50. Cal. Const. art. 5, §10 (LEXIS 2010).

51. *Id.* The statutorily created body is the Commission on the Governorship, which consists 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. Cal. Gov. Code §12070 (LEXIS 2010).

the Commission on the Governorship may petition the court regarding the existence of questions as to succession and vacancy in the office of governor, the governor's temporary disability, and the termination of the governor's disability.⁵² The Commission became a litigant in *In Re Commission on the Governorship*,⁵³ when Lieutenant Governor Mike Curb used Governor Edmund G. Brown's 1979 absence from the state to make a judicial appointment. The governor, on returning, revoked the appointment. The chief justice, as chair of the Commission on Judicial Appointments (to whom Curb sent his appointment letter) asked the Commission on the Governorship if it intended to file suit over the matter, which the Commission subsequently did. The Court majority first examined whether the Commission on the Governorship had standing and concluded that it did.⁵⁴ Focusing on the definition of "absence from the State," the Court held that while the governor was "absent," and thus the appointment by the lieutenant governor valid, the governor, on his return and prior to the point at which the appointment was "confirmed," could revoke it at will.⁵⁵ A concurring opinion agreed that the Commission on the Governor had standing to sue and that the appointment was properly revoked, but argued that "absence" meant "effective absence" from the state and that with modern technologies a governor a continent away was capable of acting effectively for the state and its interests.⁵⁶

2. Specially Designated Panel or Commission

A final process relies on the chief justice to preside over a panel or commission specifically designated to examine the

52. Cal. Gov. Code §§ 12072, 12073, 12075 (LEXIS 2010).

53. 603 P.2d 1357 (Cal. 1979). For a full discussion of the case see David B. Lloyd, Student Author, *In Re Governorship: Curbing Mike Curb—Constitutionally*, 7 Hastings Const. L.Q. 831 (1980).

54. *Commn. on the Governorship*, 603 P.2d at 115.

55. *Id.* at 122 ("[W]e conclude that Governor Brown's withdrawal of the . . . appointment was valid").

56. *Id.* at 123-24.

capacity of the governor.⁵⁷ Delaware's constitution grants the chief justice, acting unanimously with the president of the Medical Society of Delaware and the commissioner of the Department of Mental Health, the power to remove the governor upon their declaration that he or she is suffering from a disability.⁵⁸ If the governor contests this determination, the matter is submitted to the General Assembly, which must muster a two-thirds vote of all members in order to sustain the determination of disability.⁵⁹ Connecticut's constitution⁶⁰ creates a similar Council on Gubernatorial Incapacity, which by statute⁶¹ consists of the chief justice presiding over a body consisting of the president pro tempore of the Senate, the speaker of the House of Representatives, the House and Senate minority leaders, and four persons selected by the governor. Upon receipt of a suggestion of incapacity by the lieutenant governor or a majority of Council itself, a two-thirds vote of the Council is required to temporarily remove the governor from power.⁶²

Iowa's commission⁶³ consists of the chief justice, the director of mental health, and the dean of medicine at the State University of Iowa. The chief justice, or the person next in line for gubernatorial succession, calls the three together to "examine the governor" and within seven days of the examination or their attempt to do so (presumably if the governor does not cooperate), the three must then vote by secret ballot whether to find the governor temporarily unable to discharge the office. A unanimous vote is required either to find that the disability exists or to remove it.⁶⁴

Minnesota by statute creates a group of five individuals who may, upon the concurrence of four of the members,

57. For instances of state panels that do not involve the chief justice or the Supreme Court specifically, see Bellamy, *supra* n. 11, at 391-92. A detailed discussion of the workings of those panels is beyond the scope of this article.

58. Del. Const. art. III, §20(b) (LEXIS 2010).

59. *Id.*

60. Conn. Const. Amend., art. XXII (LEXIS 2009) (amending section 18 of the Connecticut constitution to include a subsection establishing the Commission).

