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John D. Feerick
Fordham University School of Law, JFEERICK@law.fordham.edu

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The Problem of Presidential Inability—
It Must Be Solved Now

By John D. Feerick

The United States is today in a position where it has no elected Vice President to succeed President Johnson. Mr. Feerick's article will interest our readers as he discusses methods to correct this situation.

On August 27, 1787, John Dickinson of Delaware asked the Constitutional Convention these vital questions: "What is the extent of the term 'disability' and who is to be the judge of it?" 1 His questions regarding the provision on executive succession were never answered. Today, one hundred and seventy-six years later, they remain unanswered. They have been revived from time to time, usually when a President has died or become disabled. Hundreds of answers have been offered. None has been found acceptable.

Although concern about the problem of presidential inability had been aroused by the Eisenhower illnesses in 1955, 1956 and 1957, interest had waned to such an extent by November 21, 1963 that the problem was 'all but forgotten by the Congress and the public. On November 22, it almost caused a national crisis. As one reporter then noted:

"For an all too brief hour today, it was not clear again what would have happened if the young President, instead of being mortally wounded, had lingered a long time between life and death, strong enough to survive but too weak to govern." 2

Or, in the words of former Vice President Richard M. Nixon:

"It is a tragic fact that it took a terrible crime in Dallas to remind us of a serious defect in our constitutional process." 3

Since the death of President John F. Kennedy, there has been much discussion of the problem. The Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, under the chairmanship of Senator Birch Bayh of Indiana, has been conducting extensive hearings on the subject. Again, various proposals have been offered. It remains to be seen whether one will, this time, be accepted.

3 Nixon, We Need a Vice President Now, Saturday Evening Post, Jan. 18, 1964, p. 6.
The problem of presidential inability revolves around Article II, Section 1, Clause 6 of the Constitution, which provides:

"In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected."

This provision is not clear on the following points: What devolves on the Vice President? Is it the "Office" or "the Powers and Duties of the said Office"? What is the meaning of "Inability"? Who is authorized to determine the existence and termination of an inability?

Some assistance in interpreting the above provision is provided by an examination of the proceedings of the Constitutional Convention of 1787. The first draft of the "succession provision" of the Constitution was presented to the Convention by a Committee of Detail on August 6, 1787. It provided that in case of the President's

"removal . . . , death, resignation, or disability to discharge the powers and duties of his office, the President of the Senate shall exercise those powers and duties, until another President of the United States be chosen, or until the disability of the President be removed." 4

On September 4, a Committee of Eleven which had been appointed to study a number of matters, including succession, delivered a report to the Convention which recommended the creation of an office of Vice President and the adoption of a succession provision which was essentially the same as that quoted above with the exceptions of the substitution of the Vice President for the President of the Senate, the inclusion of an "absence" contingency and the use of the word "inability" instead of "disability." 5 On September 7, a clause providing that the Legislature could declare by law what officer would act as President in case of the death, resignation, or disability of both the President and Vice President was added to the draft. 6 Finally, the draft of the Constitution was referred to a Committee of Style which was authorized only to "revise the style" of and "arrange" the articles agreed to by the Convention. 7 It was given no power to effect substantive changes in the matters submitted to it. On September 12, this Committee returned a draft of the Constitution which, except for a few changes, was to become the Constitution of the United States. The "succession provision" as submitted to the Committee of Style read as follows:

"Sec. 2: [1]In case of his removal as aforesaid, death, absence, resignation or inability to discharge the powers or duties of his office the Vice President shall exercise those powers and duties until another President be chosen, or until the disability of the President be removed." 4

"Sec. 1: The Legislature may declare by law what officer of the United States shall act as President in case of the death, resignation, or disability of the President and Vice President; and such Officer shall act accordingly, until such disability

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4 2 Farrand at 186.
5 Id. at 493, 495.
6 Id. at 535.
7 Id. at 547, 553. Interestingly, all its members were lawyers—Alexander Hamilton, William S. Johnson, Rufus King, James Madison and Gouverneur Morris.
be removed, or a President shall be elected."

This draft contains the substance intended by the Founding Fathers. It makes it absolutely clear that they intended merely to provide a temporary substitute for the President. Only the powers and duties were to devolve on the successor—he was merely to "act" as President. In no case, was he to "become" President. This is further supported by the fact that the words "shall be elected" were intentionally chosen so as to permit a special election. A suggestion to use the words "until the time of electing a President shall arrive" had been defeated in favor of these words.

