IN RE GOVERNORSHIP: CURBING MIKE CURB—CONSTITUTIONALLY

*By David B. Lloyd**

Upon returning from a trip to the east coast in March 1979, Governor Edmund G. Brown, Jr. was presented with a *fait accompli* by Lieutenant Governor Mike Curb, in the form of a judicial appointment to the California Court of Appeal. Political ruminations and rumblings dominated the spring, blossoming into a legal brouhaha in the summer, finally culminating with the California Supreme Court decision last winter, *In re Governorship*.[1]

This intragovernmental branch dispute is unique in the state's history, due in part to the fact that, for the first time in almost one-hundred years, the two leaders of the executive branch of the government are from different political parties.[2]

The issues presented to the California Supreme Court in this case were narrowly framed: (1) Does the lieutenant governor have the power, under article V, section 10 of the California Constitution, to make a judicial appointment when the governor is absent from the state? (2) If such power does exist, can the governor validly withdraw such an appointment upon his return to the state?[3] But underlying these two problems lurks the broader, and much more important issue of just who governs the state when the governor is physically outside its boundaries.

The supreme court, in a decision by Justice Wiley Manuel,[4] ruled that the lieutenant governor has authority to exercise gubernatorial powers of appointment to the appellate court while the governor is physically absent from the state and that the governor has the authority

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1. 26 Cal. 3d 110, 603 P.2d 1357, 160 Cal. Rptr. 760 (1979). The opinion was a consolidation of *Brown v. Curb*, in which the Governor petitioned for writs of mandate and prohibition and for declaratory relief, and *In re Governorship*, filed by the State Commission on the Governorship for determination of questions under article V, section 10 of the California Constitution.

2. In the gubernatorial election of 1886, Washington Bartlett, a Democrat, won the governorship, while Robert Waterman, a Republican, won the lieutenant governorship. Bartlett died after eight months in office, and Waterman served out the remainder of his term. 1 J. KALLENBACH & S. KALLENBACH, AMERICAN STATE GOVERNORS, 1776-1976 at 69 (1977).

3. 26 Cal. 3d at 113, 603 P.2d at 1359, 160 Cal. Rptr. at 762.

4. *Id.*

to withdraw the appointment at any time prior to the moment its confirmation becomes effective.[5]

This note will assess the respective positions of the Governor and the Lieutenant Governor in their law suit before the supreme court. Though the legal and political ramifications of this controversy may, at first blush, appear peculiar to California, the issues presented here transcend state boundaries. Thus, this note will also briefly examine the methods used by other states in dealing with the problem, along with several recent proposals designed to streamline the executive bureaucracy. It will conclude, contrary to the judgment of the California Supreme Court that the Governor's absence from the state constitutes a "disability" only when it is *in fact* disabling; that is, when the governor is outside the state and unable to act in an emergency situation[6] that calls for his immediate attention. Thus, unless a governor is so "disabled," a mere physical absence from the state *does not* authorize the lieutenant governor to exercise full gubernatorial power.[7]

I. Statement of Facts

The seeds of dispute were sown in the gubernatorial election of 1978, when Edmund G. Brown, Jr. defeated his Republican challenger, and Mike Curb defeated his Democratic opponent. The political honeymoon between the two was short-lived and it was only a question of time before a serious controversy would blossom.[8]

On December 31, 1978, Presiding Justice Parker Wood retired from the California Court of Appeal.[9] Two weeks later, Brown initiated the process of appointment to fill the vacancy by sending the names of eleven candidates to the Chairperson of the Los Angeles County Bar Association's Judicial Appointments Committee for evaluation. The Committee's evaluation of the candidates was received by the Governor on March 12, 1979. Ten days later, Brown submitted the name of Bernard Jefferson, associate justice of the court of appeal, to the Board of Governors of the State Bar for consideration, along with the name of a replacement to fill Jefferson's old post.[10]

5. *Id.*

6. An "emergency situation" could be defined as a sudden, generally unexpected occurrence or set of circumstances.

7. This power includes all responsibility, constitutional and statutory, imposed on the governor. *See generally* CAL. CONST. art. V.

8. Brown's presidential ambitions were widely known at the time, and there was no question that he would frequently be absent from the state in the future. Curb, buoyed by his successful first attempt at public office, was also seen as having high ambitions, and it was doubtful that he would remain idle if given the opportunity to exercise gubernatorial power during the Governor's absence.

9. Second Appellate District, Division One.

10. Both these submissions were made in accordance with an arrangement, traditional

Brown left Los Angeles International Airport at 10:00 a.m. on March 26, 1979, bound for Washington, D.C., to testify on behalf of the State of California before the Energy and Natural Resources Committee of the United States Senate, at the invitation of Senator Henry Jackson. Brown was absent from the state for approximately forty hours, returning to Los Angeles on March 28 at 2:11 a.m. During Brown's absence, on March 27 at about 3:00 p.m., Sheldon Lytton, chief assistant to Lieutenant Governor Curb, called Gray Davis, Brown's executive secretary, informing him of Curb's intention to appoint Judge Armand Arabian of the Los Angeles Superior Court to the vacancy on the court of appeal. Davis informed Lytton that Brown intended to appoint Jefferson to that vacancy, that Arabian's name had not been submitted to the State Bar for evaluation and thus was in violation of the traditional arrangement between the State Bar and the Governor, and that Arabian's appointment would be contrary to the Governor's expressed intentions. Davis also warned Lytton that, should Curb appoint Arabian, Brown would withdraw the appointment upon returning to the state. Shortly afterwards, Lytton, in a second phone call to Davis, informed him that notwithstanding Brown's opposition, Curb would proceed with the Arabian appointment.[11] Later that same day, by letter to the Commission on Judicial Appointments,[12] Curb appointed[13] Arabian to the vacancy on the California Court of Appeal.

Upon returning to the state on March 28, Brown telegrammed the Commission and withdrew Curb's appointment of Arabian. Two days later, the Governor appointed Jefferson to the post.[14]

In response, Curb sent a letter to the Commission on April 2, as-

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in California since the administration of Governor Earl Warren, whereby the governor submits to the Board of Governors of the State Bar the names of prospective appointees to the court of appeal for evaluation prior to their submission to the Commission on Judicial Appointments for confirmation.

11. Such interexecutive disagreements apparently were common. In September 1979, for example, while Brown was campaigning in Texas, Curb phoned Brown and his staff several times demanding to know Brown's intention on pending tax relief bills. If they were not signed, Curb warned, he would storm the Governor's office and act on the bills himself. The Governor's executive secretary responded that there was no way Curb would have been given the bills to sign. San Francisco Chronicle, Sept. 29, 1979, at 34, col. 6.

12. An appointment by the governor to fill a vacancy in the court of appeal "is effective when confirmed by the Commission on Judicial Appointments." CAL. CONST. art. VI, § 16(d). The Commission consists of the Chief Justice, the Attorney General and, when the appointment to be considered is to a court of appeal vacancy, the senior presiding justice of the affected court. *Id.*, art. VI, § 7.

13. The "appointment" in this case was actually a nomination. The appointee would not be vested with the right to office until confirmed by the Commission and given his commission by the Governor.

