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Opinion of the Attorney General on Presidential Inability

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PRESIDENTIAL INABILITY

Article II, section 1, clause 6 of the Constitution authorizes the Vice President to act as President in the event of the President's inability to discharge the powers and duties of his office, and to act in that capacity "until the disability be removed."

The same Article is interpreted as vesting authority in the Vice President to decide whether Presidential inability exists, if the President is unable to do so, and authorizes the President to determine when his inability has ended.

The memorandum of March 3, 1958, between former President Dwight D. Eisenhower and former Vice President Richard M. Nixon, representing their understanding of the constitutional role of the Vice President as acting President in the event of Presidential inability, is consistent with the correct interpretation of Article II, section 1, clause 6 of the Constitution.

Attorneys General Herbert Brownell, Jr. and William P. Rogers have expressed the same views on the identical questions.

AUGUST 2, 1961.

THE PRESIDENT.

MY DEAR MR. PRESIDENT: I have the honor to respond to your request for my opinion upon the construction to be given to the Presidential inability clause of the Constitution. Article II, section 1, clause 6 reads as follows:

"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."

You request my opinion on these questions: first, whether when Presidential inability occurs, the Vice President under

Article II, section 1, clause 6 succeeds to the "Powers and Duties" of the Presidency or whether he succeeds to the "Office," *i.e.*, becomes President and remains in the office even if the inability should cease; second, who determines whether the inability exists and who determines whether the inability has ended; and third, whether the memorandum of March 3, 1958, between former President Eisenhower and former Vice President Nixon, representing their understanding of the constitutional role of the Vice President as acting President, is a desirable precedent for this Administration to follow.

As shall be shown hereafter, the great majority of scholars and my two immediate predecessors have expressed the opinion that upon a determination of Presidential inability the Vice President succeeds temporarily to the powers and duties of that office, and does not permanently become President; and it is also their opinion that the Vice President may determine whether the inability exists. My immediate predecessors were also of the opinion that the President may determine when his inability has ended, and thereupon resume the discharge of the Presidential functions. For reasons to be discussed hereafter, I concur in their opinions. I also conclude that the understanding of March 3, 1958, is in keeping with the Constitution, and that the precedent set by it could appropriately be followed by this Administration.

I

In case of Presidential inability does the office itself or do merely the powers and duties of the office devolve on the Vice President?

For many years constitutional scholars have debated whether Article II, section 1, clause 6 was intended to transform a Vice President into a President upon the occurrence of the latter's inability. It will be noted that this clause contemplates four situations in which the Vice President may be called upon to act as President. In three situations, permanent exclusion of the President from the remainder of his term is obvious since these involved removal from office, death or resignation. The difference of opinion arises respecting the fourth contingency, *viz:* "Inability to discharge

the Powers and Duties of the said Office." Did the authors of the Constitution intend to exclude the President thereafter, despite his complete recovery, from resuming the discharge of his powers and duties? It may be noted that after this fourth contingency follow the words "the Same shall devolve on the Vice.President." Do the words "the Same" refer to the office of President, or do they refer to "the Powers and Duties"?

It is my opinion that under Article II, section 1, clause 6 of the Constitution the Vice President merely discharges the powers and duties of the Presidency during the President's inability and this conclusion, as shall be shown hereafter, finds support in the following:

1. The records and history of the Constitutional Convention.
2. Debates in the Convention and ratifying conventions.
3. Consideration of other provisions in the Constitution.
4. The example and experience of the States in providing for succession.
5. The dictates of reason and established rules of statutory construction.
6. The great weight of constitutional authority.

These considerations will be discussed in order.

1. *The records and history of the Constitutional Convention.*

Without dispute, Article II, section 1, clause 6 nowhere expressly provides that the Vice President shall under any circumstances become President. Had the framers of the Constitution intended the Vice President in certain contingencies to become President, they would not have been at a loss for words. Reference to the records of the Constitutional Convention discloses that the framers of the Constitution never intended the Vice President in event of Presidential inability to be anything but an acting President while the inability continued.

Of the various written plans submitted for consideration at the Convention, only Charles Pinckney's draft offered May 29, 1787, specifically referred to Presidential disability. Article VIII of this draft provided in part that in case of the President's removal through impeachment, death, resignation

or disability "the President of the Senate shall exercise the duties of his office until another President be chosen * * *."[1]

The House resolved itself into a Committee of the Whole to consider various proposals, but having made little progress on the question of the President's inability, referred this proposal to the Committee of Detail which was then considering other matters. This Committee reported a draft on August 6, 1787, which contained Article X, section 2 relating to Presidential inability. It provided that in case of the President's removal as aforesaid through impeachment, 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."[2] On August 27, Mr. Dickinson remarked about the vagueness of this clause. "What," he said, "is the extent of the term 'disability' & who is to be the judge of it?" Unfortunately, his suggestion produced no clarification.[3]

It will be noted that up to this point the official to act as President until the President's disability was ended was "the President of the Senate," not the Vice President. Article X of the draft was then referred to the Committee of Eleven which reported on September 4. In its report provision was included for the first time for a Vice President, as distinguished from the President of the Senate[4] who was to be *ex officio*, President of the Senate, except on two occasions: when the Senate sat in impeachment of the President, in which case the Chief Justice would preside, and "when he shall exercise the powers and duties of the President," in which case of his absence, the Senate would choose a President *pro tempore*. The Committee of Eleven also recommended that the latter part of section 2 of Article X be amended to provide that in case of the President's removal on impeachment, 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

[1] 3 Max Farrand, *The Records of the Federal Convention of 1787* (1911 Ed.), 600.
[2] 2 *id.* 186.
[3] 2 *id.* 427.
[4] 2 *id.* 495.