There is no clue in the proceedings, however, regarding the intended definition of the word "inability" other than the use of that particular word in preference to "disability." The term probably was intended to be subject to a broad construction, covering all circumstances which might cause a President to be "unable" to discharge the powers and duties of his office (e.g., mental and physical illness, coma, kidnaping, wartime capture, etc.).

Nor does the Constitution grant any explicit authority to any individual or body to make the determination that a President is "unable" to exercise his powers and perform his duties. However, since there is an explicit grant of power in the clause, i.e., to the Vice President (or other successor) to exercise the powers and duties of President under certain circumstances, a good argument can be made that the use of that power is at his discretion and that the only check on him is the power of Congress to impeach him for "high crimes and misdemeanors." It has been urged that Congress has, under the "Necessary and Proper" clause of the Constitution, the authority to make whatever laws are necessary to execute this provision and that it can, therefore, provide, by legislation, a method for determining presidential inability. However, since the Supreme Court has held that this clause is applicable only to specific grants of power and since the only specific grants of power in question are those of the Vice President (or other successor) to exercise the President's powers and of Congress to specify what officer shall act as President when both President and Vice President are disabled, any legislation which would take the determination from the successor, or even interfere with his exercise of discretion in the determination, would be of doubtful constitutionality.

The problem of interpreting the clause was further complicated when, in 1841, President William Henry Harrison died in office. His Vice President, John Tyler, confronted for the first time in our history with the question of what the role of the Vice President should be when a President dies in office, made a quick decision and, in the face of heated objection, asserted his right (by God, the Constitution,

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8 Id. at 573, 575. The two sections were separated from each other in the submitted draft.
9 Id. at 535.
and election, he said) to the office and title of President.\(^8\) He thus established the precedent that, upon the death of a President, the Vice President becomes President for the remainder of the term. Since the Constitution provides that "the Same" devolves in all cases, this interpretation that the "office" devolves in cases of death was to cause havoc when cases of presidential inability occurred in 1881 and 1919.

President Garfield was shot by an assassin on July 2, 1881 and lingered for eighty days between life and death. Vice President Arthur, despite the urging of Garfield's Cabinet that he act as President, refused to do so for lack of clear authority to make the determination that the President was "unable" and for fear that if he did, he would "become" President, oust Garfield, and be labeled a usurper. Thus, the government was, for a period of nearly three months, in a state of suspension. When Garfield died and Arthur became President, he pleaded with Congress to find a solution to the problem. But no proposed solution was found satisfactory and the problem remained unsolved.\(^14\)

In 1919, when President Wilson suffered a stroke which paralyzed the left side of his body and was confined to his quarters by his wife and doctor who permitted almost no one to see him, his Vice-President, Thomas R. Marshall, like Arthur, resisted the efforts of the Cabinet to persuade him to discharge the duties of the President. He, too, feared that he had no authority to determine that the President was "unable" and that by acting as President he would become President. Twenty-eight bills became law by default of any action by the President. No official Cabinet meetings took place until April, 1920. Mrs. Wilson and Dr. Grayson were said to be running the country. So, again, nothing was done and the administration of the country simply drifted.\(^16\)

Eisenhower's heart attack on September 25, 1955, his ileitis attack on June 8, 1956 and the stroke causing a speech impairment on November 25, 1957 revived concern about the possibility of there being no one authorized to exercise presidential power during a presidential inability\(^18\) and caused the President to make a historic agreement with his Vice-President, Richard M. Nixon, which set out the following procedures to cover cases of inability:

"(1) In the event of inability the President would—if possible—so inform the Vice President, and the Vice President would serve as Acting President, exercising the powers and duties of the office until the inability had ended.

"(2) In the event of an inability which would prevent the President from so communicating with the Vice President, the Vice President, after such consultation as seems to him appropriate under the circumstances, would decide upon the devolution of the powers and duties of the office and would serve as Acting President until the inability had ended.

"(3) The President, in either event, would determine when the inability had ended and at that time would resume the

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\(^8\) See the author's article, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 Fordham L. Rev. 73, 90-93 (October, 1963).

\(^14\) For a good account of the period, see Silva, *Presidential Succession*, 52-57 (1951).