14. Although the Board of Governors of the State Bar had not yet completed its evaluation of Jefferson, it advised Brown that, in light of Curb's actions, it did not object to Brown proceeding with the Jefferson appointment.

serting his belief that his earlier appointment of Arabian was a valid one, not subject to rescission by Governor Brown without the appointee's consent.[15] Two weeks later, Chief Justice Rose Bird, acting in her capacity as chairperson of the Commission, requested assistance from Brown and Curb with respect to their conflicting appointments. Then, on April 30, the chief justice sent a letter to State Senator James Mills, Chairman of the Commission on the Governorship,[16] inquiring whether the Commission intended to consider the conflicting contentions of the Governor and Lieutenant Governor. Mills responded affirmatively, and on May 8 the Commission on the Governorship held its inaugural meeting. One week later, the Commission voted to petition the California Supreme Court for a definitive interpretation of article V, section 10 of the California Constitution which defines the powers of the lieutenant governor during the governor's absence from the state.[17] On September 6, counsel for both parties and counsel for the Commission presented arguments before the court. Brown's legal advisor claimed that Curb's constitutional interpretation of section 10 would create chaos, while Curb's lawyer argued that his client's position was sanctified in both California law and tradition.[18] Thus, the lines were clearly drawn, the issues were cogently framed, and a minor political dispute had blossomed into a full legal controversy that was to last the remainder of the year.[19]

II. The Court's Opinion

Justice Manuel, speaking for six members of the court, divided the majority opinion into three segments. The first part disposed of the jurisdictional question raised by both the Commission on the Governorship and Brown. The second part, the interpretation of the constitution's phrase "absence from the State"[20] occupied the bulk of the opinion. The Governor's authority to revoke, rescind, or withdraw an

15. "This belief is based on the fact that once the appointment has been made, the constitutional scheme vests in the Commission, and in the Commission alone, the power to confirm or reject the appointment. Therefore, because Judge Arabian does not consent to the withdrawal of his appointment, said appointment cannot and has not been withdrawn." Letter from Mike Curb to the Commission on Judicial Appointments (April 2, 1979).

16. The Commission is the statutory body created as a result of the constitutional revision of 1966. *See* notes 22-23 and accompanying text *infra*.

17. *See* note 22 *infra*.

18. San Francisco Chronicle, Sept. 7, 1979, at 8, col. 1.

19. Brown left the state capital shortly before the presentation of arguments to campaign nationwide, returning briefly in early January to deliver his annual state-of-the-State address to the legislature. Traditionally, such a long absence required legislative approval; however, a little-known bill passed legislative muster the previous spring, allowing the Governor to be absent for up to one year without legislative approval. The bill became law without the Governor's signature—he was not in Sacramento at the time.

20. CAL. CONST. art V, § 10.

appointment of the Lieutenant Governor was the final issue to be resolved. The court concluded by issuing a peremptory writ of mandate to the Commission on Judicial Appointments to exercise its discretion with respect to the appointment of Justice Jefferson to the post of Presiding Justice of the California Court of Appeal.[21]

A. Jurisdiction

In 1966, the California Constitution was revised to state that, *inter alia*, "[t]he Lieutenant Governor shall act as Governor during the impeachment, absence from the State, or other temporary disability of the Governor."[22] Standing to raise issues of vacancy or temporary disability was vested in the Commission on the Governorship, a body created by the legislature pursuant to the constitutional revision.[23] Exclusive jurisdiction to determine all questions relating to vacancies in the office of the governor, or to any temporary disabilities of the governor, rested with the supreme court.[24]

According to a literal reading of the language in article V, section 10, the Commission had standing to raise questions of vacancy or temporary disability, but not questions associated with the Governor's absence from the state. Therefore, it felt obliged to make a jurisdictional argument. In its brief before the court, the Commission argued that it had standing to sue because the word "other" in "other temporary disabilit[ies] of the Governor,"[25] should be read consistent with the particular class of words it follows, and include other types of disabilities.[26] Thus, the Governor's absence from the state was alleged by the Commission to be a kind of temporary disability within the meaning of article V, section 10, and therefore the Commission should have standing

21. 26 Cal. 3d at 122, 603 P.2d at 1366, 160 Cal. Rptr. at 768.

22. CAL. CONST. art. V, § 10 provides in full: "The Lieutenant Governor shall become Governor when a vacancy occurs in the office of Governor. [¶] The Lieutenant Governor shall act as Governor during the impeachment, absence from the State, or other temporary disability of the Governor or of a Governor-elect who fails to take office. [¶] The Legislature shall provide an order of precedence after the Lieutenant Governor for succession to the office of Governor and for the temporary exercise of the Governor's functions. [¶] The Supreme Court has exclusive jurisdiction to determine all questions arising under this section. [¶] Standing to raise questions of vacancy or temporary disability is vested exclusively in a body provided by statute."

23. The Commission consists of "the President pro Tempore of the Senate, the Speaker of the State Assembly, the President of the University of California, the Chancellor of the California State Colleges, and the State Director of Finance." CAL. GOV'T CODE § 12070 (West Supp. 1980).

24. CAL. CONST. art. V, § 10.

25. *Id.*

26. *See* Thompson v. Hance, 174 Cal. 572, 579, 163 P. 1021, 1024 (1917) ("Other" must be construed in connection with the other parts of the subdivision to which it relates. To wrench it from its context would be to ignore the rule of *ejusdem generis*).

to petition the court to raise questions concerning his absence from the state.[27]

The Commission further argued that, even if the Governor's absence was not a temporary disability, it was another kind of question, the existence of which gave standing to the Commission to petition the supreme court to determine all questions relative to the authority of the Lieutenant Governor to act as Governor during the Governor's absence from the state.[28] The court found it unnecessary to reach this second argument, concluding that the first would suffice since it was "obvious that absence from the state is a temporary disability within the meaning of article V, section 10."[29] Having found that the Commission had standing, the court was willing to consider pleadings and arguments from all interested persons on matters within the scope of the Commission's questions.[30] Because of the exclusive jurisdiction given to it in this case, the court also was willing to grant relief, declaratory or otherwise, that ordinarily would be appropriate only from trial courts.[31]

B. Interpretation of "Absence From the State"

The Governor contended that under article V, section 10, his de-

27. Curb acknowledged that the Governor's absence from the state was a "temporary disability" under article V, section 10, but argued that "absence from the state" did not need to be defined or explained because its meaning was clear.

28. The Commission argued that, even though they may lack express standing in this case, their standing to petition the court should be implied in the words of article V, section 10. *See* Reuter v. Board of Supervisors, 220 Cal. 314, 321, 30 P.2d 417, 420 (1934) (Provisions of a constitution or of a statute should receive practical, rather than technical construction; one leading to a wise policy, rather than mischief or absurdity.); Johnston v. Baker, 167 Cal. 260, 264, 139 P. 86, 88-89 (1914) (Whatever is necessarily implied in a statute is as much a part of it as that which is expressed. A statute must be construed with reference to the object to be accomplished by it).

29. 26 Cal. 3d at 115, 603 P.2d at 1361, 160 Cal. Rptr. at 764 (footnote omitted).

30. Brown's petitions for writs of mandate and prohibition and for declaratory relief asserted that (1) Brown and Jefferson had standing to raise questions because they were beneficially interested in the enforcement of constitutionally prescribed processes; (2) Curb lacked the authority to determine the existence of a temporary disability of the Governor, and, no such determination having been made by the supreme court, he lacked authority to assume the powers of the Governor by purporting to make a gubernatorial appointment; (3) Brown, on the facts tendered, was not effectively absent from the state, within the meaning of article V, section 10; and (4) Brown may validly withdraw the appointment of Arabian at any time prior to its confirmation by the Commission on Judicial Appointments. Curb argued that (1) Brown was absent from the state on the day in question, giving Curb plenary authority under the constitution to make the appointment; and (2) Brown's conclusions were simply argumentative conclusions of law, and were in error. *Id.* at 114, 603 P.2d at 1361, 160 Cal. Rptr. at 764.

31. "The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in . . . proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition." CAL. CONST. art. VI, § 10.

parture from the state would confer no gubernatorial power on the Lieutenant Governor without a prior petition to the California Supreme Court by the Commission on the Governorship, followed by the court's determination that the absence would constitute a temporary disability. According to Brown the court's exclusive jurisdiction in such cases made it the only entity that could conclude authoritatively that the Governor was temporarily disabled by an absence. The court rejected this argument, reasoning that:

> To require express judicial authorization before the Lieutenant Governor could act as Governor during the Governor's absence or other temporary disability would contravene the purpose of article V, section 10 . . . . The Lieutenant Governor—like any public officer with executive duties—must apply and, if necessary, interpret the law prescribing those duties as found in the Constitution, legislation, and authoritative decisions. Our role is to resolve controversies as to interpretation, not to dictate initial formulations.[32]

With this resolved the court moved on to the main point of dispute. Brown and Curb offered two possible interpretations of the phrase "absence from the state." Brown proposed that the term "absence" must be read as "effective absence,"[33] requiring not only a physical absence, but also an inability to perform a particular act, brought on by a physical disability.[34] Brown further alleged that the challenged action here was not warranted by an emergency situation or any other necessity,[35] and consequently, the actions of the Lieutenant Governor should be subject to a high degree of scrutiny[36] because they were con-

32. 26 Cal. 3d at 117, 603 P.2d at 1362, 160 Cal. Rptr. at 764-65.