President be chosen, or until the inability of the President be removed." [5] He was not to become the President in either event.

On September 7, the Convention adopted an amendment to cover the vacancy or disability of *both* the President and Vice President providing that the Legislature may declare by law what officer of the United States shall act as President in such event, and "such Officer shall act accordingly, until such disability be removed, or a President shall be elected." [6]

On September 8, the last clause of section 2, Article X was agreed to by the Convention, and a Committee of five was appointed "to revise the style and arrange the articles agreed to by the House" including those provisions dealing with inability.[7] Thus, as the proposed article came to the Committee on Style, it consisted of two clauses dealing with Presidential succession. The first related to the devolution of the powers and duties of the President's office on the Vice President in certain cases including the President's inability. The second authorized Congress to designate an officer to act as President in cases in which both the President and Vice President were disabled, had died, resigned or been removed. A temporal clause modified each main clause limiting the tenure of an acting President to the duration of the inability or until "another President be chosen" (first clause) or until "a President shall be elected" (second clause). Nothing in either clause said that the Vice President was to become President.

On September 12 the Committee on Style, condensing and combining the provision for Presidential inability, together with the provision for joint inability of both the President and Vice President, reported the clause as follows: [8]

"(e) 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

[5] 2 *id.* 495, 499.
[6] 2 *id.* 532.
[7] Davis, *Inability of the President*, Sen. Doc. No. 808, 65th Cong., 3d sess. 10 (1918).
[8] 2 Ferrand, *op. cit. supra* note 1, 598–599.

what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or the period for chusing another president arrive." Madison crossed out the words "the period for chusing another president arrive" and inserted in their place "a President shall be elected." [9] In this form the clause was written into the final draft of the Constitution.

The Committee on Style had no authority to amend or alter the substance or meaning of the provisions, but merely to combine and integrate them as a matter of form.[10] In this setting, the effect of what was done by it may be better understood by placing the provisions originally agreed to by the Convention side by side with the clauses as they were adopted by the Convention.

"Articles Originally Agreed to by the Convention	*As Later Reported by Committee on Style and Finally Adopted*
Article X, section 2: * * * and in case of 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 inability of the President be removed.	Article II, section 1, paragraph 6: 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;
Article X, section 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 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;

[9] 2 *id.* 626. See also 2 *id.* 599.
[10] Davis, *op. cit. supra* note 7, 11.

and such Officer shall act accordingly, until such disability be removed, or a President shall be elected.

and such officer shall act accordingly, until the disability be removed, or a President shall be elected."

Comparison of these provisions makes clear the intention of the framers of the Constitution. When the provisions were placed into the hands of the Committee on Style and Arrangement, they explicitly provided that in case of inability of the President, the Vice President was not to become President, but merely to "exercise those powers and duties * * * until the inability of the President be removed." When, therefore, the Committee on Style condensed the language and reported the provision to read in case of the President's "inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President," the exact meaning intended by the Convention was carried over to the revised language.

It has been argued by one school of thought that "the Same" as used in the succession clause refers to "Office," and therefore the office devolves on the Vice President who thereby becomes President. The other school asserts that "the Same" has reference to "Powers and Duties," and that the Vice President may merely discharge those powers and duties, but does not become President. Since a definitive answer is not to be found in any fixed rules of English usage, Professor Ruth C. Silva has concluded that the antecedent of "the Same" should be ascertained on the basis of the intention of those who framed and ratified the Convention.[11] This is sound construction.

This interpretation is reinforced by other language initially agreed to by the Convention. If it were intended that the Vice President should act permanently as President, it seems unlikely that the language adopted by the Convention and sent to the Committee on Style would expressly prescribe a temporary period during which the Vice President shall exercise "those powers and duties," *viz:* "until another President be chosen, or until the inability of the President be removed."

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[11] Silva, *Presidential Succession* 32 (1951).

When we refer to the provisions before and after the Committee on Style had combined them, it appears that the Committee did several things: consolidated the two provisions into one and introduced the words "the same shall devolve on the Vice President"; omitted reference to "absence" as an occasion for operation of the succession rule; used the adverbial clause "until the disability be removed," only once instead of using it to modify each of the preceding clauses separately; substituted "inability" for "disability" in the clause referring to succession beyond the Vice President, possibly as being more comprehensive and covering both absence and temporary physical disability; and changed the semicolon after "Vice President" to a comma so that the limiting clause beginning "and such Officer" would refer both to the Vice President and the officer designated by Congress. Thus the evolution of this clause makes clear that merely the powers and duties devolve on the Vice President, not the office itself.

2. *The debates in the Convention and in the ratifying conventions.*

The debates in the Convention are not too illuminating on the question whether a Vice President was merely to act as President until the latter's disability was over or to become President. In support of the view that the debates demonstrate recognition that the Vice President's role was to be a temporary one while the inability existed, statements relied on are not squarely in point, but the inferences drawn are entitled to weight.

Thus, Professor Silva states:[12] "* * * This assumption [that the Vice President is an acting President] is implicit in James Wilson's objections to the election of the President by Congress. The gentleman from Pennsylvania said that the Senate might prevent the filling of a vacancy by dilatory action, so that their own presiding officer could continue to exercise the executive function. Gouverneur Morris and James Madison likewise objected to this mode of election for a similar reason—the Senate might retard appointment of a President in order that its own presiding officer might continue to possess veto power. Such objections are without

[12] *Id.* 10.

merit if the President's successor was intended to become President for the remainder of the term."