\(^15\) For a good account of the period, see Hansen, *The Year We Had No President*, 29-42 (1962).

full exercise of the powers and duties of the office.\textsuperscript{17}

This agreement was, in turn, adopted by President Kennedy and Vice-President Johnson and later by President Johnson and Speaker McCormack.\textsuperscript{18} It serves a useful purpose, but it does not provide a permanent solution to the problem.\textsuperscript{19} First, it does not have the force of law and would have no binding effect if one or both of the parties should decide to break it. Second, it does not extend beyond the term of the parties involved. Third, it does not cover the situation where the successor becomes disabled before the President. And, finally, it does not solve the problem created by the Tyler precedent, i.e., should the Vice-President become President in cases of inability as well as in cases of death?

It is imperative that a solution which would be both lasting and constitutional be found now. It would be tragic if the present opportunity to solve the problem of presidential inability were lost—and it may well be lost if no solution is generally agreed upon before the next presidential election. A most significant step in the effort to find a solution which would be generally satisfactory was taken in January of this year by the American Bar Association when it called together in Washington a group of lawyers from different parts of the United States who represented various opinions on the problem.\textsuperscript{20}

After two days of discussion, the American Bar Association panel issued a consensus which included the following points: First, the problem can be solved adequately only by a constitutional amendment. Second, the amendment must make it clear that only the powers and duties devolve in cases of inability for the duration thereof, while the office devolves in cases of death, removal and resignation. Third, the method recommended by the panel for determining the commencement and termination of inability was as follows: Inability would be established by declaration, in writing, of the President. If he were unable to make known his inability, it could be established by the Vice-President with the concurrence of a majority of the Cabinet (or such other body as Congress may by law designate). (By “Cabinet” was meant the heads of the executive departments.) The termination of inability would be established by the President, himself, in writing, but if the Vice-President and a majority of the Cabinet (or such other body as Congress may designate) did not agree.

\textsuperscript{17} White House Press Release, March 3, 1958.


\textsuperscript{19} Shockingly, the 1947 succession law requires the Speaker to resign as Speaker and Representative before he could act as President in a case of inability, even if it were for only a day.

\textsuperscript{20} They were: Herbert Brownell, former Attorney General; Walter E. Craig, President of the American Bar Association; Professor Paul Freund of Harvard Law School; Jonathan Gibson, Chicago attorney; Richard Hansen (author of The Year We Had No President). Professor James C. Kirby of Vanderbilt University; Ross L. Malone, former Deputy Attorney General; Dean Charles B. Nutting of George Washington University Law School; Lewis F. Powell, Jr., president-elect of the ABA; Sylvester Smith, Jr., former ABA president; Martin Taylor, Chairman of Federal Constitution Committee of the New York State Bar Association; Edward L. Wright, Chairman of the ABA House of Delegates; and the author.
that the President was able to resume his duties, his continued inability could be declared only by a vote of two-thirds of the members of each House of Congress. Finally, the panel recommended that an amendment provide that any vacancy in the office of Vice-President be promptly filled through nomination by the President and election by a vote of a majority of the members of Congress meeting in joint session.

It was felt that a constitutional amendment was necessary, in part, because if legislation were passed it would be prey for attack on constitutional grounds and such attack would come, most likely, during a time of inability—when the country could least afford such attack.21

The selection of the Vice-President and Cabinet to make the crucial decision was based on several factors: they are close to the President and would not exercise the power except in a proper situation; they usually would be aware of the circumstances of an inability and thus be in a good position to make a swift decision if necessary; the public would have confidence in their decision; they would likely be of the same party as the President; and there would be no violation of the principle of separation of powers. The Vice-President, acting alone, was rejected on the ground that he is an interested party and therefore would likely be too reluctant to make a decision if an occasion required it. As for the President himself having the final say, as is the case under the existing agreement, the panel rejected it, mainly because of the possibility of a mentally ill President.22

It is imperative that a workable solution be agreed upon now.23 The problem of presidential inability is too potentially hazardous a problem to leave unsolved. As the late Senator Estes Kefauver said, “The essence of statesmanship is to act in advance to eliminate situations of potential danger.” It is hoped that the Eighty-Eighth Congress will act!

21 The New York State Bar Association has consistently advocated a constitutional amendment providing that the powers and duties devolve in cases of inability and the office in all other cases and that “the commencement and termination of any inability shall be determined by such method as Congress shall by law provide.” The panel consensus was that the method should be included in the amendment.

22 Said the Washington Post: “If there is still some risk of confusion over presidential authority in its formula, we surmise that it is much smaller than the risk in the present arrangement, which makes it almost impossible to relieve the President if he should be incapacitated.” January 26, 1964.

23 For a listing of the various proposals, see Feerick, op. cit. supra note 13, at 110-120.

[End]

Insincerity

“All the skills of speech are of no use if our words are insincerely spoken.”