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Recommended Citation

John D. Feerick, *Presidential Inability: the Problem and a Solution*, 50 *American Bar Association Journal* 321 (1964).

Available at: https://ir.lawnet.fordham.edu/twentyfifth_amendment_articles/2

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Presidential Inability: The Problem and a Solution

It is urgent that the problem of Presidential inability be solved now, Mr. Feerick declares. After outlining the problem and noting Presidential incapacities in the past, he endorses the consensus proposal for a constitutional amendment worked out by the panel of experts convened by the American Bar Association in January and later adopted by the House of Delegates as the proposal of the Association.

by John D. Feerick • of the New York Bar (New York)

THE SHOCKING DEATH of President Kennedy stunned the American people and revived a problem which is as old as the nation itself. The contrast between what actually happened on November 22, 1963, and what could have happened has jolted us into the realization that the problem of Presidential inability must be solved once and for all.

Senator Kenneth B. Keating of New York has stated:

As distasteful as it is to entertain the thought, a matter of inches spelled the difference between the painless death of John F. Kennedy and the possibility of his permanent incapacity to exercise the duties of the highest office of the land.¹

Because President Kennedy died, there was a swift and orderly transfer of power. Had he lived seriously injured, however, chaos and confusion might well have invaded the United States Government. No one would have been clearly authorized by the Constitution either to determine the inability of the President or to make a major decision had one been necessary.

The Problem Arises from the Constitution

The Constitution is singularly vague on the subject of Presidential inability. It neither defines inability nor provides a method of determining the commencement or termination of inability. It merely provides that:

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.²

The wording of this clause poses a fundamental problem: What devolves on the Vice President? Is it the office of President or the powers and duties of the office? If it is the office which devolves, the Vice President would presumably become President, and thus in a case of inability the displaced President could not recover the office upon cessation of the inability.

If it is the powers and duties which devolve, the Vice President would merely act as President for the duration of the inability. It is clear, though, that whatever devolves does so in all cases—removal, death, resignation and inability.

It is evident from the records of the proceedings of the Constitutional Convention that the Founding Fathers thought they had handled the problem adequately by providing for a temporary substitute for the President in all cases. In no event did they intend the Vice President to become President.³ The debates at the convention are not at all revealing, however, as to what inability is or who determines it. It is very probable that the word "inability" was intended to cover any occurrence which would cause a President to be unable to discharge the powers and duties of his office.

1. *Hearings Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 88th Cong., 2d Sess. (1964) (hereafter cited as *1964 Senate Hearings*).

2. U.S. CONST. art. II, §1, cl. 6.

3. See SILVA, *PRESIDENTIAL SUCCESSION* (1951) and the author's recent article, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 *FORDHAM L. REV.* 73 (1963).

Presidential Inability

A persuasive argument was made by Henry E. Davis in 1881 that the reason for the Constitution's silence on these questions is that "the convention thought the provision as adopted self-explanatory, self-operative and sufficient".⁴ He believed, as do most authorities, that the Constitution implicitly gives the Vice President the power to make the determination of inability when the President is unable to do so.

Tyler's Succession Set a Precedent

The first application of the succession provision occurred on the death of President William Henry Harrison on April 4, 1841—the first death of a President in office. The then Vice President, John Tyler, asserted his right to the office and title of President and became President for the remainder of Harrison's term. Former President John Quincy Adams expressed the objection of many at the time when he stated:

[I]t [Tyler's assumption of the title and office of the Presidency] is a construction in direct violation both of the grammar and context of the Constitution, which confers upon the Vice President, on the decease of the President, not the office but the powers and duties of the said office.

The so-called Tyler precedent has been followed in turn by Vice Presidents Millard Fillmore, Andrew Johnson, Chester A. Arthur, Theodore Roosevelt, Calvin Coolidge, Harry S. Truman and Lyndon B. Johnson. Because of this interpretation that the office devolves on the Vice President when a President dies, confusion has resulted on each occurrence of Presidential inability in our history. This has been due mainly to the fear that were a Vice President to take over, he would become President for the remainder of the term, since whatever devolves does so in all cases. Doubt as to whether the Vice President has the constitutional authority to declare the President disabled has added to the confusion.⁶

On July 2, 1881, President Garfield was shot by Charles T. Guiteau and for the next eighty days he lingered between life and death, clearly unable

to discharge the powers and duties of the Presidency. Several weeks after the shooting, the Cabinet met and unanimously agreed that Vice President Arthur should assume the responsibilities of the Presidency. A majority of the Cabinet believed, however, that if he did so, he would become President for the remainder of the term. Arthur refused to act as President for fear that he would be labeled a usurper. The crisis ended on September 19, when Garfield died and Arthur succeeded to the Presidency. During his term of office, he expressed deep concern over the question of Presidential inability and repeatedly asked Congress to solve the problem. But nothing was done.