There is other evidence from which the intention of the delegates may be determined. Charles Warren reports that during the debates little enthusiasm was expressed for an officer such as the Vice President, that the discussion centered on his status as a legislative officer, and there was no discussion as to his succession even in case of the President's death.[13] However, Warren is of the opinion "the delegates probably contemplated that * * * the Vice President would only perform the duties of President until a new election for President should be held; and that he would not *ipso facto* become President."[14] It seems fairly clear that if the delegates did not contemplate that the Vice President shall become President on the death of the President, but only perform the duties of the office, that they certainly did not intend any different result upon the President's inability.

Discussion of the succession clause at the ratifying conventions was also singularly unenlightening.

Professor Silva, who has made a careful study of the matter, reports there is no record of discussion of the succession clause at the ratifying conventions except briefly at the Virginia Convention. George Mason objected to the clause because it lacked provision for the prompt election of another President in event of vacancy in both the Presidential and Vice-Presidential offices. Madison's attempt to answer this objection indicated that he did not think that the designated officer in event of succession beyond the Vice President "would have that tenure which the Constitution guarantees to a *de jure* President," but it does not appear that Madison had in mind the status of a Vice President who might be acting as President.[15] What is of greater significance is that the delegates in the ratifying conventions always carefully distinguished between "the President" and "the acting President." Reference was made to "the Vice President, when acting as President," not "the Vice President when he be-

[13] Charles Warren, *The Making of the Constitution*, 634–635 (1928).
[14] *Id.* 635.
[15] Silva, *op. cit. supra* note 11, 11.

comes President."[16] Silva says that "nowhere in the debates of the ratifying conventions did a single one of the delegates use the latter expression."[17]

The Federalist, in which Hamilton defended the proposed Constitution and explained in detail its provisions, is surprisingly silent as a whole on what was intended when a President suffers inability. However, at one point Hamilton defended the role of a Vice President over the objection that his position would be "superfluous, if not mischievous." He urged that two considerations justified the Vice President's position: one to cast the deciding vote in the Senate when they were equally divided; the other, that "the vice-president may occasionally become a substitute for the president * * *, and exercise the authorities and discharge the duties of the president."[18]

While these debates in the Convention and ratifying conventions appear to be inconclusive, generally they tend to support the argument that a Vice President or designated officer was never, in the view of the framers of the Constitution, intended to become President. If there was Presidential inability, the Vice President was to act only until the inability was terminated.[19]

3. *Consideration of other provisions of the Constitution.*

Reference to other provisions of the Constitution also supports the conclusion that in event of Presidential inability, the Vice President would merely serve as acting President.

For example, the Twelfth Amendment provides that if the House should not choose a President before March 4, "then the Vice-President shall act as President *as in the case of the death or other constitutional disability of the President.*" (Italics added.) It may be observed that this Amendment does not say that the Vice President will become President in this situation. From the underscored language, Warren has concluded that when the Twelfth Amendment was adopted, "its framers interpreted the Constitution as meaning that the Vice President should only *act* as President

[16] *id.* 12.
[17] *id.*
[18] *The Federalist* (J. E. Cooke, ed., 1961), No. 68, pp. 461–462.
[19] Silva, *op. cit. supra* note 11, 167.

in case of the latter's death * * *." [20] And from this it would necessarily follow that he would not become President in case of the President's inability.

Other provisions of the Constitution also consistently avoid language to the effect that the Vice President shall become President except in a single instance where this was the specific intention. Thus, Article I, section 3, clause 5 states that the Senate shall choose a President *pro tempore*, in the absence of the Vice President or "when he shall exercise the Office of President of the United States." Here again, the action of the Vice President is not described "as becoming President," but merely that he shall "exercise the Office." On the other hand in section 3 of the Twentieth Amendment, where it was intended that the Vice President shall actually become President, it is explicitly provided that if, at the time fixed for the beginning of the term of the President, the President elect has died, the Vice President-elect "shall become President." The same section provides, moreover, by way of comparison that in event the President has not been chosen before the time fixed for the beginning of his term, or if the President elect fails to qualify then the Vice President elect "shall act as President" until a President has qualified, and similar language is employed where neither a President elect nor a Vice President-elect shall have qualified.

This difference in treatment in various provisions of the Constitution taken as a whole convinces me that both the framers of the Constitution and members of the Congress engaged in drafting amendments to the Constitution have been in agreement that a Vice President "becomes President" only when precise language to that effect is used, and that it is not to be implied.

4. *The example and experience of the States as a guide.*

In attempting to ascertain the intention of the framers of the Constitution, it is helpful to know what the practice was in the Thirteen States when the Constitution was adopted. We would expect that the provisions of those State Constitutions dealing with succession in event of a

[20] Charles Warren, *op. cit. supra* note 13, 637. As is shown hereinafter, however, "constitutional custom" has undoubtedly modified this original interpretation in the event of the President's death.

Governor's inability definitely influenced and shaped the thinking of the framers of the Constitution in determining what provision should be made in event of Presidential inability. Accordingly we may consider those State constitutional provisions as a guide in interpreting the corresponding succession clause in the Constitution of the United States.

