Continuity of Constitutional Government and Legislative Operations: A Legislative Perspective

2007 NCSL Annual Meeting
Boston, Massachusetts
Prerequisites to COG/COOP Planning

- Assessment of constitutional and statutory requirements regarding continuity of government
  - Succession to powers and duties of public offices
  - Relocation of seat of government
  - Mass vacancies in legislative membership
  - Requirements for establishing a “quorum” of the legislature
Prerequisites to COG/COOP Planning

- Assessment of issues relating to liability if appropriate action is not taken to ensure continued performance of essential functions of state government
  - Safety of employees
  - Safety of visitors/customers
  - Safety of the public
- Assessment of existing operational capabilities based on functions, staffing and system capabilities
Prerequisites to COG/COOP Planning

- In the immediate aftermath of an event occurring, COG must consider:
  - Assuring the safety of legislative leadership
  - Determining surviving legislative “chain of command”
  - Deciding what response from the COOP the triggering event requires
    - Minor localized event or catastrophic assault on government institutions
  - Viability of continued operations at State Capitol
Ensuring Continuation of Constitutional Authority: “The People Part”
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“The People Part”

I. Continuity of Constitutional Government

A. Executive Lines of Succession

- Established in Article IV, Section 3 of the Constitution and section 14.055, Florida Statutes
  1. Governor
  2. Lt. Governor
  3. Attorney General
  4. Chief Financial Officer
  5. Commissioner of Agriculture

- Section 14.055, Florida Statutes provides selection of a governor in the event of vacancy in the executive line of succession (Joint Proclamation of the Legislature)
B. Legislative Lines of Succession

- Designated by Legislative Rule as opposed to the Constitution or statute

1. Speaker pro Tempore serves in absence or incapacity of Speaker (House Rules 1.1 and 2.5)

2. President pro Tempore serves in President’s absence. If Presidency becomes permanently vacant, the Senate may designate a new president (Senate Rule 1.7)
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- Continuity Concerns Regarding Lines of Succession:

  ✓ Executive lines of succession

  1) Vacancy or incapacity of Speaker and President may hinder ability to convene session

  2) Mass casualty, incapacity of legislative membership, or inability to travel may prevent the houses from meeting due to lack of quorum

  3) Legitimacy of selection if made by less than a quorum of members
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✓ Legislative lines of succession

1) Lines of legislative succession are shallow. There is no provision made in the House Rules for a successor after the Speaker pro Tempore.

2) Selection of new leaders from surviving or available membership may be problematic if quorum is not present or travel to seat of government is hindered.

3) Competing claims to leadership if groups of legislators are prevented from traveling to or communicating with seat of government.

4) Legitimacy of leadership selection may be challenged if minority party elects replacement leadership.

5) Length of term for newly elected leadership – duration of crisis or until next election?
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D. Relocation of Seat of Government

- Governor is constitutionally authorized to transfer the seat of government in times of invasion or grave emergency (Article II, Section 2, Florida Constitution)
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- **Continuity Concerns Relating to Relocation of Seat of Government:**

  1) Legislative sessions must be held at the seat of government; legitimacy of legislative actions if legislature is unable to physically relocate to newly designated seat of government

  2) Constitutionally questionable whether Governor may designate multiple seats of government to accommodate inability to relocate (Section 22.15, Florida Statutes, contemplates multiple seats of government)
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3) Governor is apparently authorized to move the seat of government out of the state. Concern whether public will accept leadership decisions or legislation enacted out of state.

4) Federal government involvement
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E. Mass Vacancies in Legislative Membership due to Death or Incapacity

- Legislative membership is determined by popular vote election of citizenry
- Most difficult branch of government to repopulate in the event of mass casualty
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- Continuity Concerns Surrounding Mass Vacancies in Legislative Membership:
  
  1) Legislative vacancies filled by special election rather than by an appointment process
      
      ✔ Article II, Section 6, Florida Constitution permits the legislature to fill vacancies in public office only in periods resulting from “enemy attack”

  2) Special elections are called by the Governor. Mass vacancy in executive and legislative leadership will hinder a call for elections.
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3) Florida’s Emergency Continuity of Government Act, Chapter 22, Florida Statutes, expressly permits the designation of interim successors to local offices and officers.

   ✓ Does not apply to the Legislature

4) The Constitution defines “vacancy in office.” The definition does not include “incapacity to serve.” (Article X, Section 3, Florida Constitution)

   ✓ Offices held by incapacitated members are not vacant and may not be filled
   ✓ Members may be reluctant or unable to resign
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II. Continuity of Legislative Operations

A. Assess available staffing and lines of authority

- Lines of authority should be addressed in the Legislative COOP prior to a triggering event and should be periodically revised on an as-needed basis

- Delegation of authority to make policy decisions, and any limitations thereto, need to be addressed
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- Both, lines of authority and delegations to act, should be readily known to avoid confusion as to “who is in charge” and who has authority to act.

B. Determine whether staff operations may continue in place or whether mobilization of essential staff at primary, secondary or tertiary site(s) is necessary.

- Ensure that adequate facilities are selected and prepared prior to an emergency.

- Make provision for facilities in immediate, regional and long range zones for short term and long term use for essential operations and possibly, meetings of the legislature.
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- Continuity Concerns Relating to Staffing, Lines of Authority, and Mobilization:

  1) If relocation is necessary, does short term situation require attendance by surviving members or is situation such that membership is not required to gather?