On September 25, 1919, an illness, which was followed by a stroke on October 2, rendered President Woodrow Wilson incapable of discharging the powers and duties of the Presidency and another inability crisis presented itself.⁷ While Wilson lay ill, many insisted that Vice President Thomas R. Marshall act as President. For fear that he would oust the President if he did so, Marshall, like Arthur before him, declined.

Some twenty-eight bills became law by default of any action by the President. Few public matters reached Wilson and he was seldom seen during the remainder of the term. Mrs. Wilson, Dr. Grayson and other members of the White House staff administered executive affairs. Wilson did not call a Cabinet meeting until April 13, 1920. In the interim, the Cabinet met unofficially, largely under the direction of Secretary of State Robert Lansing. When Wilson learned of these meetings, he forced Lansing to resign, believing Lansing was plotting to oust him. This series of events provoked renewed discussion of the problem, but again Congress failed to take any action.

4. Davis, *Inability of the President*, S. Doc. No. 308, 65th Cong., 3d Sess. (1918).

5. 10 ADAMS, MEMOIRS OF JOHN QUINCY ADAMS 463 (1876).

6. "... [T]he history of 170 years shows no real difficulty attends the determination of when or whether a President is unable to perform the duties of his office. The crux of the constitutional problem has been and will be to ensure that the Vice President can take over with unquestioned authority for a temporary period when the President's disability is not disputed, and that the President can resume his office once he has recovered." 1964 *Senate*

On September 24, 1955, President Eisenhower was stricken with a heart attack and the gap in the Executive forcibly presented itself once again. The problems confronting the country at that time were such that, as the President himself said, he "could not have selected a better time, so to speak, to have a heart attack...".⁸

The government was administered by a small group of officials pursuant to policy directives previously formulated by the President. Former Vice President Nixon has remarked:

The committee system worked during the period of President Eisenhower's heart attack mainly because... there were no serious international crises at that time. But had there been a serious international crisis requiring Presidential decisions, then... the committee system might not have worked.⁹

Mr. Eisenhower's ileitis attack on June 8, 1956, and the stroke causing a speech impairment on November 25, 1957, again served to point up the constitutional inadequacies in relation to Presidential inability.

Congressional hearings were held by both the House and Senate Judiciary Committees and every aspect of the subject was thoroughly examined. There was general agreement that something should be done, but widespread disagreement as to the best method for determining a President's inability was manifest. Numerous proposals were offered. None, however, commanded enough support to be adopted.

Informal Agreements

Mr. Eisenhower's illnesses prompted him to make a historic agreement with his Vice President, Richard M. Nixon, in 1958.¹⁰ This was the first act of any real significance in meeting the inability problem. The agreement provided that in case of his inability the President would inform the Vice

Hearings (remarks of former Attorney General Herbert Brownell).

7. See generally, HANSEN, THE YEAR WE HAD NO PRESIDENT 29-42 (1962) and the recent book, SMITH, WHEN THE CHEERING STOPPED (1964).

8. EISENHOWER, MANDATE FOR CHANGE 545 (1963).

9. Transcript of television broadcast, *CBS Reports: The Crisis of Presidential Succession* 17 (January 8, 1964) (remarks of former Vice President Nixon).

10. White House press release, March 3, 1958.

President, who would then act as President until the inability ceased. If the President should be unable to communicate with the Vice President, the Vice President, after such consultation as seemed appropriate, would make the decision to act as President. In either event, the President would determine when the inability had ended and at that time would resume the full exercise of the powers and duties of his office. This precedent was followed by President Kennedy and Vice President Johnson in 1961, and more recently by President Johnson and Speaker McCormack.

A penetrating objection to this type of solution was made by Mr. Nixon when he said:

[I]t would not be effective in the event you happened to have a President and Vice President who didn't get along. . . . The President might not want to write a letter. If he had written one, he might tear it up. Let's suppose, for example, that the President became disabled and that the Vice President decided that he should step in and assume the duties of the Presidency, but . . . a member of the President's family held a Cabinet position or some other high post and didn't believe that the President was so disabled. . . . You'd have a constitutional crisis there of great magnitude. . . . *We just can't have this great government of the United States run in that way, by the whims and the personal reactions of whoever may be Vice President, or President, or the wife of the President at a critical time.*¹¹