33. The first case to use this term was Olson v. Lahiff, 146 Wis. 490, 492, 131 N.W. 824, 825 (1911) ("'Absence' . . . construed reasonably . . . means . . . 'effective' absence."). *See also* Markham v. Cornell, 136 Kan. 884, 896, 18 P.2d 158, 164 (1933) (For the Lieutenant Governor to act "[t]here must be a situation where the peace and dignity of the state is in danger, or the orderly functioning of government is threatened."); Warmoth v. Graham, 26 La. Ann. 568, 570 (1874) (It was "[never] contemplated that the movements of the Governor should be watched, with the view that the Lieutenant Governor . . . should slip into his seat, the moment he stepped across the borders of the State."); Crittenden v. Walker, 78 Mo. 139, 141 (1883) ("[A]bsence must be of such a character as to indicate on the part of the governor, an abdication for the time being of the duties of the office. . . ."). Similar constructions can be found in *In re* Advisory Opinion to the Governor, 112 So. 2d 843 (Fla. 1959); Tennant v. Parker, 3 Neb. 409 (1872); *In re* An Act Concerning Alcoholic Beverages, 130 N.J.L. 123, 31 A.2d 837 (1943). For cases dealing with absences of mayors or other local officials, *see* Watkins v. Mooney, 114 Ky. 646, 71 S.W. 622 (1903); Cytacki v. Buscko, 226 Mich. 524, 197 N.W. 1021 (1924); Mayor of Detroit v. Moran, 46 Mich. 213, 9 N.W. 252 (1881); Gelinas v. Fugere, 55 R.I. 225, 180 A. 346 (1935).

34. *See generally* Sawyer v. First Judicial Dist. Court, 82 Nev. 53, 410 P.2d 748 (1966). *See also* note 140 and accompanying text *infra*.

35. *See generally* Markham v. Cornell, *supra* note 33 and accompanying text.

36. "[I]n [the] event of a specified official's physical non-presence, the crux of a provision for succession in the event of 'absence' is the state's immediate need for a specific act or

trary to the Governor's previously expressed intent.[37] Curb, on the other hand, relied on a literal interpretation of the phrase "absence from the state," arguing that Brown was absent on the day in question, giving Curb plenary authority under the constitution to make the appointment.[38] With the issue so framed, the court concluded that "constitutional and legislative history, contemporaneous interpretation and historical practice, and considerations of public policy, namely the need for certainty in effectuating executive decisions, support the Lieutenant Governor's position."[39]

1. *Constitutional and Legislative History*

The phrase "absence from the state" has remained unchanged in the California Constitution for 130 years.[40] The present article V, section 10, on which this dispute turned, was adopted in 1966, as proposed by the Constitutional Revision Commission. The court relied upon the legislative history of that proposed amendment for its literal reading of "absence from the state" and for its interpretation of "temporary disability."[41] Special counsel to the Constitutional Revision Commission had indicated, in testimony before the legislature, that:

> [T]he Commission felt that if the constitution should prohibit the Governor from acting then it should be classified as a disability. It is not an inability. *The Governor could be someplace outside the state and be very capable of performing his duties by a long distance*

function. Certainly, where the act or function performed by the successor is obviously contrary to policies of the absentee official, a closer scrutiny is warranted to determine if the 'absence' was 'effective.'" Sawyer v. First Judicial Dist. Court, 82 Nev. at 57-58, 410 P.2d at 750. *See also* Lurvey, *Absent Officials: No Carte Blanche for Successors*, 15 J. PUB. L. 324 (1966).

37. *See* text accompanying notes 9-14 *supra.*

38. "Every law of this State relating to the powers and duties of the Governor . . . extends to the person performing for the time being the duties of Governor." CAL. GOV'T CODE § 12002 (West Supp. 1980). Case law supporting Curb's position is far less prevalent than that supporting Brown's "effective absence" interpretation. *See* note 33 *supra. But see Ex parte* Crump, 10 Okla. Crim. 133, 135 P. 428, 436 (1913) ("[In the Governor's] absence from the state . . . [the] constitutional functions [of his office] shall devolve upon the Lieutenant Governor. . . ."). *See also* Walls v. Hall, 202 Ark. 999, 154 S.W.2d 573 (1941); Montgomery v. Cleveland, 134 Miss. 132, 98 So. 111 (1923).

39. 26 Cal. 3d at 117, 603 P.2d at 1362, 160 Cal. Rptr. at 765.

40. "In case of the impeachment of the Governor, or his removal from office, death, inability to discharge the powers and duties of the said office, resignation, or absence from the state, the powers and duties of the office shall devolve upon the Lieutenant-Governor for the residue of the term, or until the disability shall cease." CAL. CONST. of 1849, art. V, § 17. Substantially the same phrase was used in the Constitution of 1879 (art. V, § 16), and in the amendments of 1898, 1946 and 1948. *See generally* C. GOODWIN, THE ESTABLISHMENT OF STATE GOVERNMENT IN CALIFORNIA, 1846-1850 (1914); Hunt, *The Genesis of California's First Constitution (1846-49)*, in VIII JOHNS HOPKINS UNIVERSITY STUDIES IN HISTORICAL AND POLITICAL SCIENCE (H. Adams, ed. 1895).

41. 26 Cal. 3d at 118, 603 P.2d at 1362, 160 Cal. Rptr. at 765.

> *telephone. [But in the Commission's view] [h]e would be legally disabled from doing so.*[42]

The legislature adopted the Commission's interpretation of "absence," concluding that a physically absent governor cannot act, and is therefore legally disabled.

2. *Historical Practice and Contemporaneous Interpretation*

The court noted that neither party had brought to its attention any previous court's rejection of the proposition that the governor's physical absence confers full gubernatorial power on the lieutenant governor.[43] Consequently, the court did not feel inclined to reject it now. "The state government has functioned under this provision without any question that its language means what it plainly states."[44] Research revealed that during the past sixteen years over 1,400 gubernatorial actions had been taken by an acting governor (lieutenant governor or president pro tempore of the Senate) while the governor was physically absent from the state.[45] Thus, with marked deference to the wording of the constitution, the court rejected the argument that "absence" should be interpreted to reflect modern conditions of travel and communication:

> We note that the Constitution Revision Commission could have proposed a change in the language in 1966 to reflect modern conditions of travel and communication but did not do so. We are not persuaded that time or technology compels such a change by judicial fiat.[46]

The court noted that other jurisdictions that had been faced with this issue had followed the Governor's view, that not merely a physical absence, but an "effective" absence had to be shown before the acting

42. Transcript, Assembly Interim Comm. on Const. Amends. 29-34 (Feb. 23, 1966), *cited in In re* Governorship, 26 Cal. 3d at 118, 603 P.2d at 1362, 160 Cal. Rptr. at 765 (emphasis added). "We put these two examples [impeachment and absence from the state] in . . . because we wanted to be sure that these were construed to be [a] temporary disability, because if we just said temporary disability we think it would be reasonable for someone to construe impeachment as not being [a] temporary disability." Transcript, Assembly Interim Comm. on Const. Amends. 33 (Feb. 23, 1966), *cited in In re* Governorship, 26 Cal. 3d at 118, 603 P.2d at 1363, 160 Cal. Rptr. at 765.

43. 26 Cal. 3d at 118, 603 P.2d at 1363, 160 Cal. Rptr. at 763.