61. Conn. Gen. Stat. 3-1a (LEXIS 2009).

62. *Id.*

63. Iowa Code § 7.14(1) (LEXIS 2009).

64. Iowa Code § 7.14(1), (3).

temporarily remove the governor.⁶⁵ The declaration signed by the four remains in effect until four of the five rescind it or the governor contests it and the legislature, which must meet with forty-eight hours of the challenge, finds by two-thirds vote that the governor remains unable to discharge the powers and duties of office.⁶⁶

Of particular note is the post-Blagojevich activity in Oregon. Prior to 2009, the state's statutes were nearly identical to Minnesota's. The person next in line to succession for the governorship or the chief justice would call together the chief justice, the chief medical officer of the state hospital in Salem, and the head of the Oregon Health and Science University to "examine the governor" and vote by unanimous secret ballot their finding of temporary inability.⁶⁷ In 2009, however, the legislature created a five-member "disability evaluation panel" chaired by the chief justice. The governor selects two members (a judge of the Supreme Court or Court of Appeals, plus a licensed physician), the dean of the Oregon Health and Science University School of Medicine selects one (a physician), and the Director of Human Services also selects one (a physician).⁶⁸ The physicians selected by the Director and dean are required "[t]o the extent possible" to have "the appropriate expertise to determine whether the Governor is suffering from a physical or mental disability that prevents the Governor from discharging the duties of the office."⁶⁹ When two of five designated state officials (none of whom is a member of the disability evaluation panel) request it, the panel must convene.⁷⁰ The panel must examine the governor, and the physicians on the panel must

65. Minn. Stat. 4.06(d) (LEXIS 2009). The five members of the Council are the chief justice, the lieutenant governor, the governor's chief of staff, the governor's personal physician, and a pre-designated member of the governor's Cabinet. If the governor has not designated a Cabinet member, three of the remaining four members of the Council are required.

66. Minn. Stat. 4.06(e) (LEXIS 2009).

67. See Ore. Rev. Stat. § 176.040 (LEXIS 2007). Note that this section has now been superseded by Ore. Rev. Stat. § 176.303 (LEXIS 2010).

68. Ore. Rev. Stat. § 176.303(1) (LEXIS 2009).

69. Ore. Rev. Stat. § 176.303(1)(d), (e).

70. The five are the secretary of state, the state treasurer, the president of the Senate, the speaker of the House, and the governor's chief of staff. Ore. Rev. Stat. § 176.306 (LEXIS 2009).

explicitly conduct a medical examination, “if possible”.⁷¹ A vote of four of the five panel members is sufficient to find the governor “unable to discharge the duties of the office”; however, the votes of only three members are required to return the governor to office.⁷²

VI. CONSTITUTIONAL AMBIGUITIES

Illinois’s 1970 constitution⁷³ granted the general assembly the power to specify the person or persons able to suggest the existence of gubernatorial disability; set out the procedure by which to determine the disability; and specified that the Supreme Court could make the initial and subsequent determinations of disability. The Supreme Court’s roles were twofold: to have original and exclusive jurisdiction to review the gubernatorial disability statute passed by the General Assembly, and, should the legislature not pass such a law, to make the disability determination under such rules as the court would adopt.⁷⁴ But the General Assembly never passed such a law.

A similar set of circumstances appears in Massachusetts, where a 1968 amendment to that state’s constitution provides that a majority of the state’s highest court or a separate body established by the state legislature and charged with determining gubernatorial disability may make the necessary determination.⁷⁵ No such body has ever been provided for in a legislative enactment. Instead, when the chief justice and a majority of the associate justices of the Supreme Judicial Court transmit a declaration to the Senate president and House speaker expressing their belief that the governor is unable to discharge the duties of the office, the governor is removed. The governor

71. Ore. Rev. Stat. § 176.309 (LEXIS 2009).

72. Compare Ore. Rev. Stat. § 176.312(1) (LEXIS 2009) (“A disability evaluation panel shall find that the Governor is unable to discharge the duties of the office if four or more members of the panel vote in the affirmative for that finding.”) with Ore. Rev. Stat. § 176.312(3) (LEXIS 2009) (“The examination shall be conducted in the manner provided by ORS 176.309, except that the panel shall find that the Governor is able again to discharge the duties of the office if three or more members of the panel vote in the affirmative for that finding.”).

73. Ill. Const. art. V, §6(d) (LEXIS 2010).

74. *Id.*

75. Mass. Const. art. XCI (LEXIS 2010).

may then declare the disability removed by declaration to the Senate president and House speaker; however the chief justice and a majority of the associate justices may send those officials a counter-declaration insisting that the disability continues. Were such a contest to occur, it would be up to the legislature to assemble within forty-eight hours and, by a two-thirds majority of each house, determine whether the governor's disability continues. Should they fail to do so within twenty-one days, the governor would resume office.⁷⁶