In most of the States at that time, in event of the Governor's "absence" from the State or during his inability, provision was made for the temporary exercise of the Governor's powers by the succeeding officer. The Governor was not ousted; he remained the Governor in those contingencies, resuming the discharge of his functions upon his recovery.[21] So too, today, with very few exceptions, State Constitutions expressly or impliedly provide that where the Governor is unable to exercise the powers and duties of his office, the officer next in line of succession shall discharge them, but only temporarily.[22]

The inferences to be drawn from this review of State practice and experience relating to gubernatorial disability and its bearing upon the problem of Presidential inability have been summarized forcefully by Professor Joseph E. Kallenbach:[23]

"* * * State experience reinforces the point observable in national experience that situations of various kinds can and do arise involving inability of the Chief Executive to exercise his powers and which require devolution of these powers for an indefinite period of time upon the officer next in line of succession. It shows that constitutional provisions on this point are, in effect, self-executing. It shows that devolution of power in these circumstances can be brought about by simple acquiescence of the incumbent when he is able to recognize his incapacity. He does not, by so doing, remove himself from office, but merely acquiesces in the

[21] Richard H. Hansen, *Executive Disability*, 40 Nebr. L. Rev. 697, 701–703 (1961).

[22] Kallenbach says that currently 46 States have such provisions. *Presidential Inability*, House Committee Print, 84th Cong., 2d sess. 40 (Jan. 31, 1956). See also, Richard H. Hansen, *The Year We Had No President* (to be published soon). A fairly complete survey of provisions of State laws relating to disability of the Chief Executive of the States also appears in *Presidential Inability*, House Committee Print, *ibid.* 66 *et seq.*

[23] *Ibid.* 43.

operation of the constitutional rule that permits and requires the succeeding officer to exercise the powers of the chief executiveship. The officer named by the constitution or laws as the one upon whom the authority to act as governor shall devolve has no option but to exercise the powers and duties of that office, even though his doing so does not oust the incumbent from the office of governor permanently. His duty to so act is an ancillary and conditional function of the incumbent in the office next in line in the succession. When and if the cause occasioning the temporary devolution of power has ceased to be operative, there must be a resumption of his constitutional powers and duties by the temporarily displaced Chief Executive. His assertion of his right and capacity to reassume the powers and duties of his office is ordinarily regarded as sufficient to restore them to him."

5. *The dictates of reason and established rules of statutory construction.*

As between two different interpretations to be given a constitutional provision, it is fundamental that one will be adopted which avoids inconsistencies and results which are harsh or absurd.

Inherent in the position that a succeeding Vice President becomes President upon the latter's inability, is the fact that the President must forfeit his office, if through no fault of his own he suffers inability, however temporary it may be. It is difficult to draw any such conclusion from the language of the Constitution, or to imply one which carries with it such grievous and drastic consequences, particularly where the Constitution expressly declares only one way to remove the President, and that is through impeachment.

The absurdity of such an interpretation is made even more apparent when considered with the language of Article II, section 1, clause 6 authorizing the Congress, in case of disability of both the President and Vice President to determine "what officer shall then act as President." It is claimed by those who assert that the Vice President becomes President in event of Presidential inability, that the limiting clause "until the Disability be removed, or a President shall be elected," refers only to the clause immediately preceding it, under which an officer designated by law acts as President when *both* the President and Vice President are dis-

abled, and that it has no reference to the first portion of the clause where the President alone suffers inability. It is therefore argued that the Vice President under the latter contingency takes office for the remainder of the term free of any limitation.[24]

This contention, if accepted, would create an inconsistency and disparity in treatment between the President and Vice President most difficult to explain on rational grounds. We would then have the anomalous result that the Constitution discriminates against the President who has been elected and favors one not elected to that office. Such a dubious construction may not be adopted.

As was said in the 1881 debate on the subject:[25] "What principle, what consideration of expediency or policy is it which forbids the President, when relieved of his 'inability,' from reassuming the office to which he was elected, which does not apply with at least as much force to the Vice-President who was not elected to it? I can imagine none."

There is another apparent weakness in this argument. Assume that *both* the President and the Vice President were disabled. Under the clause providing for joint disability, if the President recovered before the Vice President, he could resume the responsibilities of his office. It obviously makes little sense to say that under the first clause where the President alone is disabled that he forfeits his office permanently, but that under the second clause where both he and the Vice President are disabled simultaneously, the President would not forfeit his office if he recovers first.[26] The framers of the Constitution were wise and mature men. Absurd and illogical results, repelled by reason, have no place in the Constitution. Nor should an interpretation involving an anomaly be imported into the Constitution unless the language itself compels it; here, "there is no such compulsion."[27]

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[24] Senator Charles W. Jones, 13 Cong. Rec. 142–143, 191–193 (1881).

[25] Senator Richard Coke, 13 Cong. Rec. 141 (1881). See also, William W. Crosskey, *Hearings before Special Subcommittee of House Committee on the Judiciary to Study Presidential Inability*, 84th Cong., 2d sess. 107 (1956).

[26] Crosskey, *id.* 107.

[27] *id.*

6. *The great weight of constitutional authority.*

In the face of these arguments, it is not surprising that almost every student of the Constitution who was recently canvassed to express an opinion, agreed that in case of temporary Presidential inability, the Vice President succeeds only to the powers and duties of the office as the acting President, and not to the office itself;[28] and in event of a seemingly permanent disability, the large majority of these scholars concluded the result would be the same because it is always possible that the disability may be removed.[29] Both of my immediate predecessors, former Attorneys General Herbert Brownell[30] and William P. Rogers[31] concurred in the majority view. This view, in my opinion, is clearly right.

As against the arguments supporting this array of opinion, there are arguments on the other side expounded by relatively few scholars.