44. *Id.* (footnote omitted).

45. *Id.* at n.6. Statistics were compiled by the Lieutenant Governor's administrative assistant. The total number of proclamations, executive orders, pardons and legislative enactments signed by acting governors from 1963 to 1979 breaks down as follows: 1963 to 1967 (during Edmund G. ("Pat") Brown's second term) 321; 1967 to 1975 (during Ronald Reagan's terms) 1026; 1975 to 1979 (during Edmund G. ("Jerry") Brown's first term) 61. The proclamations and executive orders included, *inter alia*, states of emergency, holidays, Alex Haley Day and Flash Flood Awareness Week. Declaration of Leonard Breijo, Objection and Response to Petitioners' Exhibit 7 at 6-13, *Brown v. Curb*, S.F. No. 24021.

46. 26 Cal. 3d at 118-19, 603 P.2d at 1363, 160 Cal. Rptr. at 765-66.

governor could exercise gubernatorial power.[47] Nevertheless, the court found these cases neither persuasive nor controlling:[48]

> The conceptual difficulty with the effective-absence test is that virtually any physical absence of the Governor may create a need for action by an acting governor, at least to deal with emergencies. . . . There is no room . . . for a watered down "effective" absence or any other concept whereby an acting governor could discharge some but not all of the duties of the governor in his absence.[49]

The Governor here claimed no power to act from outside the state's boundaries. Therefore, as the court concluded, since a physically absent governor cannot act, the overriding purpose of avoiding a hiatus in the availability of executive power required that, during his absence, the sole and entire power to act as governor[50] be transferred to a physically present lieutenant governor.[51] Furthermore, the court believed that a lieutenant governor, as acting governor, is free to act on whatever matters he determines need attention during the governor's absence.[52] Thus, the court concluded, "the appointment by Lieutenant Governor Curb of Judge Arabian as presiding justice of the Court of Appeal was valid."[53]

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47. *See* cases cited in notes 33-36 and accompanying text *supra.*

48. 26 Cal. 3d at 119 n.7, 603 P.2d at 1363 n.7, 160 Cal. Rptr. at 766 n.7.

49. *Id.* at 119-20, 603 P.2d at 1363-64, 160 Cal. Rptr. at 766.

50. This broad grant of power seems to contradict the narrow holding of the court, *i.e.*, that a Lieutenant Governor has the power to make a judicial appointment to an appellate court during the Governor's absence. *See* note 5 and accompanying text *supra.*

51. 26 Cal. 3d at 119, 603 P.2d at 1363, 160 Cal. Rptr. at 766. *See also* the following legislative enactments which implement article V, section 10: CAL. GOV'T CODE § 12002 ("Every law of this State relating to the powers and duties of the Governor and to acts and duties to be performed by others toward him extends to the person performing for the time being the duties of Governor."); *id.* § 12058 ("In case of impeachment of the Governor or officer acting as Governor, his absence from the state, or his other temporary disability to discharge the powers and duties of office, then the powers and duties of the office of Governor devolve upon the same officer as in the case of vacancy in the office of Governor, but only until the disability shall cease."). Case law is also in accord with this conclusion. *See* Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 244 (1944) ("Not lightly vacated is the verdict of quiescent years.") (quoting Coler v. Corn Exchange Bank, 250 N.Y. 136, 141, 164 N.E. 882, 884 (1928); South Dakota v. Brown, 20 Cal. 3d 765, 779, 576 P.2d 473, 481-82, 144 Cal. Rptr. 758, 767 (1978) ("The general acceptance of the practice of a succession of California Governors . . . 'is entitled to great weight.' ").

52. The perceptive reader might question whether Curb's appointment of Arabian, after a three-month vacancy, was a matter requiring immediate attention during Brown's forty hour absence. *See* notes 9-14 and accompanying text *supra.*

53. 26 Cal. 3d at 120, 603 P.2d at 1364, 160 Cal. Rptr. at 767.

C. The Governor's Authority to Revoke, Withdraw or Rescind the Lieutenant Governor's Appointment

Curb contended that, once the Arabian appointment[54] was made, the power and authority over the appointment transferred to the confirming power (the Commission on Judicial Appointments),[55] and the appointment could not then be revoked.[56] Therefore, Curb argued that although Brown had a remedy at law with which to challenge the appointment, it could be asserted only after the appointment was confirmed by the Commission.

Brown responded that he could validly withdraw the appointment of Arabian at any time prior to the confirmation of the appointee by the Commission on Judicial Appointments. The court agreed. In doing so, it relied upon the principle established in *Marbury v. Madison*,[57] as set forth by Chief Justice John Marshall:

> Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed.[58]

California courts have consistently followed this principle. In *Wetherbee v. Cazneau*,[59] Cazneau's appointment to office by the Governor was later withdrawn, before the Senate could confirm it. The Governor then appointed Wetherbee, issuing a commission of office to him. In an attack on the validity of the commission, the court upheld Wetherbee's appointment, concluding that an appointment to fill an office was complete upon the delivery of the commission. Thus, after the commission was issued the Governor could not revoke the appointment.[60] Similarly, in *Conger v. Gilmer*,[61] Conger was elected by the Board of Supervisors to fill a vacancy on the Board. The following day, the Board reconsidered what it had done and appointed a certain Gilmer instead. The court dismissed Conger's challenge stating that

54. *See* note 13 and accompanying text *supra*.

55. *See* note 12 *supra*.

56. *See* MacAlister v. Baker, 139 Cal. App. 183, 33 P.2d 469 (1934) (An appointment to office is complete and beyond change by the appointing power when everything requiring the action of the appointing power has been done.).

57. 5 U.S. (1 Cranch) 137 (1803).

58. *Id.* at 157. "The last act to be done by the president, is the signature of the commission. He has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer is appointed." *Id.*

59. 20 Cal. 503 (1862).

60. *Id.* at 507.

61. 32 Cal. 75 (1867).

"[u]ntil the commission . . . has been made out . . . and signed by the . . . Board [of Supervisors], the whole matter is still within their control and they are . . . at liberty to change their minds. . . ."[62] Several other cases reiterate the principle that an appointment is deemed incomplete until the issuance of the commission to office by the governor.[63] Accordingly, in the present case, the California Supreme Court had no difficulty finding that an appointment becomes "effective when confirmed by the Commission on Judicial Appointments."[64] Thus, the appointment by the Governor did not by itself entitle the appointee to take office; it was only the first step in a two-step process.[65]

The court listed several reasons for allowing the Governor to withdraw an incomplete appointment.[66] First, previous practices indicated that other governors had withdrawn appointments from commission consideration without challenge to their power. Second, because the appointee had not yet acquired any legal rights, he could not object that withdrawal constituted removal from office. Third, the power to withdraw prolonged gubernatorial scrutiny of the appointment, better assuring a candidate's qualifications.[67] Finally, other states followed the general rule that "where the nomination must be confirmed before the officer can take the office or exercise any of its functions, the power of removal is not involved and nominations may be changed at the will of the executive until title to the office is vested."[68] For these reasons, the court concluded that Brown's withdrawal of the Arabian appointment was valid.[69]

62. *Id.* at 79-80.

63. *See* Todd v. Essling, 268 Minn. 151, 156, 128 N.W.2d 307, 312 (1964) ("[I]n cases where the appointment process is initiated by a nomination, with no power vesting in the appointee . . . until confirmation, the rule laid down in the Marbury case has no application until the senate confirms and the appointing authority issues a commission. . . ."); Burke v. Schmidt, 86 S.D. 71, 77, 191 N.W.2d 281, 284 (1971) (The proper test should be "whether the action of the executive is final and complete and places the appointee in office without further action."). *See generally* 63 AM. JUR. 2D *Public Officers & Employees* § 104 (1972).

64. CAL. CONST. art. VI § 16(d).

65. The court did not decide at what point the appointment of a judge who is not subject to confirmation by the Commission on Judicial Appointments becomes irrevocable. 26 Cal. 3d at 122, n.9, 603 P.2d at 1365 n.9, 160 Cal. Rptr. at 768 n.9.