The South Dakota and California constitutions are even more vague. A 1972 amendment to the South Dakota Constitution⁷⁷ states only that "the Supreme Court shall have original and exclusive jurisdiction to determine when a continuous absence from the state or disability has occurred in the office of the Governor." It provides no other detail or provision as to who may suggest or declare such a disability or what role a governor would have with respect to the Court's deliberations. California's constitutional provision also offers little detail, providing that "[t]he Supreme Court has exclusive jurisdiction to determine all questions arising under this section," and that "[s]tanding to raise questions of vacancy or temporary disability is vested exclusively in a body provided by statute."⁷⁸

V. THE VARYING ROLES OF STATE SUPREME COURTS: INVESTIGATE, DETERMINE, OR REVIEW

In several states (Alabama, Colorado, Georgia, Maine, Mississippi, New Hampshire) the high courts are tasked with an investigatory role at the instigation of another body, an elected official, or a group of elected officials. In four states (Illinois, Massachusetts, South Dakota, and Utah) the court is permitted or required to instigate the examination on its own volition. Additionally, several other states give the supreme court sole

76. *Id.*

77. S.D. Const. art. IV, § 6 (LEXIS 2009).

78. Cal. Const. art. V, § 10 (LEXIS 2010); *see also* Cal. Gov. Code § 12058 (LEXIS 2010) (providing that succession to governorship upon gubernatorial disability shall be according to statutorily established line of succession, but failing to address either process of determining disability or who is to make determination).

discretion to review its own prior determinations of disability when determining if any disability has lapsed and whether the governor removed may return to office. Such an assignment gives the court the unenviable task of maintaining almost a constant appraisal of the governor's health, rather than relying upon the governor, the governor's counsel or staff, or even the lieutenant governor to file papers with the court when the governor has recovered instead.

The difficulty posed by such a process is that appellate courts in general, and supreme courts in particular, are adjudicatory rather than investigatory. Even in those cases in which a state supreme court has original jurisdiction over a matter it will often make use of special masters,⁷⁹ commissioners,⁸⁰ or others to contend with the examination of documents, conduct hearings, and make initial determinations and adjudications, subject to review by the court. While it is possible that courts may take the position that they have an inherent power to appoint individuals or panels to handle such matters, in states like Georgia the court is specifically to take testimony and conduct what amounts to a bench trial. Moreover, in the case of those states where the supreme courts are

79. See e.g. *In re Nettles-Nickerson*, 750 N.W.2d 560 (Mich. 2008) (incorporating recommendation of Judicial Tenure Commission that refers to findings and conclusions of special master previously appointed by state Supreme Court); *Pa. Gaming Control Bd. v. City Council*, 928 A.2d 1255, 1263-64 (Pa. 2007) (addressing statute that grants Supreme Court power to name special master to hear certain matters related to casino gambling); *Lake View Sch. Dist. No. 25 v. Huckabee*, 243 S.W.3d 919, 921 (Ark. 2006) (appointing special masters to determine whether General Assembly and state Department of Education had fulfilled requirements for school funding as established by prior order of state Supreme Court); *State ex rel. Sams v. Commr. of Correct.*, 625 S.E.2d 334, 336 (2005) (referring to report of previously appointed special master regarding plans for transfer of prisoners from local to state-controlled correctional facilities); *Doe v. Bd. of Prof. Resp.*, 104 S.W.3d 465, 468 (Tenn. 2003) (referring to appointment of special master in contempt proceeding before Supreme Court); *In re Spencer*, 759 N.E.2d 1064, 1065 (Ind. 2001) (referring to appointment of special master to hear and take evidence regarding judge's conduct); *In re Lawrence*, 520 S.E.2d 895, 895 (Ga. 1999) (referring to recommendation of special master appointed to conduct ethics investigation of attorney).

80. See e.g. *Stark v. Van Dam Floor Covering, Inc.*, 2008 Wash. LEXIS 53 (using Supreme Court commissioner to determine attorneys fees and costs); *Wis. Jud. Commn. v. Ziegler (In re Ziegler)*, 750 N.W.2d 710 (Wis. 2008) (describing "Judicial Conduct Panel" appointed pursuant to Wis. Stat. § 757.89 to conduct hearing with respect to conduct of sitting Supreme Court justice prior to her election to that court); see also Thomas C. Marvin, *Ignore The Men Behind The Curtain: The Role of Commissioners In the Michigan Supreme Court*, 43 Wayne L. Rev. 375 (1997).

permitted to be the initiators of the proceeding, they are placed in the position of—at a minimum—collecting sufficient evidence to commence a proceeding. Whereas in the Blagojevich cases⁸¹ the Illinois Supreme Court could have appointed a special master with the plenary power to operate “under such rules as it may adopt”⁸² with respect to gubernatorial incapacity, it is not at all clear that other supreme courts have such latitude.