A major contention already noted is that the immediate antecedent of the words "the Same" in Article II, section 1, clause 6 of the Constitution is "said Office," and, therefore, a reasonable interpretation is that it is the Presidential office,

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[28] Included in this group of distinguished scholars of the Constitution were: Stephen K. Bailey, Princeton University; Everett S. Brown, University of Michigan; Edward S. Corwin, Princeton, N.J.; William W. Crosskey, University of Chicago Law School; Charles Fairman, Law School of Harvard University; David Fellman, University of Wisconsin; Thomas K. Finletter, Esq., New York, N.Y.; James Hart, University of Virginia; Arthur N. Holcombe, Harvard University; Mark DeW. Howe, Law School of Harvard University; Richard G. Huber, Tulane University; Joseph E. Kallenbach, University of Michigan; Jack W. Peltason, University of Illinois; J. Roland Pennock, Swarthmore College; C. Herman Pritchett, University of Chicago; John H. Romani, the Brookings Institution, and Arthur E. Sutherland, Law School of Harvard University. *Presidential Inability,* House Committee Print, 85th Cong., 1st sess. 49–52 (1957).

[29] id. 52–54.

[30] Herbert Brownell, Jr., *Presidential Inability: The Need for a Constitutional Amendment,* 68 Yale L.J. 189, 192–193, 203–205 (1958); *Hearing before the Special Subcommittee of the House Committee on the Judiciary on Problem of Presidential Inability,* 85th Cong., 1st sess., 4, 10 (1957).

[31] *Presidential Inability, Hearings before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee,* 147, 148–149 (1958). On the other hand, former Attorney General Wayne MacVeagh would probably have supported the minority view. During Garfield's illness, MacVeagh, although agreed on the desirability of having Vice President Arthur act as President, felt that "Arthur's exercise of presidential power would be equivalent to Garfield's abdication." Silva, *Presidential Succession, op. cit. supra* note 11, 56. Unfortunately, we are not favored by any exposition on the subject by MacVeagh.

not merely the President's powers and duties, which devolves upon the Vice President.[32]

Arguments to the contrary resting on established principles of statutory construction have been made in detail above and need not be repeated. Suffice it to say, Article II does not provide that the Vice President shall become President upon the latter's inability. Since it is a contradiction in terms to have at one moment two Presidents—the one disabled, the other in office—and for the other reasons mentioned, the contention that "the Same" means "said Office" must be rejected as lacking in merit.

Another argument made in support of the theory that it is the office of President which devolves, is that the Constitution vests executive power in the President, knows a single Executive, and by implication bars any one from exercising it other than one actually President. It is claimed that in recognition of this principle, the courts have denied any one the right to discharge powers and duties of the President which under the Constitution require his personal judgment.[33]

But when the Constitution is viewed as a whole such an interpretation of the vesting clause is completely consistent with a construction which permits the Vice President to act as President while the latter is unable to perform the duties of his office. Thus it has been pointed out:[34]

"* * * The restrictions laid down by the courts apply to the delegation of executive power by the President to his subordinates, and should not by analogy be extended to the devolution of this power in such a way as to defeat the purpose of the succession clause. The records of the Federal Convention give no indication that the framers of the vesting clause would preclude the possibility of an acting President in case of vacancy or inability in the Presidency. Their sole purpose in writing the vesting clause appears to have been the establishment of a single, as contrasted with a plural,

[32] Theodore W. Dwight, *Presidential Inability*, Vol. 133 No. Am. Rev. 436, 443 (November 1881); Representative Henry A. Wise and Senator Robert J. Walker, Cong. Globe, 27th Cong., 1st sess. 4–5 (1841); Senator Charles W. Jones, 13 Cong. Rec. 142 (1881), 14 *id.* 918 (1883).

[33] Brown and Silva, *Presidential Inability*, House Committee Print, *supra* note 22, 12.

[34] *id.* 12–13. See also, Silva, *op. cit. supra* note 11, 78–77.

executive. The purpose of the succession clause seems to have been to provide a substitute for the President in certain cases, not to provide for the creation of another President. The rule is well established that the different clauses should be given effect and reconciled if possible. The conclusion is, therefore, that the clause vesting executive power in the President should be construed in such a way as to allow for an acting President, who will exercise executive power in case of the President's removal, death, resignation, or inability until the disability passes or another President is elected."

The strongest argument that can be made is that which springs from past practice. It is that when succession occurs by reason of death, the Vice President becomes President, and it is argued that the same result must necessarily follow in each of the other contingencies enumerated in the same clause, including "inability to discharge the Powers and Duties of the said Office." Indeed, it is this "constitutional custom" as it has been described,[35] involving death of a President, which has created whatever constitutional doubts may be said to exist.

All seven Vice Presidents, who have succeeded to the Presidency upon the death of the President, have taken the Presidential oath and have been generally recognized as President of the United States.[36] John Tyler was the first to establish this precedent when William Henry Harrison died in 1841, and the principle laid down by him was followed by six other Vice Presidents upon the death of the President in office.[37] Although President Tyler's action might readily have been questioned had historical materials on the framers' intent been at hand,[38] the fact remains that it has been relied on for the proposition that the Vice President becomes President when the elected President dies—a proposition scarcely to be questioned today. Corwin says in this connection:[39]

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[35] David Fellman, *Presidential Inability*, House Committee Print, *supra* note 22, 24–25.

[36] John Tyler, Millard Fillmore, Andrew Johnson, Chester A. Arthur, Theodore Roosevelt, [John] Calvin Coolidge, and Harry S. Truman.

[37] Silva, *Presidential Inability*, 35 U. Det. L.J. 139, 151–153 (1957).

[38] Hansen, *op. cit. supra* note 21, 704.