66. *Id.* at 122, 603 P.2d at 1365, 160 Cal. Rptr. at 768.

67. *See* Nelson, *Variations on a Theme—Selection and Tenure of Judges*, 36 S. CAL. L. REV. 4, 19-26 (1962).

68. McBride v. Osborn, 59 Ariz. 521, 327, 127 P.2d 134, 136 (1942) (emphasis omitted). *See also* cases cited in note 63 *supra*. Query as to why the court was willing to accept the views of other jurisdictions here, when they were unwilling to do so in interpreting "absence from the state"? *See* note 48 and accompanying text *supra*.

69. 26 Cal. 3d at 122, 603 P.2d at 1366, 160 Cal. Rptr. at 768.

III. The Concurring Opinion

Justice Frank Newman was the only member of the court to write a separate opinion.[70] He agreed with the majority in holding that the withdrawal of the Arabian appointment was valid and that the peremptory writ of mandate to the Commission on Judicial Appointments should be issued, but he challenged the conclusion that "a physically absent Governor cannot act."[71] Justice Newman asserted that "phrases in a constitution [that] were deemed apt for a horse-and-wagon era [do] not ordain that we eschew sensible, up-to-date analysis of their meaning 130 years later."[72]

A. Constitutional Interpretation

Though the majority focused primarily on the interpretation of the phrase "absence from the state," Justice Newman centered his argument on the phrase "other temporary disability."[73] By examining two constitutional provisions,[74] he reached the conclusion that an absence that is not physically disabling, *i.e.*, one that does not prevent the governor from performing his duties, is not a "temporary disability." He reasoned that (1) the office of governor must be filled "should the Governor be killed, missing, or *disabled*, until [he] . . . is *able* to perform [his] duties . . . or a successor is elected,"[75] and (2) the "Lieutenant Governor shall act as Governor during the impeachment, absence from the State, or *other temporary disability* of the Governor. . . ."[76] Therefore, Justice Newman concluded that an "other temporary disability" (such as absence from the state) does not disable a governor in the same

70. *Id.* at 123, 603 P.2d at 1366, 160 Cal. Rptr. at 768.

71. *Id.*

72. *Id. See also* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442 (1934) ("It is no answer to . . . insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time."); Missouri v. Holland, 252 U.S. 416, 433-34 (1920) ("[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407, 415 (1819) ("[W]e must never forget that it is a *constitution* we are expounding. . . . a constitution, intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs."). *See generally* Miller, *The Elusive Search for Values in Constitutional Interpretation*, 6 HASTINGS CONST. L.Q. 487 (1979).

73. 26 Cal. 3d at 124, 603 P.2d at 1366, 160 Cal. Rptr. at 769. By focusing on this provision of article V, section 10, Justice Newman suggested not only that the court's analysis was misguided, but that Brown's arguments were misguided as well. *See* notes 32-39 and accompanying text *supra*.

74. CAL. CONST. art. IV, § 21(b) and art. V § 10.

75. *Id.* at art. IV § 21(b) (emphasis added).

76. *Id.* at art. V § 10 (emphasis added).

sense as if he were dead or missing. Rather, absence constitutes a true disability only when it is in fact disabling; that is, when the governor is physically prevented from performing his gubernatorial duties.[77]

It was clear to Justice Newman that an absent Governor is not in fact disabled if he can perform the duties of his office despite his absence. Modern communication and technology permit a governor to perform his duties from nearly any location, within or without California.[78]

Justice Newman did not infer that in the twentieth century absence is never disabling. In times of a war- or enemy-caused disaster,[79] serious illness of the governor, lack of communication from the governor, or a natural disaster, the state's needs would have to be met by the lieutenant governor exercising gubernatorial powers in place of the governor.[80] In Justice Newman's view, however, there were many gubernatorial tasks that could be performed anywhere, unaffected by state boundaries. In these situations, the governor's absence should not prevent him from exercising his power merely because he is outside the state.

Accordingly, Justice Newman believed that the 130-year old interpretation of "absence from the state" should not be rigidly adhered to until modernized by constitutional amendment. "By no means does rationality call for a Gold Rush Days approach to governing. . . . [W]hen we contemplate its antiquated, stifling, and potentially hurtful impact on use of the executive power in our complex State, cannot the majority's approach here fairly be labeled radical (albeit reactionary)?"[81] Though the purpose of article V, section 10 is "to prevent gaps in the availability and continuity of the executive power,"[82] discontinuity and uncertainty will result from a determination that a physically

77. Following this analysis to its logical end, one might conclude that if the absence from the state is not *in fact* disabling, then the Lieutenant Governor or his successor should not act as Governor because the Governor's office remains filled by the Governor, though he is physically absent.

78. "Constant travelers such as the President of the United States, the Governors of other States with problems comparable to ours . . . every day benefit from telecopiers, distance-ignoring word-processors, 'talking' typewriters, signature reproducers, instant information-retrieval, other marvels not affected by State or even international boundaries." 26 Cal. 3d at 124, 603 P.2d at 1367, 160 Cal. Rptr. at 769.

79. CAL. CONST. art. IV § 21.

80. 26 Cal. 3d at 125, 603 P.2d at 1367, 160 Cal. Rptr. at 769.

81. *Id.*

82. *Id.* at 117, 603 P.2d at 1362, 160 Cal. Rptr. at 764. *Cf. In re* Advisory Opinion to the Governor, 112 So. 2d 843, 847-48 (Fla. 1959) ("[I]nability . . . does not include within its meaning the word 'absence' . . . [but] the nature of the conditions attendant upon such absence could possibly constitute inability such as would justify a devolution of the powers and duties of the office [of governor].").

absent governor cannot act.[83]

B. The Legislative Intent in 1966

Justice Newman believed that the legislative history used by the majority in its interpretation of "absence from the state"[84] was an unreliable indication of the true legislative intent in 1966. The individuals involved in drafting article V, section 10 did not, in his opinion, intend "to cast in concrete all the old assumptions on what those four words ['absence from the state'] demand."[85] Though the testimony of the staff counsel to the Constitutional Revision Commission seems to support the majority's view,[86] Justice Newman explained that that testimony, as quoted by the majority, would be best understood by examining it in the context of the entire transcript.[87] From this, it was evident, to him at least, that a certain amount of ad-libbing by staff counsel was necessary in answering some questions, and therefore, some answers were only partially correct. As such, Justice Newman concluded that because the "draft language that puzzles us here was a tiny segment of a huge set of initial recommendations,"[88] the transcripts were too misleading to form a reliable interpretation of legislative intent.

Justice Newman supported his arguments by attempting to distinguish the meanings of "inability" and "disability."[89] It would be profitable, he suggested, to examine the words used in the different constitutions of the past 130 years. In 1849 "disability" meant impeachment, absence from the state and "inability to discharge the powers and duties of the office."[90] In the event of such a disability of the governor, all "powers and duties of the office shall devolve upon the Lieutenant-Governor."[91] There was no change in this section when the

83. *See* note 11 *supra*. Though the situation there involved a relatively minor dispute, it is not difficult to imagine some of the problems that would occur in a more complicated situation.

84. *See* notes 41-42 and accompanying text *supra*.

85. 26 Cal. 3d at 126, 603 P.2d at 1368, 160 Cal. Rptr. at 770.

86. In response to a question on the meaning of "absence from the state" and the constitutional reference to "disability," counsel stated: "[t]he Commission felt that if the Constitution should prohibit the Governor from acting then it should be classified as a disability. It is not an inability. The Governor could be someplace outside the State and be very capable of performing his duties by a long distance telephone. He would be legally disabled from doing so. Disability is more accurate." Transcript, Assembly Interim Comm. on Const. Amends. 29-34 (Feb. 23, 1966) *cited in In re* Governorship, 26 Cal. 3d at 126, 603 P.2d at 1368, 160 Cal. Rptr. at 770.

