Only One Resolution to the California Senate's Great Escape

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David A. Carrillo, left, and Brandon V. Stracener, right, of the California Constitution Center at Berkeley Law. Courtesy photos

COMMENTARY

Even by the low standard of its own past performance the California legislature's conclusion to its legislative session over Labor Day weekend set a new mark for political chaos. In quick order the legislature moved to adjourn, the governor proclaimed a special session, the assembly

assented—and the senate refused, adjourning until December. An impasse resulted, with the assembly speaker insisting on considering the special session bill (it's about fuel prices), the senate president pro tem declaring the matter closed, and the official word from the governor's office amounting to "stay tuned." The problem all three actors face is that the only realistic solution here is a political compromise (gasp!) because none of them have any better options.

The one clear legal principle here is the governor's authority under California constitution article IV, section 3(b) to call a general special session: "On extraordinary occasions the governor by proclamation may cause the legislature to assemble in special session." But that provision lacks an enforcement mechanism, leaving us with no obvious procedure if the legislature (or one house) ignores a governor's proclamation. In contrast, article IV, section 10(f) authorizes a gubernatorial special session specifically for fiscal emergencies and provides a sanction for the legislature's failure or refusal to send the governor anything for signature: "the legislature may not act on any other bill, nor may the legislature adjourn for a joint recess, until that bill or those bills have been passed and sent to the governor."

But no similar sanction for the legislature refusing to cooperate appears in the provision at issue here. Nor is there any helpful historical or legal precedent to rely on. The state library has said that this has never happened before, and we found no relevant published cases. That leaves everyone in uncharted territory. Again, it's clear that the governor has the power to do what he's done, which leaves everyone wondering: "What now?" The answer is that, of all the scenarios we gamed out, only one is realistic: political compromise.

Sending the California Highway Patrol to arrest the senators is probably not an option. The closest historical analogue we found for this is the many absurd comedies from other states involving members of a legislative minority absconding to stymie legislative action by preventing a quorum from forming. This is a somewhat regular occurrence in the few states that have a supermajority quorum requirement. Many of the best (or silliest)

stories about this come from Oregon, Texas and Wisconsin. The takeaway from those escapades is that in only a few of them did a governor even attempt to deploy state law enforcement, and without practical effect. Here, the governor likely can't send state law enforcement to gaffle the senators because violating this state constitutional provision doesn't appear to be a crime.

Suing the senate is the simplest option, but that's unlikely to be fruitful. Picture the poor judge faced with signing a proposed order on a writ of mandate that says "… and I hereby order the Senate of the state of California to forthwith assemble in special session." The courts likely would be cautious with tackling the difficult constitutional separation-of-powers problems inherent in ordering the senate to convene. The most likely result is to deny writ relief, for several compelling prudential and doctrinal reasons: avoidance of constitutional questions, leaving political questions to the political branches, and respecting the legislature's core constitutional power to organize and conduct its business. These are difficult problems, with high stakes, little relevant authority, and a tight deadline—no judge will be excited to get this file.

Besides, litigating all that will take us a long way to Nov. 30 when this legislature adjourns indefinitely, perhaps running out the clock. The senate might even ignore or slow-walk a court order to help that happen. And there's an ultimate practical problem here: even if the senators are forced back into their chamber, by law or by arms, no one can prevent them from simply gaveling in and immediately adjourning. Whatever it cost to get them there—in time, treasure, and political capital—would be sunk at a stroke.

One must also consider the consequences of lassoing runaway senators back to the corral. Any entity that incurs the legislature's wrath by forcing their hand here risks their budget getting zeroed, their authorizing statutes repealed, or their appointments rejected. Even a governor's fiscal line-item veto is a poor defense against a retaliating legislature: the line-item veto only allows for reductions and is little use against a de minimis appropriation or the threat of a two-thirds legislative override. This is a

good time to remember that all laws start and end with the legislature. And they have the ultimate power of the purse.

Lacking any other good options, the best course here is a political compromise; this is primarily a political issue that needs a political solution. The state constitution provides no enforcement mechanism or obvious sanction for noncompliance, and with no precedent or authority to rely on here no one has a clear legal advantage. Thus, courts will be both reluctant and slow to weigh in. One possible move here is to invoke the legislature's Joint Rule 52, which provides an internal legislative procedure that could apply: ten or more members of the legislature may present a request for recall from joint recess to the assembly's chief clerk and the secretary of the senate. If the assembly started that process, it would be exactly the kind of self-organization the courts are prone to respect. And it might be a political path out of this standoff.

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