[39] Edward S. Corwin, *The President: Office and Powers*, 54 (1957).

"That Tyler was wrong in his reading of the original intention of the Constitution is certain. It was clearly the expectation of the Framers that the Vice-President should remain Vice-President, a stopgap, a locum tenens, whatever the occasion of his succession, and should become President only if and when he was elected as such. Tyler's exploit, however, having been repeated six times, must today be regarded as having become law of the land for those instances in which the President, through death, resignation, removal, or other cause, has disappeared from the scene."

As Corwin goes on to point out, it was the possibility that this precedent might be extended to cases of Presidential inability—permanently ousting the incumbent which deterred two Vice Presidents—Arthur and Marshall—from undertaking to exercise the powers and duties of the office of President during the prolonged illnesses of Presidents Garfield and Wilson, respectively. Neither Vice President wished to be regarded as a "usurper." This possible risk also may have led these former Presidents to minimize or deny their disability. Other factors, however, of political nature, were present in both cases.

The problem of succession to the Presidency was considered immediately after former President Eisenhower's heart attack in September 1955. Congress was not in session, and there was no immediate international crisis. On the basis of medical opinions and a survey of the urgent problems demanding Presidential action immediately or in the near future, Attorney General Brownell orally advised the Cabinet and the Vice President that the existing situation did not require the Vice President to exercise the powers and duties of the President under Article II of the Constitution.[40] All concerned accepted this opinion, and a plan was worked out to enable the executive branch to function during the President's illness which included having former Vice President Nixon preside at meetings of the Cabinet and the National Security Council. On October 21, 1955, Mr. Brownell conferred with the President in his hospital room at Denver, and advised him of the legal basis of the ac-

[40] Brownell, *op. cit. supra* note 30, at 196.

tion taken, and that no written authorizations were required to ensure that his previously established policies would be executed and that the Government activities would continue without interruption.[41] Thereafter, informal discussions took place between the President and the Vice President concerning "what the Vice President's role should be in the event of a similar unfortunate occurrence, or any other happening which would disable the President temporarily at a time when presidential action was required." [42] Moreover, when President Eisenhower was operated on for ileitis in 1956, it is said that Vice President Nixon stood by fully prepared to initiate, "as acting President, whatever action would be necessary in case of international emergency; for it was realized that the announced intention of the President to undergo a serious operation might entice a hostile foreign power to make some drastic move in the expectation of finding, at the critical moment, confused and uncertain leadership in the United States." [43]

While the overwhelming weight of authority and the strongest arguments support the theory that the Vice President is merely an acting President during the latter's disability, the precedent established by Tyler and followed by six other Vice Presidents in taking the oath of President upon a President's death, coupled with the lack of a close relationship and understanding between the President and the Vice President, created sufficient doubt to deter both Vice Presidents Arthur and Marshall from discharging the powers and duties of the President's office during periods of Presidential inability. In the Eisenhower Administration, arrangements were made between President Eisenhower and Vice President Nixon, discussed hereafter, designed to provide continuing leadership in the executive branch of the Government in the event of the President's inability, and to make clear the constitutional legitimacy of the Vice President's action, should he be obliged to discharge the powers and duties of the office for the duration of the inability.

In my view, there is a clear constitutional distinction between the situation in which a President is permanently re-

[41] *Id.*
[42] *Id.* 202.
[43] *Id.* 202–203.

moved from office by death and the situation in which he holds office but is temporarily unable to exercise its powers and duties. In the former case, the precedents of several deaths in office have established that the Vice President succeeds to the Presidency. In the latter case, he cannot so succeed because the President, the individual chosen by the people to occupy the office of Chief Magistrate, is still incumbent. In view of this distinction, the fact that the Vice President succeeds to the office of President when the elected President dies does not establish the proposition that he becomes President when he merely exercises the powers and duties of that office during the incumbent's temporary inability.

II

Who determines whether the inability exists? Who determines whether the inability is ended?

I now turn to two subsidiary questions:

1. Who has the authority under the Constitution to decide whether inability exists; and

2. Who is authorized to make the determination that the inability is over?

These are important problems upon which scholarly opinion differs somewhat.

1. The large majority is of the view that the Vice President or other "officer" designated by law to act as President has the authority under the Constitution to decide when inability exists.[44] Both of my immediate predecessors favored this

[44] Silva, *op. cit. supra* note 11, 100–102; Davis, *op. cit. supra* note 7, 13; Senator Augustus H. Garland, 13 Cong. Rec. 139–141 (1881); Senator Elbridge G. Lapham, 14 Cong. Rec. 917 (1883); Lyman Trumbull, 133 No. Am. Rev. 417, 420–422 (1881); Benjamin F. Butler, *id.*, 431–433; *Presidential Inability*, House Committee Print, *op. cit. supra* note 22. Thomas K. Finletter, *id.* 27–28; Joseph E. Kallenbach, *id.* 45. Hearings *op. cit. supra* note 25. Sidney Hyman, *id.* 58–59; Roger P. Peters, *id.* 122; C. Herman Pritchett, *id.* 71; John H. Romani, *id.* 43–44.