Perhaps the main reason for the continuing failure to solve this problem on a permanent basis has been the difficulty in finding a solution that would be practical and widely accepted. Experience indicates that there is, in fact, no perfect solution. But this is not to say that there is no workable solution. As Senator Keating noted: "The best we can hope to achieve is the best practical solution which will meet the needs of crises we can readily envision."¹²

Conference Produces a Workable Solution

The most workable solution yet proposed, in my opinion, was advanced in January, 1964, by a special panel of

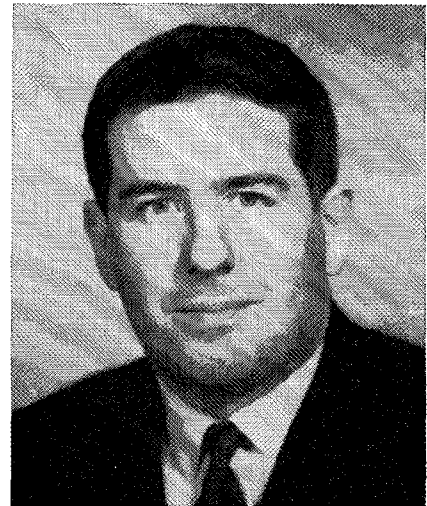
lawyers called together by the American Bar Association. The group included a former Attorney General of the United States, a former Deputy Attorney General, past, present and future Presidents of the American Bar Association, professors of law and practicing lawyers.¹³ The members of the group represented a variety of points of view regarding the question of how to solve the problem.¹⁴ The group spent two days in closed session examining the various proposals.

At the close of its session, it issued a consensus which has since been endorsed by the American Bar Association and other groups.¹⁵ The consensus is necessarily a compromise, but it represents points on which a group of persons who had studied the problem could agree. They are:

1. A constitutional amendment is necessary.

2. The amendment should state that in a case of inability, the powers and duties of the Presidency devolve on the Vice President for the duration of the inability, while in the case of death, resignation or removal, the office of President devolves for the rest of the term.¹⁶

3. The amendment should also specifically state that (a) the President may declare his own inability in writing; (b) if a President is unable or unwilling to make such a declaration, the Vice President, with majority approval of the Cabinet¹⁷ (or such other body as Congress may by law determine) may make the determination; and (c) the President may resume his powers and duties upon his own declaration in writing, except that if the Vice President and a majority of the Cabinet do not agree that the President is able to resume them, the Vice President shall continue to act and Congress shall review the dis-



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agreement. A two-thirds vote of both houses of Congress shall be required to keep the President from resuming his powers and duties.

4. An amendment should provide that whenever a vacancy occurs in the Vice Presidency, the President shall nominate a person who will, upon confirmation by Congress, become Vice President.

There were several reasons why an amendment was considered necessary. Some members of the panel were of the opinion that Congress has no power at all to legislate on this subject—that it merely has the power to legislate on the line of succession beyond the Vice Presidency. Most believed that the Vice President now has the constitutional power to determine inability and, therefore, this power

11. *CBS Reports, op. cit. supra* note 9, at 13 (emphasis added).

12. *1964 Senate Hearings*.

13. They were: Herbert Brownell, Walter E. Craig, Paul A. Freund, Jonathan C. Gibson, Richard H. Hansen, James C. Kirby, Jr., Ross L. Malone, Charles B. Nutting, Lewis F. Powell, Jr., Sylvester C. Smith, Jr., Martin Taylor, Edward L. Wright and the author.

14. The conferees "differed widely in their views just as individual Senators probably do. But they all agreed that the dire necessities of promptly solving the problems outweighed their individual preferences." *1964 Senate Hearings* (remarks of Herbert Brownell).

15. "Although there was not absolute agree-

ment by each conferee on all points of the final consensus, there was general agreement on the statement." *1964 Senate Hearings* (remarks of Walter E. Craig). For the text of the explanatory statement and consensus of the conference, see 50 A.B.A.J. 237 (1964). The House of Delegates of the American Bar Association adopted the principles of the consensus at its Midyear Meeting in February, 1964. See 50 A.B.A.J. 393 (1964).

16. The panel's recommendations concerning the Vice President were made equally applicable to whoever would be first in the line of succession.

17. The term "Cabinet" means the "heads of the executive departments".

Presidential Inability

could not be diverted from him, constitutionally, by legislation. It was stressed that if a merely legislative solution to the problem were enacted, it would be subject to constitutional challenge, which would come, very likely, during a time of inability—when we could least afford it.

The second point would eliminate the fear that a Vice President would oust the President if he acted as President in a case of inability, and it would give constitutional status to the Tyler precedent.