VII. FORMS OF “DISABILITY”

No standard definition of gubernatorial disability has been established. In arguing that the Illinois Supreme Court should remove Governor Blagojevich, for example, Illinois Attorney General Madigan noted that the language of the Illinois Constitution seems to suggest that “disability” is more expansive than a matter of mental or physical ailment,⁸³ arguing that the state constitution provides that a Governor shall be replaced if “unable to serve because of death, conviction on impeachment, failure to qualify, resignation, or other disability.”⁸⁴ She also argued that “disability” as used in the Illinois constitution is “unambiguous,”⁸⁵ and pointed out that “disabled” can be found to mean “unable, unfit, or disqualified.”⁸⁶

81. Two Blagojevich cases were filed in the Illinois Supreme Court in 2008: One, pressed by the state attorney general, sought (1) a temporary restraining order and preliminary injunction against the governor, and (2) leave to file an action to have the governor declared unable to serve under Ill. Const. Art V, § 6(b) and Ill. S. Ct. R. 382, which implements that constitutional provision. Both applications were denied. *See People v. Blagojevich*, 2008 Ill. LEXIS 1824 (denying motion for leave to file complaint pursuant to Ill. S. Ct. R. 382) & 2008 Ill. LEXIS 1822 (Dec. 17, 2008) (denying application for restraining order and preliminary injunction). The other case, filed by three Illinois taxpayers, called for the application of Ill. Const. Art. V, § 6(b) only. It too was dismissed. *See Bambenek v. Blagojevich*, 2008 Ill. LEXIS 1823 (2008) (Dec. 17, 2008) (denying motion for leave to file complaint to remove governor from office).

82. *See* nn. 70-71, *supra*, and accompanying text.

83. *People v. Blagojevich*, No. 107698, *Brief in Support of Motion For Leave to File Verified Complaint Pursuant to Supreme Court Rule 382(a)* (Ill., Dec. 12, 2008) at 10 (taking position that Illinois constitution “defines as a disability anything that renders the Governor unable to serve regardless of the specific nature of that disability”).

84. *Id.* (quoting Ill. Const. art. V., § 6(b)).

85. *Id.* at 9.

86. *Id.* at 10 (citing Webster’s dictionary). Indeed, the attorney general cited to “unfit” several times, *see id.* at i, 9 (“Article V, §6(b) requires the removal of a Governor who is

Other state constitutions vary in the level of specificity with which they define the sort of disability that can result in the supreme court's removal of the governor.⁸⁷ Seven states specify that either mental or physical disability or incapacity may serve as the basis for removal. Reasons for removal in Alabama are limited to "unsound mind," while Maine allows the legislature to suggest the governor's mental or physical disability to the Supreme Judicial Court, but allows the secretary of state to suggest removal when he or she has any reason "to believe the Governor is unable to discharge the duties of that office." Mississippi allows removal for "protracted illness," possibly covering both mental and physical ailments.

This distinction between specified disabilities and "other disabilities" is crucial for the intervention of the supreme courts. For example, in Alabama the lieutenant governor succeeds to the governorship "in case of the governor's removal from office, death or resignation," and "[i]n case of the impeachment of the governor, his absence from the state for more than twenty days, unsoundness of mind, or other disability."⁸⁸ However, the Supreme Court may only become involved if the "disability" in question is "unsoundness of mind."⁸⁹ This limitation to examinations of mental status alone may explain why no effort was made to have Governor George Wallace removed after he

"unable" or "unfit" to serve"), 10 ("This common understanding of the term 'disability' in §6(b)—something that makes one 'unable' or 'unfit' to serve—also comports with the purpose of section 6 as a whole Thus, under Art. 5 §6(b), a disability is something that renders an individual unfit or unable to serve as Governor."); *id.* at 12 ("The term [other disability] must be given its plain meaning, which describes a Governor who is unable or unfit to serve or who has been rendered incapable of proper and effective action."); 14 (asserting that "these unprecedented circumstances establish that Mr. Blagojevich is 'unable' and 'unfit' to serve effectively as Governor of the State of Illinois"). But it bears noting that the term "unfit" is not universally deemed to be synonymous with the term "unable." See e.g. U.S. Dept. of Defense, *Manual for Courts-Martial, United States* (2008) at IV-123 (providing that "[i]ncapacitated" means unfit or unable to perform properly," and indicating that "[a] person is 'unfit' to perform duties if at the time the duties are to commence, the person is drunk, even though physically able to perform the duties," while "[i]llness resulting from previous overindulgence is an example of being 'unable' to perform duties.").