The Constitution does not define inability, and it has been the subject of varying definitions, none authoritative. It has been suggested that as a matter of sound interpretation the definition of inability should cover all cases, permanent or transient, physical or mental, in which a President is in fact unable to discharge a power or duty required to be discharged in the public interest. (See Silva, *id.* 171). Most scholars are opposed to defining inability in any amendment to the Constitution or in legislation.

interpretation. Attorney General Brownell summed up the legal basis for concluding that the Vice President is the sole judge of a President's inability, where the President is unable to do it himself as follows:[45]

"* * * This is so because the Constitution does not state who should determine the President's inability in the many circumstances in which, as the founders themselves must have foreseen, it cannot be the President himself. The Cabinet could not have been intended to judge the issue, since this body is not referred to in the Constitution. It is not the Congress, except by the negative sanction of impeachment and conviction for a wrongful attempt to exercise power. Nor is it the Supreme Court, because the question of presidential inability is hardly one which fits any type of jurisdiction conferred by the Constitution on that tribunal. But the power to determine the inability of the President rests in the Vice President not simply because the Constitution places it nowhere else. By a well-known principle of law, whenever any official by law or person by private contract is designated to perform certain duties on the happening of certain contingencies, unless otherwise specified, that person who bears the responsibility for performing the duties must also determine when the contingency for the exercise of his powers arises. Similarly, under the present Constitution, it is the President who determines when his inability has terminated and he is ready once more to execute his office."

There are conflicting views. One school of thought believes that the right to make the inability declaration belongs to Congress.[46] Cooley argued that Congress may determine inability because the Constitution confers this authority in the "necessary and proper" clause, reason dictates it, the decision of Congress alone can be final, and English precedents involving Parliament and a few disabled Kings may be relied on in support of congressional action.[47]

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[45] Brownell, *op. cit. supra* note 30, 204.

[46] Early authorities are cited by Silva, *op. cit. supra* note 11, 105–107. More recent authority will be found in note 53.

[47] Thomas M. Cooley, Vol. 133 No. Am. Rev. 422, 426–427 (November 1881).

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Persuasive arguments have been raised in opposition to the theory that Congress has the power to determine specific cases of inability or to provide by general law a method for deciding such cases. One is that since the Constitution expressly provides in Article II for succession when *both* the President and Vice President are disabled, it excludes the right of Congress to act in the case of Presidential inability only. This is an application of the familiar maxim in statutory construction, *inclusio unius, exclusio alterius.*[48] It is an argument favored by Attorneys General Brownell[49] and Rogers, although the latter also stressed Professor Sutherland's contention that ending the President's duties by ordinary legislation would run counter to the doctrine of separation of powers.[50] Apart from sound constitutional interpretation, there are practical considerations since "each act of Congress must have for its validity the concurrent action of the president."[51]

Both of my immediate predecessors were, therefore, strongly opposed to the legislative or judicial route for resolving the problem. Mr. Brownell said: "Ordinary legislation would only throw one more doubtful element into the picture, for the statute's validity could not be tested until the occurrence of the presidential inability, the very time at which uncertainty must be precluded."[52] Authority is divided on this point.[53] I concur in Mr. Brownell's judgment.

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[48] Butler, *op. cit. supra* note 44, 428, 432; Davis, *op. cit. supra* note 7, 13–14.

[49] Brownell, *op. cit. supra* note 30, 206.

[50] Hearings, *op. cit. supra* note 31, 170, 176.

[51] Butler, *op. cit. supra* note 44, 431. Cornelius W. Wickersham, Chairman of the New York State Bar Association Committee on Federal Constitution, expressing the views of the Committee, stated: "It is extremely doubtful whether Congress has power to deal with the matter without a constitutional amendment and clearly the ambiguity of the present provisions cannot be cured by act of Congress alone." Hearings, *op. cit. supra* note 31, 95.

[52] Brownell, *op. cit. supra* note 30, 205.

[53] Among those who recently expressed themselves in favor of an amendment to the Constitution upon the ground that it is either necessary or desirable are: Stephen K. Bailey, Hon. Peter Frelinghuysen, Jr., Richard G. Huber, Joseph E. Kallenbach, Arthur Krock, Jack W. Peltason, C. Herman Pritchett, Arthur E. Sutherland, Hon. John J. Sparkman (*Presidential Inability*, House Committee Print, *op. cit. supra* note 28, 59–63). Edgar W. Waugh, Charles S. Rhyne (*Hearings, op. cit. supra* note 31, 127, 191).

Equally distinguished are those who currently assert that proposed plans of Presidential inability may be carried out by statute. Among these are: Everett S. Brown, Edward S. Corwin, William F. Crosskey, Charles Fairman,

2. There remains the difficult question: Who makes the decision where the parties involved are in disagreement that the President's inability is ended, and that he is ready to resume the functions of his office?

Unquestionably, those scholars who claim the Vice President becomes President upon the latter's inability would assert that the Vice President may not be divested of his authority by recovery of, or action taken thereafter by, the President. In my opinion, this view does violence to the letter and spirit of the Constitution, and would defeat the will of the people.

Attorneys General Brownell and Rogers were in agreement that the President could reclaim the discharge of the powers and duties of his office merely by announcing that his inability had terminated, and that he is ready now to execute his office.[54] In my opinion this interpretation of the Constitution is clearly correct. The force of popular opinion, the people's sense of constitutional propriety, and the cooperation of Congress could be counted on to support the President's decision if he acted properly.

There is no complete agreement among scholars as to who determines whether Presidential inability exists, and who determines when it ends. In the opinion of my two immediate predecessors, and in my own opinion, while the Vice President may declare when the President's inability exists, it is the President alone who has the constitutional authority to determine when his inability is over. This is implicit in the fact that the Vice President would merely be serving as acting President in such a contingency, and that there is only one President in office. The President's conclusion that he is able to resume the discharge of the powers and duties of the office must of necessity be accepted as binding unless and until he is removed by impeachment proceedings. As was said by one constitutional scholar:[55] "The Constitution recognizes but one method of removing the President, and that is by conviction on articles of impeachment."