The panel believed that the Vice President should be involved in the decision, since it is his duty to act as President and he should, therefore, have a voice in determining when so to act. On the other hand, it was felt that he should not have the sole power, as he would be an interested party and, therefore, reluctant to make a determination. The Cabinet was thought to be the best possible body to assist him in making the determination. Among the reasons for the selection of the Cabinet were that its members are close to the President, that they would likely be aware of an inability, that they would know whether the circumstances were such that the Vice President should act, that they are part of the Executive branch, and that the public would have confidence in their decision. A primary consideration in favor of a so-called Vice President-Cabinet approach was that it would involve no violation of the principle of separation of powers, which is fundamental to our system of government.

An insertion of a specific method in the Constitution itself was decided on for several reasons. The amendment would be self-executing and would require no further legislation by Congress. Since the Constitution is quite specific as to the election of the President and as to how he may be deprived of his powers and duties by impeachment, the method of determining inability, which would also deprive him of his prerogatives, at least temporarily, should be no less specific and should be written into the Constitution.

Giving Congress a broad power to

establish a method for determining inability is in itself no solution, for a method would still have to be agreed upon by Congress—and that could take years. The inclusion of a provision that Congress could change the Cabinet as the body to function with the Vice President was recommended. Although some members felt that Congress should have no power at all to change the method, it was the consensus that such a provision would have the advantage of flexibility, so that if it should become necessary to do so, Congress could by legislation (which would be subject to Presidential veto) change the procedure relatively quickly without having to resort to a new constitutional amendment.¹⁸

The possibility of a President's declaring that he was able when he was not led to the inclusion of the provision that the Vice President and a majority of the Cabinet could prevent him from doing so. The Vice President would continue to act in order that the office would not be filled by one whose capacity was seriously challenged. A two-thirds vote of Congress would be required to prevent the President from resuming his powers and duties, in order to weigh the provision heavily in favor of the President. This also conforms to the two-thirds vote required by the Constitution to remove a President from office. It was stressed that since the President is elected by all the people, he should not be deprived of his powers and duties except under extraordinary circumstances.

The panel was unanimous that the best way to solve the succession problem is by filling the Vice Presidency, since the Vice President, having been chosen and trained for that purpose, is the official in the best position to succeed to the Presidency.¹⁹ The manner of filling the vacancy would give the President a dominant role. However, as Congress would provide a check, it would be in conformity with current practice and would insure that the Vice President would be of the same party as the President and compatible with him.

Now Is the Time for Congress To Act

The consensus offers a very practical solution to the problem of Presidential inability. Without further legislation, it is complete, practical and consistent with the principle of separation of powers. It gives the decisive role to those in whom the people most likely would have confidence. It involves only persons who have been elected by the people or approved by their representatives, and it embodies checks on all concerned—the President, the Vice President and the Cabinet. Finally, since it would be embodied in a constitutional amendment, there would be no question about its constitutionality.

It is urgent that the problem of Presidential inability be solved now, while the tragedy of November 22, 1963, is still fresh in our memory.²⁰ To miss this opportunity and again to leave unsolved this most serious problem would be to trifle with the security of this great nation. As Senator Keating, who has been deeply concerned over the problem for many years, said: "Let us not lose the opportunity to take action on inability by losing inability proposals in the scramble for changing the succession law."²¹

In the words of Senator Birch Bayh of Indiana, Chairman of the Senate Subcommittee on Constitutional Amendments: "Our obligation to deal with the question of Presidential inability is crystal clear."²²

18. Thus, the consensus in effect combines provisions of S. J. Res. 139, 88th Cong., 1st Sess. (Senator Bayh and others) and S. J. Res. 35, 88th Cong., 1st Sess. (Senator Keating).

19. The rationale for this recommendation was well stated by the American Bar Association Committee on Jurisprudence and Law Reform: ". . . [It is] essential in this atomic age that there always be available a Presidential successor who would be fully conversant with domestic and world affairs and who would be prepared to step into the higher office on short notice and to assume its full responsibilities with a minimum of interruption of the conduct of affairs of state." See the author's article, *The Vice Presidency and the Problems of Presidential Succession and Inability*, 32 *FORDHAM L. REV.* 457 (1964).

20. "Presidential inability is, to be sure, a delicate and distasteful subject to contemplate but in all prudence it must be faced." 1964 *Senate Hearings*—(remarks of Professor Paul Freund). . . . [Surely the time has come when reasonable men must agree on one workable method." *Id.* (remarks of Lewis F. Powell, Jr.)

21. *Id.*

22. *Id.*