87. 26 Cal. 3d at 126, 603 P.2d at 1368, 160 Cal. Rptr. at 770.

88. *Id.* at 127, 603 P.2d at 1368, 160 Cal. Rptr. at 771.

89. *Id.* at 128, 603 P.2d at 1369, 160 Cal. Rptr. at 771.

90. CAL. CONST. of 1849 art. V, § 17. *See also* note 40 *supra*.

91. CAL. CONST. of 1849 art. V, § 17.

constitution was revised in 1879.[92] A 1946 amendment provided that "[i]n case of impeachment of the Governor or officer acting as Governor, his absence from the State, or his other temporary disability to discharge the powers and duties of office, then the powers and duties of the Office of Governor devolve upon [the Lieutenant Governor]."[93] Justice Newman concluded that because "there is not even a scrap of evidence that suggests any intent by anyone in 1946 to distinguish 'disability' from 'inability,' "[94] the words having been treated as synonomous since 1849, the special counsel to the Constitutional Revision Commission erred when he attempted to make such a distinction before the legislature in 1966.[95] The purpose of the 1966 revision was to provide a "scheme of succession" for the executive branch of state government.[96] The Constitutional Revision Commission refused to spell out limitations or describe specific situations that would impose a limitation on the body (*i.e.*, the California Supreme Court) that was charged with deciding what is a temporary disability. According to Justice Newman, however, the majority opinion here did set forth a needless limitation—that mere absence is a disability, *always*.[97] Thus, "[i]n 1979, as in 1849, absence should effect the transfer of gubernatorial power only when in fact it is disabling, temporarily."[98]

C. Official Travel

Justice Newman's final point revealed further weakness in the majority's opinion.[99] Most travels by a governor outside the state are for official state purposes.[100] If, according to the majority opinion, the

92. CAL. CONST. of 1879, art. V, § 16. *See* note 40 *supra*. Section 16 was considerably expanded, however, in the 1879 revision, providing an order of succession (down to seven state officers) should the office of governor become vacant, or in the case of "death, disability or other failure to take Office of both the Governor-elect and the Lieutenant Governor-elect."

93. CAL. CONST. of 1879, art. V, § 16 (amended 1946).

94. 26 Cal. 3d at 128, 603 P.2d at 1369, 160 Cal. Rptr. at 771 (emphasis omitted).

95. *See* note 86 and accompanying text *supra*. *See also Presentation of Proposed Article V*, Memorandum of the Constitutional Revision Commission, from the staff attorney to the Chairman of the Commission, at 3 (April 7, 1966). (" '[T]emporary disability' has a sufficiently definite and understood meaning to serve as a reasonable guideline for the court. Additional detail might bind the court, . . . in a way that defeats the otherwise clear purpose underlying the scheme of succession. . . .") *cited in In re* Governorship, 26 Cal. 3d at 128, 603 P.2d at 1369, 160 Cal. Rptr. at 771-72.

96. 26 Cal. 3d at 128, 603 P.2d at 1369, 160 Cal. Rptr. at 771-72.

97. *Id.* at 129, 603 P.2d at 1370, 160 Cal. Rptr. at 772.

98. *Id.*

99. *Id.*

100. It would appear that Governor Brown's travels outside California are an exception to this rule. However, Gray Davis, Brown's executive secretary, who usually remains in Sacramento during Brown's absences, has pointed out that he confers with Brown daily, no matter where the Governor travels, and that critical decisions are still made by Brown. "I

lieutenant governor has "the sole and entire power to act as Governor"[101] during the governor's absence, then 'may he not legally intervene in the official projects of the traveling Governor?"[102] Justice Newman gave several examples illustrating this point:

> How should a Congressional committee respond if a telegram or phone call from a Sacramento-based Lieutenant Governor purports to negate the on-going testimony of a Governor who is in Washington, D.C., to describe California's emergency needs? When the Governor is absent here but present there, who articulates authoritatively our State's concerns at the out-of-State headquarters of the innumerable officials who, pursuant to negotiations that might involve the Governor, supply federal funds for State use? Who speaks and acts for California at Governors' sessions, at formal meetings with other-State and overseas investors, at innumerable other 'outside forums' where the Governor's main concerns demonstrably are official concerns?[103]

For Justice Newman, the majority opinion failed to address these questions. Indeed, he believed their conclusive dicta regarding the powers of the lieutenant governor to act in the governor's absence might even have a "yo-yo" effect if carried to its logical extreme, with a lieutenant governor revoking an act of the governor which had rescinded a prior act of the lieutenant governor.[104] For these reasons, Justice Newman wanted to place a restriction on the powers of the lieutenant governor to act during a governor's absence from the state.

IV. Analysis

Though the court in this case was faced with the broad issue of determining the gubernatorial powers of the lieutenant governor during the governor's absence from the state, their narrow holding, that the lieutenant governor has authority to exercise all gubernatorial power of *appointment* while the governor is absent,[105] has left many questions unanswered—to wit: the authority of the lieutenant governor to exercise the entire plethora of gubernatorial powers during a governor's absence.

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never forget who the Governor is," Davis says. San Francisco Chronicle, Feb. 13, 1980, at 1, col. 2.

101. 26 Cal. 3d at 119, 603 P.2d at 1363, 160 Cal. Rptr. at 766.

102. *Id.* at 129, 603 P.2d at 1370, 160 Cal. Rptr. at 772.

103. *Id.* at 129-30, 603 P.2d at 1370, 160 Cal. Rptr. at 772.

104. *Id.* at 130, 603 P.2d at 1370, 160 Cal. Rptr. at 773. Suppose, for example, Curb had withdrawn the Jefferson appointment and reappointed Arabian during a subsequent absence of the Governor.

105. *Id.* at 113, 603 P.2d at 1359, 160 Cal. Rptr. at 762. *See* note 5 and accompanying text *supra*.

A. The Majority Opinion

There seems little doubt that the court had proper jurisdiction to determine questions arising in this dispute.[106] The Commission on the Governorship properly petitioned the court for a determination of questions arising under article V, section 10, and the court was free to consider arguments from other interested parties; in this case, Brown and Curb. In its petition, the Commission stated that the broader question of the lieutenant governor's powers to act as governor during the governor's absence "encompasses the entire spectrum of executive power."[107] Given the practical impossibility of convening the Commission and the supreme court every time the governor leaves the state, the Commission urged that guidelines be established for future clarification of the lieutenant governor's powers on such occasions. The court's unwillingness to issue such a guide,[108] coupled with its narrow holding, indicates a reluctance to leap into the thicket of intragovernmental branch disputes. Perhaps this was a political judgment, or perhaps it was a sincere disinclination to issue a broadly sweeping set of rules, opting instead to rely on case-by-case analysis. The court provides no answers here.

The court's determination not to budge from a "Gold Rush Days" interpretation of "absence from the state,"[109] however, is disturbing. They rely not only upon constitutional and legislative history, but on historical practices and public policy arguments as well. The fact that a word or a phrase has remained in the constitution for 130 years should not make it immune from new judicial interpretations.[110] The words of God may remain unchanging through the ages, but it is arrogant to assume that a state constitution will remain immortal and subject to only one interpretation—that given it by its framers. In interpreting the phrase "All men are created equal," would the court exclude women?

Reliance on the historical practices of a succession of California governors is also misguided.[111] The court looks to the past sixteen years and concludes that, since over 1,400 gubernatorial actions have been taken by an acting governor without challenge while the governor

106. *See* CAL. CONST. art. V, § 10. *See also* notes 22-31 and accompanying text *supra*.

107. Petition for Determination of Questions under section 10 of Article V of the California Constitution by the Commission on the Governorship at 3, *cited in In re* Governorship, 26 Cal. 3d at 116, 603 P.2d at 1361, 160 Cal. Rptr. at 764.

108. 26 Cal. 3d at 116, 603 P.2d at 1361, 160 Cal. Rptr. at 764.