David Fellman, James Hart, Arthur N. Holcombe, Hon. Herbert Hoover, Mark DeW. Howe (*Presidential Inability*, House Committee Print, *op. cit. supra* note 28, 63–68).

[54] Brownell, *op. cit. supra* note 30, 204; Rogers, *Hearings, op. cit. supra* note 31, 175.

[55] Senator Coke, 13 Cong. Rec. 141 (1881).

III

Is the understanding between President Eisenhower and Vice President Nixon a desirable precedent to be followed by this Administration?

Finally, there is before me the question whether the understanding between President Eisenhower and Vice President Nixon on Presidential inability is a desirable precedent for this Administration to follow.

On March 3, 1958, the former President and Vice President, in consultation with the Attorney General, reduced to memorandum form their understanding of the constitutional role of the Vice President as acting President. It declared: [56]

"The President and the Vice President have agreed that the following procedures are in accord with the purposes and provisions of Article 2, Section 1, of the Constitution, dealing with Presidential inability. They believe that these procedures, which are intended to apply to themselves only, are in no sense outside or contrary to the Constitution but are consistent with its present provisions and implement its clear intent.

"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 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 full exercise of the powers and duties of the Office."

It seems to me that this understanding is entirely consistent with the correct interpretation of the Constitution.

The introduction itself purports to bind only the prior incumbents of the office of the Presidency and Vice Presi-

[56] *N.Y. Times*, March 4, 1958, p. 1, col. 2, p. 17, col. 1.

dency. This is an appropriate technique which leaves subsequent administrations free, as they would in any event be, to follow or reject the precedent.

Section 1 states that in event of inability, the President would, if possible, inform the Vice President of his condition, in which case the Vice President would serve as acting President until the inability is over.

This provision contemplates that the President will voluntarily announce his own inability, if it exists, for the purpose of encouraging the Vice President to discharge the powers and duties of the office until the President has recovered. This section helps to remove the obstacle which caused responsible Government officials to refrain from acting in the Garfield and Wilson cases. No one can possibly accuse the Vice President of being disloyal or a usurper if he undertakes to serve as acting President upon the request of the President. This section embraces most of the cases of Presidential inability likely to arise.

Section 2 deals with a situation in which the President is unable to communicate with the Vice President. In that event, the Vice President may take action "after such consultation as seems to him appropriate under the circumstances."

It will be noted that section 2 leaves the determination of Presidential inability in the first instance where the Constitution places it now—in the Vice President. There is one addition in section 2 which is absent from the Constitution—the Vice President may consult with other persons as seems to him appropriate.

Even though the Vice President need not under the Constitution consult any one, it is clearly wise and conducive to strengthening his position if he seeks advice from other persons before presuming to exercise the powers and duties of the Presidency. Since the Constitution is silent on the matter, no specific persons to be consulted are mentioned, and of course, in view of the latitude given, he might conceivably consult no one before he acted.

Section 3 states that the President may, whether he or the Vice President has declared the inability, determine when

it is over, and forthwith resume the full exercise of the powers and duties of the office.

Here again, the understanding represents what my two immediate predecessors and I regard to be authorized by the Constitution—that the President may regain the powers of his office without the concurrence of any other official or group if he is of the opinion that his inability has been removed. Attorney General Brownell has said:[57] "The Eisenhower-Nixon understanding, by providing, first, for the Vice President's determination of presidential inability and, second, for the President's determination of when that inability terminates, thus coincides perfectly with article II, section 1, of the Constitution as originally drafted in 1787 * * *."

This was also Attorney General Rogers' opinion and it is mine too, without reservation.

Since this understanding may prove to be a persuasive precedent of what the Constitution means until it is amended or other action is taken, I would favor that the present Administration follow it. Cumulative precedents of this kind may be valuable in the future.

IV

Conclusions

In my judgment, there is no question that the Vice President acts as President in the event of the President's inability and acts in that capacity "until the disability be removed." I do not believe that the practice which has grown up to the effect that the Vice President "becomes President" in event of the death of the President creates any substantial doubt.

I believe also that there is no substantial question that it is the Vice President who determines the President's inability if the President is unable to do so; and that it is the President who asserts when the inability has ceased. These conclusions are supported by the great majority of reputable scholars who have examined the problem, as well as by my predecessors.

In this connection, it is important to note the development of the Vice Presidency in recent years, and the changes in

[57] Brownell, *op. cit. supra* note 30, 204.

that office which have come about, particularly in the past two decades. During this time the Vice Presidency has moved substantially from its anomalous status under the Constitution in both the executive and legislative branches towards the former. Recent Vice Presidents have been given significant executive responsibility and an important voice in the highest affairs of state. The working relationship between the President and Vice President has become increasingly close and, during the past Administration as well as the present one, the President has been concerned to keep the Vice President current and informed with regard to Presidential policies.

While one cannot predict with certainty that this trend will continue in future administrations, I regard it as altogether likely because, in an age marked by crisis, this course seems to be dictated by the necessities of our time. It is significant with regard to the problems discussed in this opinion because, in my judgment, it greatly reduces the possibility of an impasse between the President and Vice President, and thoughts in the public mind that the Vice President should be regarded as a potential usurper of office. It also is relevant because it greatly increases the practical capacity of the Vice President to act as President in the event of Presidential inability, whatever the cause.

I am of the opinion that the understanding between the President and the Vice President which I have approved above is clearly constitutional and as close to spelling out a practical solution to the problem as is possible.

Respectfully,

ROBERT F. KENNEDY.