87. See Table 2, *infra* (containing summary information relating to procedures in each of the states mentioned in this paragraph).

88. Ala. Const. art. V, §127 (LEXIS 2010).

89. Ala. Const. §128 (LEXIS 2010). Neither this section 128 nor section 127 specifies who is to determine the "other disabilities" mentioned in section 127 or to decide when they occur.

was severely wounded and paralyzed in 1972, and he remained in office until 1979.⁹⁰

Most states use the term “disability” without specifying whether it is limited to mental, physical or other impairments. This becomes a critical distinction in those states where absence from the state or some other activity (such as impeachment) may serve as the basis for temporary removal. At a minimum, it opens the possibility that a supreme court will have little to no basis from which to draw upon when and if it must confront the matter.

State	Mental	Physical	Absence	Other
AL	unsound mind			
CA			x	impeachment...or other temporary disability
CO	mental disability	physical disability		
CT				unable to exercise powers and perform duties
DE	unable to exercise powers and perform duties because of mental disability	unable to exercise powers and perform duties because of physical disability		
FL	during mental incapacity	during physical incapacity		
GA	unable to exercise powers and perform duties because of mental disability	unable to exercise powers and perform duties because of physical disability		
IL		unable to serve because of death		unable to serve because of conviction on impeachment, failure to qualify, resignation, or other disability
IN				unable to discharge powers and duties
IA				unable to discharge duties of office for reason of disability

90. See e.g. Bellamy, *supra* n. 11, at 392 (citing Thomas S. Healey, *The Two Deaths of George Wallace* 132-34 (Black Belt Press 1996)).

Table 2 (continued)				
Gubernatorial Disability Provisions Reviewable by State Supreme Courts				
State	Mental	Physical	Absence	Other
KY	because of mental incapacitation is unable to discharge duties of office	because of physical incapacitation is unable to discharge duties of office		
LA				unable to discharge powers and duties of office
ME ⁹¹	for six months continuously unable to discharge duties of office because of mental disability	for six months continuously unable to discharge duties of office because of physical disability		
ME ⁹²				unable to discharge duties of office
MD	Unable by reason of mental disability to perform duties of office	Unable by reason of physical disability to perform duties of office		
MA				unable to discharge powers and duties of office
MI				suffering under an inability
MS		unable, from protracted illness, to perform duties of office	x	office "otherwise" vacant
MO				unable to discharge power and duties of office
MN				unable to discharge powers and duties of office
NH	unable to discharge power and duties of office by reason of mental incapacity	unable to discharge power and duties of office by reason of physical incapacity		
NJ	for six months been continuously unable to discharge duties of office by reason of mental disability	for six months been continuously unable to discharge duties of office by reason of physical disability	x continued for six months	failed to qualify within six months after beginning term of office, or whenever

91. This provision is triggered by legislative action. See n. 27, *supra*, and accompanying text.

92. This provisions is triggered by the Secretary of State's action. See n. 26, *supra*, and accompanying text.

Table 2 (continued)				
Gubernatorial Disability Provisions Reviewable by State Supreme Courts				
State	Mental	Physical	Absence	Other
OH				unable to discharge duties of office by reason of disability
OK				unable to discharge powers and duties of office
OR				unable to discharge duties of the office
SD			x continued	unable to serve by reason other than temporary disability
UT				disability

VIII. CONCLUSION: THE ROLE OF THE HIGH COURTS

In sum, half of states provide for a process to temporarily or permanently remove a governor through the intervention of the state's supreme court or its chief justice. The placement of such authority into the hands of the judiciary can be observed as an extension of the courts' historic powers to review questions of mental competency and physical capacity in other contexts. However, such reviews are typically conducted at the *trial* level; supreme courts, dealing mostly, if not exclusively, with appellate proceedings, typically operate with a record from the lower court that includes findings and conclusions as to the capacity of the individual based upon medical and psychological testimony as well as other evidence. Most supreme courts rarely if ever take on the responsibility of conducting trials, gathering and ruling on evidence, or holding prolonged hearings on a single matter. In fact, the drafters of the 1901 Alabama Constitution stated unequivocally, when considering procedures for evaluation of gubernatorial disability, that they could "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."⁹³ While the courts of last resort may still be "safe", "august" and

93. *Official Proceedings*, *supra* n. 3, at 52.

not liable to give in to the “temptation” to misuse their power, it remains somewhat of an open question whether as an institutional, structural, or procedural matter they remain the best venue for such proceedings.