  2) Viability of virtual office operations should be considered for holding virtual sessions, virtual debate and virtual voting. However, legality of such action could be questionable.
Reengaging Constitutional Government: Restarting Legislative Operations
Reengaging Constitutional Government and Restarting Legislative Operations

I. Continuity of Constitutional Government

A. Quorum issues and inability to act, due to want of a quorum

- Article III, Section 4, Florida Constitution defines “quorum” as a majority of the membership of each house.

- Florida House of Representatives is comprised of 120 members - required number for quorum is 61

- Florida Senate is comprised of 40 members - required number for quorum is 21
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- Continuity Concerns about Obtaining a Quorum

1. In the event of mass casualty or an inability to travel to the seat of government, the legislature may be prevented from acting by want of a quorum.

2. Want of a quorum in one house will also effectively paralyze the entire legislature because the Constitution requires passage of laws by a majority vote in both houses.

3. Lack of quorum would be keenly felt in matters involving succession to office.
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4. The constitutionality of attendance, voting and other legislative duties and responsibilities by alternate means would need to be addressed in the Legislative COOP prior to any triggering event.

5. Constitutional changes, statutory amendment or the adoption of internal emergency management rules addressing lack of a quorum in emergency situations would need to be addressed.
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B. Extra-constitutional actions

- Article II, Section 6, Florida Constitution permits the legislature to take “extra” constitutional action to deal with an emergency

  ✓ Power is limited only to cases of enemy attack

  ✓ Restricts powers only in a manner that is necessary to deal with the emergency
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- **Continuity Concerns Surrounding Extra-Constitutional Action**

  1. Original constitutional authority appears to be driven by Cold War anticipation of devastating attack on United States. Authority fails to consider an emergency due to man-made causes:

    - Hazardous waste spill
    - Nature or acts of God
    - Plague
    - Contagion
    - Illness
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II. Continuity of Legislative Operations

A. Reestablish lines of communication

- Detailed plans on how members will communicate amongst themselves, with leadership, other branches of government, and perhaps press media need to be addressed in the Legislative COOP

- An assessment of alternate sites for communication support ability needs to be made prior to a triggering event
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- Assess and address communication security and integrity
- Assess and address possible need for communication mobility

B. Activate internal logistics and administration functions

- Identify personnel necessary for continued operation on a short, intermediate, and long term or permanent basis in the Legislative COOP. Keep list continuously updated and re-evaluated
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- Ensure that the Legislative COOP includes provision for personnel accommodation
  - Lodging
  - Transportation
  - Food

- Identify and pre-position at alternate sites prior to triggering event, material and equipment necessary for short term, intermediate, and long term or permanent operation
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C. Assess record or database integrity

- Off-site duplication of vital databases need to be addressed by the Legislative COOP prior to a triggering event

- Off-site records should be updated on a continuing basis

- Database redundancy should be considered
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- Means whereby journals and other record keeping functions can be preserved, and constitutional duties of the Clerk of the House and Secretary of the Senate can be maintained throughout the duration of an emergency need to be addressed.

- Offices should prepare and maintain emergency “grab-n-go” kits with records and data necessary to continue or restart their functions.
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D. Assess the safety and security of alternate sites and personnel

☐ Means to locate key personnel, to maintain their safety and to maintain the safety and integrity of the State Capitol or alternate sites need to be addressed in the COOP

☐ Continuity Concern Relative to Safety and Security

1. Safety and security may adversely impact public access including access by media and press
Ensuring Legitimacy of Legislative Action
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I. Continuity of Constitutional Government

A. Eliminate hindrances to act

- The Legislature, as a deliberative entity, serves to prevent prompt legislative action

- Legislature may have to rely on emergency mechanisms to speed passage of legislation
Ensuring Legitimacy of Legislative Action

B. Sunshine requirements

- The Florida Constitution requires certain legislative meetings to be open and noticed to the public

- Continuity Concerns

1. Use of permitting waiver reading requirements, single subject, waiting periods, notice and amendatory requirements, and supermajorities to slow down passage of legislation, risks an adverse perception of legitimacy by the public
Ensuring Legitimacy of Legislative Action

2. Failure to consider the “public’s right to know” may raise legitimacy concerns
Ensuring Legitimacy of Legislative Action

II. Continuity of Legislative Operations

A. Ability to support continued session operation

- Issues to address

  ✓ The ability of the House and Senate to interact with each other to ensure prompt handling of all legislation matters

  ✓ Whether certain issues should be deferred to executive branch management or should be handled legislatively
Ensuring Legitimacy of Legislative Action

- Communication of legislative decisions or concerns to the executive branch and the public
- Transportation, feeding and lodging for members and necessary support staff
- The outlook for continued operations off-site and whether a return to the Capitol is feasible
Final Thoughts and Concerns
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I. Things to Ponder

A. Concerns regarding constitutional changes, statutory amendment or rule revision necessary to address deficiencies

- Political will to act
- Need for sufficient explanation of, and reasons to support, changes necessary
- Maintaining momentum to act before ambivalence or complacency sets in
Final Thoughts and Concerns

B. What role should political partisanship play in continuity of operations planning?

C. If, due to casualty or vacancy, the minority party becomes the majority party, what role should it embrace?

- Majority party?
- “Temporary” majority party?
- Continue as minority party?
Final Thoughts and Concerns

D. If it is capable of electing a new Senate President or House Speaker, should the minority party of either house be permitted, or even required, to do so?
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Thank you