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## DETERMINING GUBERNATORIAL INCAPACITY: IT'S TIME TO REFORM THE FLORIDA CONSTITUTION

by Daniel F. Walker

Governor Lawton Chiles' hospital stay last summer should alert us to the need to amend Florida's constitution. As it now stands there is dangerously little direction in our constitution as to how the state should proceed if our governor becomes unable to serve as chief executive, either through suffering a physical breakdown or due to a crippling mental disease.

Crises like Watergate that threaten the legitimacy of a representative government reveal the strengths and weaknesses of governmental structure under great pressure. Such emergencies are exceedingly rare events in America but could occur if a political chief executive (for example, our nation's president or a state governor) became disabled but was unwilling to relinquish power, either as a permanent measure or for a temporary period of treatment and restoration.

For example, suppose a governor of our state began to conduct

himself strangely, and to exhibit unusual behavior and to sluggishly perform a limited number of official duties (all the while doing nothing dangerous or unethical or illegal.) Article 4, section 3(b) of the Florida Constitution directs that four cabinet members may notify the state supreme court by a "written suggestion" that the governor is unfit to perform the duties of public office due to his mental or physical impairment. The state supreme court would then determine the governor's alleged "incapacity to govern."

How would it make its determination?

We don't know.

Would the state supreme court act as a kind of trial court?

Probably. We're not sure.

What evidence would it consider?

Well . . . who knows?

Is "incapacity to govern" a standard comparable to "lacking the capacity to manage property and

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meet essential health and safety requirements" as Florida's guardianship law states? Might a person be legally unfit to administer state business and yet not need a guardian for personal affairs?

We have no idea.

If a governor's actions (or inactions) raise serious concerns about his mental or physical condition but he refuses to voluntarily step aside, the responsibility to force the issue lies with the cabinet. If a majority of cabinet officers file a "written suggestion" of gubernatorial incapacity with the state supreme court and the governor opposes the cabinet, we could witness a genuine state constitutional crisis. The Florida supreme court would be empowered to carry out a constitutionally-mandated duty with no rules, guidelines or parameters of inquiry. No minimum threshold of evidence is required, not even medical or psychiatric testimony.

Article 4, section 3(b) of the Florida Constitution should be amended. It could be addressed by the Constitutional Revision Commission in 1997, but the legislature should consider the issue during the 1996 session. The legislature must take charge of this issue because this subject matter lacks the popular news appeal enjoyed by issues such as term limitation.

What should they consider?

Under Georgia law, for example, four elected constitutional officers (akin to Florida cabinet members) can petition the Georgia Supreme Court that the governor "is unable to perform the duties of the office because of a physical or mental disability." Evidence must include testimony from at least three physicians in private practice, one of whom must be a psychiatrist. There must

be a speedy and public hearing on the matter, witnesses can be obtained, and legal assistance can be addressed.

The Georgia model is not perfect. For example, the state supreme court has not issued rules strictly pertaining to such a potential situation in which it might have to serve as a trial court. But at least it does require a certain amount of medical testimony and establishes that the court is to function as a quasi-trial court.

If Floridians want the Florida supreme court to serve as the primary determinant of gubernatorial incapacity, the Georgia model (Art. 5, Sec. 4, Par. 2 of its Constitution) offers several desirable features. Alternatively, our legislature could borrow and adapt provisions from some other state, or it could fashion its own unique procedure. Regardless of the measures to be implemented, the Florida Constitution should be amended soon because the existing mechanism is inadequate and unclear.

The people of Florida can continue to gamble that every governor we elect will proceed through every term with no maladies of body or enfeeblements of mind. Or we can prepare now, which is the best way to face a possible emergency. Our state constitution provides very limited tools to deal with the unfortunate scenario of an immobilized and impaired governor in office.

New tools are necessary.

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