109. *Id.* at 125, 603 P.2d at 1367, 160 Cal. Rptr. at 769. *See also* note 81 and accompanying text *supra*.

110. *But see* R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977) for an opposing view.

111. *See* notes 43-46 and accompanying text *supra*.

was physically absent,[112] the actions of Lieutenant Governor Curb should be approved. The court fails to note, however, that in most of these cases the governor and acting governor were of the same political party. In the few situations where this was not the case, the governor and acting governor usually reached agreement before the governor left the state as to what actions the acting governor could take.[113] Thus, this dispute is before the court because of a unique set of circumstances—the two leaders of the executive branch of state government are from different political parties and they are unwilling to cooperate with each other. A unique situation requires more than reliance on historical practices.

The court also invokes a public policy rationale for its interpretation. The Lieutenant Governor's position is supported by "the need for certainty in effectuating executive decisions."[114] Yet, because of its narrow holding, the only certainty about the Lieutenant Governor's position is that he may make a judicial appointment to an appellate court during the Governor's absence, subject to the Governor's rescission upon his return. The court concludes that the Lieutenant Governor is free to act on matters he determines need attention during the Governor's absence, but they never state why the appointment in this particular case needed attention on March 27 at 3 p.m.[115]

The majority, relying on the *Marbury*[116] principle, upheld Brown's authority to withdraw Curb's appointment upon returning to the state.[117] The appointment process in this case was not complete until the Commission on Judicial Appointments confirmed the appointee. As such, the Governor was free to withdraw the Arabian appointment upon returning to the state. The court also relied upon the general rule in other states that nominations can be changed at the will of the executive until title to office is vested in the appointee.[118] It is unclear why the court was so quick to rely on the policies of other jurisdictions for disposition of this issue when they were reluctant to examine other courts' interpretations of "absence from the state."

112. 26 Cal. 3d at 118 n.6, 603 P.2d at 1363 n.6, 160 Cal. Rptr. at 763 n.6. *See also* note 45 and accompanying text *supra*.

113. In 1972, for example, Governor Reagan and Lieutenant Governor Reinecke attended the Republican National Convention in Miami. The President pro tempore of the Senate, James Mills, a Democrat, became Acting Governor for one week. He held an inauguration and prepared a state-of-the-State address, but had an agreement with Reagan to take no significant actions. L. HARDY, CALIFORNIA GOVERNMENT 33 (4th ed. 1973).

114. 26 Cal. 3d at 117, 603 P.2d at 1362, 160 Cal. Rptr. at 765. *See also* note 39 and accompanying text *supra*.

115. *See* notes 52-53 and accompanying text *supra*.

116. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). *See* note 57 and accompanying text *supra*.

117. *See* notes 54-69 and accompanying text *supra*.

118. *See* note 68 and accompanying text *supra*.

B. The Concurring Opinion

Justice Newman, in his concurrence, agreed that the withdrawal of Judge Arabian's appointment was valid, but would have held that a physically absent governor did have the power to exercise gubernatorial duties, despite his absence.[119] His argument, simply stated, is that an absence that is not actually physically disabling is not a temporary disability. He based this argument on a somewhat weak foundation—the true legislative intent in 1966 cannot be ascertained through the legislative committee hearings because the answers given by staff counsel were too misleading to form a reliable interpretation of legislative intent.[120] The weakness of Justice Newman's argument rests on his failure to indicate what the court should look to if it disregards legislative history. There remains little on which to base any reliable interpretations of legislative intent. Unfortunately, he provides no alternative methods.

But Justice Newman does have a stronger argument. A governor often is required to be absent from the state on official business. If the lieutenant governor is exercising the "sole and entire power"[121] of the absent governor, what powers does the traveling governor have when conducting state business? The majority failed to answer this question. It also neglected to address the detrimental effects that may result from Justice Newman's "yo-yo" hypothesis.[122] By skirting these issues, the majority further pollutes an already muddy pond.

V. Alternative Solutions

A. Practices in Other States

Several states in addition to California have perceived a need for some type of succession arrangement in the event of a governor's disability. Problems at the national level led to a passage of the Twenty-Fifth Amendment to the United States Constitution.[123] However, the states generally have not followed this reform.

119. *See* notes 70-104 and accompanying text *supra*.

120. *See* notes 84-88 and accompanying text *supra*.

121. 26 Cal. 3d at 119, 603 P.2d at 1363, 160 Cal. Rptr. at 766.

122. *Id.* at 130, 603 P.2d at 1370, 160 Cal. Rptr. at 773. *See also* note 104 and accompanying text *supra*.

123. Section 3 provides that, "*[W]henever the President transmits* to the President pro tempore of the Senate and the Speaker of the House of Representatives *his written declaration that he is unable to discharge the powers and duties of his office*, . . . such powers and duties shall be discharged by the Vice President as Acting President." (Emphasis added). It also provides that the Vice President and a majority of cabinet officers can transmit to the Senate or House a declaration that the President is unable to discharge his duties, whereupon the Vice President immediately becomes Acting President. This amendment was approved by Congress in 1965 and ratified in 1967.

Most states have constitutional provisions concerning succession to the governorship,[124] yet only sixteen states have established a procedure for determining gubernatorial disability.[125] The procedure in

124. The following states have constitutional provisions similar to California's article V, section 10: ALA. CONST. art. III, §§ 9-13; ARIZ. CONST. art. V, § 6; ARK. CONST. art. VI, amend. 6(4); COLO. CONST. art. IV, § 13; CONN. CONST. art. IV, § 18; HAWAII CONST. art. V, § 4; IDAHO CONST. art. IV, § 12; ILL. CONST. art. V, § 6; KY. CONST. § 85; LA. CONST. art. IV, § 19; MASS. CONST. part II, ch. II, § III, art. 6, amend. LV; MICH. CONST. art. V, § 26; MISS. CONST. art. V, § 131; MO. CONST. art. IV, § 11; MONT. CONST. art. VI, § 14; NEB. CONST. art. IV, § 16; NEV. CONST. art. V, § 18; N.H. CONST. part II, art. 49; N.J. CONST. art. V, § 1, para. 7; N.M. CONST. art. V, § 7; N.Y. CONST. art. IV, § 5; N.C. CONST. art. III, § 12; N.D. CONST. art. III, § 72; OR. CONST. art. V, § 8a; R.I. CONST. art. VII, § 9; S.D. CONST. art. IV, § 6; TEX. CONST. art. IV, § 16; UTAH CONST. art. VII, § 11; WIS. CONST. art. V, § 7; WYO. CONST. art. IV, § 6.

125. THE COUNCIL OF STATE GOVERNMENTS, THE LIEUTENANT GOVERNOR: THE OFFICE AND ITS POWERS 11 (1976). These states use a two-step process in which the request for a finding of disablity, either mental or physical, is initiated by an official or an official body, with the actual determination being made by a separate body. (*See* following table).

STATE	INITIATING THE REQUEST	DETERMINING THE DISABILITY
Alabama	2 officers in line to succeed Governor	Supreme Court
California	Commission on the Governorship	Supreme Court
Colorado	Joint resolution of legislature	Supreme Court
Florida	4 cabinet members (or Governor himself)	Supreme Court
Indiana	President pro tem. of Senate and Speaker of House	Supreme Court
Iowa	Chief Justice or first in line to succeed Governor	Conference[a]
Maryland	Joint resolution of General Assembly	Court of Appeals
Massachusetts		Governor himself or Chief Justice and majority of assoc. justices[b]
Michigan	President pro tem. of Senate and Speaker of House	Supreme Court
Mississippi		Governor himself or Disability Board[c]
Nebraska	First in line to succeed Governor	Conference[d]
New Jersey	Joint resolution of legislature	Supreme Court[b]
North Carolina		Joint resolution of General Assembly
Oregon	Chief Justice or first in line to succeed Governor	Conference[e]

these states is applicable to both the physical and mental disability of the governor.[126]

B. Proposals for Reform

A solution to the types of issues raised by *In re Governorship* was proposed by Ira H. Lurvey,[127] in an article stemming from the Nevada Supreme Court's decision in *Sawyer v. First Judicial District Court.*[128] There, the Governor was absent from the state for approximately five hours. During that time, the Lieutenant Governor ordered the empanelment of a grand jury. The court determined that the Lieutenant Governor had no power to request the empanelment, and the Governor had properly revoked the request upon his return.[129]

Supporting the *Sawyer* decision, Lurvey suggested that the problem in such cases was the conflict arising between a territorial limitation on the powers of office and an abhorrence of government by absentee officials on one hand, and the citizens' right to be governed by the policies of the individual they elected to office on the other.[130] The

STATE	INITIATING THE REQUEST	DETERMINING THE DISABILITY
South Carolina		Majority of executive department heads
Virginia		Majority of executive department heads or majority of legislature

a) Members include the Chief Justice, the Director of Mental Health, and the Dean of Medicine at Iowa State University.
b) Such a declaration results in a vacancy of the office of governor.
c) Members include the Lieutenant Governor, Secretary of State, State Auditor, State Treasurer, Attorney General, President pro tempore of the Senate, Speaker of the House, and Senate and House Majority Leaders. If the Governor disagrees with this determination, the Board can submit the issue to the Missouri Supreme Court.
d) Members include the Director of the Nebraska Psychiatric Institute, Dean of the University of Nebraska College of Medicine and dean of a second accredited state college of medicine.
e) Members include the Chief Justice, Superintendent of the State Hospital and Dean of the University of Oregon Medical School.

THE COUNCIL OF STATE GOVERNMENTS, *supra* at 11-15.

126. THE COUNCIL OF STATE GOVERNMENTS, *supra* note 125, at 11-15. However, in Alabama and North Carolina, it is applicable only in cases of mental disability.

127. Lurvey, *Absent Officials: No Carte Blanche for Successors*, 15 J. PUB. L. 324 (1966). *See also* note 36 and accompanying text *supra.*

128. 82 Nev. 53, 410 P.2d 748 (1966).

129. 82 Nev. at 58, 410 P.2d at 751. "The overwhelming majority of states which have examined identical or nearly identical provisions [of the state constitution] have found that 'absence' as contained within rules for orderly succession in government means 'effective absence'—*i.e.*, an absence which is measured by the state's need at a given moment for a particular act by the official then physically not present." 82 Nev. at 56, 410 P.2d at 749 (emphasis omitted).

130. Lurvey, *supra* note 127 at 326.

solution to this conflict, according to Lurvey, lies in a simplified test: when an official is not present, his successor automatically assumes full, but latent powers, to be activated only to the extent that a particular act is reasonably necessary at that moment.[131] This proposal has failed to win acceptance by any court faced with the issue of gubernatorial succession since 1966.

Probably the most logical approach to solving future succession disputes is the team election of the governor and lieutenant governor,[132] similar to the national practice of a two-man presidential ticket. This would have the advantage of avoiding party splits. The concept was initiated by New York in 1953, and has since spread to over one-third of the states.[133]

A more radical approach was proposed last fall by California State Assemblyman Gary Hart.[134] His constitutional amendment, as originally proposed, would have completely abolished the office of lieutenant governor, effective when the present incumbent leaves it. It has since been amended however, to leave the office intact, but to strip the lieutenant governor of any gubernatorial power while the governor is absent from the state.[135]

C. A Suggested Approach

Few would disagree that the state must be governed at all times. The sheer size of the government requires as much. It is also an accepted fact that the governor is elected to govern the state.[136] There are times however, when the governor is unable to govern the state; at the same time, emergency situations may arise requiring immediate actions from the executive branch of government.[137] The Constitution and legislature have provided, first, that the lieutenant governor must fill the governor's office should the governor be killed, missing or disabled, un-

131. *Id.* at 346-48.

132. THE COUNCIL OF STATE GOVERNMENTS, *supra* note 125, at 4.

133. *Id.*

134. Assembly Constitutional Amendment No. 13, 1979-80 Regular Session, California Legislature.

135. The bill succeeded in passing the Assembly Committee on Government and Organization, but later died on the floor of the Assembly.

136. At least accepted by most—a commentator recently paraphrased an old saying, by remarking that Earl Warren proved that a person could be Governor of California forever, Pat Brown proved that anybody could be Governor, and Jerry Brown is proving that California does not need a governor. San Francisco Chronicle, Feb. 7, 1980, at 27, col. 1.

137. Justice Newman indicates, in his concurrence, that a war- or enemy-caused disaster may require immediate action on the part of the executive. *See* notes 79-80 and accompanying text *supra*. Such emergency situations are by no means limited to these causes. Other situations requiring an executive's immediate attention could include *inter alia*, natural disasters; street, prison, or other types of riots; major disturbances; or the stayings of capital punishment sentences.

til the governor is able to perform his duties again,[138] and second, that the lieutenant governor acts as governor during the impeachment, absence from the state, or *other temporary disability* of the governor.[139]

It should follow from these premises that absence from the state constitutes a "disability," like other temporary disabilities, only when it is in fact disabling—that is, when the governor is unable to act in an emergency situation that requires his immediate attention.[140] As long as the governor is capable of performing his executive duties, regardless of his physical location, the lieutenant governor need not assume the duties of the governor's office.

If the governor's absence is not *in fact* disabling, the lieutenant governor should not act because the duties of the governor's office are still possessed by the governor. In short, although article V, section 10 of the California Constitution ostensibly confers full gubernatorial power on the lieutenant governor during the governor's absence from the state, a more sensible interpretation is that the section actually confers only as much power as is necessary to govern the state while the governor is *in fact* disabled, and only for as long as the governor's disability continues. This approach would not only promote intragovernmental harmony, but would provide a workable and practical solution to the future problems that are bound to surface in spite of, or perhaps because of, the California Supreme Court's decision in *In re Governorship*.

Conclusion

Although article V, section 10 of the California Constitution seems clear on its face, and has been relatively free of controversy since its adoption in 1966, the conflict in *In re Governorship*,[141] has given rise to many significant and provocative issues for adjudication.

Undoubtedly, the decision reached in this case as to the gubernatorial powers of the lieutenant governor during the governor's absence from the state was within the realm of proper judicial interpretation. However, for the reasons previously alluded to, the majority opinion is lacking in the depth of analysis necessary to support any persuasive conclusions. A definite set of guidelines is necessary to preserve the effectiveness of the executive branch of the state government. Indeed,

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138. CAL. CONST. art. IV, § 21(b); CAL. GOV'T CODE § 12058.5 (Deering, 1973).

139. CAL. CONST. art. V, § 10.

140. *See* notes 73-77 and accompanying text *supra*. One could argue under this analysis that all non-emergency actions of past acting governors are invalid. However, in almost all situations, actions taken by the acting governor were with the direct or implied consent of the governor; were taken pursuant to an agreement with the governor (*see e.g.*, note 113 *supra*); or were of so little consequence as to preclude any major disputes.

141. 26 Cal. 3d 110, 603 P.2d 1357, 160 Cal. Rptr. 760.

the court's refusal to deal with the subject, and its rather cavalier treatment of the arguments presented, assure that the issues in dispute here will be raised again.

As a brief postscript, during the months pending the outcome of *In re Governorship*, relations between the Governor and Lieutenant Governor were anything but harmonious.[142] They are no better now. Brown has continued to leave the state without hesitation. While the Governor did agree to appoint a small number of those recommended by Curb to various state posts, Brown has refused all of Curb's recommendations to the bench.[143] The standoff remains—exacerbated, perhaps, by the California Supreme Court's decision in *In re Governorship*.

142. *See* note 11 *supra*.

143. San Francisco Chronicle, January 11, 1980 at 7, col. 1. However, Curb said that he intended to get his fair share of judicial appointments, either by cooperating with Brown or acting when he leaves the state. "If he's out of the state a third of the time, I'd like to have a third of the responsibility, and that means a third of the input and a third of anything else that goes along with maintaining that responsibility." *Id.*